

IN THE HIGH COURT OF MANIPUR

AT IMPHAL

MC(CrI.A) No. 11 of 2023

Md. Sikandar, aged about 26 years, S/o Md. Nasir of Lilong
Heinou Makhong, P.O. Sagoltongba, P.S. Lilong & District-
Thoubal, Manipur-795130

..... Appellant/s

- Versus -

The State of Manipur, represented by the Special Secretary
(Home), Government of Manipur, Old Secretariat Building,
Babupara, Imphal West District, Manipur-795001.

.....Respondent/s

B E F O R E

HON'BLE MR. JUSTICE A. GUNESHWAR SHARMA

For the Applicant	::	Mr. Ph. Sanajaoba, Adv. and Mr. RK. Kulajit, Adv.
For the respondents	::	Mr. H. Samarjit, PP
Date of hearing	::	25.07.2023
Date of Order	::	08.08.2023

ORDER (CAV)

[1] The appellant has filed Cril.A. No. 6 of 2023 against the order of conviction dated 28.02.2023 and order on sentence dated 04.03.2023 passed by the Ld. Special Judge, ND & PS (FTC), Manipur convicting the appellant under Section 21(b) of NDPS Act and sentence him to undergo rigorous imprisonment of 3 (three) years with a fine of Rs. 20,000/-

(Rupees twenty thousand) and in default of fine of another simple imprisonment of 2 (two) months in Spl. Trial Case No. 57 of 2018.

[2] Vide order dated 15.05.2023, this Court admitted the appeal and called for Trial Court record and directed the Registry to prepare paper book. Along with Criminal Appeal, the appellant also filed an application being MC(Cril.A.) No. 11 of 2023 under Section 389 Cr.PC praying for enlarging the appellant on bail by suspending the operation of the conviction and sentence orders dated 28.02.2023 and 04.03.2023 during the pendency of the Criminal Appeal preferred by the appellant.

[3] It is stated that the appellant has a good case on merit and is likely to succeed on merit. If the order of conviction and sentence of 3 (three) years imprisonment is not stayed, the appellant will suffer immensely as the appeal will take time to dispose of and the appeal will become infructuous. It is prayed that the order of conviction dated 28.02.2023 and order on sentence dated 04.03.2023 be stayed during the pendency of the present appeal.

[4] Mr. H. Samarjit, learned PP for the State respondent, draws the attention of this Court to the provisions of Section 32A of NDPS Act, 1985 to the effect that no sentence awarded under this Act shall be suspended or remitted or commuted. The provisions of Section 32A of NDPS Act is reproduced hereinbelow:

“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.”

[5] Learned PP submits that the provisions of Section 32A NDPS Act as reproduced above has excluded the applicability of Section 389 Cr.PC for suspending sentence during the pendency of the appeal. Hence, the present application is not maintainable. Learned PP further relies on the judgment of the Hon'ble Supreme Court in the case of **Union of India Vs. Rattan Mallik Alias Habul** reported as **(2009) 2 SCC 624** to the effect that while considering bail under Section 37 of NDPS Act, the twin conditions laid down in Section 37(1)(b)(ii) of NDPS Act that the accused is not guilty of offence and is not likely to commit any offence while on bail, have to be considered. Learned PP has pointed out that in the present case, the appellant has been convicted of an offence under Section 21(b) of NPDS Act and hence, he is not entitled to release on bail as one of the main condition of Section 37(1)(b)(ii) is not satisfied. Accordingly, learned PP submits that the application be dismissed on merit.

[6] Mr. Ph. Sanajaoba, learned counsel for the appellant, draws the attention of this Court to the decision of Hon'ble Supreme Court in the case of **Dadu Alias Tulsidas Vs. State of Maharastra** reported as **(2000) 8 SCC 437** where 3 (three) Judge Bench of the Hon'ble Supreme Court held that Section 32A of NDPS Act is unconstitutional to the extend that it takes away the right of the Court to suspend the sentence of convict under the NDPS Act. He further submits that the submission of the learned PP has no substance and is in ignorance and against the decision of the 3

(three) Judge Bench of the Hon'ble Supreme Court that Section 32 is unconstitutional to the extent of exclusion of the power of the Court to suspend sentence under Section 389 Cr.PC during the pendency of the appeal. With respect to the decision of **Rattan Malik Alias Habul** (Supra), it is pointed out that the decision is for grant of bail during the pendency of the trial and is not related to suspension of sentence post-conviction in an appeal. Accordingly, it is prayed that order of conviction and sentence be suspended and the appellant be released on bail during the pendency of the appeal as the appeal would be infructuous as the same may not likely to be disposed of before the expiry of the sentence awarded.

