

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

**INTERIM APPLICATION NO.815 OF 2019
IN
CRIMINAL APPEAL NO.1046 OF 2019**

Kaluram Chaudhary S/o.

Babulal Chaudhary

.. Applicant/Appellant

Versus

Union of India and Anr.

.. Respondents

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Mr.Rizwan Merchant, Mr.Ravi Gurnani, Mr.Pradeep Hingorani a/w.
Mr.Vijay P. Agale, Advocate for the Applicant/Appellant.

Mr.Shreeram Shirsat, Spl. P.P. for Respondent No.1-UI.

Mr.H.J. Dedhia, APP for the Respondent No.2-State.

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CORAM : PRAKASH D. NAIK, J.

DATED : FEBRUARY 26, 2022.

P.C. :

This is an application for suspension of sentence and grant of bail during the pendency of Criminal Appeal No.1046 of 2019.

2 The applicant was prosecuted for the offences under Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act", for short). Vide judgment and order dated 15th July, 2019, passed by the Court of NDPS Special Judge City Civil and Sessions Judge, Greater Mumbai in NDPS Special Case No.28 of 2016, @ 103/2016, @ 11/2018. The applicant has been convicted for the offence punishable under Sections 22(c) read with Section 8(c) of the NDPS Act, and,

sentenced to undergo imprisonment of 10 years, and, to pay fine of Rs.1,00,000/-. He is also convicted for the offence under Section 29 read with Section 22(c) read with Section 8(c) of NDPS Act, and, sentenced to undergo rigorous imprisonment for 10 years, and, to pay fine of Rs.1,00,000/-. Both the substantive sentences were directed to run concurrently.

3 Learned advocate for the applicant has urged that the sentence of imprisonment imposed by the trial Court may be suspended and the applicant be granted bail. The applicant has undergone the sentence of six years and five months. The maximum sentence imposed by the trial Court is ten years. The Appeal preferred by the applicant has been admitted. The Appeal would not come upon for hearing within short span of time.

4 Learned counsel has relied upon following decisions:

- (i) *Mayuresh Nandkumar Purohit Vs. Kaushik Manna and Anr.*¹;
- (ii) *Mossa Koya KP Vs. State (NCT of Delhi)*²;
- (iii) *Man Singh Vs. Union of India*³;
- (iv) *Inderjeet Singh Vs. State of Punjab, decided by the Supreme Court in Criminal Appeal No. 14394 of 2011 dated 12th August, 2011;*

1 2018 All SCR (Cri.) 653

2 2022 (1) RCR (Cri) 315

3 2006 (2) RCR (Cri) page 73

- (v) *Ramnik Singh Vs. Intelligence Officer D.R.I., delivered in Criminal Appeal No.165 of 2013, dated 21st January, 2013;*
- (vi) *Nitin Chinchole Vs. Union of India, in Criminal Application No.2287 of 2020, decided by this Court on 9th December, 2021; and*
- (vii) *Sachin Atmaram Vartak Vs. State of Maharashtra*⁴.

5 Learned counsel submitted that in the case of Mayuresh Purohit (Supra), the sentence of imprisonment was suspended pending Appeal considering the fact that the Appellant was in custody for substantial period of time. In the case of Mossa Koya KP Vs. State (NCT of Delhi)(Supra), the sentence of imprisonment imposed for conviction for an offence under the N.D.P.S. Act was suspended by the Apex Court in view of the fact that the appellant therein was in custody, and, there were remote chances of hearing Appeal expeditiously. Similar view was taken in the case of Man Singh Vs. Union of India (Supra) and Inderjeet Singh Vs. State of Punjab (Supra). IN the case of Nitin Chinchole Vs. Union of India (Supra), the convict has challenging the order in Appeal for challenged the conviction N.D.P.S. Act. He was sentenced for imprisonment of 12 years. Considering the fact that he was in custody for a period of about 8 years, this Court had suspended the sentence of imprisonment pending Appeal, and, granted bail. In case of Sachin Varak Vs. State of

Maharashtra (Supra), this Court had granted bail pending trial to the accused who was facing prosecution under the provisions of N.D.P.S. Act on the ground that prolonged custody without trial violates Article 21 of Constitution of India.

