

Supreme Court of India

Dadu @ Tulsidas vs State Of Maharashtra on 12 October, 2000

Author: Sethi

Bench: K.T.Thomas, R.P. Sethi, S.N. Variava.

CASE NO.:

Writ Petition (crl.) 169 of 1999

Writ Petition (crl.) 243 of 1999

PETITIONER:

DADU @ TULSIDAS

Vs.

RESPONDENT:

STATE OF MAHARASHTRA

DATE OF JUDGMENT: 12/10/2000

BENCH:

K.T.Thomas, R.P. Sethi & S.N. Variava.

JUDGMENT:

SETHI, J:

L...I...T.....T.....T.....T.....T.....T.....T...J 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 Code of Criminal Procedure (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

"Bail and parole have different connotation in law. Bail is well understood in criminal jurisprudence and Chapter XXXIII of the Code of Criminal Procedure 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.11, 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 behaviour; 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 confines 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 NE 2d 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, 1002].

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 extend 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

"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".

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.

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 subparagraph (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."

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." 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* [1987 (1) SCC 124] held that "it is also a basic principle of the Rule of Law which permeates every 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 a most 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 & Ors. v. B.D. Sardana & Ors.* [AIR 1999 SC 3127] 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.

In *Ram Charan v. Union of India* [1991(9) LCD 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 within 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 *Ishwarsingh M. Rajput v. State of Gujarat* [1990 (2) Gujarat Law Reporter 1365 =1991(2) Crimes 160] 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:

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.

This Court in *Union of India v. Ram Samujh & Anr.* [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".

(emphasis supplied) 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 Dilier v. Chief Secretary, Union Territory of Goa* [1990 (1) SCC 95] 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."

8. 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."

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.

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.