

(1991) 03 AHC CK 0087
In the Allahabad High Court
Case No : Writ Petition No. 1304 of 1990

Ram Charan

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 05-03-1991

Acts Referred:

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Article 14, 21, 32A

Citation : (1991) 03 AHC CK 0087

Hon'ble Judges : S.H.A.Raza, J and D.K.Trivedi, J

Final Decision : Allowed

Judgement

S. H. A. Raza, J.—Invoking the jurisdiction of this Court under Article 226 of the Constitution of India, the petitioners of both the above writ petitions have challenged the vires of the provisions of Section 32A of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act) which reads as under:

"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."

2. By means of the aforesaid provision which was substituted in the aforesaid Act by Act No. 2 of 1989 on 6th January, 1989 after conviction of an accused, under any of the provisions of the Act during pendency of appeal, the power of the Court to suspend, remit or commute the sentence was taken away.

3. The petitioners of both the writ petitions after conviction preferred appeals before this Court which was admitted and the same are still pending, but their bail applications were rejected for the reason that Section 32A of the Act does not provide provision, for grant of bail. Thereafter petitioners have filed the present writ petitions challenging the vires of the act on the ground that the

aforesaid provisions are arbitrary and deprive the petitioners of their lives or personal liberty without due procedure established by law.

4. The main thrust of the argument of the learned Counsel for the petitioners is that by the aforesaid provision, various provisions of the Cr. P.C. including Sections 360, 389, 432, 436, 437 and 438 have been rendered ineffective. It was further submitted that while a person alleged to have committed a murder or any other heinous offence even after conviction may be granted bail, during the pendency of his appeal by the appellate Court and the sentence awarded may be suspended, remitted or commuted by the Court or the Government as the case may be, a person involved for committing an offence under the aforesaid Act, which is less heinous and grave in comparison of culpable homicide and other heinous offences cannot be granted bail by the Court and his sentence cannot be suspended, remitted or commuted either by the Court or the Government, as the case may be.

5. As in the aforesaid writ petition the vires of Section 2A was challenged, notice was issued to Attorney General of India. A counteraffidavit has been filed in one of the writ petitions and Mr. D. S. Randhawa, Chief Standing Counsel, submitted that the counteraffidavit filed in one writ petition be also treated as counteraffidavit in the other writ petition.

6. Although Section 32A puts an embargo to suspend, remit or commute the sentence after conviction of an accused, during the pendency of an appeal, it has been averred in the counteraffidavit that there is distinction between the suspension of sentence and grant of bail and order to suspend a sentence, cannot be said to be an order for grant of bail. Further the bar against suspension, remission or commutation of sentence has been made subject to the provisions of Section 33, which provides for application of Section 360 of the Code of Criminal Procedure 1973, and of the Probation of Offenders' Act, 1958. Even under Section 389, the powers of the High Court, during the pendency of appeal, to suspend sentence and also to grant bail are the two distinct powers independent of each other power to grant bail has not been taken away from higher Courts (emphasis ours) as alleged in this paragraph and even now the High Court can exercise this power subject to the limitations of Section 37. power of High Court has not been taken away regarding the grant of bail. However, the facts remains that the Act has been brought into force for the purpose of making drug offences more cognizable and Section 32A has been inserted with a view to ensure that the drug offenders do not escape with lesser punishments. In paragraph 12 of the counteraffidavit it was further alleged that a person cannot claim bail as of right. The question of release on bail is entirely a matter of discretion with the Court. While rejecting the bail of the petitioner the Hon'ble Judge of this Court had not held that it had been refused as there existed a statutory bar in the Act itself.

7. Mr. D. S. Randhawa, learned Chief Standing Counsel appearing on behalf of the opposite parties, submitted that the aforesaid averments were made in the

counteraffidavit, only with regard to right of the High Court to grant bail during the pendency of the trial of the offence, but after conviction Courts have been completely fettered either to suspend, remit or commute the sentence or grant bail. Thus, Mr. Randhawa wants us to travel beyond the averments made in the counteraffidavit. He contended that no accused person has any right much less a fundamental right either to file an appeal or get the sentence suspended, remitted or commuted. The right to prefer an appeal is a statutory right and the power to suspend, remit or commute the sentence or grant bail, has also been vested to the Court or other authorities by the statute. When the Legislature has the authority to confer such powers the Legislature can also snatch or take away that power. Although the argument of Mr. Randhawa is clearly at variance of what has been stated in the counteraffidavit in which it was stated "a convicted person cannot claim bail as of right. The question of release of bail is entirely a matter of discretion of the Court"; but treating his argument on its face value, we would like to discuss the points raised by him.

