Suspension of sentence and grant of bail in NDPS Cases

Sl. No	Name	Year	Name	Ratio
1.	Berlin Joseph Vs State	1992	Kerala High Court	
2.	Maktool Singh Vs. State of Punjab	1999	Supreme Court	
3.	Dadu Vs. State Of Maharashtra	2000	Supreme Court	
4.	Mohammad Ismail	2002	Bombay High Court	
5.	Man Singh	2004	Supreme Court	
6.	Daler Singh	2006	State of Punjab	
7.	Ratan Kumar Vishwas	2008	Supreme Court	
8.	Rattan Mallik	2009	Supreme Court	
9.	Gurmeet Lal	2013	Delhi High Court	
10.	Mukesh Vs State of UP	2017	Madhya Pradesh high Court	
11.	Sheru Vs NCB	2020	Supreme Court	
12.	Preet Pal Singh	2020	Supreme Court	
13.	NCB Vs Lokesh Chadha	2021	Supreme Court	
14.				
15.				
16.				

MANU/KE/0274/1992

Equivalent Citation: 1993(1)ALT(Cri)217, 1992(2)Crimes353(Ker.), 1992(1)Crimes1221(Ker.)

IN THE HIGH COURT OF KERALA

Crl. M.P. No. 1742/91, Crl. No. 314/91 and Crl. M.C. No. 1155/91

Decided On: 24.02.1992

Appellants: **Berlin Joseph**
Vs.
Respondent: **State**

Hon'ble Judges/Coram:
K.T. Thomas, P.K. Shamsuddin and K.P. Balanarayana Marar, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: M.N. Sukumaran Nair, B. Raman Pillai, and S. Vijayakumar, Advs. in Crl. M.P. 1742 of 1991 and C.P. Chandrasekharan and M.P. Balakrishna Kidavu, Advs. Crl. M.C. No. 1155 of 1991

For Respondents/Defendant: M. Ratna Singh, Adv.

***Case Note:**
Narcotic Drugs and Psychotropic Substances Act, 1985 (Central Act 61 of 1985) - Section 32A--High Court has no power to suspend the sentence of a convicted person during the pendency of appeal or revision unless it relates to minor offences under Section 27 of the Act.

Petitioner in Crl. M.P. No. 1742/91 has filed appeal against his conviction and sentence for infringing the provisions of the Narcotic Drugs and Psychotropic Substances Act. He has moved the above petition praying for suspension of the execution of sentence passed against him. In Crl. M.C. No. 1155/91 the Petitioner challenges the order of the Sessions Court dismissing his application for bail on the ground that proviso to Section 16(2) of the Code is not applicable. Thulasidas, J. doubted the correctness of the decision in 1991 (2) K.L.T. 787 and referred these cases to a larger bench. When these cases came up for hearing before a Division Bench, the same were referred to a Full Bench. Dismissing Crl. M.P. No. 1742/91 and allowing Crl. M.C. No. 1155/91;

Held:

It is necessary to make a special note of a parenthetical clause included in Section 32A which reads thus: "other than Section 27". The said words in parenthesis make it clear that a sentence passed for an offence under Section 27 can be suspended in exercise of powers under Chapter 29 of the Code. Section 27 deals with punishments for relatively minor offences under the N.D.P.S. Act. In fact, a reading of the aforesaid parenthetical clause fortifies the interpretation that Section 32A in its generality is intended to operate against suspension of sentence at any stage either by the High Court or by any other authority. Application of Section 32A cannot be confined to governmental powers and it applies to suspension of sentence during the pendency of appeal also. High Court has no power to

suspend the sentence of a convicted person either during the pendency of his appeal or revision, unless it relates to the offence under Section 27.

Code of Criminal Procedure, 1973 (Central Act 2 of 1974) - Section 167(2)-- Section 37 of the Narcotics Drugs and Psychotropic substances Act, 1985 does not override Section 167(2) of the Code.

Held:

The directive contained in Section 167(2) proviso is intended to be issued at the appropriate stage even if offences under N.D.P.S. Act are involved. If Section 37 of the N.D.P.S. Act is allowed to control or restrict the application to proviso to Section 167(2) of the Code, the latter provision would become ineffective and a dead letter. Section 167(2) would operate even for offences under the N.D.P.S. Act and then Section 37 of the N.D.P.S. Act has no application. In other words, Section 37 of the N.D.P.S. Act does not override Section 167(2) of the Code.

ORDER

K.T. Thomas, J.

1. There is clear cleavage of opinions between two learned Judges of this Court regarding interpretation of certain provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the N.D.P.S. Act'). The main questions on which such different interpretations were made by the learned Judges are these:

(1) Whether the High Court can suspend the sentence passed on an accused convicted of an offence under N.D.P.S. Act during pendency of his appeal before the High Court?

(2) Whether the conditions in Section 37 of the N.D.P.S. Act for granting bail have overriding effect on the proviso to Section 167(2) of the Code of Criminal Procedure (for short 'the Code')?

2. The questions came before Full Bench after some tides and drifts. We shall state briefly the background of how it reached the Full Bench. In Appachan v. Excise Circle inspector 1990 (2) K.L.T. 610, Balakrishnan, J. held that Section 37 of the N.D.P.S. Act does not override Section 167 of the Code. But correctness of the said decision has been doubted by Ramakrishnan, J. in Anr. case and referred it to a Division Bench. It was in the said case that the two learned Judges took conflicting views. The decision of the Division Bench is reported in Phasalu v. State of Kerala 1991 (2) K.L.T. 787 Pareed Pillay, J. took the view that High Court has no power to suspend sentence during pendency of the appeal, whereas Balakrishnan, J. adopted the opposite view that High Court has the power to suspend such sentence on the premise that power of the High Court under Section 389 of the Code is saved by the operation of Section 36B of the N.D.P.S. Act. As the two learned Judges adopted two conflicting views on the legal position, those cases were laid before Anr. Single Judge. Padmanabhan, J. (learned Single Judge) agreed with Balakrishnan, J. that Section 32A of the N.D.P.S. Act is not meant to curtail the powers of the High Court. He proceeded further and held that such power of the High Court is subject to Section 37 of the N.D.P.S. Act.

3. In Crl. M.P. No. 1742/91, Petitioner is a convicted accused who filed an appeal

against his conviction and sentence before this Court. He prays for suspension of the execution of sentence passed against him. In Crl. M.C. No. 1155/91, Petitioner challenges the order of the Sessions Judge dismissing his application for bail on the ground that proviso to Section 167(2) of the Code is not applicable. Thulasidas, J. doubted the correctness of the decisions in Phasalu v. State of Kerala 1991 (2) K.L.T. 787 including the decision of Padmanabhan, J., and referred these cases to a larger bench. When these cases came before a Division Bench, they have been referred to a Full Bench to resolve the conflict That is how these matters are before the Full Bench now.

4. The N.D.P.S. Act was originally enacted in 1985 as there was need to make a comprehensive legislation on narcotic drugs and psychotropic substances and to make provisions for implementations of international convention relating to such drugs and substances. Later, as Parliament felt that more stringent provisions are necessary to check the menace of drug addiction and illicit traffic in such substances, imposition of greater curbs was found necessary. Hence Parliament passed Narcotic Drugs and Psychotropic Substances (Amendment) Act, 1988 which received the assent of the President on 6th January 1989 and became Act 2 of 1989, as per which certain new provisions were added to the parent Act. Sections 32A, 36A and 36B are some of the new provisions while Section 37 was drastically re-moulded through the amendment. In deciding the questions referred to the Full Bench, we find it appropriate to extract those provisions here (except Section 36A which can be referred to at a later stage).

> 32A. No suspension, remission or commutation in any sentence awarded under this Act.- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force but subject to the provisions of Section 33, no sentence awarded under this Act (other than Section 27) shall be suspended or remitted or commuted.
>
> 36B. Appeal and revision.- The High Court may exercise so far as may be applicable all the powers conferred by Chapters XXIX and XXX of the Code of Criminal Procedure, 1973 (2 of 1974) on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court.
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> **37.** Offences to be cognizable and non-bailable.-
>
> (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless-
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is

not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in Clause (b) of Sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974), or any other law for the time being in force on granting of bail.

5. The contention based on Section 36B is that since high Court has "all the powers" conferred by Chapters 29 and 30 of the Code, High Court has also power to suspend the sentence passed on a convicted person by exercising powers under Section 389 of the Code (Section 389 falls within Chapter 29 of the Code). Section 389 of the Code provides that pending appeal by a convicted person, the appellate Court may order that execution of the sentence appealed against be suspended. According to the learned Counsel, Section 32A of the N.D.P.S. Act can have application, in the aforesaid background, only to "suspension, remission and commutation of sentences" referred to in Sections 432 and 433 of the Code which fall within Chapter 32 of the Code. Counsel invited our attention to the main title given to Chapter 32 of the Code as "Execution, suspension, remission and commutation of sentences". The Sub-title given to the 'E' division in the Chapter is "suspension, commutation and remission of sentences". As powers of the High Court while dealing with an appeal (provided in Chapter 29 of the Code) are well preserved, the legislative intention is not to whittle down the High Court's power to suspend the sentence during pendency of appeal, according to the learned Counsel. We will examine the tenability of this contention now.

6. Article 72 of the Constitution of India confers power on the President of India "to suspend, remit or commute sentence" in all cases where punishment or sentence is for an offence against any law relating to a matter to which executive power of the Union extends. Article 161 contains similar power which Governor of a State can exercise in relation to a person convicted of any offence against law relating to a matter which the executive power of the State extends. A Constitution Bench of the Supreme Court has held in Maru Ram v. Union of India MANU/SC/0159/1980 : A.I.R. 1980 S.C. 2147 that power under Articles 72 and 161 of the Constitution cannot be exercised by the President or Governor on their own but only on the advice of the appropriate Government. The said ratio has been followed by Anr. Constitution Bench of the Supreme Court in Kehar Singh v. Union of India MANU/SC/0240/1988 : A.I.R. 1989 S.C. 653 Thus, the position relating to Articles 72 and 161 of the Constitution, as interpreted by the Supreme Court, is that the appropriate executive Government can advise the Head of the State to exercise powers thereunder and such advice is binding on him If the object of Section 32A of the N.D.P.S. Act is to take away the power of the Government to suspend, remit or commute the sentence, the legislative exercise in enacting the said provision is practically of futility because even without Sections 432 and 433 of the Code, the appropriate Government can suspend, remit or commute sentences in exercise of the constitutional functions. For this reason, firstly, we are not impressed by the contention that the sole object of incorporating a provision like Section 32A in the N.D.P.S. Act was to impose curb on the executive power to suspend, remit or commute the sentence passed on a particular accused.

7. Next is, if legislative intent in enacting Section 32A of the N.D.P.S. Act is only to curb the Governmental powers under Sections 432 and 433 of the Code, clear and necessary words in Section 32A would have been conveniently employed in the provision. Instead of saying "notwithstanding anything contained in the Code", Section 32A could have been worded as "notwithstanding anything contained in

Chapter 32 of the Code". That apart, the words "or any other law for the time being in force" in Section 32A would further show that the sole aim of the provision is not to letter exclusively the power envisaged in Sections 432 and 433 of the Code.

8. Yet, a more catching indication gatherable from the Amendment Act is that Section 37 is specifically made applicable only to a person "accused of an offence" and not to a person convicted of an offence. The reasoning of Padmanabhan, J., on this score, is that the words "any person accused of an offence" would include a convicted person also "as a person who is accused of an offence will not cease to be so simply because he is tried, convicted and sentenced; appeal is continuation of the proceeding and the accused continues to be so till the proceeding comes to a final conclusion". We do not think that legislature would have used the words "person accused of an offence" to stretch the tentacles to a convicted person also. An analysis of the legislative exercise would show that there was some effort to explicitly exclude a convicted person from its ambit.

9. In this context it is appropriate to refer to Rule 184 of the Defence of India Rules, 1971 which says that "notwithstanding anything contained in the Code of Criminal Procedure, 1898 (V of 1898), no person accused or convicted of a contravention of these rules or orders made thereunder, shall, if in custody, be released on bail or his own bond unless..." (similar conditions provided). Reference can also be made to Section 57(a)(4) of the Kerala Abkari Act. It reads thus:

> Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (Central Act 2 of 1974), no person accused or convicted of an offence under Sub-section (1) or Sub-section (3) shall, if in custody, be released on bail or his own bond unless-(similar conditions provided).

Thus in similar provisions in other statutes "convicted person" is also specifically included in addition to "accused person". His exclusion from Section 37 of the N.D.P.S. Act, in that background, is not without any reason or rationale. It is because the case of a convicted person is covered elsewhere (in Section 32A) that the legislature wanted to exclude him from the scope of Section 37. It cannot be assumed that Parliament wanted an accused person to be enmeshed under more stringent rigorous than convicted persons.

10. In support of the argument that Section 32A is not intended to take away the High Court's power to suspend sentence, main thrust was laid on Section 36B. The said section, no doubt, empowers the High Court to exercise the powers envisaged in Chapter 29 of the Code. But does it empower the High Court to exercise all the powers envisaged in the said Chapter? It must be borne in mind that the section has advisedly used the rider words "so far as it is applicable" in order to indicate that the section is not intended to invoke all the powers envisaged in the Chapter hook, line and sinker. If that part of Section 389 of the Code which deals with discretion of the High Court to suspend the sentence is not applicable, then Section 36A of the N.D.P.S. Act is not a carte blanche to exercise all powers conferred on the appellate Court by virtue of Chapter 29 of the Code.

11. To winch the legislative intent, it is permissible for Courts to take into account "Objects and Reasons" presented while introducing the Bill before the legislature. Such a course was considered not desirable a decade ago, but "the recent trend in juristic thought in western countries" has led our Courts also to take into account "everything whish is logically relevant" while interpreting the provisions of a statute.

Vide K.P. Varghese v. I.T. Officer, Ernakulam A.I.R. 1981 S.C. 1992 Hindustan Paper Corporation Ltd. v. Government of Kerala 1985 K.L.T. 915 statement of Objects and Reasons for introducing Bill No. 125/88 in the Lok Sabha (which later became Act 2 of 1989) was published in the Gazette of India (6th December, 1988). One of the statements is thus:

> Even though the major offences are non-bailable by virtue of the level of punishment, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of N.D.P.S. Act, 1985 the need to amend the law to further strengthen it has been felt.

The aforesaid statement, when red along with the scheme of the amended provisions helps to discern that Section 32A is intended to provide an embargo against suspension, remission and commutation of sentence of a convicted person, whether it is during the pendency of appeal or otherwise.

12. Sri M.N. Sukumaran Nayar, learned Counsel tried to show that the aforesaid interpretation would lead to hazarduous consequences. He cited one possibility like this: Even under Section 37 bail can be granted in cases where the offence is punishable for a term of less than five years, but if he is convicted of that offence, his sentence (which may be a short term imprisonment) cannot be suspended, when his appeal is pending. In this context, we have to make a special note of a parenthetical clause included in Section 32A which leads thus: "(other than Section 27)". The said words in parenthesis make it clear that a sentence passed for an offence under Section 27 can be suspended in exercise of powers under Chapter 29 of the Code. Section 27 deals with punishments for relatively minor offences under the N.D.P.S. Act. In fact, a reading of the aforesaid parenthetical clause fortifies the interpretation that Section 32A in its generality is intended to operate against suspension of sentence at any stage either by the High Court or by any other authority.

13. For the aforesaid reasons, we agree with the view adopted by Pareed Pillay, J. in Phasalu v. State of Kerala 1990 (2) K.L.T. 610 that application of Section 32A cannot be confined to governmental powers and it applies to suspension of sentence during the pendency of appeal also. High Court has no power to suspend the sentence of a convicted person either during the pendency of his appeal or revision, unless it relates to the offence under Section 27.

14. We will now proceed to consider the second point whether Section 37 of the N.D.P.S. Act overrides the command contained in the proviso to Section 167(2) of the Code that on the expiry of 90 days or 60 days, as the case may be, the accused person shall be released on bail if he is prepared to and does furnish bail.

15. Sub-section (1) of Section 167 of the Code enjoins a duty on the police officer arresting an accused to forward him to the nearest Magistrate within 24 hours. Sub-section (2) casts obligation on such Magistrate to decide, inter alia, whether the accused so forwarded should be kept in further custody and if so, in which place. Such custody shall not exceed 15 days in the whole. Then comes the proviso which consists of three limbs. In the first limb, the Magistrate can authorise detention of the accused beyond 15 days (not in police custody). Second limb consists of a prohibition that no Magistrate shall authorise detention of the accused person in custody for a total period exceeding 90 days or 60 days depending on gravity of the offence. The third limb contains the legislative command that on the expiry of 60/90 days (as the case may be) an accused "shall be released on bail" if he is prepared to

and does furnish bail. If the conditions in Section 37 of the N.D.P.S. Act have to be complied with before releasing an accused on bail even after the expiry of 60/90 days the legislative directive contained in Section 167 loses its commanding force. Either Section 37 of the N.D.P.S. Act has to yield to the proviso in Section 167(2) of the Code or Section 37 must override the other.

16. What would be the consequence, if Section 37 of N.D.P.S. Act overrides Section 167 of the Code? We pointed out that under Section 167 of the Code a Magistrate has no power to authorise detention of any person beyond a period of 60/90 days. If such an accused person can be released on bail, at the said stage, only on compliance with the stringent conditions contained in Section 37, practically no accused can be released on bail even after the said period of 60/90 days, unless he is set free, he will continue to remain in detention. But how long? Perhaps the police may take many months (if not years) to finalise the report. The accused will have to languish in custody without a trial like a "Pappilone" for considerably long period.

17. In Rajnikant v. Intelligence Officer, Narcotic Control Bureau MANU/SC/0440/1989 : A.I.R. 1990 S.C. 71 Jagannatha Shetty, J. sitting as vacation Judge, has held that the right to bail under Section 167(2) proviso (a) to the Code is absolute and is a legislative command and not the discretion of the Court. Although the accused in the said case was involved in offences under Sections 21, 23 and 29 of the N.D.P.S. Act, the said decision was rendered when N.D.P.S. Act remained before its amendment by Act 2 of 1989. So, that decision is of no help in deciding the question now posed. Nor does the Supreme Court decision in Narcotics Control Bureau v. Krishnan Lal MANU/SC/0152/1991 : A.I.R. 1991 S.C. 558 : 1991 (1) K.L.T. 547 help us in resolving the present question, because in that decision the question considered was whether Section 37 would control Section 439 of the Code. That is a different question altogether.

18. For deciding this aspect, we have necessarily to go into the contours of Section 36A of the N.D.P.S. Act. It contains three Sub-sections. In the first Sub-section, after providing that offences under N.D.P.S. Act shall be tried by special Court constituted by the Government. It enables a Magistrate to order detention of the accused forwarded to him under Section 167(2) of the Code. Here the same powers as contained in Section 167(2) of the Code are repeated with the only alteration that the Court to which the accused is to be forwarded next is the Special Court constituted under the N.D.P.S. Act. Clause (c) of the said Sub-section is important in this context. It reads thus:

> (c) the Special Court may exercise, in relation to the person forwarded to it under Clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under Section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to him under that section.

The said Clause is clear indication that the directive contained in Section 167(2) proviso is intended to be issued at the appropriate stage even if offences under N.D.P.S. Act are involved. If Section 37 of the N.D.P.S. Act is allowed to control or restrict the application to proviso to Section 167(2) of the Code, the latter provision would become ineffective and a dead letter.

19. A Division Bench of the Calcutta High Court has considered the same question in Md. Abdul v. State of West Bengal 1991 (III) Crimes 741. Their Lordships held that

"since proviso to Section 167(2) lays down that no person can be remanded to custody under authority of that section for a period beyond 90/60 days the proviso to Sub-section (2) of Section 167 is automatically attracted and the learned Special Judge has no option but to release the person on bail". The Division Bench has considered how far Section 37 would come into play in such situation and found that Section 167 of the Code will stand unfettered.

20. The result of the discussion is that Section 167(2) would operate even for offences under the N.D.P.S. Act and then Section 37 of the N.D.P.S. Act has no application. In other words, Section 37 of the N.D.P.S. Act does net override Section 167(2) of the Code. Hence the legal position set out by Balakrishnan, J. in Appachan v. Excise Circle Inspector 1990 (2) K.L.T. 610 is correct.

Crl. M.P. No. 1742/91 is accordingly dismissed. The impugned order in Crl. M.C. No. 1155/91 is set aside and we direct the lower Court to dispose of the application afresh.

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MANU/SC/0637/2000

Equivalent Citation: 2000(3)ACR2573(SC), AIR2000SC3203, 2000(2)ALD(Cri)804, 2000 (41) ACC 911, 2001(2)BLJ246, 2000(3)BLJR2390, IV(2000)CCR125(SC), 2000CriLJ4619, 2000(4)Crimes124(SC), 2000(4)CTC313, 2000(72)ECC233, (2001)1GLR647, JT2000(Suppl1)SC449, 2000(4)RCR(Criminal)275, 2000(6)SCALE746, (2000)8SCC437, [2000]Supp3SCR703, 2001(2)UJ1245

IN THE SUPREME COURT OF INDIA

W.P. (Crl.) No. 169 of 1999 with W.P. (Crl.) No. 243 of 1999

Decided On: 12.10.2000

Appellants:**Dadu**
Vs.
Respondent:**State of Maharashtra**

Hon'ble Judges/Coram:
K.T. Thomas, R.P. Sethi and S.N. Variava, JJ.

Case Note:
Constitution of India-Articles 14 and 21-Narcotic Drugs and Psychotropic Substances Act, 1985-Sections 32A and 37-Code of Criminal Procedure, 1973-Sections 389, 432 and 433-Constitutionality of Section 32A of N.D.P.S. Act-Whether Section 32A constitutionally valid in taking away powers of Court to suspend sentence?-Whether it excludes grant of parole to person convicted under Act-Held, that Section 32A is unconstitutional in so far as it ousts jurisdiction of appellate court to suspend sentence awarded to convict under Act-But section constitutionally valid in so far as it takes away right of Executive to suspend, remit or commute sentence-However, Section 32A does not, in anyway, affect powers of authorities to grant parole-Still Section 32A does not entitle convicts to ask for suspension of sentence as matter of right-Nor Courts absolved of their legal obligations to exercise power of suspension of sentence within parameters prescribed under Section 37 of N.D.P.S. Act.

Parole is not a suspension of the sentence. The convict continues to be serving the sentence despite granting of parole under the statute, rules, jail manual or the Government orders. "Parole" means the release of a prisoner temporarily for a special purpose before the expiry of a sentence, on the promise of good behaviour and return to jail. It is a release from jail, prison or other internment after actually being in jail, serving part of sentence. Grant of parole is essentially an executive function to be exercised within the limits prescribed in that behalf. It would not be open to the Court to reduce the period of detention by admitting a detenu or convict on parole. Court cannot substitute the period of detention either by abridging or enlarging it.

Parole does not amount to the suspension, remission or commutation of sentences which could be withheld under the garb of Section 32A of the Narcotic Drugs and Psychotropic Substances Act, 1985. Notwithstanding the provisions of the offending section, a convict is entitled to parole, subject, however, to the conditions governing the grant of it under the statute, if any, or the jail manual or the Government instructions.

Awarding sentence, upon conviction, is concededly a judicial function to be discharged by the Courts of law established in the country. It is always a matter of judicial discretion, however, subject to any mandatory minimum sentence prescribed by the Law. The award of sentence by a criminal court wherever made subject to the right of appeal cannot be interfered or intermeddled with in a way which amounts to not only interference but actually taking away the power of judicial review. Awarding the sentence and consideration of its legality or adequacy in appeal is essentially a judicial function embracing within its ambit the power to suspend the sentence under peculiar circumstances of each case, pending the disposal of the appeal. Not providing atleast one right of appeal, would negate the due process of law in the matter of dispensation of criminal justice. There is no doubt that the right of appeal is the creature of a statute and hence conferred, a substantive right. Providing a right of appeal but totally disarming the Court from granting interim relief in the form of suspension of sentence would be unjust, unfair and violative of Article 21 of the Constitution particularly when no mechanism is provided for early disposal of the appeal. The pendency of criminal litigation and the experience in dealing with pending matters indicate no possibility of early hearing of the appeal and its disposal on merits atleast in many High Courts.

Case Category:
CRIMINAL MATTERS - CRIMINAL MATTERS RELATING TO DRUGS AND COSMET
NDPS ACT

JUDGMENT

R.P. Sethi, J.

1. The Constitutional validity of Section 32A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as "the Act") is under challenge in these petitions filed by the convicts of the offences under the Act, The Section is alleged to be arbitrary, discriminatory and violative of Articles 14 and 21 of the Constitution of India which creates unreasonable distinction between the prisoners convicted under the Act and the prisoners convicted for the offences punishable under various other statutes. It is submitted that the Legislature is not competent to take away, by statutory prohibition, the judicial function of the Court in the matter of deciding as to whether after the conviction under the Act the sentence can be suspended or not. The Section is further assailed on the ground that it has negated the statutory provisions of Sections 389, 432 and 433 of the CrPC

(hereinafter referred to as "the Code") in the matter of deciding as to whether after the conviction under the Act the sentence can be suspended, remitted or commuted or not and also under what circumstances, restrictions or limitations on the suspension of sentences or the grant of bail could be passed. It is further contended that the Legislature cannot make relevant considerations irrelevant or deprive the courts of their legitimate jurisdiction to exercise the discretion. It is argued that taking away the judicial power of the appellate court to suspend the sentence despite the appeal meriting admission, renders the substantive right of appeal illusory and ineffective.
According to one of the petitioners, the prohibition of suspension precludes the Executive from granting parole to a convict who is otherwise entitled to it under the prevalent statutes, jail manual or Government instructions issued in that behalf.

2. The petitioner in W.P. No. 169/99 was arrested and upon conviction under Section 21 of the Act sentenced to undergo imprisonment for 10 years. He claims to have already undergone sentence for more than 7 years. He could not claim parole presumably under the impression that Section 32A of the act was a bar for the State to grant it. Though the petitioner has referred to Maharashtra Jail Manual, particularly Chapter XXXVIII providing various kinds of remissions and authorising the grant of parole yet nothing is on the record to show as to whether he in fact applied for parole or not.

3. Petitioner in W.P. 243 of 1999, after trial was convicted under the Act and the bail application filed by him alongwith appeal presented in the High Court was dismissed is not pressed in view of the judgment of this Court in Maktool Singh v. State of Punjab MANU/SC/0166/1999 : 1999CriLJ1825 .

4. The vires of the section have been defended by the Union of India on the ground that as the Parliament has jurisdiction to enact the law pertaining to Narcotic Drugs and Psychotropic Substances Act, reasonable restrictions can be imposed upon the right of the convict to file appeal and seek release, remission or commutation. The Act is intended to curb the drug addiction and trafficking which is termed to be eating into the vitals of the economy of the country. The illicit money generated by drug trafficking is being used for illicit activities including encouragement of terrorism. Anti-drug justice has been claimed to be a criminal dimension of social justice. It is submitted that statutory control over narcotic drugs in India was being generally exercised through certain Central enactments, though some of the States had also enacted certain statutes to deal with illicit traffic in drugs. Reference is made to the Opium Act and the Dangerous Drugs Act etc. In the absence of comprehensive law to effectively control psychotropic substances in the manner envisaged by the International Convention of Psychotropic Substances, 1971, a necessity was felt to enact some comprehensive legislation on the subject. With a view to meet the social challenge of great dimensions, the Parliament enacted the Act to consolidate and amend the existing provisions relating to control over drug abuse and to provide for enhanced penalties under the Act. The Act provides enhanced and stringent penalties. The offending section is claimed to be not violative of Articles 14, 19 and 21 of the Constitution of India. To fulfil the international obligations and to achieve the objectives of curbing the menace of illegal trafficking, the Section was enacted not only to take away the power of the Executive under Section 433 of the Code but also the power under the Code to suspend, remit or commute the sentences passed under the Act. The convicts under the Act are stated to be a class in themselves justifying the discrimination without offending guarantee of equality enshrined in the Constitution. To support the Constitutional validity of the Section, the respondents have also relied upon the Lok Sabha debates on the subject.

5. Before dealing with the main issue regarding the validity of Section 32A, a side issue, projected in Writ Petition No. 169, is required to be dealt with. The writ petition appears to be based upon the misconception of the provisions of law and in ignorance to the various pronouncements of this Court.