6 Learned counsel for respondent/Union of India submitted that the applicant has been convicted under the provisions of N.D.P.S. Act. He has been sentenced to undergo imprisonment of 10 years. While suspending sentence of imprisonment, the Court is required to consider the rigors of Section 37 of N.D.P.S. Act. The applicant is now convicted for offences under N.D.P.S. Act. The embargo under Section 37 of the N.D.P.S. Act, would be strictly applicable. Learned counsel relied upon the decision of the Apex Court in the case of *Dadu Alias Tulsidas Vs. State of Maharashtra*⁵, and, order passed by the Madhya Pradesh High Court in Cr.A.No.302/2014, in the case of *Jahid Vs. State of Madhya Pradesh* dated 2nd April, 2018.

7 Learned counsel submitted that in the decision in the case of *Dadu Alias Tulsidas Vs. State of Maharashtra* (Supra), the Apex Court was considering the constitutional validity of Section 32 A of the N.D.P.S. Act. The Court held that the said provision was unconstitutional to the extent that it takes away the right of the court

5 (2000) 8 SCC 437

to suspend the sentence of a person who are convicted under Act. The Apex Court however held that the rigors of Section 37 would be required to be considered while suspending sentence. It is submitted that in accordance with Section 37 of N.D.P.S. Act, the conditions stipulated therein would act as an restrictions for granting bail by suspending sentence of imprisonment Section 37 of N.D.P.S. Act stipulates that no person accused of an offence punishable under Section 19 or 24 or 27 A and also for offences involving commercial quantity shall be released on bail or on his own bond unless the Public Prosecutor has been given an opportunity to oppose the application for such release and when the public prosecutor opposes the application, the Court is satisfied that there are reasonable ground for believing that he is not guilty of such offence, and, that he is not likely to commit any offence while on bail. Learned counsel adverted to paragraph 27 of the said decision, wherein, the Apex Court has observed that Section 32-A is void insofar as it takes away the right of the Courts to suspend the sentence awarded to a convict under the Act. However, it 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

8 Mr.Shirsat, however, submitted that while adjudicating the issue relating to suspension of sentence in the case of Inderjeet Singh Vs. State of Punjab (Supra), relied upon by the learned counsel for the appellant, the decision in the case of Dadu Alais Tulsidas (Supra) was not placed before the Court for consideration. He, further submitted that the decisions in the case of Man Singh Vs. Union of India (Supra) can be distinguished while suspending the sentence the Apex Court has observed that the appellant therein was in jail for a substantial period of time, and, he had undergone detention for more than seven years of imprisonment. The Court also took note of the facts that there is no likelihood of Appeal being heard in near future. Although the decision in the case of Dadu Alais Tulsidas Vs. State of Maharashtra (Supra), was referred on facts the said order can be distinguished as appeal was not likely to be heard. The other orders relied upon by the learned counsel does not refer to in the case of Dadu Alias Tulsidas Vs. State of Maharashtra (supra). In the present case, the Appeal can be fixed for hearing. The applicant/appellant has been convicted by the trial Court on the basis of the evidence. In the light of the restrictions embodied under Section 37 of the N.D.P.S. Act, the applicant is not entitled for suspension of sentence and grant of bail.

9 Undisputedly, the applicant has been convicted as aforesaid, and, he has been sentenced to undergo imprisonment of 10 years, on two counts. The sentences were, however, directed to run concurrently. The applicant is in custody for period of about 6 years and 5 months. The judgment of the trial Court has been challenged by the applicant by preferring an appeal before this Court. The Appeal is admitted and pending for final hearing. In the case of Dadu Alias Tulsidas Vs. State of Maharashtra (Supra), the Apex Court was dealing with the issue relating to constitutional validity of Section 32-A of N.D.P.S. As per Section 32-A, no sentence awarded under the Act shall be suspended or remitted or commuted. The Apex Court held that the right of suspension of sentence cannot be taken away. However, in paragraph 27, the Apex Court held 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. It was also observed that it would neither entitle such convicts to ask for suspension of 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 High Court of Madhya Pradesh in its order dated 2nd April, 2018, passed in the case of Jahid Vs. State of M.P. (Supra), which has been

relied upon by learned counsel for respondent had rejected application for suspension of sentence of imprisonment. The Court had considered the decision in the case of Dadu @ Tulsidas (Supra).

