

HIGH COURT OF SIKKIM
Record of Proceedings

IA No. 01 of 2018

IN

Crl. A. No. 25 of 2018

RABIN BARAILY & ANR.

APPELLANT (S)

VERSUS

STATE OF SIKKIM

RESPONDENT

Date: 28.11.2018

CORAM:

HON'BLE THE CHIEF JUSTICE

For Appellant(s) : Ms. Gita Bista, Advocate as Legal Aid Counsel.

For Respondent(s) : Mr. Thinlay Dorjee Bhutia, Addl. Public Prosecutor.

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ORDER

The appeal has been filed by the applicants/appellants against the Judgment and Order dated 30.06.2018, passed by the learned Special Judge (SADA), West Sikkim at Gyalshing, in Sessions Trial (SADA) Case No. 3 of 2018, *State of Sikkim vs. Rabin Baraily and another*, in which they were sentenced to undergo rigorous imprisonment of 7 years and to pay a fine of Rs.50,000/- (Rupees Fifty Thousand) only, under Section 9 (1) (b) of Sikkim Anti Drugs Act, 2006 (hereinafter referred to as 'SADA 2006'). In default of payment of fine, the appellants were directed to undergo simple imprisonment for six months. The appellants have also been

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sentenced to pay a fine of Rs.5,000/- (Rupees five thousand) under Section 9(b) of SADA 2006. In default of payment of fine, the appellants have been directed to undergo simple imprisonment for one month.

2. The present bail application (I.A. No. 01 of 2018) has been moved by the applicants/appellants under Section 389 of the Code of Criminal Procedure, 1973 (hereinafter referred to as 'Cr. P.C.') for suspension of sentence during pendency of the appeal and also for their release on bail.

3. Learned Additional Public Prosecutor referred to Section 15 of SADA 2006 and submitted that application is not maintainable and deserves to be rejected.

4. Section 15 of the SADA 2006 is reproduced herein below:

"15. Notwithstanding anything contained in the Code of Criminal Procedure, 1973 or any other law for the time being in force, no sentence awarded under this Act (other than Section 7 (b) shall be suspended, remitted or commuted."

5. This Court also finds similar section in Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'NDPS Act'). Section 32A of the NDPS Act is also being reproduced herein below:

"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

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of section 33, no sentence awarded under this Act (other than Section 27) shall be suspended, remitted or commuted.”

6. The constitutional validity of Section 32A of the NDPS Act was challenged in the Hon’ble Supreme Court in the matter of ***Dadu alias Tulsidas vs. State of Maharashtra: (2000) 8 SCC 437*** and the Hon’ble Supreme Court held the said section as unconstitutional to the extent it takes away the right of the Court to suspend the sentence of a person convicted under the Act. Paragraphs 16, 17, 25, 26 and 29 of ***Dadu alias Tulsidas*** (supra) are self referred hereinafter:

“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 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

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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.

x x x

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* [(1991) 9 LCD 160 (All)] has correctly interpreted the law relating to the constitutional validity of the section and the judgment of the Gujarat High Court in *Ishwar Singh M. Rajput case* [(1990) 2 Guj LR 1365 : (1991) 2 Crimes 160] 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.

x x x

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.

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(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.”

7. In view of the fact that Hon’ble Apex Court has declared the section 32A of NDPS Act (which is identical as Section 15 of SADA 2006) as unconstitutional to the extent it takes away the right of the court to suspend the sentence of a person, convicted under the Act, the objection raised by learned Additional Public Prosecutor is rejected.

8. I also heard learned counsel for the parties on merit.

9. The learned Additional Public Prosecutor referred to **Dadu alias Tulsidas** (*supra*) and submitted that the sentence awarded under the NDPS Act can only be suspended by the appellate Court only and strictly subject to the conditions spelt out in Section 37 of the NDPS Act. Similar provision is found in SADA 2006 which is Section 18 of SADA 2006.

10. The contention of learned Counsel for the applicants is that the applicant No.1 is 19 years old. He is the only son of his parents and his father is an aged person and is not well. He is a driver by profession and his parents are dependent on his income. It is also submitted by learned counsel for the applicant No.2 that applicant No. 2 is 25 years old and is married, having one infant child. It is also submitted that the applicants/appellants have a very

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good case in their favour for acquittal. In support of her submission, she referred to the statements of PW-3 and PW-7. PW-3, in his statement, has stated that when he reached the place of occurrence, the alleged bag was already in the possession of the police. She also referred to the statement of PW-7, in which he has stated that the bag was being searched by PW-3. By referring the statement of PW-3 and PW-7, the learned counsel for the appellants submits that PW-3 is an interested party as he has nothing to do with the bag. She submitted that testimony of PW-3 and PW-7 is sufficient to give benefit of doubt to the appellants. She submitted that in case the applicants/appellants are kept in jail with hardcore convicts for a long time and subsequently appeal is allowed, possibility of their being reformed will be negligible. It is also submitted by her that in case bail is granted to the applicants, they will not misuse the same.

11. The bail application is opposed to by the learned Additional Public Prosecutor. He submits that the learned Trial Court in its judgment, on careful examination of the prosecution witnesses, found the applicants guilty of the offence and convicted them. Therefore, bail application moved by the appellants/applicants deserved to be rejected.

12. It is true that trial court convicts a person after assessing the evidence against him and after giving its finding. In normal circumstances bail is not granted in appeal. But, bail can be granted by the appellate Court after assessing the evidence led by

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the prosecution. If appellate court finds that there is a slightest possibility of acquittal and also bail not likely to be misused by him, bail should be granted in such case. Otherwise, in case of acquittal, the days spent by the accused inside jail cannot be compensated.

13. On having given careful consideration of the submissions of learned counsel for the parties and gone through the paper-book, I am of the tentative view that the applicants have a good case. Apart from this, I am also conscious of the fact that both the applicants are of young age. The drug which was recovered was spasmoproxivom, which is used as pain killer. The offence is committed at a very young age as the appellant No.1 is only 19 years old. At this young age, it is very easy for the boys to get swayed to earn money through short cuts. They are young boys and there is a possibility of their being reformed. They have no criminal history as pointed out by the counsel for the parties and therefore they are not likely to commit offence again while on bail.

14. Considering all these facts, I am of the view that the sentence so awarded to the applicants needs to be suspended and they are entitled for bail during the pendency of this appeal.

15. Let the applicants be enlarged on bail by executing a personal bond and furnishing two reliable sureties, each of the like amount, to the satisfaction of the Judge concerned.

16. The applicants are directed not to leave the State of Sikkim without prior permission of this Court and they are further

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directed to attend the nearest police station once in a fortnight. They are also directed to be remain present during the hearing of the appeal in this Court.

- 17.** Accordingly, I.A. No. 1 of 2018 stands disposed of.
- 18.** List the appeal for final hearing on 24.05.2019.

Chief Justice
28.11.2018

jk/bp Index : Yes / No
 Internet : Yes / No