6. Parole is not a suspension of the sentence. The convict continues to be serving the sentence despite granting of parole under the Statute, Rules, Jail Manual or the Government orders. "Parole" means the release of a prisoner temporarily for a special purpose before the expiry of a sentence, on the promise of good behavior and return to jail. It is a release from jail, prison or other internment after actually been in jail serving part of sentence.

7 . Grant of parole is essentially an Executive function to be exercised within the limits prescribed in that behalf. It would not be open to the court to reduce the period of detention by admitting a detenue or convict on parole. Court cannot substitute the period of detention either by abridging or enlarging it. Dealing with the concept of parole and its effect on period of detention in a preventive detention matter, this Court in Poonam Lata v. M.L Wadhawan MANU/SC/0875/1987 : 1987CriLJ1924 held:

> There is no denying of the fact that preventive detention is not punishment and the concept of serving out a sentence would not legitimately be within the purview of preventive detention. The grant of parole is essentially an executive function and instances of release of detenus on parole were literally unknown until this Court and some of the High Courts in India in recent years made others of release on parole on humanitarian considerations. Historically 'parole' is a concept known to military law and denotes release of a prisoner of war on promise to return. Parole has become an integral part of the English and American systems of criminal justice intertwined with the evolution of changing attitudes of the society towards crime and criminals. As a consequence of the introduction of parole into the penal system, all fixed-term sentences of imprisonment of above 18 months are subject to release on licence, that is, parole after a third of the period of sentence has been served. In those countries, parole is taken as an act of grace and not as a matter of right and the convict prisoner may be released on condition that he abides by the promise. It is a provisional release from confinement but is deemed to be a part of the imprisonment. Release on parole is a wing of the reformative process and is expected to provide opportunity to the prisoner to transform himself into a useful citizen. Parole is thus a grant of partial liberty of lessening of restrictions to a convict prisoner, but release on parole does not change the status of the prisoner. Rules are framed providing supervision by parole authorities of the convicts released on parole and in case of failure to perform the promise, the convict released on parole is directed to surrender to custody. (See The Oxford Companion to Law, edited by Walker, 1980 Edn. p. 981; Black's Law Dictionary, 5th Edn., P. 1006; Jowitt's Dictionary of English Law, 2nd Edn., Vol. 2, p. 1320; Kenny's Outlines (sic) Criminal Law; 17th Edn., pp. 574-76; (sic) English Sentencing System by Sir Rup (sic) Cross at pp. 31-34; 87 et seq; Amer(sic) Jurisprudence, 2nd Edn., Vol. 59, pp, 53-61; Corpus Juris Secundum, Vol. 67; Probation and Parole, Legal and Social Dimensions by Louis P. Carney). It follows from these authorities that parole is the release of a very long terms prisoner from a penal or correctional institution after he has served a part of his sentence under the continuous custody of the State and under conditions that permit his incarceration in the event of misbehavior.

8 . This position was again reiterated in State of Haryana v. Mohinder Singh MANU/SC/0073/2000 : 2000CriLJ1408 .

9. The Constitution Bench of this Court in Sunil Fulchand Shah v. Union of India and Ors. MANU/SC/0109/2000 : 2000CriLJ1444 considered the distinction between bail and parole in the context of reckoning the period which a detenu has to undergo in prison and held:

> Bail and parole have different connotation in law. Bail is well understood in

criminal jurisprudence and Chapter XXXIII of the CrPC contains elaborate provisions relating to grant of bail. Bail is granted to a person who has been arrested in a non-bailable offence or has been convicted of an offence after trial. The effect of granting bail is to release the accused from internment though the court would still retain constructive control over him through the sureties. In case the accused is released on his own bond such constructive control could still be exercised through the conditions of the bond secured from him. The literal meaning of the word 'bail' is surety. In Halsbury's Laws of England, 4th Edn., Vol. II, Para 166, the following observation succinctly brings out the effect of bail:

> The effect of granting bail is not to set the defendant (accused) at liberty but to release him from the custody of law and to entrust him to the custody of sureties who are bound to produce him to appear at his trial at a specified time and place. The sureties may seize their principal at any time and may discharge themselves by handing him over to the custody of law and he will then be imprisoned.

'Parole', however, has a different connotation than bail even though the substantial legal effect of both bail and parole may be the release of a person from detention or custody. The dictionary meaning of "parole" is:

The Concise Oxford Dictionary - (New Edition)

> The release of a prisoner temporarily for a special purpose or completely before the expiry of a sentence, on the promise of good behavior; such a promise; a Word of honour

Black's Law Dictionary - (6th Edition)

> Release from jail, prison or other confinement after actually serving part of sentence. Conditional release from imprisonment which entitles parolee to serve remainder of his term outside confides of an institution, if he satisfactorily complies with all terms and conditions provided in parole order.

According to the Law Lexicon, "Parole" has been defined as:

> A parole is a form of conditional pardon, by which the convict is released before the expiration of his term, to remain subject, during the remainder thereof, to supervision by the public authority and to return to imprisonment on violation of the condition of the parole.

According to Words and Phrases:

> "Parole" ameliorates punishment by permitting convict to serve sentence outside of prison walls, but parole does not interrupt sentence. People ex rel Rainone v. Murphy 135 NE2d 567, 571, 1 NY 2d 367, 153 NYS 2d 21, 26.
>
> 'Parole does not vacate sentence imposed, but is merely a conditional suspension of sentence. Wooden v. Goheen Ky, 255 SW 2d 1000.
>
> A 'parole' is not a 'suspension of sentence', but is a substitution,

> during continuance of parole, of lower grade of punishment by confinement in legal custody and under control of warden within specified prison bounds outside the prison, for confinement within the prison adjudged by the court. Jenkins v. Madigan CA Ind, 211 F 2d 904.
>
> A 'parole' does not suspend or curtail the sentence originally imposed by the court as contrasted with a 'commutation of sentence' which actually modifies it.

10. Again in State of Haryana v. Nauratta Singh and Ors. MANU/SC/0176/2000 : 2000CriLJ1710 it was held by this Court as under:

> Parole relates to executive action taken after the door has been closed on a convict. During parole period there is no suspension of sentence but the sentence is actually continuing to run during that period also.

11. It is thus clear that parole did not amount to the suspension, remission or commutation of sentences which could be withheld under the garb of Section 32A of the Act. Notwithstanding the provisions of the offending Section, a convict is entitled to parole, subject, however, to the conditions governing the grant of it under the statute, if any, or the Jail Manual or the Government Instructions. The Writ Petition No. 169 of 1999 apparently appears to be misconceived and filed in a hurry without approaching the appropriate authority for the grant of relief in accordance with jail manual applicable in the matter.

12. We will now deal with the crux of the matter relating to the constitutional validity of Section 32A in the light of the challenge thrown to it. Section 32A of the Act reads: "32A. No suspension, remission or commutation in any sentence awarded under this Act.- Notwithstanding anything contained in the CrPC, 1973 or any other law for the time being in force but subject to the provisions of Section 33, no sentence awarded under this Act (other than Section 27) shall be suspended or remitted or commuted."

13. A perusal of the Section would indicate that it deals with three different matters, namely, suspension, remission and commutation of the sentences. Prohibition contained in the Section is referable to Sections 389, 432 and 433 of the Code. Section 432 of the Code provides that when any person has been sentenced to punishment for an offence, the appropriate Government may, at any time, without conditions or upon conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced in the manner and according to the procedure prescribed therein. Section 433 empowers the appropriate Government to commute:

> (a) a sentence of death, for any other punishment provided by the Indian Penal Code;
>
> (b) a sentence of imprisonment for life, for imprisonment for a term not exceeding fourteen years or for fine; (c) a sentence of rigorous imprisonment, for simple imprisonment for any term to which that person might have been sentenced, or for fine;
>
> (d) a sentence of simple imprisonment, for fine.

14. However, Section 389 of the Code empowers an appellate court to suspend the

sentence pending the appeal and release the appellant on bail. Section 32A of the Act, therefore, takes away the powers both of the Appellate Court and the State Executive in the matter of suspending, remitting and commuting the sentence of a person convicted under the Act other than for an offence under Section 27 of the Act. This Court in Maktool Singh 's case (supra) held that Section 32A of the Act was a complete bar for the Appellate Court to suspend a sentence passed on persons convicted of offences under the Act (except under Section 27) either during the pendency of any appeal or otherwise. It has an overriding effect with regard to the powers of suspension, commutation and remission provided under the Code. After referring to some conflicting judgments of the High Courts, this Court concluded:

> The upshot of the above discussion is that Section 32A of the Act has taken away the powers of the court to suspend a sentence passed on persons convicted of offences under the Act (except Section 27) either during pendency of any appeal or otherwise. Similarly, the power of the Government under Sections 432, 433 and 434 of the Criminal Procedure Code have also been taken away. Section 32A would have an overriding effect with regard to the powers of suspension, commutation and remission provided under the Criminal Procedure Code.

15. The restriction imposed under the offending Section, upon the Executive are claimed to be for a reasonable purpose and object sought to be achieved by the Act. Such exclusion cannot be held unconstitutional, on account of its not being absolute in view of the constitutional powers conferred upon the Executive. Articles 72 and 161 of the Constitution empowers President and the Governor of a State to grant pardons, reprieves, respites or remissions of punishments or to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the Executive power of the Union and State exists. For the exercise of aforesaid constitutional powers circulars are stated to have been issued by the appropriate Governments. It is further submitted that the circulars prescribe limitations both as regards the prisoners who are eligible and those who have been excluded. The restriction imposed upon the Executive, under the Section, appears to be for a reasonable purpose and object sought to be achieved by the Section. While moving the Amendment Bill, which included Section 32A, in the Parliament on 16th December, 1988, the Minister of State in Department of Revenue in the Ministry of Finance explained to the Parliament that the country had been facing the problem of transit traffic in illicit drugs which had been escalated in the recent past. The spill-over from such traffic had been causing problems of abuse and addiction. The Government was concerned with the developing drug situation for which a number of legislative, administrative and preventive measures had been taken resulting in checking the transit traffic to a considerable extent. However, increased internal drug traffic, diversion of opium from illicit growing areas and attempts of illicit manufacture of drugs within the country threatened to undermine the effects of the counter measures taken. Keeping in mind the magnitude of the threat from drug trafficking from the Golden Crescent region comprising Pakistan, Afghanistan and Iran and the Golden Triangle region comprising Burma, Thailand and Laos and having regard to the internal situation, a 14 point directive was stated to have been issued by the then Prime Minister on 4th April, 1988, as a new initiative to combat drug trafficking and drug abuse. Keeping in mind the working of the 1985 Act, the Cabinet Sub Committee recommended that the Act be suitably amended, inter alia,:

> (i) to provide for the Constitution of a fund for control of drug abuse and its

governing body. The Fund is to be financed by such amounts as may be provided by the Parliament, the sale proceeds of any property forfeited under the Act and any grants that may be made by any person or institution;

(ii) to provide for death penalty on second conviction in respect of specified offences involving specified quantities of certain drugs;

(iii) to provide that no sentence awarded under the Act, other than Section 27, should be suspended, remitted or commuted;

(iv) to provide for Constitution of Special Courts;

(v) to provide that every offence punishable under this Act shall be cognizable and non-bailable;

(vi) to provide immunity from prosecution to the addicts volunteering for treatment for deaddiction or detoxification once in their life time;

(vii) to bring certain substances which are neither narcotic drugs nor psychotropic substances but are used in the manufacture or production of these drugs or substances, under the ambit of the Act. Such controlled substances would be regulated by issue or order;

(viii) violation of the provisions relating to the controlled substances would be liable for punishment with rigorous imprisonment for a term which may extent to 10 years and fine which may extend to Rs. 1 lakh;

(ix) financing illicit traffic and harbouring drug offenders would be offences liable to punishment at the same level as per drug traffic offences.

The distinction of the convicts under the Act and under other statutes, in so far as it relates to the exercise of the Executive Powers under Sections 432 and 433 of the Code is concerned, cannot be termed to either arbitrary or discriminatory being violative of Article 14 of the Constitution. Such deprivation of the Executive can also not be stretched to hold that the right to life of a person has been taken away except, according to the procedure established by law. It is not contended on behalf of the petitioners that the procedure prescribed under the Act for holding the trial is not reasonable, fair and just. The offending Section, in so far as it relates to the Executive in the matter of suspension, remission and commutation of sentence, after conviction, does not, in any way, encroach upon the personal liberty of the convict tried fairly and sentenced under the Act. The procedure prescribed for holding the trial under the Act cannot be termed to be arbitrary, whimsical or fanciful. There is, therefore, no vice of unconstitutionality in the Section in so far as it takes away the powers of the Executive conferred upon it under Sections 432 and 433 of the Code, to suspend, remit or commute the sentence of a convict under the Act.

16. Learned counsel appearing for the parties were more concerned with the adverse effect of the Section on the powers of the judiciary. Impliedly conceding that the Section was valid so far as it pertained to the appropriate Government, it was argued that the Legislature is not competent to take away the judicial powers of the Court by statutory prohibition as is shown to have been done vide the impugned section. Awarding sentence, upon conviction, is concededly a judicial function to be discharged by the courts of law established in the country. It is always a matter of judicial discretion, however, subject to any mandatory minimum sentence prescribed

by the law. The award of sentence by a criminal court wherever made subject to the right of appeal cannot be interfered or intermeddled with in a way which amounts to not only interference but actually taking away the power of judicial review. Awarding the sentence and consideration of its legality or adequacy in appeal is essentially a judicial function embracing within its ambit the power to suspend the sentence under the peculiar circumstances of each case, pending the disposal of the appeal.

17. Not providing at least one right of appeal, would negate the due process of law in the matter of dispensation of criminal justice. There is no doubt that the right of appeal is the creature of a statute and when conferred, a substantive right. Providing a right of appeal but totally disarming the court from granting interim relief in the form of suspension of sentence would be unjust, unfair and violative of Article 21 of the Constitution particularly when no mechanism is provided for early disposal of the appeal. The pendency of criminal litigation and the experience in dealing with pending matters indicate no possibility of early hearing of the appeal and its disposal on merits at least in many High Courts. As the present is not the occasion to dilate on the causes for such delay, we restrain ourselves from that exercise. In this view of the matter, the appellate powers of the court cannot be denuded by Executive or judicial process.

18. This Court in Bhagwan Rama Shinde Gosai and Ors. v. State of Gujarat MANU/SC/0347/1999 : 1999CriLJ2568 held that when a convicted person is sentenced to a fixed period of sentence and the appellate court finds that due to practical reasons the appeal cannot be disposed of expeditiously, it can pass appropriate orders for suspension of sentence. The suspension of the sentence by the appellate court has, however, to be within the parameters of the law prescribed by the Legislature or spelt out by the courts by judicial pronouncements. The exercise of judicial discretion on well recognised principles is the safest possible safeguards for the accused which is at the very core of criminal law administered in India. The Legislature cannot, therefore, make law to deprive the courts of their legitimate jurisdiction conferred under the procedure established by law.

19. Thomas M. Cooley in his "Treatise on the Constitutional Limitations" 8th Edition observed that if the Legislature cannot thus indirectly control the action of the courts by requiring of them a construction of the law according to its own views, it is very plain it cannot do so directly, by setting aside their judgments, compelling them to grant new trials, ordering the discharge of offenders, or directing what particular steps shall be taken in the progress of a judicial inquiry. In Denny v. Mattoon 2 Alien, 361, it was stated:

> If, for example, the practical operation of a statute is to determine adversary suits pending between party and party, by substituting in place of the well settled rules of law the arbitrary will of the legislature, and thereby controlling the action of the tribunal before which the suits are pending, no one can doubt that it would be an unauthorised act of legislation, because it directly infringes on the peculiar and appropriate functions of the judiciary. It is exclusive province of courts of justice to apply established principles to cases within their jurisdiction, and to enforce their decisions by rendering judgments and executing them by suitable process. The legislature have no power to interfere with this jurisdiction in such manner as to change the decision of cases pending before courts, or to impair or set aside their judgments, or to take cases out of the settled course of judicial proceeding. It is on this principle that it has been held that the legislature have no power

to grant a new trial or direct a rehearing of a cause which has been once judicially settled. The right of a review, or to try a new facts which have been determined by a verdict or decree, depends on fixed and well-settled principles, which it is the duty of the court to apply in the exercise of a sound judgment and discretion. These cannot be regulated or governed by legislative action.

20. Cooley further opined that forfeiture of rights and property cannot be adjudged by legislative act, confiscations without a judicial hearing after due notice would be void as not being due process of law. Rights of the parties, without the authority of passing consequential or interim orders in the interest of justice, would not be a substantive one.

21. Offending Section is stated to have been enacted in discharge of the international obligations as claimed by the concerned Minister in the Parliament. This submission also appears to be without any substance. Countries, parties to the United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, 1988, in the 6th Plenary Meeting held on 19th December, 1988 resolved to adopt means and measures to curb the rising trend in the illicit production of demand for and traffic in narcotic drugs and psychotropic substances which posed a serious threat to the health and welfare of the human beings and adversely affected the economic, cultural and political foundations of the Society. The member countries, inter alia agreed to adopt such measures as may be necessary to establish as criminal offences in its domestic law when committed intentionally:

(a)(i) The production, manufacture, extraction, preparation, offering, offering for sale, distribution, sale, delivery on any terms whatsoever, brokerage, dispatch, dispatch in transit, transport, importation or exportation of any narcotic drug or any psychotropic substance contrary to the provisions of the 1961 Convention, the 1961 Convention as amended or the 1971 Convention;

ii) The cultivation of opium poppy, coca bush or cannabis plant for the purpose of the production of narcotic drugs contrary to the provisions of the 1961 Convention and 1961 Convention as amended;

iii) The possession or purchase of any narcotic drug or psychotropic substance for the purpose of any of the activities enumerated in (i) above;

iv) The manufacture, transport, or distribution of equipment, materials or of substances listed in Table I and Table II, knowing that they are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

v) The organisation, management or financing of any of the offences enumerated in (i), (ii), (iii) or (iv) above; (b) (i) The conversion or transfer of property, knowing that such property is derived from any offence or offences established in accordance with sub paragraph (a) of this paragraph, or from an act, of participation in such offence or offences, for the purpose of concealing or disguising the illicit original of the property or of assisting any person who is involved in the commission of such an offence or offences to evade the legal consequences of his actions,

iii) The concealment or disguise of the true nature, source, location, disposition, movement rights with respect to, or ownership of property,

knowing that such property is derived from an offence or offences established in accordance with paragraph (a) of this paragraph or from an act of participation in such an offence or offences;

It was further agreed that subject to the constitutional principles and the basic concept of its legal system each country shall provide for:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property was derived from an offence or offences established in accordance with subparagraph (a) of this paragraph or from an act of participation in such offence or offences;

(ii) The possession of equipment or materials or substances listed in Table I and Table II, knowing that they are being or are to be used in or for the illicit cultivation, production or manufacture of narcotic drugs or psychotropic substances;

(iii) Publicly inciting or inducing others, by any means, to commit any of the offences established in accordance with this article or to use narcotic drugs or psychotropic substances illicitly;

(iv) Participation in, association or conspiracy to commit, attempts to commit and aiding, facilitating and counselling the commission of any of the offences established in accordance with this article.

22. The parties to the Convention further resolved to provide in addition to conviction and punishment for an offence that the offender shall undergo measures such as treatment, education, after care, rehabilitation or social re-integration, It was further agreed: "The parties shall endeavour to ensure that any discretionary legal powers under their domestic law relating to the prosecution of persons for offences established in accordance with this article are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences. The parties shall ensure that their courts or other competent authorities bear in mind the serious nature of the offences enumerated in paragraph 1 of this article and the circumstances enumerated in paragraph 5 of this article when considering the eventuality of early release or parole of persons convicted of such offences."

23. A perusal of the agreement of the Convention to which India is claimed to be a party, clearly and unambiguously show that the court's jurisdiction with respect to the offences relating to narcotic drugs and psychotropic substances was never intended to be ousted, taken away or curtailed. The Declaration was made, subject to "constitutional principles and the basic concepts of its legal system prevalent in the polity of a member country". The international Agreement emphasised that the courts of the member countries shall always bear in mind the serious nature of offences sought to be tackled by the Declaration while considering the eventuality of early release or partly of persons convicted of such offences. There was no International Agreement to put a blanket ban on the power of the court to suspend the sentence awarded to a criminal under the Act notwithstanding the constitutional principles and basic concepts of its legal system. It cannot be denied that judicial review in our country is the heart and soul of our constitutional scheme. The judiciary is constituted the ultimate interpreter of the Constitution and is assigned the delicate task of determining the extent and scope of the powers conferred on each branch of the Government, ensuring that action of any branch does not transgress its limits. A

Constitution Bench of this Court in S.P. Sampath Kumar v. Union of India MANU/SC/0851/1987 : (1987)ILLJ128SC held that "it is also a basic principle of the Rule of Law which permeates very provision of the Constitution and which forms its very core and essence that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law and it is the judiciary which has to ensure that the law is observed and there is compliance with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercise of the power of judicial review which is almost potent weapon in the hands of the judiciary for maintenance of the Rule of Law, The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the Rule of Law would become a teasing illusion and a promise of unreality". Again in S.S. Bola and Ors. v. B.D. Sardana and Ors. MANU/SC/0813/1997 : AIR1997SC3127 it was reiterated that judicial review is the basic feature upon which hinges the checks and balances blended with hind sight in the Constitution as people's sovereign power for their protection and establishment of egalitarian social order under the rule of law. The judicial review was, therefore, held to be an integral part of the Constitution as its basic structure. Similarly, the filing of an appeal, its adjudication and passing of appropriate interim orders is concededly a part of the legal system prevalent in our country.

24. In Ram Char an v. Union of India 1991(9) SCR 160, the Allahabad High Court while dealing with the question of the constitutional validity of Section 32A found that as the Section leaves no discretion to the court in the matter of deciding, as to whether, after conviction the sentence deserves to be suspended or not without providing any guidelines regarding the early disposal of the appeal with in a specified period, it suffers from arbitrariness and thus violative of mandate of Articles 14 and 21 of the Constitution. In the absence of right of suspending a sentence, the right of appeal conferred upon accused was termed to be a right of infructuous appeal. However, Gujarat High Court in Ishwar singh M. Rajput v. State of Gujarat MANU/GJ/0256/1990 : (1990)2GLR1365 while dealing with the case relating to grant of parole to a convict under the Act found that Section 32A was Constitutionally valid. It was held:

> Further, the classification between the prisoners convicted under the Narcotics Act and the prisoners convicted under any other law, including the Indian Penal Code is reasonable one, it is with specific object to curb deterrently habit forming, booming and paying (beyond imagination) nefarious illegal activity in drug trafficking. Prisoners convicted under the Narcotics Act are class by themselves. Their activities affect the entire society and may, in some cases, be a death-blow to the persons, who become addicts. It is much more paying as it brings unimaginable easy riches. In this view of the matter, the temptation to the prisoner is too great to resist himself from indulging in same type of activity during the period, when he is temporarily released. In most of the cases, it would be difficult for him to leave that activity as it would not be easy for the prisoner to come out of the clutches of the gang, which operates in nefarious illegal activities. Hence, it cannot be said that Section 32A violates Article 14 of the Constitution on the ground that it makes unreasonable distinction between a prisoner convicted under the Narcotic Act and a prisoner convicted for any other offences.

25. Judged from any angle, the Section in so far as it completely debars the appellate courts from the power to suspend the sentence awarded to a convict under

the Act cannot stand the test of constitutionality. Thus Section 32A in so far as it ousts the jurisdiction of the court to suspend the sentence awarded to a convict under the Act is unconstitutional. We are, therefore, of the opinion that Allahabad High Court in Ram Charan's case (Supra) has correctly interpreted the law relating to the constitutional validity of the Section and the judgment of Gujarat High Court in Ishwar singhh M. Rajput's case cannot be held to be good law.

26. Despite holding that Section 32A is unconstitutional to the extent it affects the functioning of the criminal courts in the country, we are not declaring the whole of the section as unconstitutional in view of our finding that the Section, in so far as it takes away the right of the Executive to suspend, remit and commute the sentence, is valid and intra vires of the Constitution. The Declaration of Section 32A to be unconstitutional, in so far as it affects the functioning of the courts in the country, would not render the whole of the section invalid, the restriction imposed by the offending section being distinct and severable.

27. Holding Section 32A as void in so far as it takes away the right of the courts to suspend the sentence awarded to a convict under the Act, would neither entitle such convicts to ask for suspension of the sentence as a matter of right in all cases nor would it absolve the courts of their legal obligations to exercise the power of suspension of sentence within the parameters prescribed under Section 37 of the Act. Section 37 of the Act provides:

> **37.** Offences to be cognizable and non-bailable
>
> (I) Notwithstanding anything contained in the CrPC, 1973--
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for a term of imprisonment of live years or more under this Act shall be released on bail or on his own bond unless--
>
> i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> ii) where the Public Prosecutor opposes the application, the court is satisfied that there are, reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in Clause (b) of Sub-section (1) are in addition to the limitations under the CrPC, 1973 or any other law for the time being in force, on granting of bail.

28. This Court in Union of India v. Ram Samujh and Anr. MANU/SC/0530/1999 : 1999(66)ECC335 held that the jurisdiction of the court to grant bail is circumscribed by the aforesaid section of the Act. The bail can be granted and sentence suspended in a case where there are reasonable grounds for believing that the accused is not guilty of the offence for which convicted and he is not likely to commit any offence while on bail and during the period of suspension of the sentence. The Court further held:

> The aforesaid section is incorporated to achieve the object as mentioned in

the Statement of Objects and Reasons for introducing Bill No. 125 of 1988 thus:

Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985 the need to amend the law to further strengthen it, has been felt.

It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while (sic) persons who are(sic) dealing in narcotic drugs are instrumental in causing death or in inflicting deathblow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the Narcotic Drugs & Psychotropic Substances Act, has succinctly observed about the adverse effect of such activities in Durand Dilier v. Chief Secretary, Union Territory of Goa MANU/SC/0173/1989 : 1990(25)ECC289 as under: (SCC p. 104, para 24).

> 24, With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addition among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine.

8. To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the Narcotic Drugs & Psychotropic Substances Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

> i) there are reasonable grounds for believing that the accused is not guilty of such offence; and
>
> ii) that he is not likely to commit any offence while on bail. are satisfied.

29. Under the circumstances the writ petitions are disposed of by holding that (1) Section 32A does not in any way affect the powers of the authorities to grant parole; (2) It is unconstitutional to the extent it takes away the right of the court to suspend the sentence of a convict under the Act; (3) Nevertheless, a sentence awarded under the Act can be suspended by the appellate court only and strictly subject to the conditions spelt out in Section 37 of the Act as dealt with in this judgment.

30. The petitioner in Writ Petition No. 169/99 shall be at liberty to apply for parole and his prayer be considered and disposed of in accordance with the statutory provisions, if any, Jail Manual or Government Instructions without implying Section 32A of the Act as a bar for consideration of the prayer. Similarly petitioner in Writ Petition No. 243/99 is at liberty to move the High Court for suspension of sentence awarded to him under the Act. As and when any such application is filed, the same shall be disposed of in accordance with law and keeping in view the limitations prescribed under Section 37 of the Act and the law laid down by this Court.

MANU/PH/1806/2006

Equivalent Citation: 2017CriLJ2337, 2007(1)RCR(Criminal)316

IN THE HIGH COURT OF PUNJAB AND HARYANA

Criminal Misc. No. 44549 of 2006 in Criminal Appeal No. 259-DB of 2000

Decided On: 13.12.2006

Appellants: **Daler Singh**
Vs.
Respondent: **State of Punjab**

Hon'ble Judges/Coram:
Virender Singh and A.N. Jindal, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Mr. K.S. Dhaliwal, Advocate

For Respondents/Defendant: Mr. K.S. Boparai, Additional Advocate General Punjab assisted by Mr. M.S. Sidhu, Senior Deputy Advocate General, Punjab, Mr. H.S. Hooda, Advocate General, Haryana with Mr. Siddharth Batra, Assistant Advocate General, Haryana Mr. R.S. Rai, Senior Standing Counsel, U.T. Chandigarh Mr.D.D. Sharma, Standing Counsel, Union of India

JUDGMENT

Virender Singh, J.

