

(2017) 01 MP CK 0231
MADHYA PRADESH HIGH COURT
Case No: 1752 of 2015

SARVADAMAN MAIRAL, & ORS.

APPELLANT

Vs

STATE OF M P, & ANR.

RESPONDENT

Date of Decision: Jan. 18, 2017

Acts Referred:

- Constitution of India, Article 142 - Enforcement of decrees and orders of Supreme Court and orders as to discovery, etc
- Code of Criminal Procedure, 1973, Article 389(1)

Hon'ble Judges: Virender Singh

Bench: Single Bench

Advocate: A K Saraswat, Abhishek Soni

Judgement

1. Heard on IA No.5908/2016, an application under Section 389 (1) of Cr.P.C., 1973.
2. This is the first application for suspension of sentence/bail before this Court. The accused is convicted vide judgment dated 08/12/2015 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.
3. Appellant is in custody from 31/10/2008.
4. No other bail application for suspension either pending, filed or decided by any other Court or by the Hon"ble Supreme Court.
5. According to the prosecution case, on 08/05/2008 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.

6. 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.

7. Learned counsel for the appellant has placed reliance on the decisions of this Court dated 16/01/2015 in Cr.A.No.709/2012 (Sarwar vs. State of M.P.) (By Hon"ble Shri Alok Verma, J.), dated 26/03/2015 in Cr.A.No.1495/2013 (Rameshwar @ Ramlal vs. State of M.P.) (By Hon"ble Shri T.K. Kaushal, J.), dated 29/06/2015 in Cr.A.31/2014 (Dilip Singh vs. State of M.P.) (By Hon"ble Shri Jarat Kumar Jain, J.), dated 28/09/2015 in Cr.A.No.56/2013 (Parmanand and another vs. 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 vs. State of M.P.) (By Hon"ble Shri P.K. Jaiswal, J.), dated 06/01/2017 in Cr.A.No.1777/2013 (Shambhulal vs. State of M.P.) (By Honble Rajeev Kumar Dubey, J.) as well as on the Orders of Hon"ble Supreme Court dated 21/01/2013 in SLP (Cri.) No.9180/2012 (Ramnik Singh vs. Intelligence Officer, Directorate of Revenue Intelligence), Mansingh vs. Union of India (2004) 13 SCC 42, dated 10/09/2012 in SLP (Cri.) No.5729/2012 (Mohd. Sadiq vs. Union of India) in support of his contention.

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

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

10. I have considered the rival contentions of the counsels. **11.** In *Dadu @ Tulsidas Vs. State of Maharashtra* (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. Para 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 :

"37. Offences to be cognizable and nonbailable. (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*, (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 nonbailable 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 death-blow 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 Diler v. Chief Secretary, Union Territory of Goa*, (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)

12. In *Ratan Kumar Vishwas vs. State of U. P. and Anr.* 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.

13. The same principal was reiterated in the case of *Union of India vs. Rattan Mallik @ Habul* AIR 2009 SC (Supp) 1567. It is held in para 13-15 of the judgment:

13. It is plain from a bare reading of the non obstinate clause in the Section and subsection (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 subsection (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 (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 subsection (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. (emphasis supplied)

14. In a recent judgment, the Apex Court in the case of Union of India vs. Ismile decided in Special Leave to Appeal (Cri.) No.1408/2015 on 13.07.2015 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 25.07.2014 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.

15. In Daulat Singh alias Gatu vs. State of Rajasthan, 2014 Cri.L.J. 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, (2000 Cri LJ 4619) (supra) and Rattan Mallik, (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.

16. Considering Man Singh case (2009 Cr.L.J. 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, (2000 Cri LJ 4619) (supra) and the same was reiterated in the case of Rattan Mallik (2009 Cri LJ 3042) (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.

17. In Cr.A.No.24/2008 Ms. V. Sumanlata Vs. State order dated 21.08.2015 and also in a latest judgement passed in Cr.A.No.188/2012 Ismile and another Vs. Union of

India order dated 10.01.2017 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.

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

19. 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 Ratan 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 Art. 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 judgements cited by the applicant.

20. 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.