[7] This Court considered the rival submissions, the provisions of the law and decisions of the Hon'ble Supreme Court in this regard.

[8] Para 25, 26, 27 & 29 case law **Dadu Alias Tulsidas** (Supra) regarding constitutional validity of Section 32A of NDPS Act is reproduced hereinbelow:

“25. Judged from any angle, the section insofar 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 32-A insofar 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 the Allahabad High Court in Ram Charan Case has correctly interpreted the law relating to the constitutional validity of the section and the judgment of the Gujarat High Court in Ishwar Sinh M. Rajput case cannot be held to be good law.

26. Despite holding that Section 32-A 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, insofar 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 32-A to be unconstitutional, insofar 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 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 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 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"

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."

[9] From the above case of **Dadu Alias Tulsidas** (Supra), it is clear that Section 32A of NDPS Act is invalid with respect to exclusion of the power of the Court to suspend sentence under Section 389 Cr.PC. It was further held that suspension of sentence is not automatic and in a conviction under Section NDPS Act, the Court has to satisfy the mandate of Section 37 of the Act while releasing a person on bail.

[10] This Court is of the opinion that the submission of Mr. H. Samarjit, learned PP for the State respondent has some substance that for consideration of the twin conditions as laid down under Section 37(1)(b)(ii) of the NDPS Act, i.e. believing that a person is not guilty of the offence and

he is not likely to commit any offence when bail is to be taken into account while considering the suspension of sentence in case of NDPS Act.

[11] On a mere perusal of Section 37 of NDPS Act, the said abovementioned twin conditions is with respect to offence under Section 19, 24, 27A and offences involving commercial quantity. In the present case, the appellant has been convicted under Section 21(b) of NDPS Act and awarded a sentence of 3 (three) years rigorous imprisonment by the learned Trial Court. Admittedly, the offence under Section 21(b) of NDPS Act is for intermediate quantity and the same is not concerned with the commercial quantity which is provided under Section 21(c) of the Act. The special consideration for bail under Section 37 of NDPS Act is with respect to the offence under Sections 19, 24, 27A or offence involving commercial quantity. Since, the appellant has been convicted under Section 21(b) with respect to intermediate quantity, the stipulation of Section 37 NDPS with respect to grant of bail will not applicable to the case of the appellant herein as the sentence is only for 3 (three) years imprisonment. It may be noted that an appeal may take some time.

[12] This Court is of the considered view that the appellant is entitled to the benefit of suspension of sentence as provided under Section 389 Cr.PC during the pendency of the present appeal. However, there will be no order on the suspension of the conviction. Accordingly, the effect and operation order dated 04.03.2023 passed by the Ld. Special Judge, ND & PS (FTC), Manipur in Spl. Trial Case No. 57 of 2018 imposing a sentence of rigorous imprisonment of 3 (three) years with a fine of Rs. 20,000/- in

default of another simple imprisonment of 2 (two) months is suspended during the pendency of the present appeal. The appellant is to be released on bail bond of Rs. 1,00,000/- (Government Employee) with a surety of like amount to the satisfaction of the Ld. Special Judge, ND & PS (FTC), Manipur subject to the condition that:

- (1) He shall not leave the State without permission of this Court;
- (2) He shall not try to influence anybody in connection with the present appeal;
- (3) He shall not commit similar offence during the pendency of the present appeal; and
- (4) For breach of any of the condition, the State may approach this Court for appropriate order.

[13] With these observations and directions, the application is allowed. No cost.

[14] Send a copy of this order to the Ld. Special Judge, ND & PS (FTC), Manipur for information and necessary action.

JUDGE

FR/NFR

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KH. JOSHUA
MARING

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KH. JOSHUA MARING
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