1. The plight of convicts languishing in jails, after conviction, during the pendency of the appeals, on account of previous fixture of work has always been a matter of great concern for the Courts and of the protagonists of Human Rights, alike. The present case is also of the like nature.

2. Applicant-appellant Daler Singh is praying for suspension of substantive sentence awarded to him under section 15 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (for short 'the Act') primarily on the ground that he has by now already undergone more than seven years of his sentence out of the awarded substantive sentence of 12 years and that besides that the appeal is not likely to be heard in near future.

3. Not only the present appeal but also a large number of other appeals filed by the convicts under the Act which are not likely to be taken up in near future, has attracted our attention and therefore, we are framing certain guidelines/policy for the grant of bail where the appeals against the conviction under the Act filed in this Court cannot be heard within a reasonable time.

4. We have heard Mr. K.S.Dhaliwal, learned counsel for the applicant-appellant and Mr. K.S.Boparai, Additional Advocate General, Punjab assisted by Mr. M.S.Sidhu, Senior Deputy Advocate General, Punjab and have also sought the assistance of Advocate General, Haryana, Senior Standing Counsel, Union of India and Senior Standing Counsel, Union Territory, Chandigarh on the point. Consequently, Mr. H.S.Hooda, learned Advocate General, Haryana, assisted by Mr. Siddharth Batra, AAG Haryana, Mr. RS Rai, Senior Standing Counsel, U.T. Chandigarh and Mr. D.D.Sharma,

Standing Counsel, Union of India have been given audience on behalf of respective States.

5. Without delving deep into the scheme of the Act, we at this juncture are concerned only with a few provisions relating to the suspension of sentence and the release of the accused on bail during pendency of the appeal.

6. The original Act as incorporated in the year 1985 provided for minimum sentence of ten years and fine of Rs.1,00,000/- and could extend to twenty years and a fine of Rs.2,00,000/-, irrespective of the quantity of the contraband, except in cases of young men below 18 years of age or where a minor quantity of narcotics meant for consumption of the individual was involved. In some cases the sentence could extend to even death penalty. As regards the provisions of bail during trial, Section 37 was incorporated and it was made stringent by mentioning that the bail could be granted on the following conditions :-

> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

7. Prior to the amendment by way of Act No. 2 of 1989, there were no specific provisions for post conviction suspension of sentence during the appeal. Examining the difficulties prevailing in the Courts that the accused involved in petty recoveries of the narcotics were being dealt with stringently by providing minimum sentence of 10 years, it was felt that sentence awarded against the accused should commensurate with the gravity of the offences and there should be specific provisions governing the suspension of sentence during the pendency of appeal and in order to over-come the aforesaid difficulties, Act No. 2 of 1989 named as Narcotic Drugs & Psychotropic Substance (Amendment) Act, 1988 came into force with effect from 29.5.1989, wherein a table under Clauses 7(a) and 13(a) of Section 2 of the Act was brought on the statute book, classifying the quantity of the narcotic as commercial and non-commercial one. While relaxing the provisions regarding bail in the cases involving noncommercial quantity as was classified in the table, provisions regarding bail in cases of commercial quantity were allowed to remain the same. In order to make the punishment harsher and stringent, two sections i.e. 32-A and 36-B were added with regard to the suspension of sentence during the appeal. Chapters No. XXIX and XXX of the Code of Criminal Procedure 1973 were made applicable to the appeals through Section 36-B of the Act which reads as under :

> Appeal and revision- The High Court may exercise, so far as may be applicable, all the powers conferred by Chapters XXIX and XXX of the Code of Criminal Procedure, 1973, on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Sessions trying cases within the local limits of the jurisdiction of the High Court

8. Section 389 Code of Criminal Procedure dealing with the provisions of suspension of sentence during appeal was covered under Chapter XXIX but these powers vested in the Appellate Court regarding the suspension of sentence were taken away by Section 32-A of the Act inserted by the same Act No. 2 of 1989 which reads as under :-

> 32-A. No suspension, remission or commutation in any sentence awarded under this Act- Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law for the time being in force but subject to the provisions of section 33, no sentence awarded under this Act (other than section 27) shall be suspended or remitted or commuted.

9. In the light of this section it was widely felt that no sentence could be suspended during the pendency of the appeal as the powers conferred under Section 36-B upon the appellate Courts were taken away by Section 32-A of the Act. The matter with regard to scope and powers of the Appellate Court with regard to the suspension of sentence was considered by the Apex Court in case Maktool Singh v. State of Punjab, 1999 (2) RCR (Cri.) 130 wherein it was observed as under :-

> 25. The upshot of the discussion is that Section 32A of the Act has taken away the powers of the court to suspend a sentence passed on persons convicted of offences under the Act (except Section 27) either during pendency of an appeal or otherwise. Similarly, the power of the Government under Section 432, 433 and 434 of the Criminal Procedure Code have also been taken away. Section 32-A would have an overriding effect with regard to the powers of suspension, commutation and remission provided under the Criminal Procedure Code.

10. The Apex Court took into consideration the difficulties being experienced by the Courts, the accused and the swelling number of the cases, in Maktool Singh's case (supra) and was pleased to make a stopgap arrangement observing as under :-

> The solution to such problems can be worked out by Parliament under the Act on a priority basis and dispose them of as early as possible. As a temporary measure to lessen the problem we direct the Registry of each High Court to include every appeal (against conviction of offences under the Act) in the hearing list as soon as such appeal becomes ripe for hearing. We express the hope that the Bench of the High Court concerned would give preference to such appeal for early hearing.

11. Subsequently the Apex Court in case Dadu alias Tulsi Dass v. State of Maharashtra, 2000 (4) RCR (Cri) 275, while giving priority to the right of liberty and speedy trial of a citizen struck down the provisions of Section 32-A in as far as relating to the suspension of sentence during the pendency of the appeal by making the following observations :-

> 17. Not providing atleast one right of appeal would negate the due process of law in the matter of dispensation of criminal justice. There is no doubt that the right of appeal is the creature of a statute and when conferred a substantive right. Providing a right of appeal but totally disarming the court from granting interim relief in the form of suspension of sentence would be unjust, unfair and violative of Article 21 of the Constitution particularly when no mechanism is provided for early disposal of the appeal. The pendency of criminal litigation and the experience in dealing with pending matters indicate no possibility of early hearing of the appeal and its disposal on merits atleast in many High Courts. As the present is not the occasion to dilate on the causes for such delay, we restrain ourselves from that exercise. In this view of the matter, the appellate powers of the Court cannot be denuded by Executive or judicial process.

12. While taking serious note of this stringent law, curtailing the powers of the Appellate Court to suspend the sentence, the Apex Court after dealing with many precedents further observed as under :-

> **24.** Judged from any angle, the Section in so far as it completely debars the appellate courts from the powers to suspend the sentence awarded to a convict under the Act cannot stand the test of constitutionality. Thus Section 32A in so far as it ousts the jurisdiction of the Court to suspend the sentence awarded to convict under the Act is unconstitutional. We are, therefore, of the opinion that Allahabad High Court in Ram Charan's case (supra) has correctly interpreted the law relating to the constitutional validity of the section and the judgment of Gujarat High Court in Ishwar Singh M. Rajput's case cannot be held to be good law.
>
> **25.** Despite holding that Section 32A is unconstitutional to the extent it affects the functioning of the criminal courts in the country, we are not declaring the whole of the section as unconstitutional in view of our finding that the Section, in so far as it takes away the right of the Executive to suspend, remit and commute the sentence, is valid and intra vires of the Constitution. The Declaration of Section 32A to be unconstitutional, in so far as it affects the functioning of the courts in the country, would not render the whole of the section invalid, the restriction imposed by the offending section being distinct and severable.

13. While declaring Section 32-A, in so far as ousting the jurisdiction of the Appellate Court to suspend the sentence during pendency of the appeal as ultravires, the Apex Court further declared that the Courts are empowered to suspend the sentence and grant bail while keeping in view the provisions of Section 37 of the Act. But the thrust of the Apex Court was to give primacy to the fundamental right of the accused of a speedy trial and speedy justice.

14. After the judgment of the Apex Court in Dadu's case (supra), a doubt still persisted regarding the powers of the High Courts to suspend the sentence in the light of stringent provisions of Section 37 of the Act, which were to be taken note of while dealing with the application for suspension of sentence in appeal under the Act. In the light of Maktool Singh v. State of Punjab and Dadu alias Tusli Ram v. State of Maharashtra's cases (supra), a Full Bench of this Court in case Tule Ram v. State of Haryana, 2005 (4) RCR (Cri) 319 : 2005 (3) Apex Cri 363 taking due note of the various provisions of law and also the different judgments passed by the Apex Court from time to time observed as under :-

> 11. There can be no dispute with this proposition but one cannot lose sight of the fact that the Apex Court in Brahmajeetsingh Sharma's case (supra) was dealing with a provision which related to grant of bail during trial and not with regard to grant of bail post-conviction. We fail to see how the judgment of the Apex Court would help us to conclude that the law as enunciated by the Apex Court in relation to Maharashtra Control of Organised Crime Act, 1999 would be applicable to the appeals filed against conviction under the NDPS Act. Section 37 of the NDPS Act will have to be applied differently when one is dealing with a bail application filed pending trial as against one's filed in appeals. What the Apex Court in Ranjit Singh Brahmajeetsingh Sharma's case (supra) has laid down are the guidelines for dealing with the bail applications during trial but these cannot be of any assistance regarding

the post-trial stage where the accused already stands convicted.

15. The Full Bench while dealing with the matter and keeping in view the magnitude of the menace, observed that "in view of this that a strict interpretation will have to be placed to the effect that the Act, as presently framed, does not provide for any post conviction suspension of sentence as it would be inappropriate for the High Court to read into the judgment in Dadu's case (supra) what is not explicitly provided for therein" but, still giving some concession to the accused for seeking relief of suspension of sentence and keeping in view the Constitutional mandate, as provided under Article 21 of the Constitution of India, the Full Bench further observed as under :-

> We are conscious of the fact that according to the constitutional mandate of Article 21 of the Constitution of India a speedy trial is guaranteed by the State for all person falling foul with law. Since an appeal is only an extension of the trial, the Courts of law would be obliged to ensure the expeditious disposal and pass appropriate orders as and when they feel that the right of the convict to the guarantee provided under Article 21 of the Constitution of India is being interfered with. As and when any appellant moves this Court, then taking into consideration the facts and circumstances of the case, in case of delay in the disposal appeal is not attributable to the appellant himself, the Court may pass such orders as the appellant may be entitled in view of the provisions of Article 21 of the Constitution of India.

16. It cannot be disputed that under the constitutional scheme an accused is entitled to a speedy trial and speedy justice. An appeal is a continuation of trial. His right to liberty is fundamental one but some provisions with regard to curtailing his liberty could be enacted and the same, if reasonable, could be taken as valid. However, the absolute bar as to curtail liberty of the accused, even if the delay in final disposal of the appeal is not attributable to him, can certainly be said to be against the intent and spirit of the Fundamental Rights and would be violative of the Constitutional mandate. As such the liberty of the accused cannot be taken away absolutely for an indefinite period. We are afraid if liberty of an accused is curtailed unreasonably, then his right to appeal will be defeated; his destiny will be unimaginable if he is ultimately acquitted after he has undergone almost the entire sentence or major chunk of it, and no body would come to explain the justification for the period of his confinement during which he remained in custody till the disposal of the appeal. The plight of such convicts can well be imagined.

17. The delay in disposal of the criminal appeals pending in the High Courts is a matter of serious concern. We have, therefore, called upon the Additional Registrar (Judicial) of this Court to give us in writing a year wise statement of all pending Single Bench and Division Bench appeals under the Act against the conviction upto date. As per the information supplied to us, 3931 Single Bench appeals are pending in this Court for disposal. Out of the said pendency in 806 appeals, the appellants (convicts) are in custody. 1268 Single Bench appeals are on Board for final hearing, out of which 510 appellants are in custody.

18. We have also been informed by the Additional Registrar (Judicial) that 219 Division Bench appeals under the Act are pending in this Court and in almost all the appeals, the convicts are in custody.

19. We have also come across many cases which have been listed for final hearing

but could not be heard due to paucity of time and other unavoidable reasons and for the fault not attributable to the accused. It is this alarming situation that needs our serious attention. It is the plight of such prisoners that we must address ourselves to. In this background Mr. K.S. Dhaliwal, Advocate has advanced his contentions in the course of hearing urging that some outer limit of the period of custody in all should be provided and detention thereafter should entitle the accused convict to bail irrespective of the merits of the case.

20. In order to strengthen his arguments, Mr. Dhaliwal has also relied upon the judgment rendered in Man Singh v. Union of India, 2006 (2) RCR (Cri) 73 : 2006(1) AC 425(SC) wherein the Apex Court while noticing Dadu's case (supra) suspended the sentence and granted bail to the accused mainly on the following grounds :-

1. The appellant has already undergone more than 7 years of imprisonment.

2. There is no likely-hood of the appeal being heard in the near future.

21. Mr. Dhaliwal also relies upon another order of Division Bench of this Court dated April 18,2006 rendered in Criminal Appeal No. 103-DB of 2006, Shinder Singh vs State of Punjab, vide which the appellant who was convicted under section 15 of the Act for allegedly carrying 315 kgs of poppy husk, was granted the concession of suspension of substantive sentence after he had undergone more than five years out of 20 years sentence imposed upon him. We reproduce the relevant para from the said order as under :-

> The learned counsel for the applicant-appellant has attempted to bring his case within the exception carved out in paragraph 13 of the report. We re-produce paragraph 13 herein below :
>
> While giving the interpretation, we are conscious of the fact that according to the constitutional mandate of Article 21 of the Constitution of India a speedy trial is guaranteed by the State for all persons falling foul with law. Since an appeal is only an extension of the trial, the Courts of law would be obliged to ensure the expeditious disposal of the appeals and pass appropriate orders as and when they feel that the right of the convict to the guarantee provided under Article 21 of the Constitution of India is being interfered with. As and when any appellant moves this Court, then taking into consideration the facts and circumstances of the case, in case the delay in the disposal of the appeal is not attributable to the appellant himself, the Court may pass such orders as the appellant may be entitled in view of the provisions of Article 21 of the Constitution of India.

Mr. A.S.Grewal, the learned Addl. A.G. Punjab has, however, pointed out that the Full Bench had in terms held that bail in narcotics matters after conviction could not be granted. The learned counsel is broadly right in his assertion, but paragraph 13 quoted above, clearly makes an exception where the disposal of the appeal is likely to be delayed, and where there is no possibility of the same being heard in the near future. This is a matter which has to be heard by a Division Bench, we are of the opinion that keeping in view the present situation, the possibility of this appeal being heard in the foreseeable future is very remote as appeals of the years prior to the year 2000 are presently being heard. We accordingly allow this Crl. Misc. and direct that applicant-appellant Shinder Singh shall be released on bail to the satisfaction of the Chief Judicial Magistrate, Mansa. We also direct that the recovery of fine shall remain stayed during the pendency of the appeal.

Sd/- H.S.Bedi

Acting Chief Justice

Sd/- Ranjit Singh

April 18, 2006. Judge

22. Mr. Dhaliwal also relies upon another order dated 22.5.2005 passed in Criminal Appeal No. 836-DB of 2003 passed by a Division Bench of this Court regarding suspension of substantive sentence in which the appellant was granted bail primarily on the basis of the long detention of the accused observing as under :-

> 6. It is not disputed that appellant has undergone more than 6- 1/2 years of actual sentence. No doubt, there is a bar in granting bail under Sections 32-A and 37 of the Narcotic Drugs & Psychotropic Substances Act, (hereinafter referred to as "the Act"), but the Hon'ble Supreme Court in Dadu alias Tulsidas v. State of Maharashtra, 2000 (4) RCR (Cri) 275 has held that sentence of the appellant can be suspended. It was held by the Hon'ble Supreme Court that Section 32-A of the act is partially unconstitutional, as it curtails the power of the Appellate Court to suspend the sentence during appeal.

23. On the other hand Mr. Hawa Singh Hooda, learned Advocate General, Haryana who is assisted by Mr. Siddharth Batra, learned Assistant Advocate General, Haryana while picking up the thread, contends that of course certain guidelines may be framed for extending the concession of suspension of sentence to the convicts whose appeals are not heard for a reasonably long period but certain hardened criminals like habitual offenders or inter-State contraband traffickers or foreign nationals should not be held entitled to this concession of the guidelines being framed as granting them bail would amount to encouraging them and once they are enlarged on bail they may again indulge in the same nefarious activities. Mr. Hooda then contends that in some of the cases it is noticed that the convicts are also facing trial for other offences along with the cases registered against them under the Act. Even if presumption of innocence is in their favour, still in such type of situation such convicts may not be extended this concession. He then contends that the convicts found in possession of heavy quantity of contraband or who were otherwise indulging in drug trafficking should also be dealt with severely. The leniency if shown to such offenders, would be against the Legislative intent and spirit and would defeat the very purpose of enactment of this 'Act'. Mr. Hooda otherwise submits that an efforts should be made to dispose of their appeals on priority even by constituting special Benches exclusively for this purpose.

24. The other State counsel of respective States have adopted the views of Mr. Hooda and have not added their individual view point.

25. While dealing with the question of releasing a convict on bail in a case where he was sentenced to life imprisonment for an offence under section 302 of Indian Penal Code, the Hon'ble Apex Court in Kashmir Singh v. State of Punjab, MANU/SC/0099/1977 : AIR 1977 (SC) 2147 observed as under :-

> It would, indeed, be travesty of justice to keep a person in jail for a period of five or six years for an offence which is ultimately found not to have been committed by him. Can the Court ever compensate him for his incarceration which is found to be unjustified ? Would it be just at all for the Court to tell a

person, "We have admitted your appeal because we think you have a prima facie case, but unfortunately, we have no time to hear your appeal for quite a few years, and, therefore, until we hear your appeal, you must remain in jail, even though you may be innocent" ? What confidence would such administration of justice inspire in the mind of the public? It may quite conceivably happen, and it has in fact, happened in a few cases in this Court, that a person may serve out his full term of imprisonment before his appeal was taken up for hearing. Would a judge not be overwhelmed with a feeling of contrition while acquitting such a person after hearing the appeal? Would it not be an affront to his sense of justice? Of what avail would the acquittal be to such person who has already served out his term of imprisonment or at any rate a major part of it? It is, therefore, absolutely essential that the practice which this Court has been following in the past must be reconsidered and as long as this Court is not in a position to hear the appeal of an accused within a reasonable period of time, the Court should ordinarily, unless there are cogent grounds for acting otherwise, release the accused on bail. xx xxx xxx xxx xxx.

26. Dealing with the question regarding bail to under-trials languishing in jails, the Apex Court in case Supreme Court Legal Aid Committee representing Undertrial Prisoners v. Union of India, 1994 (3) RCR (Cri.) 639 issued some guidelines and in para No. 16 thereof observed that the aforesaid guidelines were intended to operate as one time directions in those cases in which the accused persons were languishing in jail and their trials were delayed. Thus, obviously this judgment could not be applied for two reasons : (i) that it was applicable in cases of undertrials; and (ii) these were one time directions. However, the directions are in no way against the legislative intent but are in furtherance of Article 21 of the Constitution of India. Therefore, it will also not be inappropriate if similar principles are followed with some variations and modifications in cases relating to convicts who are languishing in jails for the reasons that their appeals are not likely to be heard for a considerable period, are framed by us.

27. Again, this Court also while classifying the offences, where the convicts were sentenced for life imprisonment, dealt with the aspect regarding the suspension of sentence in case Dharam Pal v. State of Hayana, 1999 (4) RCR (Cri) 600 and issued some guidelines regarding the suspension of sentence during the pendency of the appeal, which were subsequently approved by the Apex Court in case Surinder Singh alias Shingara Singh v. State of Punjab 2005(4) RCR (Cri) 103 : 2005(3) AC 263.

28. Even Full Bench of this Court in Tule Ram's case (supra) also did not choose to lay down an absolute embargo upon the powers of this Court for suspension of sentence in cases where the provisions of Article 21 appear to be violated. It is because of this that we have felt that after the accused persons have suffered a substantial part of the punishment awarded for the offence, then even after filing of the appeals, any further deprivation of personal liberty would be violative of the fundamental right visualized by Article 21' which has to be telescoped with the right guaranteed by Article 14, which also promises justness, fairness and reasonableness in procedural matters.

In a latest judgment rendered in Salem Advocates Bar Association, Tamil Nadu v. Union of India, 2005(3) RCR(Civil) 530 (SC) : 2005 (3) Civil Court Cases 420 (SC), the Apex Court while dealing with the issue of disposing of the appeals under different Acts including the NDPS Act laid certain guidelines for the Courts to make an

endeavour to dispose of the appeals within a fixed period by putting the cases in different tracks. The same are reproduced as under :-

> Criminal Appeals should be classified based on offence, sentence and whether the accused is on bail or in jail. Capital punishment cases, rape, sexual offences, dowry death cases should be kept in Track I. Other cases where the accused is not granted bail and is in jail, should be kept in Track II. Cases which affect a large number of persons such as cases of mass cheating, economic offences, illicit liquor tragedy, food adulteration cases, offences of sensitive nature should be kept in Track III. Offences which are tried by special courts such as POTA, TADA, NDPS, Prevention of Corruption Act, etc. should be kept in Track IV. Track V - all other offences.
>
> The endeavour should be complete Tract I cases within a period of six months. Track II cases within nine months. Track III within a year, Track IV and Track V within fifteen months.

29. We, therefore, feel that keeping in view the spirit of Article 21, the following principles should be adopted for the release of the prisoners (convicts) on bail after placing them in different categories as under :-

> (i) Where the convict is sentenced for more than ten years for having in his conscious possession commercial quantity of contraband, he shall be entitled to bail if he has already undergone a total sentence of six years, which must include alteast fifteen months after conviction.
>
> (ii) Where the convict is sentenced for ten years for having in his conscious possession commercial quantity of the contraband, he shall be entitled to bail if he has already undergone a total sentence of four years, which must include alteast fifteen months after conviction.
>
> (iii) Where the convict is sentenced for ten years for having in his conscious possession, merely marginally more than non-commercial quantity, as classified in the table, he shall be entitled to bail if he has already undergone a total sentence of three years, which must include alteast twelve months after conviction
>
> (iv) The convict who, according to the allegations, is not arrested at the spot and booked subsequently during the investigation of the case' but his case is not covered by the offences punishable under section 25, 27-A and 29 of the Act, for which in any case the aforesaid clauses No. (i) to (iii) shall apply as the case may be, he shall be entitled to bail if he has already undergone a total sentence of two years, which must include alteast twelve months after conviction.

30. In our view, no bail should be granted to a proclaimed offender, absconder or the accused repeating the offence under the Act. Similarly a foreign national who has been indicted under the Act and other traffickers who stand convicted for having in their possession extra ordinary heavy quantity of contraband (like heroine, brown-sugar, charas etc.) shall not be entitled to the concession of bail as extending the said concession to such like convicts, in our view, would certainly be against the very spirit of the 'Act'.

31. Similarly a convict who is sentenced for the commission of an offence punishable

under section 31 and 31A of the Act shall not be entitled to be released on bail by virtue of this order.

32. The principles enumerated above would, however, have no effect on the concession of bail, otherwise provided under the provisions of the Act or any other law for the time being in force. At the same time these principles would also not affect the right of any convict to apply for interim suspension of sentence on account of any exceptional hardship, which shall be dealt with according to the facts of the each individual case, nor shall it affect the right of convict to seek bail on the merits of case.

33. In our view, listing of an appeal on Board, of a particular Bench, should not be an impediment for exercise of the concession of bail. Similarly , the rejection of the previous bail application on merits or otherwise will not de-bar a convict, the concession of bail after the expiry of the necessary period of detention as detailed above.

34. Adverting to the facts of the case in hand, the admitted position is that the applicant-appellant is in custody since the date of his arrest. Mr. Boparai after verifying the detention period of the applicant-appellant from the concerned quarters, makes a statement at the Bar that, he by now, has undergone more than seven years of his substantive sentence. We are also of the opinion that keeping in view the present situation, the possibility of the present appeal being heard in near future is very remote. We, therefore, allow the instant criminal miscellaneous and direct that the applicant-appellant shall be released on bail to the satisfaction of Chief Judicial Magistrate, Sangrur on his furnishing adequate surety bonds.

We further direct that copies of this judgment be supplied free of costs to Inspector General of Prisons for the State of Punjab, Haryana as also of the Union Territory of Chandigarh for onward transmission to the jail/sub-jail under their control, for onward information of all prisoners. Another copy of the judgment be supplied to Mr. D.D. Sharma, representing Union of India.

MANU/DE/0578/2013

Equivalent Citation: ILR (2013) II Delhi 1389, 2013(1)JCC37, 2013(3)RCR(Criminal)62

IN THE HIGH COURT OF DELHI

Crl. M.(B). 43/2013 in Crl. A. 909/2009

Decided On: 18.02.2013

Appellants: **Gurmeet Lal**
Vs.
Respondent: **Narcotic Control Bureau**

Hon'ble Judges/Coram:
G.P. Mittal, J.

Counsels:
For Appellant/Petitioner/Plaintiff: Mr. Vikas Jain, Advocate

For Respondents/Defendant: Mr. B.S. Arora, Advocate

Case Note:
Narcotics and Psychotropic Substances Act, 1988 - Sec. 37--Applicant convicted for offence under section 21(c) of the Act and sentenced to undergo Rigorous Imprisonment for 10 years and to pay fine of Rs. 2,00,000/- already undergone the sentence of about 8 years and 2 months--Applicant during pendency of appeal sought to be released on bail only on the ground of long incarceration--Held, merely on the ground of long incarceration the applicant cannot be granted bail, as the twin test laid down under section 37 of the Act is not satisfied because the applicant has failed to satisfy the Court that there are reasonable grounds for believing that the applicant did not commit the offence under Sec. 21(c) and that he is not likely to commit any offence while on bail.

I have gone through the judgments of the Co-ordinate Benches of this Court whereby suspension of sentence was granted without satisfaction under Section 37 of the NDPS Act. The same would be of no avail in view of the judgments of the Supreme Court in Dadu, Ratan Kumar Vishwas and Rattan Mallik.

Nothing has been placed on record by the Applicant to satisfy this Court even prima facie that there are reasonable grounds for believing that he is not guilty of the offence under Section 21(c) of the NDPS Act for which he stands convicted by the learned Special Judge, or that he is not likely to commit any offence while on bail. On the other hand, it is pointed out by the learned counsel for the Respondent that the instant case was registered against the Applicant while he was on bail in a case under the NDPS Act registered in Jammu. The learned counsel for the Applicant urges that the Applicant has since been acquitted in the said case. Be that as it may, the Applicant has failed to satisfy the twin test as laid down under Section 37(b)(ii) of the NDPS Act.

ORDER

G.P. Mittal, J.

1. An interesting question of law falls for determination in the instant Application, viz., whether a person convicted under Sections 21/29 of the Narcotics and Psychotropic Substances Act, 1988 (NDPS Act) and sentenced to a long period of imprisonment is entitled to suspension of sentence simply on the ground of long incarceration or the twin test as laid down under Section 37 of the NDPS Act is required to be satisfied? The Applicant stands convicted for an offence under Section 21(c) of the NDPS Act. By an order on sentence dated 15.09.2009, the Applicant was sentenced to undergo RI for a period of 10 years and to pay a fine of '2,00,000/-. The Applicant avers that he has already undergone the sentence of about 08 years and 02 months from the date of his arrest which includes three years since the date of his conviction. It is stated that the Applicant during the period of interim suspension of sentence did not misuse the liberty granted to him by the Court. He is, therefore, entitled to suspension of sentence.

2. The Application is opposed by the learned counsel for the Respondent on the ground that long incarceration is not a sufficient ground to suspend his sentence of imprisonment or the sentence of fine. The learned counsel for the Respondent relies on a three Judge Bench decision of the Supreme Court in Dadu v. State of Maharashtra, MANU/SC/0637/2000 : (2000) 8 SCC 437, another three Judge Bench decision of the Supreme Court in Ratan Kumar Vishwas v. State of Uttar Pradesh, MANU/SC/8237/2008 : (2009) 1 SCC 482, a Division Bench decision of Supreme Court in Union of India v. Rattan Mallik @ Habul, MANU/SC/0076/2009 : (2009) 2 SCC 624 and a judgment passed by a learned Single Judge of this Court in Triloki v. NCB (in Crl.A. 794/2010) decided on 13.09.2012.