10 In the case of Mayuresh Purohit Vs. Kaushik Manna and Anr. (Supra), the accused was convicted under Section 29 read with Section 8(c) and 20(b)(ii)(C) of the N.D.P.S. Act, and, sentenced to undergo rigorous imprisonment for a period of 10 years and to pay a fine of Rs.1,00,000/-, by the trial Court. The convict preferred Appeal before the High Court. The application for suspension of sentence was not allowed. The convict had approached the Apex Court. While deciding the said Appeal, the Apex Court has observed that, the Appeal before the High Court, though listed for hearing has not been heard till date and since a statement has made by the counsel for the respondents some time may be taken for hearing of appeal unless the same is expedited, the Court did not see any reason for expedite the hearing Appeal before the High Court, as there are several similar and older matters in the cause list of particular Bench hearing the matter. The Court, however, took note of the fact that the accused has been in custody for over six years, the sentence imposed is one of ten years and considering the totality of the matter, directed that the convict be released on bail. In the case of Mossa Koya KP Vs. State (NCT of Delhi)

(Supra), the appellant before the Apex Court was denied suspension of sentence under Section 389 of Cr.P.C. by Delhi High Court. The appellant was convicted under Section 29 of the N.D.P.S. Act and sentenced to undergo rigorous imprisonment for 10 years and to pay fine of Rs.1,00,000/-, with the default sentence. The appellant had undergone sentence of about 8 years. The respondents therein had made a statement before the Apex Court that it would be appropriate if the said Court expedite the hearing of the Appeal and since the appellant was convicted for the offence under the N.D.P.S. Act, the prayer for suspension of sentence may not be considered having regard to seriousness of Appeal. The Apex Court observed that the submissions of the learned Additional Solicitor General that the offences under N.D.P.S. Act are of serious nature and the case is at post conviction stage, is appreciated. But, the Court cannot be unmindful of the fact that the appellant has undergone 8 years out of the total sentence of 10 years. The Appeal is unlikely to be heard early. In all probability, the entire sentence would have been undergone by the time the Appeal is heard. The decision on the basis of which the High Court of Delhi has declined to grant suspension of sentence, are, at the highest, a broad guidelines and reliance cannot be placed on the same pedestal as a statutory interdict. With the pendency of the work in the High Court, it may not be feasible to expedite the disposal of the

Appeal within a short period. The Court suspended the sentence of imprisonment by setting aside the order of the High Court. In the case of Inderjeet Singh Vs. State of Punjab (Supra), the appellant therein had preferred an Appeal before the High Court challenging the conviction under Section 15 of the N.D.P.S. Act. He was sentenced to undergo the imprisonment of 10 years and fine of Rs.5,00,000/-. The Supreme Court has observed that it is unlikely that the Appeal can be taken for final disposal immediately. The appellant was in custody for more than 8 years hence the Appellant therein was directed to be released on bail on suspending the sentence of imprisonment. In the case of Man Singh Vs. Union of India (Supra), the Apex Court has made a reference to the decision in the case of Dadu Alias Inderjeet Vs. State of Maharashtra (Supra). The facts of the said decision indicate that the appellant was in jail for the period of about 7 years. It was contended that there is no likelihood of Appeal would be heard immediately. The counsel for the appellant (convict therein) had relied upon the decision in the case of Dadu Alias Inderjeet Vs. State of Maharashtra (Supra). The Apex Court suspended the sentence of imprisonment. In the case of Ramnik Singh (Supra), the convict was tried for the offence under N.D.P.S. Act. He was convicted and sentenced to undergo imprisonment of ten years. The convict had served the sentence of five years and four months. It was observed