3. On the other hand, the learned counsel for the Applicant referring to the report of the Supreme Court rendered by a three Judge Bench in Man Singh v. Union of India, MANU/DE/4074/2006 : (2006) 1 SCC (Cri) 279 submits that long incarceration after conviction is sufficient to grant suspension of sentence. The learned counsel for the Applicant relies on Vishal Sharma v. Directorate of Revenue Intelligence, (Crl.M. (B).193/2011 in Crl.A. 148/2010) decided on 06.02.2012, Sachin Arora v. Directorate of Revenue Intelligence, (Crl.M.(B).1659/2011 in Crl.A. 881/2010) decided on 12.01.2012, Ubesh Ansari @ Chandu v. State, (Crl.M.(B).842/2011 in Crl.A. 449/2009) decided on 15.07.2011, Iqbal v. State, (Crl.M.(B).1409/2011 in Crl.A. 466/2009) decided on 12.08.2011 and Sunil Kumar v. The State of NCT of Delhi, (Crl.M.(B).1102/2010 in Crl.A. 931/2010) decided on 13.09.2012 where the suspension of sentence was granted in a case of commercial quantity on the ground of long incarceration.

4. The Constitutional validity of Section 32A in the NDPS Act came up for consideration before a three Judge Bench of the Supreme Court in Dadu. The Supreme Court went into the objects and reasons for insertion of Section 32A in the NDPS Act, referred to the United Nations Conventions Against Illicit Traffic in Narcotics and Psychotropic Substances, 1988 and held that Section 32A of the NDPS Act so far as it ousted the jurisdiction of the Court to suspend the sentence awarded to a convict under the Act as unconstitutional, but at the same time laid down that grant of bail during trial or suspension of sentence during Appeal would only be on satisfying the condition as laid down under Section 37 of the NDPS Act. In para 29 of the judgment, the Supreme Court concluded as under:

29. Under the circumstances the writ petitions are disposed of by holding

that:

(1) Section 32-A does not in any way affect the powers of the authorities to grant parole.

(2) It is unconstitutional to the extent it takes away the right of the court to suspend the sentence of a convict under the Act.

(3) Nevertheless, a sentence awarded under the Act can be suspended by the appellate court only and strictly subject to the conditions spelt out in Section 37 of the Act, as dealt with in this judgment.

5. In Ratan Kumar Vishwas, a three Judge Bench of the Supreme Court reiterated the principles for suspension of sentence as held in Dadu. Para 18 of the report lays down as under:

To deal with the menace of dangerous drugs flooding the market, Parliament has provided that a person accused of offence under the Act should not be released on bail during trial unless the mandatory conditions provided under Section 37 that there are reasonable grounds for holding that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail are satisfied. So far as the first condition is concerned, apparently the accused has been found guilty and has been convicted.

6. Similarly, in Rattan Mallik, this Court held that without recording the satisfaction as required under Section 37, the suspension of sentence cannot be granted and the matter was remitted back to the High Court for rehearing the Application for suspension of sentence only after the Respondent surrendered to custody. Paras 16 and 17 of the report are extracted as under:

16. Merely because, according to the learned Judge, nothing was found from the possession of the respondent, it could not be said at this stage that the respondent was not guilty of the offences for which he had been charged and convicted. We find no substance in the argument of learned counsel for the respondent that the observation of the learned Judge to the effect that "nothing has been found from his possession" by itself shows application of mind by the learned Judge tantamounting to "satisfaction" within the meaning of the said provision. It seems that the provisions of the NDPS Act and more particularly Section 37 were not brought to the notice of the learned Judge.

17. Thus, in our opinion, the impugned order having been passed ignoring the mandatory requirements of Section 37 of the NDPS Act, it cannot be sustained. Accordingly, the appeal is allowed and the matter is remitted back to the High Court for fresh consideration of the application filed by the respondent for suspension of sentence and for granting of bail, keeping in view the parameters of Section 37 of the NDPS Act, enumerated above. We further direct that the bail application shall be taken up for consideration only after the respondent surrenders to custody. The respondent is directed to surrender to custody within two weeks of the date of this order, failing which the High Court will take appropriate steps for his arrest.

7. It is true that a three Judge Bench decision of the Supreme Court in Man Singh

had granted suspension of sentence in a case under the NDPS Act where the convict had served more than seven years of imprisonment out of the total sentence of ten years. But, at the same time, it is to be noted that the provision of Section 37 of the NDPS Act did not come for consideration before the Supreme Court. The three Judge Bench in Dadu and in Ratan Kumar Vishwas specifically dealt with the interpretation and the satisfaction to be recorded while granting suspension of sentence during the pendency of the Appeal. Thus, the report in Man Singh shall not be of any help to the Applicant.

8. I have gone through the judgments of the Co-ordinate Benches of this Court whereby suspension of sentence was granted without satisfaction under Section 37 of the NDPS Act. The same would be of no avail in view of the judgments of the Supreme Court in Dadu, Ratan Kumar Vishwas and Rattan Mallik.

9. Nothing has been placed on record by the Applicant to satisfy this Court even prima facie that there are reasonable grounds for believing that he is not guilty of the offence under Section 21(c) of the NDPS Act for which he stands convicted by the learned Special Judge, or that he is not likely to commit any offence while on bail. On the other hand, it is pointed out by the learned counsel for the Respondent that the instant case was registered against the Applicant while he was on bail in a case under the NDPS Act registered in Jammu. The learned counsel for the Applicant urges that the Applicant has since been acquitted in the said case. Be that as it may, the Applicant has failed to satisfy the twin test as laid down under Section 37(b)(ii) of the NDPS Act.

10. Thus, the Applicant is not entitled to the suspension of sentence.

11. Consequently, the Application is dismissed.

CRL.A. 909/2009

12. Since the Applicant is in custody for a long time, the hearing of the Appeal is expedited.

13. Both the parties are directed to file brief synopsis along with relevant case laws running into not more than three pages within two weeks. Renotify on 10.04.2013 in the category of 'After Notice Misc. Matters'.

MANU/SC/0166/1999

Equivalent Citation: 1999(1)ACR682(SC), AIR1999SC1131, 1999(1)ALD(Cri)735, 1999 (38) ACC 583, 1999CriLJ1825, 1999(2)Crimes338(SC), (2001)1GLR298, JT1999(2)SC176, 1999-2-LW(Crl)652, 1999(II)OLR1, 1999(II)OLR(SC)1, 1999(2)PLJR75, 1999(2)RCR(Criminal)130, RLW2000(1)SC69, 1999(2)SCALE26, (1999)3SCC321, [1999]1SCR1156

IN THE SUPREME COURT OF INDIA

Crl.A. No. 312 of 1999 (@ S.L.P. (Crl.) No. 35 of 1999)

Decided On: 17.03.1999

Appellants: **Maktool Singh**
Vs.
Respondent: **State of Punjab**

Hon'ble Judges/Coram:
K.T. Thomas and M.B. Shah, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: Vikram Chaudhari and Mahabir Singh, Advs

For Respondents/Defendant: R.S. Sodhi, Adv.

Case Note:

Criminal - suspension - Sections 32A and 36B of Narcotic Drugs and Psychotropic Substances Act, 1985 and Sections 432, 433 and 434 of Criminal Procedure Code, 1973 - whether convicted person under Act of 1985 be suspended during pendency of appeal presented by him - Section 32A has taken away powers of Court to suspend sentence passed on persons convicted of offences under Act - similarly power of Government under Sections 432, 433 and 434 also taken away - Section 32A would have overriding effect with regard to powers of suspension, commutation and remission under Code - held, convicted person cannot be suspended during pendency of appeal however Registry of each High Court can be directed to include very appeal in hearing list.

JUDGMENT

K.T. Thomas, J.

1. Leave granted.

2. Can the sentence, passed on a convicted person under the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the Act') be suspended during the pendency of appeal presented by him? Answers given to the said question by different High Courts are in different tones. The question has now winched to the fore in this Court as the appellant did not succeed in getting the sentence (passed on him) suspended by the High Court though he moved for it on presentation of an appeal in challenge of the conviction and sentence.

3. Section 32A of the Act, which was inserted by Act No. 2 of 1989 reads thus:

> 32A. No suspension, remission or commutation in any sentence awarded

> under this Act - Notwithstanding anything contained in the CrPC, 1973 or any other law for the time being in force but subject to the provisions of Section 33, no sentence awarded under this Act (other than Section 27) shall be suspended or remitted or commuted.

4. A plain reading of the above Section is that it prohibits suspension of a sentence awarded under the Act except in the case of an offence under Section 27. To make the aforesaid meaning clearer the legislature has added a non obstante limb to the Section to the effect that such prohibition is operative in spite of any other provision contained in the CrPC, 1973 (for short 'the Code') or under any other law. But the impact of the aforesaid ban is sought to be diluted with the help of Section 36B of the Act which reads thus:

> 36B. Appeal and revision - The High Court may exercise, so far as may be applicable, all the powers conferred by Chapters XXIX and XXX of the CrPC, 1973, on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court.

5. Chapter XXIX of the Code contains a fasciculus of provisions for dealing with "Appeals" among which is included Section 389 of the Code which confers power for suspension of sentence pending appeal. Such powers can be exercised by the appellate court as well as by the High Court. In certain cases power of suspension of sentence can be exercised by the convicting court as provided in Sub-section (3).

6. The argument advanced before us is that when Section 36B of the Act preserved the powers of the High Court under Chapter XXIX of the Code while dealing with an appeal challenging conviction under the Act, it must be deemed to have preserved all the powers mentioned in Section 389 of the Code including the power to suspend the sentence. But we cannot give accord to that argument on the following grounds. When Section 36B of the Act is juxtaposed with Section 32A the latter must dominate over the former mainly for two reasons. First is that Section 32A overrides all the provisions of the Code, by specific terms, through the non obstante limb incorporated therein. Second is that Section 36B has clearly indicated that its applicability is subject to the extent of adaptability because of the words employed therein "so far as may be applicable". This means, the High Court can exercise powers under Chapter XXIX of the Code only to the extent such powers are applicable. In other words, if there is an interdict against applicability of any provision, the High Court cannot use such provision, albeit its inclusion in Chapter XXIX of the Code. That is the effect of employment of the words "so far as may be applicable" when a statute incorporates provision of another statute.

7. Otherwise Section 32A of the Act must have been intended for covering some other field altogether. Learned Counsel contended that the Section is intended to cover the provisions subsumed in placitum "E" in Chapter XXXII of the Code. Sections 432 to 435 are bundled therein. The sub-title given to placitum E is this: "Suspension, Remission and Commutation of Sentences". Section 432 deals with the power of the appropriate Government to suspend execution of any sentence or to remit the whole or any part of the punishment to which any person has been sentenced. Section 433 deals with the powers of the Government to commute sentence. The contention is that Parliament has sought to curb the aforesaid powers of the Government through enactment of Section 32A of the Act, and not the power of the High Court to suspend sentence.

8. If the intention of Parliament in enacting Section 32A of the Act is only to curb Government's powers under Sections 432 and 433 of the Code the Parliament would, instead of using the present all covering words in the non obstante clause ("notwithstanding anything contained in the Code or in any other law") have employed the words "notwithstanding anything contained in Chapter XXXII of the Code". Precision and brevity are generally the hallmarks of legislative draftsmanship. Hence lesser words for achieving the purpose would have been employed by the legislature while framing a provision in the statute.

9. That apart, could parliament have laboured so much if its only object was to bridle the powers of the Government under Section 432 and 433 of the Code because even apart from those provisions a Government could achieve it by exercising the constitutional powers. Article 72 of the Constitution of India confers power on the President of India "to suspend, remit or commute sentence" in all cases where punishment or sentence is for an offence against any law relating to a matter to which executive power of the Union extends. Article 161 contains similar power which Government of a State can exercise in relation to a person convicted of any offence against law relating to a matter which the executive power of the State extends.

10. A Constitution Bench of this Court has held in Maru Ram v. Union of India MANU/SC/0159/1980 : 1980CriLJ1440 that power under Articles 72 and 161 of the Constitution cannot be exercised by the President or Governor on their own but only on the advice of the appropriate Government. The said ratio has been followed by another Constitution Bench in Kehar Singh v. Union of India MANU/SC/0240/1988 : 1989CriLJ941 . Thus, the position relating to Articles 72 and 161 of the Constitution, as interpreted by this Court, is that the appropriate executive Government can advice the Head of the State to exercise powers thereunder and such advice is binding on him.

11. If the object of Section 32A of the NDPS Act is to take away the power of the Government to suspend, remit or commute the sentence, the legislative exercise in enacting the said provision is practically of futility because even without Section 432 of the Code, the appropriate Government can suspend, remit or commute sentences in exercise of the constitutional functions.

12. For the aforesaid reasons we are not impressed by the contention that the sole object of incorporating a provision like Section 32A in NDPS Act was to impose curb on the executive power under Sections 432 and 433 of the Code to suspend, remit or commute the sentence passed on a particular accused.

13. In this context the raison d'etre for introducing Section 32A in the Act can be looked at. In the "Statement of Objects and Reasons" for introducing Bill No. 125/1988 in the Lok Sabha (which later became Act 2 of 1989) the following passage has been mentioned as one of the statements:

> Even though the major offences are non-bailable by virtue of the level of punishment, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of NDPS Act, 1985 the need to amend the law to further strengthen it, has been felt.

14. One of the objects mentioned therein is this: "To provide that no sentence awarded under the Act shall be suspended, remitted or commuted."

15. It must be pointed out that in the "Statement of Objects and Reasons" no concern was shown against the executive powers of remission or commutation or suspension of sentence, but the main concern focussed was on the need to further strengthen the bail provisions. That apart, we are not aware of any criticism from any quarter that Government have been remitting or suspending or commuting sentences awarded to persons convicted of offences under the Act. It is preposterous to think that a situation was created by which Parliament was forced to step in to curb the executive powers of the Government to suspend sentences passed on the convicts under the Act.

16. At this juncture a reference to Section 37 of the Act is apposite. That provision makes the offences under the Act cognizable and non-bailable. It reads thus:

> **37.** Offences to be cognizable and non-bailable.- (1) Notwithstanding anything contained in the CrPC, 1973 -
>
> (a) every offence punishable under this Act shall be cognizable;
>
> (b) no person accused of an offence punishable for a terra of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless-
>
> (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
>
> (ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in Clause (b) of Sub-section (1) are in addition to the limitations under the CrPC, 1973 or any other law for the time being in force, on granting bail.

17. The only offences exempted from the purview of the aforesaid rigours on the bail provisions are those under Sections 26 and 27 of the Act. The former is punishable up to a maximum imprisonment for three years and latter up to a maximum imprisonment for one year. For all other offences the court's power to release an accused on bail during the period before conviction has been thus drastically curtailed by providing that if the Public Prosecutor opposes the bail application no accused shall be released on bail, unless the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence.

18. If the position was thus even before a trial court completes adjudication, the position regarding bail cannot be more liberal and lighter after the trial court finds him guilty of the offence on completion of the adjudication. The interpretation sought to be placed by the learned Counsel would lead to the consequence that power of court to release an accused on bail during reconviction is rigorous while it will be liberal during post- conviction period. We do not think that Parliament would have intended such a consequence to take place. Section 32A was intended to plug the lacuna which existed during the pre-amendment stage.

19. It is pertinent to notice that Section 32A itself exempted cases falling under Section 27 of the Act by putting the words "other than Section 27" within a

parenthesis. This is because Section 27 deals with offences of far lesser degree when compared with the other offences in the Act. Learned Counsel contended that if that was the intention of Parliament Section 26 also would have been included in the parenthesis so as to exempt that offence from the purview of Section 32A. We are not disposed to question the wisdom of Parliament as to why Section 26 was also not brought within the exemption. Perhaps it was not so done because Section 26 relates to offences which are more serious than the offences mentioned in Section 27 of the Act.

20. A Full Bench of the Kerala High Court in Berlin Joseph @ Ravi v. State(1992) 1 Crimes 1221 : (1992) KLT 514 has adopted the view that Section 32A of the Act has curtailed the powers of the court to suspend the sentence passed on a convicted person of offences under the Act, except the offence under Section 27. A Division Bench of Rajasthan High Court in Anwar v. State MANU/RH/0357/1994 and a Full Bench of Madhya Pradesh High Court in Rajendra Singh v. State of M.P. MANU/MP/0314/1994 have also adopted the same view.

21. But a Division Bench of the Delhi High Court in Amarjit Singh v. State(1993) 2 R.Crl. R 466, has taken a different view on Section 32A. Though the Full Bench decision in Berlin Joseph v. State (supra) was brought to the notice of the Division Bench it was skipped by a court observation in the following lines:

> Mr. Handa strongly relied on a later Full Bench decision of the Kerala High Court in Berlin Joseph @ Ravi v. State (1992) 1 Crimes 1221 where the Full Bench has taken the view that High Court has no power to suspend the sentence of a convicted person under the Act during the pendency of his appeal or revision. With respect we are unable to agree to this view. Section 32A of the Act is neither a proviso to Section 36B of the Act nor it controls it.

22. The Delhi High Court has not adverted to any of the reasoning contained in Berlin Joseph's decision. But a Full Bench of the Gujarat High Court in Jyotiben Ramlal Purohit v. State of Gujarat MANU/GJ/0217/1995 : (1996)1GLR395 , considered the question, rather at length, and differed from the ratio in Berlin Joseph (supra). Three premises were put forward by the Gujarat High Court in the said decision. First is that Section 36B has clearly conferred all powers provided in Chapter XXIX of the Code. Second is, the word "award" used in Section 32A of the Act denotes only the sentence passed by the final court and not the trial court. Third is, that under Section 389(3) of the Code a trial court is empowered to suspend the sentence for the offence under Section 26 of the Act and if that be so "the legislature can hardly have thought about bringing such an anomalous consequence, namely that the trial court can grant bail but the appellate court cannot".

23. We must observe that the aforesaid three premise are faulty. We have already dealt with the contention that Section 36B would take care of powers of the appellate court to suspend the sentence and we found that the provision cannot override the clear ban contained in Section 32A of the Act. The second premise that the word "award" should be construed not as a sentence passed by the trial court cannot be upheld at all. How can it be said that when trial court awards a sentence that cannot be treated in law as a sentence awarded. Then what is the legal import of such a sentence? To say that a sentence passed by a trial court would be no awarding of sentence merely because the conviction has been challenged, appears to us to be too tenuous for countenance.

24. The third premise adopted by the Gujarat High Court is based on a fallacious assumption that in spite of Section 32A the trial court has power to suspend the sentence passed on a conviction under Section 26 of the Act. Learned judges wrongly assumed that under Section 389(3) of the Code a trial court has such a power. The effect of any order passed under Section 389(3) of the Code is to suspend the sentence, as can be discerned from the words in the specific "and the sentence of imprisonment shall be deemed to be suspended." When power of suspending the sentence is taken away by the legislative interdict, it would apply to the court which convicts the accused as well. A legal premise cannot be made up on a wrong assumption.

25. The upshot of the above discussion is that Section 32A of the Act has taken away the powers of the court to suspend a sentence passed on persons convicted of offences under the Act (except Section 27) either during pendency of any appeal or otherwise. Similarly, the power of the Government under Sections 432, 433 and 434 of the Criminal Procedure Code have also been taken away. Section 32A would have an overriding effect with regard to the powers of suspension, commutation and remission provided under the Criminal Procedure Code.

26. Before parting with the matter we must deal with a possible fall- out of adopting such a view. Learned Counsel for the appellant has voiced a concern that if High Courts have no power to suspend sentence under any contingency its consequence is that long duration of pendency of appeals would result in serious miscarriage of justice in many cases. We are aware of such hard consequences which might erupt. The solution to such problems can be worked out by Parliament. Till then the High Courts should direct the Registry to board appeals under the Act on a priority basis and dispose them of as early as possible. As a temporary measure to lessen the problem we direct the Registry of each High Court to include every appeal (against conviction of offences under the Act) in the hearing list as soon as such appeal becomes ripe for hearing. We express the hope that the Bench of the High Court concerned would give preference to such appeal for early hearing.

27. The appeal is disposed of accordingly.

MANU/SC/1180/2004

Equivalent Citation: IV(2006)CCR41(SC), 2004(16)CriminalCC430, 2006(2)RCR(Criminal)73, (2004)13SCC42

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 1077 of 2004 (Arising out of SLP(Crl.) No. 3117 of 2004)

Decided On: 27.09.2004

Appellants: **Man Singh**
Vs.
Respondent: **Union of India (UOI)**

Hon'ble Judges/Coram:
R.C. Lahoti, C.J.I, P.K. Balasubramanyan and P.P. Naolekar, JJ.

Case Category:
CRIMINAL MATTERS - CRIMINAL MATTERS RELATING TO BAIL/INTEI
BAIL/ANTICIPATORY BAIL AND AGAINST SUSPENSION OF SENTENCE

ORDER

1. Leave granted.

2. The appellant has been held guilty of the offence punishable under Sections 8/18 and 8/15 of the Narcotic Drugs and Psychotropic Substances Act, 1985 and directed to undergo rigorous imprisonment for 10 years with a fine of Rs. 1 lakh on each count.

3. The appellant has been in jail since 1.3:1997 and has already undergone more than seven years of imprisonment. It is stated by the learned counsel for the appellant that there is no likelihood of the appeal being heard in the near future. Reliance is placed on the decision of this Court in Dadu v. State of Maharashtra, MANU/SC/0103/2000 : 2000(2) Apex Court Journal 621 (S.C.) : (2000)3 SCC 262 : 2000 SCC(Cri) 609. The learned counsel for the appellant states that the appellant is prepared to deposit the amount of fine.

4. The appeal is allowed. It is directed that on the appellant depositing the amount of fine, the execution of the sentence of imprisonment shall remain suspended during the hearing of the appeal by the High Court and the appellant shall be released on bail to the satisfaction of the trial Court for appearance consistently with the judgment of the High Court.

MANU/MH/0692/2002

Equivalent Citation: 2003CriLJ1324, 2003(1)MhLj623

IN THE HIGH COURT OF BOMBAY (NAGPUR BENCH)

Criminal Appeal No. 13 of 1997

Decided On: 12.09.2002

Appellants: **Mohammad Ismail**
Vs.
Respondent: **State of Maharashtra**

Hon'ble Judges/Coram:
R.K. Batta, J.

Counsels:
For Appellant/Petitioner/Plaintiff: H. Ahmed and Mahesh Singh, Advs.

For Respondents/Defendant: T.D. Khade, APP

Case Note:

a) It is declared that while issuing a notice under Section 50(1) of the Narcotic Drugs and Psychotropic Substances Act, 1985, the accused must be familiarized with his right to be searched before a gazetted officer or magistrate.

b) The Court clarified that by merely seeking the willingness of the accused regarding his search before a gazetted officer or a magistrate, it cannot be concluded that his right under the law to be searched has been communicated to him.

c) A search conducted during the conviction and sentence of the accused under Section 21 of the Narcotic Drugs and Psychotropic Substances Act,1985 was found to be in violation of Section 50 of the Act - The Court thus vitiated the conviction and sentence.

d) A gazetted officer before whom the accused was searched couldn't be treated as investigating officer on the mere grounds that he was a gazetted officer.

e) The appellant took investigating officer to a building and went into bed-room and from one cupboard, took out polythene bag containing brown sugar - The Court acquitted the accused on the grounds that ownership and possession of place of seizure of contraband articles could not be justified in favour of the appellant.

JUDGMENT

R.K. Batta, J.

1. The appellant was tried for possession of 87.500 gms of brown sugar worth Rs. 87,500/-, under Section 21 of the Narcotic Drugs and Psychotropic Substances Act

(for short, the "NDPS Act"). The prosecution case, in brief, is that on prior information which was reduced into writing in the Station Diary, the police party along with panchas, went near Kamalbaba Durgah, Nagpur and accosted the appellant from whose personal search, 12.500 gms of brown sugar valued at Rs. 12,500/- was recovered besides cash of Rs. 9758/-. After the said recovery, the appellant was interrogated and he disclosed that he would point out brown sugar in the house and accordingly, he was taken to the house and from a cupboard, he took out one polythene packet as also cash. The said polythene packet contained 75 gms of brown sugar besides a sum of Rs. 2800/-. The samples were taken and forwarded to the Chemical Analyser who reported that heroin (diacetyl morphine) is detected in both the samples.

2 . The prosecution examined in all six witnesses in support of the charge. The learned Special Judge (NDPS) accepted the prosecution evidence relating to recovery of brown sugar from the person as also from the house of appellant and held the appellant guilty under Section 21 of the NDPS Act. On conviction, the appellant was sentenced to undergo rigorous imprisonment for a period of ten years and to pay fine of Rs. one lakh, in default, to suffer further rigorous imprisonment for two years. The period of detention undergone during the investigation and trial was set off in terms of Section 428 Criminal Procedure Code. The appellant challenges the conviction and sentence imposed by filing this appeal.

3. The learned Advocate for the appellant substantially and mainly urged two points before me. The first contention advanced by him is that insofar as recovery from person is concerned, the safeguard under Section 50 of the NDPS Act have not been complied with inasmuch as the appellant was not informed of his right to get the search conducted in the presence of gazetted officer or the magistrate. In this connection, my attention has been drawn to notice under Section 50(1) of the NDPS Act (exhibit 55); evidence of P.W. 5 Dr Sitaram Joshi, a pancha witness and evidence of PW 6 Wasudeo Sidam, Police Inspector who conducted the raid. Reference to the same shall be made at the time of discussion of the matter on merits. The second contention advanced by the learned Advocate for appellant is that insofar as recovery from the house is concerned, the prosecution has failed to prove that the house either belongs to the appellant or that the same was in occupation of the appellant and in the absence of proof of the same, recovery cannot be used as against the appellant in order to sustain the conviction. Learned Advocate for the appellant has placed reliance on number of rulings on this aspect with which I shall deal at a later stage while discussing the case on merits.

4 . Learned APP, on the other hand, urged before me that there is substantial compliance of the provisions of Section 50 of the NDPS Act in view of the notice (exhibit 55) as also depositions of pancha witness PW 5 Dr Joshi and PW 6 Sidam who have stated that the appellant was apprised of his right to be searched before the gazetted officer or the magistrate. In respect of recovery from the house, it is urged by learned APP that the evidence of pancha witness, Dr Joshi (PW 5) and that of Police Inspector Sidam (PW 6) proves that the said recovery is made from the house of appellant and that there is no reason as to why the said recovery should be disbelieved. Learned APP has also placed reliance on number of rulings to which reference shall be made hereinafter.

5. Though, according to the prosecution case, there were two distinct recoveries, that is to say, one from the person of the appellant while he was near Kamalbaba Durga and the other from his house which is at some distance from the place where the

appellant was searched, yet a combined charge was framed by the learned Special Judge, NDPS. The charge reads as under :--

> "That, you above named accused on or about 31-12-1992 at about 8.15 a.m. at Mominpura, near Kamal Baba Durgah, Nagpur was found in possession of brown sugar weighing 87 gram and 500 mg. worth of Rs. 87,500/- and cash of Rs. 12,558/- amount of sale proceed of brown sugar, without having any valid licence, permit or authorisation and thereby committed an offence punishable under Section 21 of N.D.P.S. Act, within my cognizance.
>
> And, I hereby direct that, you above named accused be tried by me on the said charge."

In the charge, there is neither any specific reference to the recovery of part of brown sugar from personal search nor there is reference to recovery of the balance brown sugar from the house of appellant. In my considered opinion, the charge has thus caused serious prejudice to the appellant.

6. Be that as it may, coming to the challenges advanced by the learned Advocate for appellant, I shall first deal with the challenge relating to the recovery from the person of the appellant. This recovery, admittedly, was made on prior information and the police party had gone along with the panchas. Section 50(1) of the NDPS Act provides that when any officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, Section 42 and Section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate, The law in this respect is well settled and no longer res-integra. The requirement under Section 50 is that the accused must be apprised of the fact that he has a right to get his personal search conducted before the Gazetted officer or the Magistrate. The Apex Court in State of Punjab v. Balbir Singh,MANU/SC/0436/1994 : 1994CriLJ3702 has laid down that the provisions of Section 50 of the NDPS Act are mandatory. The Apex Court in this respect has laid down-

> "On prior information, the empowered officer or authorised officer while acting under Section 41(2) or 42 should comply with the provisions of Section 50 before the search of the person is made and such person should be informed that if he so requires, he shall be produced before a gazetted officer or a magistrate as provided thereunder. It is obligatory on the part of such officer to inform the person to be searched and if such person so requires failure to take him to the gazetted officer or the magistrate would amount to non-compliance of Section 50 which is mandatory and thus it would affect the prosecution case and vitiate the trial. After being so informed whether such person opted for such a course or not would be a question of fact." .....
>
> "It is an imperative requirement on the part of the officer intending to search to inform the person to be searched of his right that if he so chooses, he will be searched in the presence of a gazetted officer or a magistrate. Thus the provisions of Section 50 are mandatory."

7. The Apex Court has further laid down in State of Punjab v. Baldev Singh etc. etc. MANU/SC/0981/1999 : 1999CriLJ3672 to the following effect :--

> "On the basis of the reasoning and discussion above, the following

conclusions arise :

> (1). That when an empowered officer or a duly authorised officer acting on prior information is about to search a person, it is imperative for him to inform the concerned person of his right under Sub-section (1) of Section 50 being taken to the nearest Gazetted Officer or the nearest Magistrate for making the search. However, such information may not necessarily be in writing.
>
> (2). That failure to inform the concerned person about the existence of his right to be searched before a Gazetted Officer or a Magistrate would cause prejudice to accused;
>
> (3). That a search made, by an empowered officer, on prior information, without informing the person of his right that if he so requires, he shall be taken before a Gazetted Officer or a Magistrate for search and in case he so opts, failure to conduct his search before a Gazetted Officer or a Magistrate, may not vitiate the trial but would render the recovery of the illicit article suspect and vitiate the conviction and sentence of an accused, where the conviction has been recorded only on the basis of the possession of the illicit article, recovered from his person, during a search conducted in violation of the provisions of Section 50 of the Act."

it has been pointed out by the Apex Court in the aforesaid judgment that failure to inform the accused about existence of his right to get search before a Gazetted officer or a Magistrate would cause prejudice to the accused.

8. In this judgment, the Apex Court did not express any opinion as to whether the provisions of Section 50 of the NDPS Act are mandatory or directory, but it was held that failure to inform the person concerned of his right to get search conducted before a Gazetted Officer or a Magistrate would render the recovery of illicit article suspicious and render the conviction and sentence of the accused as bad and unsustainable in law.

9. In this respect, learned APP has placed reliance on the judgment of the Apex Court Beckodan Abdul Rahiman v. State of Kerala 2002 All MR (Cri.) 1591 However, the said judgment does not in any manner help the prosecution. This judgment lays down that the safeguards laid down under Section 50 of the NDPS Act are intended to serve a duel purpose to protect a person from false accusation and frivolous charges as also to lend credibility to the search and seizure conducted by the empowered officer. If the empowered officer fails to comply with the requirements of the section, the prosecution is to suffer for the consequences.

10. In K. Mohanan v. State of Kerala, , upon which reliance was placed by learned Advocate for appellant, also it was held that before subjecting a person to search, the officer concerned must inform him of his right to be searched before a gazetted officer or a Magistrate and failure to do so would cause prejudice to such person. It was further observed that if the accused, who was subjected to search was merely asked whether he was required to be searched in the presence of a gazetted officer or a Magistrate, it cannot be treated as communicating to him that he had a right under law to be searched. It was further observed that if the accused is told that he had a right under law to have himself searched, what would have been the answer given by him, cannot be gauged at this distance of time. The said observation was made by

the Apex Court in view of the fact that the main defence adopted by the appellant in that case at all stages was that Section 50 of the Act was not complied with.

11. Coming to the evidence on this aspect in the case under consideration, the prosecution case is that notice (exhibit 55) was given to the appellant under Section 50(1) of the NDPS Act. The said notice reads as under :--

> "Notice under Section 50(1) of N.D.P.S. Act.
>
> Date 31-12-1992.
>
> To,
>
> Mohammad Ismail son of Karim Patel Ansari, aged 27 years, residing near Kamal Baba Dargah at Mominpura, Police Station, Tahsil, Nagpur.
>
> Under Section 50(1) of N.D.P.S. Act there is provision of taking your personal search in connection with the intoxicant in the presence of the Executive Magistrate or Magistrate or Gazetted Officer of any department of the State Government.
>
> If you desire we can make arrangement of the same."

This notice only speaks of a provision relating to personal search in the presence of Executive Magistrate or Magistrate or Gazetted Officer as also that if the appellant so desired, arrangement could be made for the same. This notice, in my opinion, in the context and evidence on record, does not apprise the appellant of his right but only points out the existence of such provision. The accused must be made aware of the right in clear, unambiguous and categorical terms that he has a right to get himself searched before the Gazetted Officer or the Magistrate and that if he so desires he can be taken to a Gazetted officer or a Magistrate. The notice in question falls short of the requirement under Section 50(1) of the NDPS Act. Besides this, the pancha witness Dr Sitaram Joshi (PW 5) on this aspect has stated that the police told the accused that search had to be taken and police asked the accused whether he intended to offer the search before Executive Magistrate. This deposition also does not convey that the appellant was apprised of his right properly. In addition, it speaks of only search before Executive Magistrate, but the requirement of law is, Gazetted Officer or Magistrate. P.W. 5 Dr Joshi also states that appellant declined for the search. In the notice under Section 50(1) (exhibit 55), there is no whisper that the appellant had declined to exercise the said right even though the endorsement of the appellant was taken for having received copy of the said notice. In case the appellant had declined to exercise such right, the said fact should have been incorporated in written notice (exhibit 55). In this respect, the Investigating Officer P.W. 6 Wasudeo Sidam has stated that he had disclosed the purpose of search to the accused and asked the accused whether he intended to offer search before Magistrate or Gazetted Officer and the accused told that it was not necessary. This again is not sufficient compliance of the requirement under Section 50(1) of the NDPS Act since it does not, in fact, apprise the appellant of his right thereunder. The observations contained in para 6 of the judgment of the Apex Court in K. Mohanan v. State of Kerala (supra) are squarely applicable to the facts of the case under consideration insofar as compliance of requirement under Section 50 of the Act is concerned.

12. Learned APP has placed reliance on the judgment of this Court in Noorkhan @ Naru v. State of Maharashtra MANU/MH/0239/2002 : 2002(3)MhLj13 in respect of her

contention that in the light of evidence on record, the requirement under Section 50(1) of the NDPS Act has been duly complied with.

In my opinion, the observations made in this judgment are based upon the facts and circumstances of the case and the same cannot be applied mutatis mutandis to the facts of the case under consideration.

13. On account of non-compliance of the requirements of Section 50(1) of the NDPS Act, the recovery of the illicit articles becomes suspect and it vitiates the conviction and sentence since conviction and sentence is recorded only on the basis of possession of illicit article recovered from the person of the appellant during search conducted in violation of the provisions of Section 50 of the Act. The law laid down by the Apex Court in State of Punjab v. Balbir Singh (supra) in sub-paras (1), (2) and (3) of paragraph 55 squarely applies to the case under consideration. Therefore, the conviction of the appellant on the basis of recovery of illicit article from his possession cannot be sustained and is required to be set aside.

14. It may be mentioned here that the learned Special Judge, NDPS has in para 11 of the judgment stated that the Investigating officer is a Gazetted Officer and as such, there is compliance of Section 50(1) of the NDPS Act in the present case. This finding of the learned Special Judge, NDPS cannot fulfil the requirements of Section 50 of the Act inasmuch as P.W. 6 Wasudeo Sidam is Investigating Officer and the Gazetted Officer before whom the accused is to be taken for search in case the accused so desires, cannot obviously be the Investigating Officer himself, but has to be another Gazetted Officer. If the reasoning of the learned Special Judge, NDPS is accepted, it will have the effect of nullifying the provisions of Section 50 of the NDPS Act. The learned Special Judge has thus taken an erroneous view in respect of Section 50 of the Act when he has stated that there is compliance of Section 50 of the NDPS Act because the Investigating Officer himself is a Gazetted Officer.

15. Now, coming to the second challenge advanced by the learned Advocate for the appellant, it is necessary to look into the evidence. The prosecution case is that after recovery of illicit articles from the personal search of the appellant, appellant made disclosure under Section 27 of the Evidence Act which was reduced into writing that the brown sugar and sale proceeds are in the house and he will produce the same. According to the learned Special Judge, NDPS, this statement is not under Section 27 of the Evidence Act, but it is confession made by the accused/ appellant before independent panch witness Dr Joshi (PW 5). For this proposition, he has placed reliance on Abdul Razak @ Raja v. Sandip Kr. Dutta Gupta and Anr. 1989 (3) Crimes 272. In the said case, while dealing with a case under Section 20(b)(ii) of the NDPS Act, the Calcutta High Court found that confession had been made by the accused therein before Intelligence Officer under Section 53 of the NDPS Act and since the said officer was not a police officer, the confessional statement was admissible. The learned Special Judge, NDPS has totally misunderstood this judgment which was based upon the fact that the Intelligence Officer functioning under Section 53 of the Act was not a Police Officer on account of which fact the confession made to him was admissible. In the case under consideration, the statement was made by , the appellant before the Police Officer, P.I. P.W. 6 Wasudeo Sidam which was reduced into writing by him which is obviously hit under Section 25 of the Evidence Act but could only be used as disclosure under Section 27 of the Evidence Act and if there is recovery in pursuance of the same, the same could be used against the appellant. The learned Special Judge, NDPS erroneously held that the confession was made before an independent pancha witness Dr Joshi (PW 5). It is pertinent to note that this

statement is alleged to have been made by the appellant in the presence of Police Officer Wasudeo Sidam (PW 6) who had, in fact, recorded that information in memorandum (exhibit 56).

16. Dr Sitaram Joshi (PW 5), a pancha witness, has not spoken anything as to what was stated by the appellant. He has merely stated that the accused/ appellant was asked whether any other property was with him and immediately exhibit 56 was prepared. He did not depose as to what was stated by the appellant which was recorded in the memorandum. He further stated that police entered the house of the accused and the accused took out a packet containing brown sugar. In cross-examination he stated that he did not know the owner of the house. In this context, statement of this witness that the police entered the house of the accused, does not have much significance. On this aspect, the Investigating Officer Wasudeo Sidam (PW 6) has stated that the accused told that brown sugar and the sale proceeds were in the house and he agreed to produce the same. He further stated that accused took them to a building and went into the bed-room and from one cupboard he took out a polythene bag containing brown sugar. He admitted during cross-examination that he had not enquired about the ownership and occupation of the building from where the property was produced by the accused in the Corporation record. He also stated that he did not record statements of adjoining occupants of the house. In case of recovery from the house, it is incumbent on the prosecution that the house from where recovery is effected, either belongs to the accused or that it was in his occupation. None of this has been proved by the prosecution. In this respect, learned Advocate for the appellant has relied upon the Judgment of the Apex Court in Mohd. Alam Khan v. Narcotics Control Bureau and Anr., MANU/SC/0794/1996 : 1996CriLJ2001 wherein it has been held that where ownership and possession of the premises by accused from which contraband articles were seized is not established, accused is entitled to acquittal. In this case, the prosecution had failed to establish ownership and possession of the premises from where the contraband articles were seized as belonging to the appellant. The Apex Court in the said case found that no acceptable evidence was led by the prosecution to prove that appellant was owner and was actual owner of the said building. Learned APP has relied upon judgment of the learned single Judge of this Court in Yogesh Rambhau Vrkude v. State of Maharashtra 2002 All MR (Cri.) 1519 wherein it was held that the presence of the accused himself with his wife in the premises, was sufficient to raise inference that accused was in possession of the house. The observations made in the said judgment have to be read in context of that case. In that case, accused and his wife were found inside the house where the seizure was made and it is on the basis of these facts that the observations therein have been made. In the case under consideration, the appellant was first searched near Kamalbaba Durgah and subsequently, he was taken to a house from where the remaining contraband was recovered. The prosecution has not led any evidence worth the name to prove that the appellant was either in possession or owner of the said house from where the contraband was recovered. In this view of the matter, the said recovery cannot be fastened on the accused/appellant. Therefore, appellant is entitled to acquittal in respect of the seizure of the contraband from the house in question.

17. For the aforesaid reasons, the appeal is allowed. The conviction and sentence of the appellant recorded by the Special Judge, NDPS vide judgment dated 16-11-1996 in Special Criminal Case No. 17/93 is hereby quashed and set aside. The appellant is, therefore, ordered to be acquitted of the charge. He shall be set at liberty in case he is not required in any other case.

MANU/MP/0069/2017

Equivalent Citation: I(2017)CCR383(MP)

IN THE HIGH COURT OF MADHYA PRADESH

Criminal Appeal No. 1752 of 2015

Decided On: 08.01.2017

Appellants: **Mukesh**
Vs.
Respondent: **State of M.P.**

Hon'ble Judges/Coram:
Virender Singh, J.

Counsels:
For Appellant/Petitioner/Plaintiff: A.K. Saraswat, Learned Counsel

For Respondents/Defendant: Abhishek Soni, Learned Deputy Government Advocate

ORDER

Virender Singh, J.

1. (Passed on 18.1.2017) Heard on IA No. 5908/2016, an application under Section 389(1) of Cr.P.C., 1973. This is the first application for suspension of sentence/bail before this Court. The accused is convicted vide judgment dated 8.12.2015 passed in SST No. 17/2008 under Section 8/15 (C) of NDPS Act and sentenced to undergo 10 years RI with fine of Rs. 1,00,000/-, in default of payment of fine, further to undergo one year RI.

2. Appellant is in custody from 31.10.2008.

3. No other bail application for suspension either pending, filed or decided by any other Court or by the Hon'ble Supreme Court.

4. According to the prosecution case, on 8.5.2008 upon a intelligence input that the accused persons Shiva, Mukesh and Chhoturam are transporting contraband, the police intercepted Mahindra Pick-up (for short Jeep) bearing registration No. RJ-21/G/3402 after following the due process. As the police tried to stop the Jeep, the driver turned it towards a dirt track (side road/Kachchi sadak) and as the jeep stop after some distance, three persons from inside the jeep came out and tried to flee away. The police followed them and caught two persons namely Mukesh and Chhoturam out of them. Third one namely Shiva Grujar managed to escape and could not be caught on the spot. On search, the police party found 380 kg. 500 gms. Poppy Straw in the vehicle. Thereafter, the police implicated present appellant in this case.

5. It is submitted by learned Counsel for the appellant that he is in jail from 31.10.2008 and almost completed 9 years in custody. There is no apprehension of his absconding during pendency of this appeal. The final hearing of the present appeal is likely to take sufficiently long period, therefore, sentence awarded to him be suspended and he be released on bail.

6. Learned Counsel for the appellant has placed reliance on the decisions of this Court dated 16.1.2015 in Cr.A. No. 709/2012, Sarwar v. State of M.P.) (By Hon'ble Shri Alok Verma, J.), dated 26.3.2015 in Cr.A. No. 1495/2013 (Rameshwar @ Ramlal v. State of M.P.) (By Hon'ble Shri T.K. Kaushal, J.), dated 29.6.2015 in Cr.A. 31/2014 (Dilip Singh v. State of M.P.) (By Hon'ble Shri Jarat Kumar Jain, J.), dated 28.9.2015 in Cr.A. No. 56/2013 (Parmanand and Another v. State of M.P.) (By Hon'ble Mrs. S.R. Waghmare, J.), dated 20.10.2015 in Cr.A. No. 1801/2013 (Shyam and Others v. State of M.P.) (By Hon'ble Shri P.K. Jaiswal, J.), dated 6.1.2017 in Cr. A. No. 1777/2013 (Shambhulal v. State of M.P.) (By Hon'ble Rajeev Kumar Dubey, J.) as well as on the Orders of Hon'ble Supreme Court dated 21.1.2013 in SLP (Cri.) No. 9180/2012 (Ramnik Singh v. Intelligence Officer, Directorate of Revenue Intelligence), Mansingh v. Union of India, MANU/SC/1180/2004 : (2004) 13 SCC 42, dated 10.9.2012 in SLP (Cri.) No. 5729/2012 (Mohd. Sadia v. Union of India) in support of his contention.

7. In support of the application, an affidavit has been filed by father of the appellant.

8. Prosecution has opposes the application and prays for its rejection.

9. I have considered the rival contentions of the Counsels.

10. In Dadu @ Tulsidas v. State of Maharashtra, MANU/SC/0637/2000 : VII (2000) SLT 379 : AIR 2000 SC 3203, case, while declaring Section 32-A of the Act unconstitutional, the Hon'ble Apex Court also considered the issue of non possibility of early hearing of appeal and its disposal on merits and has held that the suspension of the sentence by the Appellate Court has to be within the parameters of the law prescribed by the Legislature or spelt out by the Courts by judicial pronouncements. The exercise of judicial discretion on well recognised principles is the safest possible safeguards for the accused which is at the very core of criminal law administered in India.

Paras 27, 28, 29 of the judgment reads as under:

> **27.** Holding Section 32-A as void insofar as it takes away the right of the Courts to suspend the sentence awarded to a convict under the Act, would *neither entitle such convicts to ask for suspension of the sentence as a matter of right in all cases nor would it absolve the Courts of their legal obligations to exercise the power of suspension of sentence within the parameters prescribed under Section 37 of the Act*. Section 37 of the Act provides:
>
> > " 3 7 . *Offences to be cognizable and non-bailable.*--(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973--
> >
> > (a) every offence punishable under this Act shall be cognizable;
> >
> > (b) no person accused of an offence punishable for a term of imprisonment of five years or more under this Act shall be released on bail or on his own bond unless--
> >
> > (i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and
> >
> > (ii) where the Public Prosecutor opposes the application, the

> Court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.
>
> (2) The limitations on granting of bail specified in Clause (b) of Sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 or any other law for the time being in force, on granting of bail.

28. This Court in *Union of India v. Ram Samujh*, MANU/SC/0530/1999 : (1999) 9 SCC 429 held that the jurisdiction of the Court to grant bail is circumscribed by the aforesaid Section of the Act. The bail can be granted and sentence suspended in a case where there are reasonable grounds for believing that the accused is not guilty of the offence for which convicted and he is not likely to commit any offence while on bail and during the period of suspension of the sentence. The Court further held:

> "The aforesaid Section is incorporated to achieve the object as mentioned in the Statement of Objects and Reasons for introducing Bill No. 125 of 1988 thus:
>
> > "Even though the major offences are non-bailable by virtue of the level of punishments, on technical grounds, drug offenders were being released on bail. In the light of certain difficulties faced in the enforcement of the Narcotic Drugs and Psychotropic Substances Act, 1985 the need to amend the law to further strengthen it, has been felt".

It is to be borne in mind that the aforesaid legislative mandate is required to be adhered to and followed. It should be borne in mind that in a murder case, the accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instrumental in causing death or in inflicting deathblow to a number of innocent young victims, who are vulnerable; it causes deleterious effects and a deadly impact on the society; they are hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing in intoxicants clandestinely. Reason may be large stake and illegal profit involved. This Court, dealing with the contention with regard to punishment under the NDPS Act, has succinctly observed about the adverse effect of such activities in Durand Dilier v. Chief Secretary, Union Territory of Goa, MANU/SC/0173/1989 : (1990) 1 SCC 95 : (AIR 1989 SC 1966) as under (SCC p. 104, para 24):

> "24. With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, Parliament in its wisdom, has

made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine."

To check the menace of dangerous drugs flooding the market, Parliament has provided that the person accused of offences under the NDPS Act should not be released on bail during trial unless the mandatory conditions provided in Section 37, namely,

(i) there are reasonable grounds for believing that the accused is not guilty of such offence; and

(ii) that he is not likely to commit any offence while on bail, are satisfied."

29. Under the circumstances the writ petitions are disposed of by holding that:

(1) Section 32-A does not in any way affect the powers of the authorities to grant parole;

(2) It is unconstitutional to the extent it takes away the right of the Court to suspend the sentence of a convict under the Act;

(3) Nevertheless, a sentence awarded under the Act can be suspended by the Appellate Court only and strictly subject to the conditions spelt out in Section 37 of the Act as dealt with in this judgment.

(Emphasis added)

11. In Ratan Kumar Vishwas v. State of U.P. & Anr., MANU/SC/8237/2008 : I (2009) DLT (Crl.) 367 (SC) : IX (2008) SLT 471 : AIR 2009 SC 581 in para 15 & 16, the Hon'ble Supreme Court has said:

"15. In the said case it was clearly observed that a sentence awarded under the Act can be suspended by the Appellate Court only and strictly subject to the conditions as spelt out in Section 37 of the Act.

16. To deal with the menace of dangerous drugs flooding the market, Parliament has provided that a person accused of offence under the Act should not be released on bail during trial unless the mandatory conditions provided under Section 37 that there are reasonable grounds for holding that the accused is not guilty of such offence and that he is not likely to commit any offence while on bail are satisfied."

12. The same principal was reiterated in the case of Union of India v. Rattan Mallik @ Habul, MANU/SC/0076/2009 : I (2009) DLT (Crl.) 660 (SC) : I (2009) SLT 684 : 1 (2009) CCR 293 (SC) : AIR 2009 SC (Supp) 1567. It is held in paras 13-15 of the judgment:

13. It is plain from a bare reading of the non obstinate Clause in the section and Sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by Sub-clause (b) of Sub-

section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz.; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds". The expression 'reasonable grounds' has not been defined in the said Act but means something more than-*prima facie* grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. *[Vide Union of India v. Shiv Shanker Kesari,* MANU/SC/7905/2007 : (2007) 7 SCC 798.*Thus, recording of satisfaction on both the aspects, noted above, is sine qua non for granting of bail under the NDPS Act.*

(Emphasis added)

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDPS Act, the Court is not called upon to record a finding of 'not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

15. Bearing in mind the above broad principles, we may now consider the merits of the present appeal. It is evident from the afore-extracted paragraph that the circumstances which have weighed with the learned Judge to conclude that it was a fit case for grant of bail are: (i) that nothing has been found from the possession of the respondent; (ii) he is in jail for the last three years; and (iii) that there is no chance of his appeal being heard within a period of seven years. *In our opinion, the stated circumstances may be relevant for grant of bail in matters arising out of conviction under the Indian Penal Code, 1860 etc. but are not sufficient to satisfy the mandatory requirements as stipulated in Sub-clause (b) of Sub-section (1) of Section 37 of the NDPS Act.* Merely because, according to the Ld. Judge, nothing was found from the possession of the respondent, it could not be said at this stage that the respondent was not guilty of the offences for which he had been charged and convicted. We find no substance in the argument of learned Counsel for the respondent that the observation of the learned Judge to the effect that "nothing has been found from his possession" by itself shows application of mind by the learned Judge tantamounting to "satisfaction" within the meaning of the said provision. It seems that the provisions of the NDPS Act and more particularly Section 37 were not brought to the notice of the learned Judge."

(Emphasis supplied)

13. In a recent judgment, the Apex Court in the case of Union of India v. Ismile decided in Special Leave to Appeal (Cri.) No. 1408/2015 on 13.7.2015 set aside the order of suspension of sentence on the ground of bleak chances of early hearing of the appeal by holding that the period of sentence is not a ground for suspension of jail sentence. The order passed by the Apex Court reads as under:

> We have heard learned Counsel for the parties. The challenge is to order dated 25.7.2014 passed by the High Court of Madhya Pradesh suspending the sentence of the respondent who was convicted for an offence under the provisions of the Narcotic Drugs and Psychotropic Substances Act (for short 'NDPS Act') and sentenced to 15 years of rigorous imprisonment. The High Court has suspended the sentence on two grounds viz.; (i) only evidence available against the respondent is the confessional statement made by him and (ii) that the appeal will take long time to be heard on merits. We are of the view that the reasons given by the High Court are inadequate for the suspension of sentence. The confessional statement made by the respondent is to the effect that he was having 13 kg. of heroine with him and despite appearing on several occasions, the confession was not retracted. The fact that the appeal cannot be heard early is not a ground for suspension of sentence. Court should make an endeavour to dispose of the appeal at the earliest. We also find that the High Court has not looked at Section 37 of the NDPS Act in so far as the respondent is concerned while on the other hand it has denied suspension of sentence to accused No. 2 i.e. Zakir in view of the provisions of Section 37 of the NDPS Act. Under these circumstances, we set aside the order of the High Court and direct that the respondent be taken in custody forthwith to serve the sentence subject to any application that the respondent may move before the High Court. We also request the High Court to hear the matter expeditiously and dispose it of considering the fact that the respondent has already served six years of rigorous imprisonment. We make it clear that our observations will not have any bearing on the merits of the appeal. The special leave petition is disposed of.

14. In Daulat Singh alias Gatu v. State of Rajasthan, MANU/RH/0123/2014 : 2014 Cri. LJ 2860 (Raj. HC), the learned judge of the Rajasthan High Court has considered various judgments on the issue of suspension of sentence in the cases falls under the Act and has concluded.

> **4.** As per the provision aforesaid a Court considering any application to release an accused of the offences punishable under Section 19 or Section 24 or Section 27A and also for offences involving commercial quantity of contraband cannot be released on bail without recording the satisfaction as desired under Sub-clauses (1) and (2) of Clause (b) of Section 37(1) of the Act of 1985.
>
> **11.** The authority of Hon'ble the Supreme Court under Article 142 of the Constitution of India is an extraordinary authority and that is not abide by the statutory provisions. The power available can very well be exercised beyond statutory limits if that is required for dispensing complete justice in any case. It shall be pertinent to notice here that as per Article 141 of the Constitution of India the law declared by the Supreme Court shall be binding on all Courts within the territory of India, as such, the binding effect in the form of precedent is available to the judgments declaring law by the Apex Court. Article 142 of the Constitution of India nowhere refers judgments but

decree or order. The decrees or orders passed by the Apex Court while exercising its extraordinary authority under Article 142 of the Constitution of India cannot be taken as precedent. It shall also be appropriate to mention that the Constitution of India nowhere prescribes any authority to High Courts akin to the powers available to Hon'ble the Supreme Court as per Article 142(1) of the Constitution of India. This Court, thus, is required to operate within the four corners of the statutes applicable. The resultant is that Hon'ble Supreme Court may grant release on bail or suspension of sentence without getting itself satisfied with the requirements of Section 37 of the Act of 1985, if that is necessary for doing complete justice, such an authority, however, is not available to the High Court or the trial Court, as the case may be. As already stated, the order passed in the case of Mansingh (supra) is a reflection of the authority exercised under Article 142 of the Constitution of India, thus, is not having a binding effect or in other words, an authority of precedent for the High Court or the other Courts subordinate to it. The judgments given in the case of Dadu alias Tulsidas v. State of Maharashtra, (MANU/SC/0637/2000 : 2000 Cri LJ 4619) (supra) and Rattan Mallik, (MANU/SC/0076/2009 : 2009 Cri LJ 3042) (supra) are laying down law, hence, are having binding effect and those are required to be adhered in their true spirit.

15. Considering Man Singh case (MANU/SC/0076/2009 : 2009 Cri. LJ 3042) (supra) the learned Judge of the Rajasthan High Court further opined that effect, implication and need of the operation of Section 37 of the Act of 1985 was considered in detail by Hon'ble the Supreme Court in the case of Dadu alias Tulsidas v. State of Maharashtra (supra) and the same was reiterated in the case of Rattan Mallik (supra). So far as the order passed in the case of Mansingh (supra) is concerned, that is not containing reasons as desired under Section 37 aforesaid. The order is a reflection of the authority exercised under Article 142 of the Constitution of India, thus, is not having a binding effect. Similar is the position of the judgments passed in Ramnik Singh &Mohd. Sadiq case (supra) and they do not have binding effect. Similarly, other cases of this high Court cited by the learned Counsel for the applicant also have no binding effect for the aforesaid reason.

16. In Cr. A. No. 24/2008, Ms. V. Sumanlata v. State order dated 21.8.2015 and also in a latest judgment passed in Cr. A. No. 188/2012, Ismile and another v. Union of India, order dated 10.1.2017 division bench of this High Court has refused to suspend execution of the sentence awarded by the learned Trial Court on the ground of period of detention.