that, since the Appeal is pending before High Court and the possibility of the Appeal being taken up for hearing in near future is remote, the convict was entitled for suspension of sentence during pendency of Appeal. This Court vide order 9th December, 2021, granted bail to the appellant who was convicted under Section 8 (c), 23(c), 25, 27 A read with Sections 29 and 22(C) of the N.D.P.S. Act, on the ground that out of 12 years of the sentence of imprisonment awarded by the trial Court, the accused had undergone approximately 8 years in custody. In the case of Sachin Vartak Vs. State of Maharashtra (Supra), the issue related to the grant of bail pending trial to person facing prosecution under the provisions of N.D.P.S. Act on account of prolonged custody. It was urged by the accused therein that incarceration in custody for a substantial period of time affect the right of the accused under Article 21 of the Constitution of India.

11 From the ratio and the tenor of the decisions of the Apex Court referred to hereinabove, wherein sentence of imprisonment has been suspended, pending Appeal, It is apparent that, the Court was considering the fact that the convict therein were convicted for the offence under the N.D.P.S. Act, their Appeals were pending, there were remote chances of hearing the Appeal immediately and that the convicts therein were in custody for a substantial period of time. In

the light of the sentence imposed by the trial Court and the period for which the convicts therein were in custody, the sentence of imprisonment was suspended. In the decision in the case of Dadu Alias Tulsidas Vs. State of Maharashtra (Supra), the Apex Court was adjudicating the issue about the constitutional validity of 32 A of the N.D.P.S. Act. Said provision was held unconstitutional to the extent that it takes away right to suspend sentence of imprisonment. It is also observed that the Court cannot be unmindful of the fact that there are restrictions under Section 37 and other legal restrictions while granting bail, suspension of sentence etc. It is also pertinent to note that in the case of Man Singh (Supra) the Apex Court has referred the decision in the case of Dadu Alias Tulsidas Vs. State of Maharashtra (Supra). The sentence of imprisonment was suspended. The Madhya Pradesh High Court was dealing with application for suspension of sentence of imprisonment on merits. In all the decisions wherein sentence has been suspended the Court was primarily concerned with the fact that the accused was in custody and suffered substantial imprisonment.

12 Applying the principles enunciated in the said decisions to the present case, it can be seen that the applicant has been in custody for about six years and five months. He has been

sentenced for imprisonment for 10 years. The Appeal has been admitted in 2019. Learned counsel for respondent had urged that the Appeal can be fixed for hearing. It is noted that several Appeals wherein the accused are in custody are pending in this court. The accused therein are in custody for substantial period of time. The present Appeal cannot be taken out of turn by expediting the hearing.

13 In view of the aforesaid circumstances, the sentence of imprisonment can be suspended pending the Appeal preferred by the applicant/appellant.

14 Hence, I pass the following order:

:: ORDER ::

- (i) Interim Application No.815 of 2019, is allowed;
- (ii) The Sentence of imprisonment awarded vide judgment and order dated 5th July, 2019, passed by the Court of N.D.P.S. Special Judge City Civil and Sessions Judge, Greater Mumbai, in NDPS Special Case No.28 of 2016/103/2016 and 11/2018, is suspended and the applicant/appellant be released on bail on executing P.R. Bond in the sum of Rs.1,00,000/-, with one or more sureties in the like amount;

- (iii) Applicant/appellant shall deposit his passport in the Registry of this Court;
- (iv) Applicant/appellant shall not leave India without prior permission of this Court;
- (v) Applicant/appellant shall attend the trial Court once in three months on first Saturday of the month;
- (vi) In the event there are two consecutive defaults in attending the trial Court, the said fact may be brought to notice of this Court. In such eventuality, the prosecution is at liberty to move an application for cancellation of bail;
- (vii) Applicant/appellant shall furnish his current residential address while executing the bail bond before the trial Court;
- (viii) Interim Application No.815 of 2019, stands disposed of accordingly.

(PRAKASH D. NAIK, J.)