17. Thus, it is clear that the custody period alone cannot be made a ground for Bail/suspension in NDPS cases.

18. In the orders granting suspension of sentence passed by the different benches of this Court the law laid down by the Hon'ble Supreme Court in Dadu's case or reiterated in Raton Kumar & Rattan Malik cases (supra) is not considered and order passed in Ramnik Singh case and Man Singh case (supra) have been passed under the powers conferred by the Article 142 of the Constitution. Further, Division Bench of our own High Court has declined the claim of suspension on the ground of period of detention in CrA No. 24/2008 & 188/2012 (supra). Therefore, the same benefit cannot be extended on the basis of the judgments cited by the applicant. The applicant/appellant was caught on the spot and commercial quantity of poppy straw was found in his possession. Learned trial Court has appreciated the evidence in para

8 onward of its judgment. In the backdrop of facts and so also the evidence adduced by the prosecution, when I consider the conditions enumerated in Section 37 of the Act, I find that this is not a fit case to suspend the sentence either on the ground of period of detention or on merits as well, therefore, without commenting on the merits of the case, the application (IA No. 5908/2016) is dismissed.

MANU/SC/0151/2021

Equivalent Citation: 2021(221)AIC96, AIR2021SC1436, 2021 (2) ALT (Crl.) 14 (A.P.), 2021(2)J.L.J.R.69, 2021(2)JKJ229[SC], 2021(1)N.C.C.801, 2021(2)PLJR57, 2021(2)RCR(Criminal)272, (2021)5SCC724

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 257 of 2021 (Arising out of SLP (Crl.) No. 670 of 2021)

Decided On: 02.03.2021

Appellants: **The State (GNCT of Delhi) Narcotics Control Bureau**
Vs.
Respondent: **Lokesh Chadha**

Hon'ble Judges/Coram:
Dr. D.Y. Chandrachud and M.R. Shah, JJ.

Case Category:
CRIMINAL MATTERS - CRIMINAL MATTERS RELATING TO SUSPENSION OF SENTENCE

Case Note:
Criminal - Conviction - Suspension of sentence - Section 389(1) of the Code of Criminal Procedure 1973 (CrPC) - Respondentconvicted under Sections 23(c) and 25A of the Narcotic Drugs and Psychotropic Substances Act 1985 - Appeal filed alongwith application for suspension of sentence - Application allowed by High Court vide impugned order - Hence, the present Appeal - Whether High Court erred in granting the suspension considering the gravity/ nature of offences?

Facts:

The Respondent wasconvicted of offences punishable under Sections 23(c) and 25A of the Narcotic Drugs and Psychotropic Substances Act 1985 (NDPS). Parcels as seized from courier office pursuant to search operation were found to contain 325 grams of heroin and 390 grams of pseudoephedrine. The parcels were booked to a foreign destinationat the behest of a foreign national by the co-Accused who was an employee of the Respondent. The Respondent himself was a proprietor of the courier agency which had accepted the parcels initially for booking from the foreign national.The Special Judgeconcluded that the offence stood established against the Respondent, but the benefit of doubt was granted to the co-Accused on the ground that he was only an employee acting at the behest of the Respondent. High Court allowed the application for suspension of sentence opining that appeal is not likely to be taken for hearing in near future on account of disruption caused by COVID-19 pandemic subject to conditions directed. Hence, the present appeal.

Held, while allowing the Appeal:

Where the trial has ended in an order of conviction, the High Court, when a suspension of sentence is sought Under Section 389(1) of Code of Criminal Procedure, must be duly cognizant of the fact that a finding of guilt has been arrived at by the Trial Judge at the conclusion of the trial. This is not

to say that the High Court is deprived of its power to suspend the sentence under Section 389(1) of Code of Criminal Procedure. The High Court may do so for sufficient reasons which must have a bearing on the public policy underlying the incorporation of Section 37 of the NDPS Act. [9]

The High Court unfortunately, in the present case, has not applied its mind to the governing provisions of the NDPS Act. On the basis of the material which emerged before the learned Special Judge and which forms the basis of the order of conviction, no case for suspension of sentence under Section 389(1) of Code of Criminal Procedure was established. The order granting suspension of sentence under Section 389(1) of Code of Criminal Procedure is unsustainable and would accordingly have to be set aside.[10]

Appeal allowed. [12]

JUDGMENT

Dr. D.Y. Chandrachud, J.

1. Leave granted.

2. This appeal arises from a judgment of a learned Single Judge of the High Court of Delhi dated 28 July 2020, by which the application filed by the Respondent seeking suspension of sentence Under Section 389(1) of the Code of Criminal Procedure 1973[1] has been allowed.

3. The Respondent has been convicted of offences punishable Under Sections 23(c) and 25A of the Narcotic Drugs and Psychotropic Substances Act 1985[2]. He has been sentenced to suffer rigorous imprisonment for ten years in respect of the offence Under Section 23(c) and for three years under the provisions of Section 25A, apart from fine.

4. Briefly stated, on 2 December 2015, the 10 of the Narcotics Control Bureau, Delhi Zonal Unit received a phone call from DHL Courier that two parcels were lying in the office and were suspected to contain narcotic drugs. Accordingly, a team of the Narcotics Control Bureau, Delhi Zonal Unit, reached the office of DHL. Two parcels were seized. The parcels were found to contain 325 grams of heroin and 390 grams of pseudoephedrine. The parcels were booked to a foreign destination, at the behest of a foreign national, by the co-Accused who was an employee of the Respondent. The Respondent himself is a proprietor of the courier agency which had accepted the parcels initially for booking from the foreign national.

5. The Special Judge, after considering the entirety of the evidence on the record, came to the conclusion that the offence stood established as against the Respondent, but the benefit of doubt was granted to the co-Accused on the ground that he was only an employee who was acting at the behest of the Respondent. An appeal has been filed before the High Court of Delhi by the Respondent. While considering the application for suspending the sentence, the learned Single Judge recorded the following submissions of the Respondent in paragraph 2 of the impugned order:

> **2.** Learned Counsel for the Appellant submits that out of the total sentence of 10 years awarded to the Appellant by the Trial Court, the Appellant has

already undergone a period of about 4 years and 4 months. He has taken the Court through the records to show that though the Appellant who was owner of the courier company has been convicted and the employee of the company who had received the parcels, has been acquitted on the same set of evidence. It is further submitted that no investigation was made to arrest the consignor. He also submits that since the appeal is likely to take some time to come up for final hearing, no useful purpose would be served in keeping the Appellant in jail till such time and prays that the Appellant's sentence may be suspended during the pendency of the appeal.

6. The application was opposed on behalf of the Narcotics Control Bureau by the Senior Standing Counsel, who appeared to oppose the suspension of sentence. The High Court, while passing an order of suspension of sentence, indicated its reasons in paragraph 4 of the order, which reads as follows:

> **4.** Looking into the facts and circumstances of the case and the period undergone by the Appellant and the fact that the appeal is not likely to be taken for hearing in near future on account of disruption caused by COVID-19 pandemic, the application is allowed and the sentence of the Appellant is suspended during the pendency of the appeal on his furnishing a personal bond in the sum of Rs. 50,000/- with one surety of the like amount to the satisfaction of the concerned Jail Superintendent/Duty Magistrate, subject to the following further conditions:
>
> (i) The Appellant will not leave NCT of Delhi without prior permission of the Court.
>
> (ii) The Appellant shall appear before the Court as and when the appeal is taken up for final hearing.
>
> (iii) In case of change of address, the Appellant shall promptly inform the same to the concerned 10 as well as to the Court.

7. Mr. Aman Lekhi, learned Additional Solicitor General appearing on behalf of the Appellant, submits that the provisions of Section 37 of the NDPS Act contain stringent requirements before an application for bail can be allowed. Learned Additional Solicitor General submits that one of the requirements is that "the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail". It was urged that in a case such as a present where the conviction is under the provisions of Sections 23(c) and 25A of the NDPS Act, the requirement of Section 37 that "there are reasonable grounds for believing that he is not guilty of such offence" must apply a fortiori because the trial Court after conducting a trial has, on the basis of the evidence which is adduced, come to the conclusion that the offence has been established. In the present case, it was urged that absolutely no reasons have been indicated by the learned Single Judge of the High Court for granting bail, save and except for a vague reference to the "facts and circumstances" of the case, the period undergone by the Respondent and the fact that the appeal was not likely to be taken for hearing in the near future due to the disruption caused by the Covid-19 pandemic.

8. On the other hand, Ms. Nidhi, learned Counsel appearing through the Supreme Court Legal Services Committee to represent the Respondent, has adverted to the judgment of the Trial Judge and submitted that prima facie the involvement of the Respondent would not stand established. That apart, it has been submitted that the

Respondent has undergone about four years and four months of imprisonment and the High Court having exercised its discretion to grant bail, a case for interference has not been made out.

9. While considering the rival submissions, we must at the outset advert to the manner in which the learned Single Judge of the High Court has dealt with the application for suspension of sentence Under Section 389(1) of Code of Criminal Procedure. The offence of which the Respondent has been convicted by the Special Judge arises out of the provisions of Sections 23(c) and 25A of the NDPS Act. The findings of the learned Special Judge which have been arrived at after a trial on the basis of evidence which has been adduced indicate that the Respondent who was a proprietor of a courier agency was complicit with a foreign national in the booking of two parcels which were found to contain 325 grams of heroin and 390 grams of pseudoephedrine. Section 37 of the NDPS Act stipulates that no person Accused of an offence punishable for offences Under Section 19 or Section 24 or Section 27A and also for offences involving a commercial quantity shall be released on bail, where the public prosecutor opposes the application, unless the Court is satisfied "that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail". Where the trial has ended in an order of conviction, the High Court, when a suspension of sentence is sought Under Section 389(1) of Code of Criminal Procedure, must be duly cognizant of the fact that a finding of guilt has been arrived at by the Trial Judge at the conclusion of the trial. This is not to say that the High Court is deprived of its power to suspend the sentence Under Section 389(1) of Code of Criminal Procedure. The High Court may do so for sufficient reasons which must have a bearing on the public policy underlying the incorporation of Section 37 of the NDPS Act. At this stage, we will refer to the decision of a two-Judge Bench of this Court in Preet Pal Singh v. State of Uttar Pradesh MANU/SC/0591/2020 : (2020) 8 SCC 645 where Justice Indira Banerjee, speaking for the Court, observed as follows:

> **35.** There is a difference between grant of bail Under Section 439 of the Code of Criminal Procedure in case of pre-trial arrest and suspension of sentence Under Section 389 of the Code of Criminal Procedure and grant of bail, post-conviction. In the earlier case there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the Rule and jail is an exception, as held by this Court in Dataram Singh v. State of U.P and Anr. (supra). However, in case of post-conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the Rule and jail an exception attracted, once there is conviction upon trial. Rather, the Court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in Section 389(1) of the Code of Criminal Procedure.

10. The principles which must guide the grant of bail in a case under the NDPS Act have been reiterated in several decisions of this Court and we may refer to the decision in State of Kerala v. Rajesh MANU/SC/0084/2020 : (2020) 12 SCC 122. The High Court unfortunately, in the present case, has not applied its mind to the

governing provisions of the NDPS Act. On the basis of the material which emerged before the learned Special Judge and which forms the basis of the order of conviction, we are of the view that no case for suspension of sentence Under Section 389(1) of Code of Criminal Procedure was established. The order granting suspension of sentence Under Section 389(1) of Code of Criminal Procedure is unsustainable and would accordingly have to be set aside.

11. While concluding, however, we hasten to add that our observations are confined to the question as to whether a case for suspension of sentence was made out and shall not affect the merits of the case when the appeal comes up for hearing before the High Court.

12. For the above reasons, we allow the appeal. The judgment and order of the High Court dated 28 July 2020 suspending the sentence of the Respondent shall stand set aside and the Respondent shall surrender forthwith to the sentence. However, having regard to the fact that the Respondent has undergone four years and four months of imprisonment, we would request the High Court to take up the appeal for hearing and final disposal upon the Respondent's surrendering to the sentence and dispose it of by the end of 2021.

13. Pending application, if any, stands disposed of.

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[1]"CrPC"

[2]"NDPS Act"

MANU/SC/0591/2020

Equivalent Citation: 2020(3)ACR2128, 2020(8)ADJ612, 2020(214)AIC129, AIR2020SC3995, 2020 (2) ALD(Crl.) 707 (SC), 2020 (113) ACC 679, 2020(5)BLJ355, 2020(3)Crimes147(SC), I(2021)DMC45SC, 2020(3)J.L.J.R.421, 2020(4)JKJ123[SC], 2020(3)MLJ(Crl)633, 2020(3)PLJR371, 2020(4)RCR(Criminal)848, (2020)8SCC645, 2020(2)UC1281

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 520 of 2020 (Arising out of SLP (Crl.) No. 2102 of 2019)

Decided On: 14.08.2020

Appellants: **Preet Pal Singh**
Vs.
Respondent: **The State of Uttar Pradesh and Ors.**

Hon'ble Judges/Coram:
Arun Mishra and Indira Banerjee, JJ.

Case Category:
CRIMINAL MATTERS - CRIMINAL MATTERS RELATING TO CANCELLATION TO BAIL

Case Note:
Criminal - Suspension of sentence - Validity of - Sections 304B, 406 and 498A of Indian Penal Code, 1860, Section 389 of Code of Criminal Procedure, 1973 and Sections 3 and 4 of Dowry Prohibition Act, 1961 - Sessions Court convicted Respondent No.2 for offences under Sections 304B, 498A and 406 of Code and Sections 3 and 4 of Act - Being aggrieved by conviction and sentence, Respondent No. 2 filed appeal in High Court - After filing appeal, Respondent No. 2 filed application inter alia praying that he be enlarged on bail, during pendency of appeal - High Court granted bail to Respondent No. 2 by staying execution of sentences of imprisonment - Hence, present appeal - Whether High Court erred in granting bail to Respondent No. 2 by staying execution of sentences of imprisonment.

Facts:

The Sessions Court convicted Respondent No. 2 for offences under Sections 304B, 498A and 406 of the Indian Penal Code (IPC) and Sections 3 and 4 of the Dowry Prohibition Act, 1961 by staying execution of the sentences of imprisonment. Being aggrieved by the conviction and sentence, the Respondent No. 2 filed an appeal in the High Court. After filing the appeal, the Respondent No. 2 filed application inter alia praying that he be enlarged on bail, during the pendency of the aforesaid appeal. The said application had been allowed. The High Court granted bail to the Respondent No. 2, husband of the deceased victim, convicted by a judgment of the Additional District and Sessions Judge/Special Judge (EC Act), for offences under Sections 304B, 498A and 406 of the Indian Penal Code (IPC) and Sections 3 and 4 of the Dowry Prohibition Act, 1961 by staying execution of the sentences of imprisonment.

Held, while allowing the appeal:

(i) It was nobody's case that the death of the victim was accidental or

natural. There was evidence of demand of dowry, which the Trial Court had considered. The death took place within seven or eight months and there was oral evidence of the parents of cruelty and torture immediately preceding the death. There was also evidence of payment to the Respondent-Accused by the victim's brother. The Respondent No. 2 had not been able to demonstrate any apparent and/or obvious illegality or error in the judgment of the Sessions Court, to call for suspension of execution of the sentence. [38]

(ii) In considering an application for suspension of sentence, the Appellate Court was only to examine if there was such patent infirmity in the order of conviction that renders the order of conviction prima facie erroneous. Where there was evidence that had been considered by the Trial Court, it was not open to a Court considering application under Section 389 to re-assess and/or re-analyze the same evidence and take a different view, to suspend the execution of the sentence and release the convict on bail. [39]

(iii) It was difficult to appreciate how the High Court could casually have suspended the execution of the sentence and granted bail to the Respondent No. 2 without recording any reasons, with the casual observation of force in the argument made on behalf of the Appellant before the High Court, that was, the Respondent No. 2. In effect, at the stage of an application under Section 389 of the Code of Criminal Procedure, the High Court found merit in the submission that the brother of the victim not having been examined, the contention of the Respondent No. 2, being the Appellant before the High Court, that the amount was taken as a loan was not refuted, ignoring the evidence relied upon by the Sessions Court, including the oral evidence of the victim's parents. [41]

(iv) From the evidence of the Prosecution witnesses, it transpires that the Appellant had spent money beyond his financial capacity, at the wedding of the victim and had even gifted an car. The hapless parents were hoping against hope that there would be an amicable settlement. Even as late the brother of the victim paid amount to the Respondent No. 2. The failure to lodge an FIR complaining of dowry and harassment before the death of the victim, was inconsequential. The parents and other family members of the victim obviously would not want to precipitate a complete breakdown of the marriage by lodging an FIR against the Respondent No. 2 and his parents, while the victim was alive. [42]

(v) The impugned order of the High Court was set aside and the Respondent No. 2 was directed to surrender for being taken into custody. [43]

JUDGMENT

Indira Banerjee, J.

1. Leave granted.

2. This appeal, filed by the father of the deceased victim, is against the order dated 21.01.2019 passed by the Allahabad High Court, Lucknow Bench in Criminal Misc. Application No. 129789 of 2018, in Criminal Appeal No. 1594 of 2018, whereby the

High Court granted bail to the Respondent No. 2, Sandeep Singh Hora, husband of the deceased victim, convicted by a judgment dated 23.7.2018 of the Additional District and Sessions Judge/Special Judge (EC Act), Lucknow, hereinafter referred to as the "Sessions Court" in Sessions Trial No. 1385 of 2010, for offences Under Sections 304B, 498A and 406 of the Indian Penal Code (IPC) and Sections 3 and 4 of the Dowry Prohibition Act, 1961 by staying execution of the sentences of imprisonment.

3. By an order dated 23.7.2018 in Sessions Trial No. 1385 of 2010 the Sessions Court sentenced the Respondent No. 2 to Simple Imprisonment of 3 years and fine of Rs. 10,000/- Under Section 498A of the Indian Penal Code and in default of payment of fine to further Simple Imprisonment of 3 months; Life Imprisonment for offence Under Section 304B of the Indian Penal Code; Simple Imprisonment for 3 years and fine of Rs. 5,000/- for offence Under Section 406 of the Indian Penal Code and in default of payment of fine, further simple imprisonment of 2 months; Simple Imprisonment for 5 years and fine of Rs. 15,000/- Under Section 3 of the Dowry Prohibition Act and in default of payment of fine, further Simple Imprisonment of 3 months and Simple Imprisonment of one year and fine of Rs. 5,000/- Under Section 4 of the Dowry Prohibition Act and, in default of payment of fine, further Simple Imprisonment of 3 months. All the sentences were to run concurrently.

4. Being aggrieved by the conviction and sentence, the Respondent No. 2 filed an appeal in the High Court which was numbered Criminal Appeal No. 9514 of 2018. After filing the appeal, the Respondent No. 2 filed Criminal Misc. Application No. 129789 of 2018 inter alia praying that he be enlarged on bail, during the pendency of the aforesaid appeal. The said application has been allowed by the order dated 21.1.2019 under appeal.

5. The High Court recorded the submission made on behalf of the Respondent No. 2 that (i) No FIR in relation to demand for dowry or harassment had been filed before the death of the victim; (ii) the Respondent No. 2 had taken Rs. 2,50,000/- as loan from the brother of the victim and not as dowry, which was established because the brother of the victim had not been produced as a witness; and (iii) that the deceased had committed suicide which was evident from the post mortem report. The cause of death as shown in the post mortem report was "asphyxia as a result of ante mortem hanging".

6. The High Court briefly recorded the submission on behalf of the State and on behalf of the Appellant and then the submission on behalf of the Respondent No. 2, in rebuttal, that the Respondent No. 2 had been framed.

7. After recording the submissions of the respective parties, the High Court passed a short, cryptic, non speaking order, under appeal before this Court, which is set out hereinbelow for convenience:

> After hearing learned Counsel for the parties and going through the record, we find force in the arguments raised by learned Counsel for the Accused-Appellant. Keeping in view the facts and circumstances of the case, without commenting anything on merits of the case, we are of the considered opinion that Accused-Appellant is entitled to be released on bail.
>
> Let Accused-Appellant, namely Sandeep Singh Hora convicted in aforesaid Sessions Trial No. 1385 of 2010 be enlarged on bail during pendency of appeal subject to his furnishing a personal bond and two sureties each in the

like amount to the satisfaction of court concerned.

It is clarified that no stay order has been passed in respect of fine imposed on the Accused Appellant and the same shall be deposited within four weeks from today and in default, the Accused-Appellant shall be deprived from the benefit of the bail order passed today.

The bail bonds after being accepted, shall be transmitted to this Court for being kept on record of this appeal.

8. It is not in dispute that the victim died in circumstances which were not natural, on the night of 24/25.8.2010, within about 8Â½ months of her marriage with the Respondent No. 2 on 12.12.2009.

9. On 25.8.2010, at about 3.05 a.m., a First Information Report No. 352/2010 was registered on the complaint of the Appellant, pursuant to which, a criminal case being Crime No. 480 of 2010 was initiated against Respondent No. 2, his parents and his sister Sonia @ Disha Chhugani Under Sections 498A, 304B, 406 and 411 of the Indian Penal Code and Sections 3 and 4 of the Dowry Prohibition Act.

10. After investigation into the case, the Investigating Officer submitted a chargesheet against the Respondent No. 2, his father Balvir Singh, his mother Manjeet Kaur and his sister Sonia @ Disha Chhugani.

11. The case was committed to the Sessions Court, after which charges were framed against the Accused Under Sections 498A, 304B and 406 of Indian Penal Code and Sections 3 and 4 of the Dowry Prohibition Act, to which the Accused pleaded not guilty and claimed trial. The Accused were absolved of the charge Under Section 411 of the Indian Penal Code.

12. In Sessions Trial No. 1385 of 2010, the Prosecution examined eight witnesses, including the Appellant, being the complainant in the FIR, his wife, being the mother of the victim and his sister Rajendra Pal Kaur, being the paternal aunt of the victim. The defence also examined five witnesses. The Respondent No. 2 and the other Accused were examined Under Section 313 of the Code of Criminal Procedure (CrPC).

13. The evidence adduced before the Sessions Court, has meticulously been recorded in the judgment and order dated 23.7.2018, under appeal before the High Court. The family members of the victim, who deposed before the Sessions Court, have given oral evidence that the Appellant had spent money beyond his financial capacity, for the wedding of his daughter, that is, the victim. However, soon after the marriage of the victim to the Respondent No. 2 on 12.12.2009, the victim's in-laws as well as the Respondent No. 2, her husband, harassed her mentally and physically for more dowry.

14. From the oral evidence of the victim's parents, and other family members, it transpires that the victim used to make phone calls to her mother, maternal grandmother and her aunt, complaining of harassment meted out to her by the members of her matrimonial family. There is oral evidence that the Appellant's wife used to console her by saying that things would settle down in due course.

15. From the oral evidence it also transpires that the in-laws of the victim used to pressurize the victim to bring cash from her parents. On 17.6.2010, the Respondent No. 2 along with his father Balvir Singh came to Sitapur and took cash of Rs.

2,50,000/- from the victim's brother, Pritam Singh. From the oral evidence of the Appellant, it transpires that on the evening of 24.8.2010, the victim rang up the Appellant twice, complaining of atrocities. She was frightened and expressed fear for her life. On the same night at 12.15 a.m. the Appellant was informed that his daughter had died.

16. The 2nd Prosecution Witness, being the mother of the victim, stated that the family had spent approximately Rs. 21 lacs for the marriage of the victim. They had gifted I-10 car, which they had purchased, after obtaining loan against insurance policy. However, after marriage, the in-laws of the victim started harassing the victim, demanding cash of Rs. 15 to 20 lacs, alleged to have been promised by her parents and also demanding a Pajero car in place of the I-10 car.

17. The post mortem report reveals the following ante-mortem injuries:

> Oblique ligature mark 30 cm x 1.5 cm on front and around the neck just above thyroid cartilage; both lungs and membranes congested; right heart chamber full and left empty; there was some semi-digested food material available in stomach; liver, spleen, both kidneys congested; uterus empty and normal; the death had possibly taken place half day before post-mortem. As per the opinion of the witness, the deceased had died due to asphyxia as a result of ante mortem hanging.

18. The Respondent No. 2 and his parents were examined Under Section 313 of the Code of Criminal Procedure. They denied practically everything, except the fact that the Respondent No. 2 had married the victim on 12.12.2009. They emphasized on the fact that the victim had committed suicide, and contended that the entire investigation had been conducted under the supervision and instructions of a motivated IPS officer, who was a friend of the Appellant.

19. The Respondent No. 2 and/or his parents have, in their examination Under Section 313 of the Code of Criminal Procedure, suggested that the deceased victim had wanted to marry some other boy, but had been compelled by her parents to marry the Respondent No. 2 and that she frequently used to talk with and exchange messages with that boy. There is also a suggestion that the victim had committed suicide because of mental illness. Significantly, on the one hand it is insinuated that her involvement with another boy led to the suicide and on the other hand it is suggested that she committed suicide due to mental illness. The suggestions are somewhat contradictory and in any case the suggestion of mental illness is unsupported by any evidence whatsoever.

20. Through three of the witnesses examined by the defence, namely, one Shri K.K. Pandey, Sub-Divisional Engineer, Mobile Services (Security) who deposed as the 1st Defence Witness, Shri Madhu Balusu, Nodal Officer, Reliance Communications, Gomti Nagar, Lucknow who deposed as 2nd Defence Witness, and Shri Prashant Mishra who deposed as 3rd Defence Witness, the defence made an attempt to establish the victim's involvement with the said Prashant Mishra. The evidence of the aforesaid three witnesses evinces calls from the victim's phone to the phone in the name of Prashant Mishra, and from the said phone to the phone of the victim and also exchange of some messages between the two phones. However, the said Prashant Mishra, who deposed as Defence witness said, that the phone in his name was always kept at home and used by his parents and sister. The victim was a class friend of his sister, Prachi. He did not know the mobile number of the victim. The victim used to

talk to his sister Prachi. This witness deposed that he knew that the victim had married the Respondent No. 2. He said that his sister Prachi and his mother had attended the wedding. This witness categorically asserted that phone calls to and from the victim from this phone number were not made in his presence, nor were the messages exchanged in his presence.

21. The 4th Defence Witness, Smt. Lajwanti Chugani (mother-in-law of Sonia @ Disha Chhugani) and the 5th Defence Witness Shri Bhagwan Das Chugani (father-in-law of Sonia alias Disha Chhugani) deposed that their daughter in law Sonia did not have good relations with her parents as she had left her first husband and remarried their son against the wishes of her parents.

22. The Sessions Court considered the evidence adduced on behalf of the Prosecution, including the oral evidence of the family members of the victim, the evidence of the defence witnesses and the defence of the Respondent No. 2, his parents and his sister Under Section 313 of the Code of Criminal Procedure and thereafter convicted the Respondent No. 2 as also his parents Balvir Singh and Manjeet Kaur Under Sections 498A, 304B and 406 of the Indian Penal Code and Under Sections 3 and 4 of the Dowry Prohibition Act. The Respondent No. 2's sister Sonia @ Disha Chugani was acquitted of all the charges against her.

23. The judgment and order of the Sessions Court, under appeal in the High Court is based on evidence. The oral evidence adduced before the Sessions Court, which has meticulously been recorded in the judgment and order dated 23.7.2008, under appeal before the High Court, reveals that there is evidence of torture and harassment of the victim, by the Respondent No. 2 and his parents, for more dowry, soon after marriage, which continued till her death. The victims husband (Respondent No. 2) and her in laws pressurized the victim to bring cash from her parents and also pressurized her for a Pajero car in place of the I-10 car gifted by her parents at the time of marriage. The Respondent No. 2 came to Sitapur along with his father, Balvir Singh on 17.6.2010 and took cash of Rs. 2,50,000/- from the victim's brother, Pritam Singh. Even as late as on the evening of 24.8.2010, the Respondent No. 2 went to the residence of the victim's aunt and threatened to put an end to the marriage. On 24.8.2010, the victim had made frantic calls complaining of torture, and expressing fear for her life. From the oral evidence, it may be reasonably inferred that she was traumatized. The same night, she died in unnatural circumstances.

24. It is not for this Court to go into the merits of the appeal pending before the High Court. Suffice it to mention that prima facie the Sessions Court has proceeded on the basis of evidence and the Respondent No. 2 has not been able to make out a case of any patent infirmity and/or illegality in the judgment and order of the Sessions Court.

25. The Short question that arises for consideration in this appeal is, whether the High Court was justified in directing release of the Respondent No. 2 on bail, during the pendency of his appeal before the High Court.

26. Section 389 provides that, pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against, be suspended and, also, if he is in confinement, that he be released on bail. Of course, in view of the mandate of Section 389(3) of the Code of Criminal Procedure, the principles are different in the case of sentence not exceeding three years and/or in the case of bailable offences. In this case, of course, none of the offences for which the Respondent No. 2 has been

convicted are bailable. Moreover the Respondent No. 2 has, inter alia, been given life imprisonment for offence Under Section 304B of the Indian Penal Code and imprisonment for five years for offence Under Section 3 of the Dowry Prohibition Act.

27. As the discretion Under Section 389(1) is to be exercised judicially, the Appellate Court is obliged to consider whether any cogent ground has been disclosed, giving rise to substantial doubts about the validity of the conviction and whether there is likelihood of unreasonable delay in disposal of the appeal, as held by this Court in Kashmira Singh v. State of Punjab MANU/SC/0099/1977 : (1977) 4 SCC 291 and Babu Singh and Ors. v. State of U.P. MANU/SC/0059/1978 : (1978) 1 SCC 579.

28. Section 304B was incorporated in the Indian Penal Code by the Dowry Prohibition (Amendment) Act, 1986 (Act 43 of 1986). The object of the amendment was to curb dowry death. Section 304B does not categorize death, it covers every kind of death that occurs otherwise than in normal circumstances. Where the other ingredients of Section 304B of the Code are satisfied, the deeming fiction of Section 304B would be attracted and the husband or the relatives shall be deemed to have caused the death of the bride.

29. The essential ingredients for attraction of Section 304B are:

(i) the death of woman must have been caused in unnatural circumstances.

(ii) the death should have occurred within 7 years of marriage

(iii) Soon before her death the woman must have been subjected to cruelty or harassment by her husband or his relatives and such cruelty or harassment must be for or in connection with the demand for dowry, and such cruelty or harassment is shown to have been meted out to the woman soon before her death.

30. As observed by this Court in State of Punjab v. Iqbal Singh and Ors. MANU/SC/0354/1991 : (1991) 3 SCC 1, the legislative intent of incorporating Section 304B was to curb the menace of dowry death with a firm hand. In dealing with cases Under Section 304B, this legislative intent has to be kept in mind. Once there is material to show that the victim was subjected to cruelty or harassment before death, there is a presumption of dowry death and the onus is on the Accused in-laws to show otherwise. At the cost of repetition, it is reiterated that the death in this case took place within 8Â½ months of marriage. There is apparently evidence of harassment of the victim for dowry even on the day of her death, and there is also evidence of payment of a sum of Rs. 2,50,000/- to the Respondent-Accused by the victim's brother, two months before her death.

31. In Kalyan Chandra Sarkar v. Rajesh Ranjan and Anr. MANU/SC/0214/2004 : (2004) 7 SCC 528, this Court held:

> **11.** The law in regard to grant or refusal of bail is very well settled. The Court granting bail should exercise its discretion in a judicious manner and not as a matter of course. Though at the stage of granting bail a detailed examination of evidence and elaborate documentation of the merits of the case need not be undertaken, there is a need to indicate in such orders reasons for prima facie concluding why bail was being granted particularly where the Accused is charged of having committed a serious offence. Any order devoid of such reasons would suffer from non-application of mind.

32. Even though detailed examination of the merits of the case may not be required by courts while considering an application for bail but, at the same time, exercise of jurisdiction has to be based on well settled principles and in a judicious manner and not as a matter of course as held by this Court in Chaman Lal v. State of U.P. and Anr. MANU/SC/0631/2004 : (2004) 7 SCC 525.

33. In Mauji Ram v. State of Uttar Pradesh and Anr. MANU/SC/0991/2019 : (2019) 8 SCC 17, this Court referred to Ajay Kumar Sharma v. State of U.P. and Ors. (2005) 7 SCC 507, Lokesh Singh v. State of U.P. and Anr. MANU/SC/8138/2008 : (2008) 16 SCC 753 and Dataram Singh v. State of U.P. and Anr. MANU/SC/0085/2018 : (2018) 3 SCC 22 and stated categorically that this Court had time and again emphasised the need for assigning reasons while granting bail.

34. In Lokesh Singh v. State of U.P. and Anr. (supra), this Court referred to Kalyan Chandra Sarkar v. Rajesh Ranjan (supra) and set aside the impugned order of the High Court granting bail.

35. In Ajay Kumar Sharma (supra), a three-Judge Bench of this Court relied on Chaman Lal v. State of U.P. (supra) and set aside order of bail granted by the High Court holding, that it was well settled that even though detailed examination of the merits of the case may not be required by the courts while considering an application for bail, at the same time exercise of discretion has to be based on well settled principles and in a judicious manner and not as a matter of course.

36. There is a difference between grant of bail Under Section 439 of the Code of Criminal Procedure in case of pre-trial arrest and suspension of sentence Under Section 389 of the Code of Criminal Procedure and grant of bail, post conviction. In the earlier case there may be presumption of innocence, which is a fundamental postulate of criminal jurisprudence, and the courts may be liberal, depending on the facts and circumstances of the case, on the principle that bail is the Rule and jail is an exception, as held by this Court in Dataram Singh v. State of U.P. and Anr. (supra). However, in case of post conviction bail, by suspension of operation of the sentence, there is a finding of guilt and the question of presumption of innocence does not arise. Nor is the principle of bail being the Rule and jail an exception attracted, once there is conviction upon trial. Rather, the Court considering an application for suspension of sentence and grant of bail, is to consider the prima facie merits of the appeal, coupled with other factors. There should be strong compelling reasons for grant of bail, notwithstanding an order of conviction, by suspension of sentence, and this strong and compelling reason must be recorded in the order granting bail, as mandated in Section 389(1) of the Code of Criminal Procedure.

37. In Vinod Singh Negi v. State of Uttar Pradesh and Anr. MANU/SC/1093/2019 : (2019) 8 SCC 13, this Court set aside the impugned order of suspension of sentence and grant of appeal as the order was devoid of reasons.

38. It is nobody's case that the death of the victim was accidental or natural. There is evidence of demand of dowry, which the Trial Court has considered. The death took place within 7 or 8 months and there is oral evidence of the parents of cruelty and torture immediately preceding the death. There is also evidence of payment of Rs. 2,50,000/- to the Respondent-Accused by the victim's brother. The Respondent No. 2 has not been able to demonstrate any apparent and/or obvious illegality or error in the judgment of the Sessions Court, to call for suspension of execution of the

sentence.

39. In considering an application for suspension of sentence, the Appellate Court is only to examine if there is such patent infirmity in the order of conviction that renders the order of conviction prima facie erroneous. Where there is evidence that has been considered by the Trial Court, it is not open to a Court considering application Under Section 389 to re-assess and/or re-analyze the same evidence and take a different view, to suspend the execution of the sentence and release the convict on bail.

40. Even though the term 'dowry' is not defined in the Indian Penal Code, it is defined in the Dowry Prohibition Act, 1961 as any valuable security given or agreed to be given either directly or indirectly by one party to the marriage to the other party to the marriage, or by any person at or before or any time after the marriage, in connection with the marriage of the parties.

41. It is difficult to appreciate how the High Court could casually have suspended the execution of the sentence and granted bail to the Respondent No. 2 without recording any reasons, with the casual observation of force in the argument made on behalf of the Appellant before the High Court, that is, the Respondent No. 2 herein. In effect, at the stage of an application Under Section 389 of the Code of Criminal Procedure, the High Court found merit in the submission that the brother of the victim not having been examined, the contention of the Respondent No. 2, being the Appellant before the High Court, that the amount of Rs. 2,50,000/- was taken as a loan was not refuted, ignoring the evidence relied upon by the Sessions Court, including the oral evidence of the victim's parents.

42. From the evidence of the Prosecution witnesses, it transpires that the Appellant had spent money beyond his financial capacity, at the wedding of the victim and had even gifted an I-10 car. The hapless parents were hoping against hope that there would be an amicable settlement. Even as late as on 17.6.2010 the brother of the victim paid Rs. 2,50,000/- to the Respondent No. 2. The failure to lodge an FIR complaining of dowry and harassment before the death of the victim, is in our considered view, inconsequential. The parents and other family members of the victim obviously would not want to precipitate a complete breakdown of the marriage by lodging an FIR against the Respondent No. 2 and his parents, while the victim was alive.

43. For the reasons discussed above, the appeal is allowed. The impugned order of the High Court is set aside and the Respondent No. 2 is directed to surrender for being taken into custody. The bail bonds shall stand cancelled.

MANU/SC/8237/2008

Equivalent Citation: 2009(1)ACR135(SC), AIR2009SC581, 2011 (Suppl.) ACC 787, I(2009)CCR30(SC), 2009(1)CLJ(SC)1, 2009(1)PLJR115, 2009(1)RCR(Criminal)239, 2008(14)SCALE349, (2009)1SCC482

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 1754 of 2008 (Arising out of SLP (Crl.) No. 1777 of 2008)

Decided On: 07.11.2008

Appellants: **Ratan Kumar Vishwas**
Vs.
Respondent: **State of U.P. and Ors.**

Hon'ble Judges/Coram:
Dr. Arijit Pasayat, C.K. Thakker and Devinder Kumar Jain, JJ.

Case Note:
Code of Criminal Procedure, 1973 - Section 389--Suspension of sentence pending appeal against conviction--Grant of bail--Conviction for offences under Sections 27A and 29 of N.D.P.S. Act--Sentence awarded under N.D.P.S. Act--Can be suspended in appeal only and strictly subject to conditions spelt out in Section 37 of N.D.P.S. Act--High Court found that parameters of Section 37 of N.D.P.S. Act not fulfilled to warrant grant of bail by suspension of sentence--No interference called for.

Ratio Decidendi:
Person accused of offence under the NDPS Act should not be released on bail unless the mandatory conditions provided under Section 37 that there are reasonable grounds for holding that the accused is not guilty of such office and that he is not likely to commit any offence while on bail are satisfied.

Case Category:
CRIMINAL MATTERS - CRIMINAL MATTERS RELATING TO BAIL/INTEI
BAIL/ANTICIPATORY BAIL AND AGAINST SUSPENSION OF SENTENCE

JUDGMENT

Arijit Pasayat, J.

1. Leave granted.

2. Challenge in this appeal is to the Judgment of a learned Single Judge of the Allahabad High Court dismissing the application filed by the appellant for suspension of sentence and grant of bail. Appellant-Ratan Kumar Vishwas has filed an Appeal No. 6636 of 2006 questioning his conviction the offence punishable under Sections 27A and 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'the Act'). He was sentenced to undergo rigorous imprisonment for 14 years and to pay a fine of rupees two lacs with default stipulation. Learned Additional Sessions Judge, Fast Track Court No. 1, Kanpur Nagar has found the appellant guilty and convicted and sentenced him as aforesaid.

3. Brief facts of the case as projected by prosecution are that a secret and reliable

information on 5.3.2004 was received by the complainant an officer of the N.C.B., Varanasi that huge quantity of Charas was being brought from Nepal to Kanpur in Truck No. UHN 9137 and same was standing at Kanodia Auto Centre, Lucknow Kanpur bypass road and it belonged to Akhilesh Kumar Bajpai son of Srikant Bajpai, resident of 127/333, Nirala Nagar, Kanpur Nagar. This information was reduced to writing and thereafter Intelligence Officers, U.K. Singh and K.K. Mishra along with S. Rallabhandi, S.K. Singh and R.K. Gupta, also Intelligence Officers, Ramnath, sepoy with driver Vijendra Kumar, proceeded from camp office, Gujani in departmental vehicle number U.P. 65-S-6951 and U.P 65-V-7826 and reached near the Kanodia Auto Centre at about 9 p.m. Two persons standing nearby were called and they disclosed their names as Rajendra Prasad and Ramjee Singh. After explaining the purpose for which they were requested to be present i.e. during search, they agreed. At 9.05 p.m. a team reached near the above truck and three persons were found sitting inside the truck and on enquiry they disclosed their names as Bhola Prasad, Shambhu Prasad and Lalji Yadav. On asking Bhola Prasad disclosed that he was driver of the Truck and Lalji was cleaner and Shambhu Prasad was owner of the Truck and told that on reaching the petrol pump at Kanpur, he had to contract Akhilesh Kumar Bajpai on phone number 0512-2616517. These officers gave their identity to these three persons and asked them in writing if they desired their vehicle to be searched in presence of a Gazetted Officer or a Magistrate which was their legal right. But they declined in writing and offered that the search be made by them. At this the officers of the N.C.B. searched the vehicle in accordance with law and in the presence of two witnesses and they found black colour plates wrapped in polythene kept in plastic bags in specially made secret cavity behind the cabin of the Truck. On testing with the test kit possessed by the N.C.B. Officers, the recovered black colour plates were found to be Charas. The recovered Charas was seized along with vehicle. However, due to darkness and unavailability of weighing facility and for security reasons, the vehicle and the arrested persons were taken to the Customs and Central Excise Office, Kanpur Nagar where they reached at about 10.45 p.m. They recovered 14 plastic bags which were weighed and the gross weight was 252.500 Kgs. and the net weight was 250.400 Kgs. Two samples of 25 grams each were drawn from all the 14 bags and were marked and kept in separate sealed envelopes. All the packets of samples were signed by the accused persons and the witnesses and the officers of the N.C.B. The accused Bhola Prasad, Shambhu Prasad admitted that they had to take that Charas to Akhilesh Kumar Bajpai. They also told that accused Govind Singh of Nepal State with the help of accused Kamal and Virendra Kumar had visited Veerganj in Nepal few days earlier to meet Govind and to finalise the deal for Charas.

4. At that time, the recovery memo was also prepared which was duly signed by the accused, witnesses and the officers of the N.C.B. Thereafter the officers of the N.C.B., independent witnesses Sri S.R. Agarwal, superintendent, Kailash Chandra, Inspector of Customs and Central Excise and police force of Kidwai Nagar reached the house of Akhilesh Kumar Bajpai in Nirala Nagar at about 12.30 a.m. on 6.3.2004. A person opened the door and disclosed this name as Akhilesh Kumar Bajpai. The officers gave their introduction and also apprised him the purpose of visit and asked him in writing if he desired his house to be searched in presence of Gazetted Officer or a Magistrate which was his right. But he declined in writing and offered search to be made by them. House was searched in accordance with law and in presence of the independent witnesses. During search of the house Jitendra Singh, Virendra Kumar and Govind Singh were found to be present there. These three persons were separately given in writing if they wanted to be searched before a Gazetted Officer or a Magistrate as it was their right but they declined. On search of Virendra Kumar some papers were recovered.

5. Akhilesh Kumar Bajpai told that this Charas was arranged by him to be sold through appellant-Ratan Kumar Vishwas of Bharthana, District Etawah. He had given Rs. 20,000/- to Jitendra Kumar and Virendra Kumar to be given to Kamal of Veerganj, Nepal, through Govind. Recovery memo was prepared at the house of Akhilesh Kumar Bajpai and was signed by the witnesses and the officers as well as the accused persons.

6. The statements of the accused persons under Section 67 of the Act were recorded and they made their voluntary statement giving details about their involvement in the trade of Charas. The seized Charas was sent to C.R.C., New Delhi for chemical analysis through letter dated 6.3.2004 along with test memo affixing specimen of the seal. The Chemical Examiner gave his report dated 25.5.2004 and confirmed that the content of the samples was Charas. A detailed report about search and seizure was submitted to the superior officer on 6.3.2004. The Charas and the truck were deposited in the office of the Customs and Central Excise, Sarvodaya Nagar, Kanpur.

7. On 19.3.2004 the follow up action was conducted at the residential premises of Ratan Kumar Vishwas at 42, Sarojni Road, Bharthana, District Etawah. But he was found absconding and statement of his son was recorded under Section 67 of the Act and he disclosed the phone number as 05680-225182 which was installed in his house in the name of his father. The summons for appearance of Ratan Kumar Vishwas was also served on him. The copies of the guest register of the City Hotel and Babarchi Hotel, Veerganj, Nepal were obtained which were attested by the First Secretary, High Commission, Nepal and it showed that Govind had stayed there on 21.2.2004. Call details of the phone of Akhilesh Kumar Bajpai installed at his house were obtained from Mahanagar Telephone Exchange. Details of the visitors registers from Manager, Mahalaxmi Lodge were also obtained and they confirmed that Govind and Shambhu Prasad had stayed in the Lodge from 29.2.2004 to 5.3.2004. Voluntary statement of Ratan Kumar Vishwas was recorded under Section 67 of the Act on 19.4.2004 and he admitted his involvement in illicit trade of Charas and that he was also aware of the consignment and that he was also aware of the consignment of the Charas transported by vehicle No. UHN 9137, which was seized by N.B.G., Varanasi on 5.3.2004 at Kanodia Auto Centre. He was also aware of the fact that Akhilesh Kumar Bajpai was bringing the consignment of Charas for sale in Rajasthan through him. Akhilesh Kumar Bajpai used to contact him on his phone No. 05680-225182 through his phone No. 0512- 2616517. He also disclosed that he had given Rs. 1.5 lacs to Diwakar resident of Kidwai nagar for becoming a partner in the trade of Charas and Diwakar purchased a Truck for supply of Charas from Nepal to Indore and Rajasthan. Ratan Kumar Vishwas was arrested on 19.4.2004.

8. After completion of investigation charge sheet was filed. As accused persons abjured guilt trial was held.

9. To further the prosecution version, witnesses were examined while one Rajesh Kumar was examined as DW-3. As noted above, conviction was recorded and appeal has been filed before the High Court.

10. In respect of the prayer for suspension of sentence and grant of bail the preliminary stand was that the conviction is based on inadmissible evidence. It was submitted that the appellant was not the owner and he was neither the purchaser nor the seller and there was no recovery from him. His conviction was based only on the statement of co-accused. The High Court found that this was not a case where the prayer for suspension of sentence is to be accepted. Accordingly, the prayer was

rejected.

11. In support of the appeal, the stand taken before the High Court was re-iterated. Additionally, it was submitted that the statement purportedly was made on 19.4.2004 in respect of alleged incident dated 5.3.2004. On 22.4.2004 a telegram was sent by DW-3 alleging that the appellant was tortured and false confessional statement was recorded.

12. Learned counsel for the appellant has further submitted that the rigors of Section 37 of the Act cannot be applied to the present case after Section 32A of the Act was held to be ultra vires by this Court.

13. In response, learned counsel for the respondent submitted that the conviction is based on the evidence of PWs 1, 2 and 3 in addition to the statement under Section 67 of the Act. It is pointed out that the appellant was found absconding and, therefore, the statement of his son was recorded under Section 67 of the Act. The telephone records were also verified and it was noted that the involvement of the appellant was sufficiently established.

14. It is to be noted that in Dadu v. State of Maharashtra MANU/SC/0637/2000 : 2000CriLJ4619 it was held that Section 32A was ultra vires to the extent it took away the powers relatable to Section 389 of the Code of Criminal Procedure, 1973 (in short 'the Code') In Dadu's case (supra) it was held as follows :

> **29.** Under the circumstances the writ petitions are disposed of by holding that :
>
> (1) Section 32A does not in any way affect the powers of the authorities to grant parole.
>
> (2) It is unconstitutional to the extent it takes away the right of the court to suspend the sentence of a convict under the Act.
>
> (3) Nevertheless, a sentence awarded under the Act can be suspended by the appellate court only and strictly subject to the conditions spelt out in Section 37 of the Act, as dealt with in this judgment.

15. In the said case it was clearly observed that a sentence awarded under the Act can be suspended by the Appellate Court only and strictly subject to the conditions as spelt out in Section 37 of the Act.

16. To deal with the menace of dangerous drugs flooding the market, Parliament has provided that a person accused of offence under the Act should not be released on bail during trial unless the mandatory conditions provided under Section 37 that there are reasonable grounds for holding that the accused is not guilty of such office and that he is not likely to commit any offence while on bail are satisfied. So far as the first condition is concerned, apparently the accused has been found guilty and has been convicted. Section 37 of the Act reads as follows :

> Offences to be cognizable and non-bailable- (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)-
>
> (a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in Clause (b) of Sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on grant of bail.

17. The High Court has dealt with the factual position in great detail to conclude that the parameters of Section 37 are not fulfilled to warrant grant of bail by suspension of sentence. We find no reason to interfere in the matter.

The High Court is requested to dispose of the Criminal Appeal pending before it expeditiously.

18. Learned Counsel for the appellant submitted that the appellant is ailing and needs treatment. It is open to him to move the appropriate authorities for providing such medical treatment as is needed.

19. The appeal fails and is dismissed.

MANU/SC/0076/2009

Equivalent Citation: 2009(1)ALD(Cri)684, 2009 (Suppl.) ACC 165, I(2009)CCR293(SC), 2009CriLJ3042, JT2009(2)SC121, (2009)42OCR697, 2009(2)PLJR128, 2009(1)RCR(Criminal)938, 2009(2)SCALE51, (2009)2SCC624, [2009]2SCR533, 2009(1)UJ346

IN THE SUPREME COURT OF INDIA

Criminal Appeal No. 137 of 2009 (Arising out of S.L.P. (Criminal) No. 1057 of 2008)

Decided On: 23.01.2009

Appellants:**Union of India (UOI)**
Vs.
Respondent:**Rattan Mallik**

Hon'ble Judges/Coram:
Devinder Kumar Jain and R.M. Lodha, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: A. Sharan, A.S.G., Sunita Sharma, Shreekant N. Terdal and Sushma Suri, Advs

For Respondents/Defendant: A.K. De, Rajesh Dwivedi, Vinay P. Tripathi and Dipak Kumar Jena, Advs.

Case Note:
Criminal - Narcotics - Grant of bail - Requirements under NDPS Act - Sections 8, 19, 24, 27A, 29, 37, 37(1) and 37(2) of Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 439 of Code of Criminal Procedure, 1973 - Respondent convicted and sentenced by Trial Court - High Court suspended the sentence and granted bail to Respondent in appeal on the ground that nothing was found from possession of Respondent, he was in jail for last three years and there was no chance of his appeal being heard within a period of seven years - Hence, present appeal - Held, while dealing with the application for bail, one should not lose sight of the mandatory requirements of Section 37 - Conviction under special statute containing specific provisions for dealing with grant of bail cannot be ignored - Power to grant bail to a person Accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by Sub-clause (b) of Sub-section (1) of Section 37 - Recording of satisfaction that Accused is not guilty of offence and that he is not likely to commit any offence while on bail is sine qua non for granting of bail under the NDPS Act - In the present case, stated circumstances not sufficient to satisfy the mandatory requirements as stipulated in Sub-clause (b) of Sub-section (1) of Section 37 - Impugned Order passed ignoring mandatory requirements of Section 37 - Appeal allowed - Matter remitted back to High Court for fresh consideration - Appeal disposed of

Ratio Decidendi:
"Recording of satisfaction that Accused is not guilty of offence and that he is not likely to commit any offence while on bail is sine qua non for granting of bail under the NDPS Act."

Case Category:
CRIMINAL MATTERS - CRIMINAL MATTERS RELATING TO BAIL/INTEI
BAIL/ANTICIPATORY BAIL AND AGAINST SUSPENSION OF SENTENCE

JUDGMENT

Devinder Kumar Jain, J.

1. Delay condoned.

2. Leave granted.

3 . Challenge in this appeal, by the Union of India, is to the order dated 13th November, 2006, passed by the High Court of Judicature at Allahabad suspending the sentence awarded by the trial Court to the respondent for having committed offences under Sections 8/27A and 8/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act') and granting him bail.

4. Since in this appeal we propose to deal with the short question, viz. whether the High Court, while accepting the prayer for grant of bail, had kept in view the parameters of Section 37 of the NDPS Act, we deem it unnecessary to advert to the facts of the case against the respondent in greater detail, it would suffice to note that the case of the prosecution against the respondent was that he was involved in financing and trading in 14.900 kilograms of heroin, recovered from a specially made cavity above the cabin of a truck. Upon consideration of the evidence adduced, the Trial Court came to the conclusion that the prosecution had successfully proved the charges against the respondent and three others. On conviction, the Trial Court sentenced the respondent to undergo rigorous imprisonment for ten years and to pay a fine of Rs. 1 lac under Section 27A of the NDPS Act and undergo rigorous imprisonment for ten years and a fine of Rs. 1 lac under Section 29 of the NDPS Act, with default stipulation.

5. Being aggrieved, the respondent preferred an appeal to the High Court along with an application for suspension of sentence and grant of bail till his appeal was finally decided. The High Court, by the impugned order, has allowed the bail application and has ordered that the respondent shall be released on bail on his executing a personal bond and furnishing two sureties each in the like amount to the satisfaction of the concerned Court.

6. The considerations which weighed with the High Court for suspension of sentence and grant of bail are brief and for the sake of ready reference are extracted below:

> The appellant has been convicted under Sections 8/27A and 8/29 N.D.P.S. Act for ten years R.I and also fine. Nothing has been found from his possession. Besides the appellant is in jail since 5.9.2003. Three years have already lapsed. There is no chance of the appeal being heard within a period of seven years.

7. Aggrieved thereby, the Union of India has preferred this appeal.

8. Mr. A. Sharan, learned Additional Solicitor General of India, strenuously urged that the High Court has committed a grave error of law in granting bail to the respondent, ignoring the mandatory provisions of Section 37 of the NDPS Act. The learned Counsel contended that the High Court lost sight of the restrictions and limitations

imposed by Section 37 of the NDPS Act. According to the learned Counsel, the grant of bail to the respondent, without recording any finding on the conditions as stipulated in Section 37(1)(b)(ii) of the NDPS Act, the order suspending the sentence is ex facie illegal and therefore deserves to be set aside, with a direction to the respondent to surrender to custody forthwith. In support of the proposition that suspension of sentence by the appellate Court has to be within the parameters of law, prescribed by the Legislature, the learned senior counsel placed reliance on a three judge Bench decision of this Court in ***Dadu alias Tulsidas v. State of Maharashtra MANU/SC/0637/2000 :*** 2000CriLJ4619 .

9 . Learned Counsel appearing on behalf of the respondent, on the other hand, supported the impugned order and submitted that if the impugned order is read as a whole, it can be inferred therefrom that the learned Judge was conscious of the provisions of Section 37 of the NDPS Act. It is, thus, urged that the order granting bail to the respondent being discretionary, this Court should be loath to interfere with it in exercise of its jurisdiction under Article 136 of the Constitution.

10. Having carefully gone through the impugned order, we are constrained to observe that while dealing with the application for bail, the learned Judge appears to have lost sight of the mandatory requirements of Section 37 of the NDPS Act and thus, the impugned order is clearly unsustainable.

11. The broad principles which should weigh with the Court in granting bail in a non-bailable offence have been enumerated in a catena of decisions of this Court and, therefore, for the sake of brevity, we do not propose to reiterate the same. However, when a prosecution/conviction is for offence(s) under a special statute and that statute contains specific provisions for dealing with matters arising thereunder, including an application for grant of bail, these provisions cannot be ignored while dealing with such an application. As already noted, in the present case, the respondent has been convicted and sentenced for offences under the NDPS Act and therefore, while dealing with his application for grant of bail, in addition to the broad principles to be applied in prosecution for offences under the Indian Penal Code, 1860 the relevant provision in the said special statute in this regard had to be kept in view.

12. Section 37 of the NDPS Act, as substituted by Act 2 of 1989 with effect from 29th May, 1989 with further amendment by Act 9 of 2001 reads as follows:

37. Offences to be cognizable and non-bailable. -

(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)--

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under Section 19 or Section 24 or Section 27A and also for offences involving commercial quantity shall be released on bail or on his own bond unless--

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such

offence and that he is not likely to commit any offence while on bail.

(2) The limitations on granting of bail specified in Clause (b) of Sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (12 of 1974), or any other law for the time being in force on granting of bail.

13. It is plain from a bare reading of the non-obstante clause in the Section and Sub-section (2) thereof that the power to grant bail to a person accused of having committed offence under the NDPS Act is not only subject to the limitations imposed under Section 439 of the Code of Criminal Procedure, 1973, it is also subject to the restrictions placed by Sub-clause (b) of Sub-section (1) of Section 37 of the NDPS Act. Apart from giving an opportunity to the Public Prosecutor to oppose the application for such release, the other twin conditions viz; (i) the satisfaction of the Court that there are reasonable grounds for believing that the accused is not guilty of the alleged offence; and (ii) that he is not likely to commit any offence while on bail, have to be satisfied. It is manifest that the conditions are cumulative and not alternative. The satisfaction contemplated regarding the accused being not guilty, has to be based on "reasonable grounds". The expression 'reasonable grounds' has not been defined in the said Act but means something more than prima facie grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence he is charged with. The reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify satisfaction that the accused is not guilty of the alleged offence. [Vide ***Union of India v. Shiv Shanker Kesari MANU/SC/7905/2007 :***2008CriLJ335] Thus, recording of satisfaction on both the aspects, noted above, is *sine qua non* for granting of bail under the NDPS Act.

14. We may, however, hasten to add that while considering an application for bail with reference to Section 37 of the NDFS Act, the Court is not called upon to record a finding of not guilty'. At this stage, it is neither necessary nor desirable to weigh the evidence meticulously to arrive at a positive finding as to whether or not the accused has committed offence under the NDPS Act. What is to be seen is whether there is reasonable ground for believing that the accused is not guilty of the offence(s) he is charged with and further that he is not likely to commit an offence under the said Act while on bail. The satisfaction of the Court about the existence of the said twin conditions is for a limited purpose and is confined to the question of releasing the accused on bail.

15. Bearing in mind the above broad principles, we may now consider the merits of the present appeal. It is evident from the afore-extracted paragraph that the circumstances which have weighed with the learned Judge to conclude that it was a fit case for grant of bail are: (i) that nothing has been found from the possession of the respondent; (ii) he is in jail for the last three years and (iii) that there is no chance of his appeal being heard within a period of seven years. In our opinion, the stated circumstances may be relevant for grant of bail in matters arising out of conviction under the Indian Penal Code, 1860 etc. but are not sufficient to satisfy the mandatory requirements as stipulated in Sub-clause (b) of Sub-section (1) of Section 37 of the NDPS Act. Merely because, according to the Ld. Judge, nothing was found from the possession of the respondent, it could not be said at this stage that the respondent was not guilty of the offences for which he had been charged and convicted. We find no substance in the argument of learned Counsel for the respondent that the observation of the learned Judge to the effect that "nothing has

been found from his possession" by itself shows application of mind by the Ld. Judge tantamounting to "satisfaction" within the meaning of the said provision. It seems that the provisions of the NDPS Act and more particularly Section 37 were not brought to the notice of the learned Judge.

16. Thus, in our opinion, the impugned order having been passed ignoring the mandatory requirements of Section 37 of the NDPS Act, it cannot be sustained. Accordingly, the appeal is allowed and the matter is remitted back to the High Court for fresh consideration of the application filed by the respondent for suspension of sentence and for granting of bail, keeping in view the parameters of Section 37 of the NDPS Act, enumerated above. We further direct that the bail application shall be taken up for consideration only after the respondent surrenders to custody. The respondent is directed to surrender to custody within two weeks of the date of this order, failing which the High Court will take appropriate steps for his arrest.

17. The appeal stands disposed of accordingly.

MANU/SC/0814/2020

Equivalent Citation: 2020(4)RCR(Criminal)242

IN THE SUPREME COURT OF INDIA

Criminal Appeal Nos. 585-586 of 2020 (Arising out of SLP (Criminal) Nos. 2249-2250 of 2020)

Decided On: 11.09.2020

Appellants: **Sheru**
Vs.
Respondent: **Narcotics Control Bureau**

Hon'ble Judges/Coram:
Sanjay Kishan Kaul, Aniruddha Bose and Krishna Murari, JJ.

Counsels:
For Appellant/Petitioner/Plaintiff: N.K. Modi, Sr. Adv. and M.P. Shorawala, Adv.

For Respondents/Defendant: S.V. Raju, ASG, B.V. Balaram Das, Manan Poori and Rajiv Ranjan, Advs.

Case Category:
CRIMINAL MATTERS - CRIMINAL MATTERS RELATING TO SUSPENSION OF SENTENCE

ORDER

1. Leave granted.

2. We have heard learned Counsel for the parties.

3. The submission of the learned senior Counsel for the Appellant, inter alia, is that he has been in custody for almost eight years and despite the directions of this Court to treat the case at priority, at present the case is not reached for hearing.

4. On the other hand, the learned Additional Solicitor General for the Respondent contends that the normal principle of a large period having already been served during the pendency of the appeal cannot be a ground to suspend the sentence and grant bail, in view of the stringent provisions of Section 37 of the NDPS Act. In this behalf, he has invited our attention to judgment of this Court in the case of Union of India v. Rattan Mallik @ Habul - MANU/SC/0076/2009 : (2009) 2 SCC 624.

5. We have given a thought to the matter and there is no doubt that the rigors of Section 37 would have to be met before the sentence of a convict is suspended and bail granted and mere passage of time cannot be a reason for the same, However, we are faced with unusual times where the Covid situation permeates. We are also conscious that this Court has passed orders for release of persons on bail to de-congest the jail but that but that is applicable to cases of upto seven years sentence.

6. In the given aforesaid facts and circumstances of the case, we consider it appropriate to enlarge the Appellant on bail on terms and conditions to the satisfaction of the Trial Court.

7. At the insistence of the learned Additional Solicitor General, we clarify that the order has been passed in the given facts of the case and not to be treated as a precedent.

8. The appeals stand disposed of.

SUSPENSION OF SENTENCE IN NDPS ACT

By AdvocateIn Chandigarh Posted March 5, 2018
In Bail & Custody, Narcotices Drugs Matter

Generally, after concluding the criminal trial, the court pronounces the convict either the accused or acquit. If accused is convicted for the offense lesser than three-year punishment, the convicted court has power to post-conviction suspension of sentence of the accused and grant the time for filing the appeal against the sentence awarded to him. But The NDPS Act makes no provision for post-conviction suspension of sentence.

Court Has No Power to Grant Suspension of Sentence-

The section 32-A under the Narcotic Drugs and Psychotropic Substances, 1985 (`NDPS Act – for short) barred the convicted court from suspending the sentence for filling the appeal. Definition of section 32-A" is very clear " No suspension, remission or commutation in any sentence awarded under this Act – Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law for the time being in force but subject to the provisions of section 33, no sentence awarded under this Act (other than section 27) shall be suspended or remitted or commuted. A plain reading of the above Section is that it prohibits the suspension of a sentence awarded under the Act except in the case of an offence under section 27. To make the aforesaid meaning clearer the legislature has added a non-obstante limb to the Section to the effect that such prohibition is operative in spite of any other provision contained in the Code of Criminal Procedure, 1973 (for short the Code) or under any other law. But the impact of the aforesaid ban is sought to be diluted with the help of section 36B of the Act which reads thus:

36B. Appeal and revision The High Court may exercise, so far as may be applicable, all the powers conferred by Chapters XXIX and XXX of the Code of Criminal Procedure, 1973, on a High Court, as if a Special Court within the local limits of the jurisdiction of the High Court were a Court of Session trying cases within the local limits of the jurisdiction of the High Court.

Power of High Court to grant of Suspension of Sentence –

A case for the grant of bail pending trial or suspension of sentence pending disposal of appeal would not be on the same analogy in view of the provisions of section 32-A and 37 (1) (b) and (2) of the NDPS Act. In respect of the said provisions a Full Bench of this Court in the case of Tule Ram v. State of Haryana, 2005 (4) RCR (Cr.) 319 considered the powers of the appellate Court for suspension of sentence in a case under the NDPS Act pending appeal.

It was observed by the Supreme Court that where an appeal is preferred against conviction under the NDPS Act in the High Court, the High Court has ample power and discretion to suspend the sentence. That discretion has to be exercised judiciously depending upon the facts and circumstances of each case. While considering the suspension of sentence each case is to be considered on the basis of the nature of the offence, the manner in which the occurrence had taken place, whether bail granted earlier had been misused. It was observed that there was no straitjacket formula which could be applied in exercising discretion and the facts and circumstances of each case would govern the exercise of judicious discretion while considering an application filed by a convict under Section 389 Cr.P.C.

Facts considered for Suspension of Sentence–

There are some of the factors seen by the court at the time of granting the suspension of sentence like the nature of the offence, including the gravity or heinousness or the cruel mode of its execution, the question whether there has been misuse earlier, other criminal cases, if any, pending against the convict or other cases where he has been convicted, the propensity and potentiality of the person seeking suspension of sentence in criminal activities while on bail, the likelihood of the convict absconding or his having been a proclaimed offender, his conduct in jail and whether he has misused the concession of parole or furlough, his capacity to furnish surety for his release are some of the factors which would require consideration. Besides, it would be open to the Court to even post the appeal for hearing by fixing a time-frame for its disposal. Therefore, these aspects would also be best left to the judicious discretion of the Court seized of the case.

SUSPENSION OF SENTENCE UNDER THE NDPS ACT : BALANCING DELAY IN ADJUDICATION & RIGHTS OF CONVICTS

AJIT SHARMA

Published In Cri LJ 2018

The Delhi High Court has in several recent orders suspended the sentence of convicts under Narcotic Drugs and Psychotropic Substances Act, 1985 (the "NDPS Act") because the convict has served about half of the sentence during the pendency of the criminal appeal.[1-2] Court relied upon the decision of Punjab & Haryana High Court in Daler Singh v. State of Punjab[3] while suspending sentence of convicts under NDPS Act on the ground of delay in hearing of appeal and on the sentence already served. Whether High Court can suspend the sentence of a person convicted under NDPS Act on the ground of delay in hearing of the appeal is the issue that I attempt to address in this article.

The NDPS Act is a special statute promulgated specifically to check the rampant growth in use of scheduled narcotics and prohibited substances in the country. The NDPS Act gives special powers to the Investigating Officers to investigate and arrest suspected persons and provides for setting up of special courts to try offences under the NDPS Act.

Section 37 of the NDPS Act provides that a person accused of an offence under NDPS Act shall be released on bail where the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail. Section 37 begins with a non-obstante clause and sub-section (2) of Section 37 further clarifies that limitation imposed in sub-section (1) are in addition to any limitations imposed on the power to grant bail under the Code of Criminal Procedure, 1973. Section 37 states as follows:

"Offences to be cognizable and non-bailable –

1. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974)—
    a. every offence punishable under this Act shall be cognizable;
    b. no person accused of an offence punishable for offences under section 19 or section 24 or section 27-A and also for offences involving commercial quantity shall be released on bail or on his own bond unless–
        i. the Public Prosecutor has been given an opportunity to oppose the application for such release, and
        ii. where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail.

The limitations on granting of bail specified in clause (b) of sub-section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force, on granting of bail."

Regular bail is therefore granted to an accused only after the Court forms a prima facie view on merits that reasonable grounds exist to believe that the accused is not likely to have committed the offence s/he is accused of and that s/he is not likely to commit the offence again if released on bail (See Union of India v. Rattan Mallik[4] where Supreme Court held that satisfaction of both the aforesaid conditions is a sina qua non for grant of bail under NDPS Act). In Dadu v. State of Maharashtra[5] a three-Judge Bench of the Supreme Court held that Section 32-A of the NDPS Act is unconstitutional to the extent is takes away the power of Appellate Court to suspend sentence of a person convicted under NDPS Act and further held that the threshold of Section 37 also applies to convicts seeking suspension of sentence during the pendency of their criminal appeal before High Court.

As such it appears from a bare reading of Section 37 that period of incarceration of accused is irrelevant to the adjudication of regular bail application under NDPS Act, which application has to be disposed of on merits of the case in terms of the twin tests prescribed by Section 37. The Delhi High Court however has of late in a number of NDPS cases suspended the sentence of convicts only on account of the time served in prison.

Thus, sentence is suspended by short and summary orders almost automatically by factoring in the period served and without any discussion on the merits of the case. The Delhi High Court relies upon the division bench judgment of Punjab & Haryana High Court passed in Daler Singh (supra) wherein the High Court framed the following guidelines for automatic suspension of sentence of convicts under NDPS Act by looking at the period served by them and without any need to adjudicate the application for suspension of sentence in terms of the mandate of Section 37.

i. "Where the convict is sentenced for more than ten years for having in his conscious possession commercial quantity of contraband, he shall be entitled to bail if he has already undergone a total sentence of six years, which must include at least fifteen months after conviction.

ii. Where the convict is sentenced for ten years for having in his conscious possession commercial quantity of the contraband, he shall be entitled to bail if he has already undergone a total sentence of four years, which must include at least fifteen months after conviction.

iii. Where the convict is sentenced for ten years for having in his conscious possession, merely marginally more than non-commercial quantity, as classified in the table, he shall be entitled to bail if he has already undergone a total sentence of three years, which must include at least twelve months after conviction.

iv. The convict who, according to the allegations, is not arrested at the spot and booked subsequently during the investigation of the case' but his case is not covered by the offences punishable under sections 25, 27-A and 29 of the Act, for which in any case the aforesaid clause Nos. (i) to (iii) shall apply as the case may be, he shall be entitled to bail if he has already undergone a total sentence of two years, which must include at least twelve months after conviction.

In our view, no bail should be granted to a proclaimed offender, absconder or the accused repeating the offence under the Act. Similarly a foreign national who has been indicted under the Act and other traffickers who stand convicted for having in their possession extra ordinary heavy quantity of contraband (like heroine, brown-sugar, charas etc.) shall not be entitled to the concession of bail as extending the said concession to such like convicts, in our view, would certainly be against the very spirit of the 'Act'.

Similarly a convict who is sentenced for the commission of an offence punishable under sections 31 and 31-A of the Act shall not be entitled to be released on bail by virtue of this order."

The Punjab & Haryana High Court balanced the need for expeditious disposal of appeals arising under NDPS Act with the requirements of Section 37 however it appears that in the process the requirements of Section 37 have been given a complete go by. The High Court in fact further observed that rejection of a bail application on merits would not debar the court from suspending sentence of NDPS convicts after expiry of the abovementioned period of imprisonment. Thus, the Court held that the period of confinement of convict is the primary factor to be considered while suspending sentence in terms of the guidelines. This judgment has since been relied upon by the Delhi High Court in a number of cases and sentence has been suspended without any prima facie adjudication on merits as is mandated by Section 37.

The Punjab & Haryana High Court in Daler Singh (supra) relied upon a number of decisions of Supreme Court where the court directed expeditious disposal of criminal appeals by applying the principle of justice delayed is justice denied.[6] The High Court also relied upon the order of Supreme Court in Man Singh v. Union of India[7] where the Apex Court by a short and summary order suspended sentence of a NDPS convict on the ground that petitioner had served more than half of the sentence. Subsequently in Ramnik v. Union of India[8] also the Supreme Court by a short order directed suspension of sentence on the ground that the convict had served more than half of the sentence.

The judgment in Daler Singh (supra) also excludes foreign nationals from availing the benefits of the guidelines laid down thereunder. Thus relying upon Daler Singh (supra), the Delhi High Court has suspended the sentence of Indian nationals who have completed the period of imprisonment specified in the guidelines laid down in Daler Singh (supra) but at the same time rejected application for suspension of sentence moved by foreign nationals who have also completed the same period of imprisonment.[9] No reasons have been given by court for completely excluding all foreign nationals from availing the benefit of Daler Singh (supra) while extending the same benefit to Indian nationals. This is in spite of the fact that in matters of liberty and confinement neither the statute nor the Constitution distinguishes between Indian and foreign nationals and any such discrimination is a patent violation of Article 14 of the Constitution. The Punjab & Haryana High Court has given no reasons in Daler Singh (supra) to deny the benefit of guidelines laid down therein to foreign nationals. Perhaps it is a mere apprehension that foreign nationals are more likely to abscond while on bail but such apprehensions can be dealt with at the time of imposing conditions while granting bail/ suspension of sentence. The High Court however does not consider this issue and summarily holds that foreign nationals/ convicts would not get the benefit of guidelines laid down in Daler Singh (supra).

Daler Singh (supra) completely ignores the mandate of Section 37 and avoids an adjudication on merits, which is contrary to a long line of decisions of the Supreme Court and which clarify that while granting regular bail under NDPS Act the mandate of Section 37 cannot be given a go by and that order of bail/ suspension of sentence must be on merits after forming a prima facie view on guilt of the accused. Where appeals are pending for a long time and appellant has served more than half of sentence, in my view the right thing to do would be to hear the appeal expeditiously and if so required, in a time bound manner, instead of enlarging the convict on bail.

In Ratan Kumar Vishwas v. State of U.P.[10] Supreme Court reaffirmed the requirement to comply with Section 37 each time an application for bail or suspension of sentence of an NDPS Act convict is being adjudicated. In Union of India v. Mohd. Ismile[11] Supreme Court clarified that period of incarceration or delay in hearing of appeal is not a ground for suspension of sentence and that sentence can be suspended only after complying with the mandate of Section 37. In both the aforesaid cases, the Supreme Court requested the High Court to hear the criminal appeals expeditiously.

The Delhi High Court in Gurmeet Lal v. Narcotics Control Bureau[12] disagreed with its earlier orders and the practice of granting bail/ suspension of sentence on the basis of period of imprisonment served without complying with the mandate of Section 37. Similarly, the Rajasthan High Court in Daulat Singh v. State of Rajasthan[13] considered the decision of Supreme Court in Man Singh v. Union of India (supra) and held that the said summary order was passed by Supreme Court in exercise of its inherent powers under Article 142. The High Court held that detailed order of Supreme Court in Rattan Malik (supra) declared the law and that as such Courts cannot grant bail or suspend sentence of NDPS convicts without considering the merits of the case as required by Section 37.

Recently in Mukesh v. State of M.P. [14] and in Pappulal alias Hanuman v. State of M.P. [15] the Madhya Pradesh High Court reiterated the view taken by the Rajasthan High Court in Daulat Singh (supra) and held that Supreme Court orders in Man Singh (supra) and Ramnik (supra) were passed in exercise of inherent powers under Article 142 and as such do not declare the law on grant of bail/ suspension of sentence in NDPS cases. The High Court held that the decision of Supreme Court in Rattan Malik (supra) declares the law on the subject and that therefore compliance with Section 37 of NDPS Act is mandatory while adjudicating applications for bail or suspension of sentence under NDPS Act.

It is therefore clear in view of the aforesaid judgments of Supreme Court and various High Courts that the guidelines framed by Punjab & Haryana High Court in Daler Singh (supra) regarding suspension of sentence of convicts under NDPS Act completely ignore the mandate of Section 37 of NDPS Act. Court has no power to suspend sentence under Section 37 merely on account of the period of sentence served. Period of sentence served is wholly irrelevant to adjudication of a Section 37 application. However, it would be expedient in the interest of justice that the appeal be heard expeditiously where the applicant has already served about half or more of the sentence. The directions issued by the Supreme Court in Salem Advocates Bar Association (supra) regarding time bound disposal of criminal appeals ought to be considered by Courts adjudicating sentence suspension applications and such appeals should be listed for final disposal at the earliest.

- By: Ajit Sharma, Advocate on Record, Supreme Court of India

1. See order dated 28.09.2016 passed in Cri. A. 435/ 2015 [Farik v. State] at http://delhi highcourt.nic.in/dhcqrydisp_o.asp? pn=188611&yr=2016 and order dated 06.10.2016 passed in Cri. A. 484/ 2016 [Nabi Hasan v. State] at http://delhi highcourt.nic.in/dhcqrydisp_o.asp? pn=199897&yr=2016.
2. Ibid
3. 2017 Cri LJ 2337 (DB) (P & H).
4. See Rattan Malik v. Union of India, 2009 Cri LJ 3042 (SC).
5. 2000 Cri LJ 4619 (SC).
6. High Court relied upon, inter alia, Kashmir Singh v. State of Punjab [AIR 1977 SC 2147] where Court observed that Courts should ordinarily suspend the sentence of convicts when appeals cannot be heard in reasonable time unless there are cogent grounds for acting otherwise; and Salem Advocates Bar Association, Tamil Nadu v. Union of India (AIR 2005 SC 3353) where Court observed that an endeavour should be made to dispose of appeals under NDPS Act within 15 months of being filed.
7. (2004) 13 SCC 42.

8. MANU/SC/1412/2013 (Order dated 21-01-2013 passed in Cri. A. No. 165/ 2013).
9. See Order dated 20.02.2017 passed in Crl. A. No. 1186/ 2015 at http://delhihigh court. nic.in/dhcqrydisp _ o.asp?pn = 37594 &yr=2017.
10. AIR 2009 SC 581.
11. Order dated 13.07.2015 passed in SLP (Cri.) No. 1408/2015.
12. (2013) 3 RCR (Cri.) 62 (Del).
13. 2014 Cri.L.J. 2860 (Raj).
14. I (2017) CCR 383 (MP).
15. Order dated 18.01.2017 passed in Cri. A.175/ 2016. Special Leave Petition against this order was dismissed by the Supreme Court vide order dated 24.07.2017 passed in SLP (Cri.) No. 4966/ 2017.

Guest Post: Suspension of Sentence and the NDPS Act — An Unhappy State of Affairs

(I am delighted to present a guest post by Nipun Arora, an advocate practising in Delhi, and Shivkrit Rai, a law researcher at the Delhi High Court)

The Code of Criminal Procedure (Cr.P.C.) provides for securing liberty of persons in custody at various stages: individuals named as an accused in cases where the trial is pending can seek bail in terms of Sections 437 & 439 (Regular Bail); and convicts can seek a stay on execution of sentence under Section 389 (Suspension of Sentence). Jurisprudentially, there has been a difference between the two and the factors that the court must consider while deciding upon either of these. However, for the Narcotic Drugs and Psychotropic Substances Act (NDPS Act), the situation is different. This post discusses how the distinction becomes diluted in cases under NDPS Act and leads to serious trouble.

Understanding the two stages of liberty for an accused. Bail v. Suspension of Sentence

During the trial, an accused person can seek bail. For a bailable offence, this can be availed as a matter of right, whereas in a non-bailable offence, bail depends on the discretion of the court after considering various factors such as the possibility of fleeing, chances of tampering the evidence, gravity of the offence, etc.

If found guilty, the convict can make an appeal before the appellate court, and during the pendency of this appeal, the convict can seek suspension of the sentence imposed by the trial court. The logic is similar as that of bail: if there is a possibility that the person might not have committed the offence, it would not be proper to confine them in custody.

However, the factors to be considered for suspension of sentence are different from that of bail. At this stage, the trial is over, evidence has been recorded, and a competent court has found the person guilty after application of judicial mind. The factors such as possibility of tampering evidence do not exist anymore. The decision to suspend the sentence or not has to be based on different factors: primarily on how long it would take for the court to decide the appeal. For instance, it would not be proper to suspend the sentence if the appeal is to be heard next week; whereas it would be desirable for the sentence to be suspended if the appeal might not come up for several years. The Supreme Court has reiterated these principles several times [*Bhagwan Rama Shinde Gosai* v. *State of Gujarat*, AIR 1999 SC 1859; *Kashmira Singh* v. *State of Punjab*, (1977) 4 SCC 291].

The distinction between bail and suspension of sentence has also been recognised by courts multiple times in *Anil Ari* v. *State of WB* [AIR 2009 SC 1564]; *Atul Tripathi* v. *State of UP* [(2014) 9 SCC 177]; *Jagdip Beldar* v. *State of Bihar* [Crl. App. (SJ) 2319/2017 (Patna HC)]. The logic is the same as discussed above: the trial has ended, a competent court has found the person guilty, the presumption of innocence does not exist anymore. The situation at pre-conviction and post-conviction stage is thus different.

Bail & suspension of sentence under NDPS Act

In cases under certain special statutes, the standard principles of bail as discussed above do not apply. These are the offences that are considered "grave" such as those under the Narcotic Drugs and Psychotropic Substances Act (NDPS Act), the Maharashtra Control of Organised Crime Act (MCOCA), the Unlawful Activities (Prevention) Act (UAPA), etc. Under the NDPS Act, bail can only be granted if "*the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any offence while on bail*" (Section 37, NDPS Act). The embargo is problematic and has been discussed earlier on this blog. In brief, it requires the court to adjudge the guilt of the accused even before the trial has commenced and mostly without adequate material before it.

Besides the strict threshold for bail, the legislature also tried to place a blanket prohibition on suspension of sentence. By an amendment in 1989, Section 32A was inserted in the NDPS Act which took away the power of the court to suspend the sentences awarded under this law. This provision was challenged before the Supreme Court in *Dadu @ Tulsidas* v. *State of Maharashtra* [(2000) 8 SCC 437]. The full-bench of the Supreme Court held that the restriction on the power to suspend sentences is unconstitutional as contrary to Articles 14 and 21. The Court approved the judgement of Allahabad High Court in *Ram Charan* v. *Union of India* [AIR 1990 All 1480] that taking away the possibility of suspension of sentence renders the right to appeal meaningless.

While holding the provision unconstitutional, however, the Supreme Court noted that it would not automatically entitle an appellant to have the sentence suspended. It observed:

Holding Section 32A as void in so far as it takes away the right of the courts to suspend the sentence awarded to a convict under the Act, would neither entitle such convicts to ask for suspension of the sentence as a matter of right in all cases nor would it absolve the courts of their legal obligations to exercise the power of suspension of sentence within the parameters prescribed under Section 37 of the Act.

The Court then misquotes a division-bench judgement of the Supreme Court in *Union of India* v. *Ram Samujh* [(1999) 9 SCC 429] to apparently substantiate the position that restrictions of Section 37 would apply to suspension of sentence as well, though that judgement related to regular bails and did not deal with suspension of sentence at all. Regardless of the misquote, the law as it stands is that the threshold required in regular bail needs to be met for suspension of sentence as well. This makes things peculiar.

The Problematic Misinterpretation of the Court in *Dadu @ Tulsidas*

In theory, the extension of restrictions of Section 37 would make suspension of sentence impossible and could lead to certain illogical conclusions. For starters, the threshold for bail as per Section 37 requires the court to be of the opinion that the person "is not guilty of such offence". The same threshold cannot be applied in a case of suspension of sentence, as the person has already been convicted by a competent court. Thus, the moment an order for suspension of sentence is passed, which matches the threshold of bail i.e. "not guilty of such offence", the entire appeal will have to be allowed. This is because a conviction can only stand if the guilt is proved beyond reasonable doubt, and if there could be any opinion that the convict is not guilty (as required under Section 37), there clearly exists a reasonable doubt (or perhaps much more than a mere reasonable doubt).

It is absurd that a person can be said to be reasonably not guilty (in the order for suspension) but be a convict (in the final order) at the same time from the assessment of the same material by the same court. The extension of Section 37 to suspension of sentences makes the issues of the interim order so connected with the issues of the final judgement, that they cannot possibly be separated.

This paradox does not exist (or is not as apparent) at the stage of trial, perhaps because of the distinction in factors under consideration as discussed earlier: The trial court has to make a prima facie determination before or during the trial, and there is a possibility of adequate material emerging showing the guilt of the accused. However, that is not the case at the appellate stage – once it can be concluded in the interim order that there are grounds to believe that the accused is innocent, that view ought to be extended even at the final stage.

Even besides the resultant illogic, restrictions of Section 37 were not supposed to apply to suspension of sentence. It states that "no person accused of an offence" shall be released unless the conditions are satisfied – the subject of the section here is an accused, not a convict. The scope of the section is clearly limited by the words of the legislature. The legislature has not laid down any additional requirement for suspension of sentence. By extending the scope of Section 37 to apply to suspension of sentences as well, the paradoxical situation has emerged.

Conclusion

There has been a distinction in regular bail and suspension of sentence, and the factors relevant to both. However, the Supreme Court in *Dadu @ Tulsidas* appears to have overlooked this distinction and artificially created further restrictions which should not have applied otherwise. There was no especial requirement for the Supreme Court to have engaged in the unnecessary academic exercise of whether the restrictions of Section 37 would apply or not, when the scope of the challenge before it was limited precisely to the constitutionality of Section 32-A. *Dadu @ Tulsidas*, thus, appears to have been decided incorrectly to this extent and needs to be reconsidered. The embargo of Section 37 should not apply to cases of suspension of sentence.