8. Mr. Randhawa has vehemently urged that the Act was enacted to prescribe deterrent penalties to meet the challenges of activities of well organised gangs of smugglers as the three earlier Act, Opium Act, 1857, Opium Act, 1878 and Dangerous Drugs Act, 1930 prescribed lesser punishment and in this regard referred to the objects of the present enactment which are reproduced below:

(i) The penalties prescribed under these Acts are not sufficiently deterrent to meet the challenges of the activities of wellorganised gang of smugglers. The three Acts i.e. Opium Act (1857). The Opium Act (1878) and Dangerous Drugs Act (1930) prescribe a maximum term of imprisonment for three years with or without fine for repeated offence. No minimum sentence has been prescribed. Therefore, drug traffickers, have been let off with nominal sentences. The country, in recent past have been facing the pressing problem of transit traffic of drugs being smuggled from the neighbouring countries.

(ii) The existing Central laws do not invest the officers of a number of Enforcement Agencies of the Central Government Department of Narcotics, Customs, Excise etc. with the power of investigation of offences under the said laws.

(iii) Since the enactment of the aforesaid three Central Acts, international cooperation in the control of drug misuse has been developed by various countries and the concerned Governments, with the idea of welfare schemes for their people are cooperating to control the production and distribution of various drugs. The united Nation has worked through such bodies as Untied Nation Commission on .Narcotic Drugs and the World Health Organisation"s Committee on Addiction Producing Drugs

(a) the estimate the world"s annual needs for various drugs for administration in therapeutic.....dosage and to curtail the excess production of these drugs in terms of legitimate needs

(b) to develop international understanding and promote international agreement in respect of their needs to curb the malady and to provide the source of information on drugs and their control through international bulletins like U. N. Bulletin on Narcotics and W. H. O. Technical Report series on various aspects of drug abuse. The Government of India has been a party to these treaties and a participant to these conventions, which entail several international obligations not fully covered by these acts.

(iv) During recent years, new drugs of addiction known as psychotropic substances have appeared on the scene and posed very serious problems. There is no law to enable the Government to exercise control over these substances, as envisaged in the Convention of Psychotropic Substances (1971) to which India is a party."

9. It seems that Mr. Randhawa has relied upon the commentary of some book which dealt with the purpose and object of the Act. The preamble of this legislation is limited to the extent that this Legislation was enacted to consolidate and amend the law relating to Narcotic Drugs, to make stringent provisions for the control and regulation of operations relating to narcotic drugs and psychotropic substances and for matters connected therewith. Undoubtedly, the object and purpose of this enactment is to prescribe deterrent punishment to those persons who deal with Narcotic Drugs and Psychotropic Substances and indulge into smuggling. Nobody can deny that in the recent past, all over the World and in this country addiction of drugs and its smuggling has touched greater heights and this menace has posed serious problems. The present petitioners have not even challenged the vires of the Act in toto but have only challenged the vires of Section 32A of the Act hence the argument of learned Chief Standing Counsel that the provision of Section 32A is in conformity with the purpose and object of the Act which provide deterrent punishment for the offence committed under the Act has no substance. This Act itself while providing deterrent punishment, has vested the Court the power to grant bail during the trial of the case, hence it has to be seen as to whether the right to suspend, remit or commute the sentence which has been abrogated by the provisions of Section 32A is in consonance with the purpose and objects of the Act which seek to provide deterrent punishment for the offence.

10. Article 21 of the Constitution envisages that a person can be deprived of his life and liberty only in accordance with the procedure which is fair, reasonable and just. The Act, undoubtedly provides a deterrent punishment to a person involved into the commission of an offence under any provisions of this Act, but the award of deterrent punishment does not mean that the moment a person is accused of the said offence, he could be straightaway put behind the bars for the given period. A person involved into the commission of an offence can be released on bail during the trial of the case. The Courts have not been fettered, to release an offender during the trial of the case but after conviction, an embargo has been put in, by means of which the Courts cannot suspend, remit

or commute the sentence meaning thereby that the power of the Court to grant bail to a convicted person has been taken away even when the appeal filed against the conviction has been pending. Hence, it cannot be said that the provision of Section 32A of the Act has any nexus with the proposed object of the Act.

11. Mr. D. S. Randhawa, Chief Standing Counsel of the Union of India while defending the provisions contained in Section 32A of the Act, has advanced the argument that a person has no fundamental right or a substantial right to file an appeal. Right to prefer an appeal is statutory right. He has drawn our attention to certain provisions of the Cr. P.C. as well as certain other Acts which do not provide any provision for preferring an appeal against conviction. He further submitted that similarly the provisions regarding suspension, remission and commutation of the sentence are also statutory right and it is within the Legislative powers of the Union to alter, amend or abrogate the provisions regarding suspension, remission and commutation of the sentence. Hence the provisions of Section 32A are valid and the same were enacted with a view to curb and eliminate the possibility of drug traffickers being released on bail after conviction. It was also submitted that during the trial of the case under any offence pertaining to this Act a person could be released on bail as his guilt had not been determined but when a person by the trial Court is proved to be guilty of the offence under the Act, the situation becomes different and thus the provisions contained in Section 32A putting a ban to suspend, emitted or commute the sentences is fully justified.

12. In the case of Sunil Batra v. Delhi Administration AIR 1978 SC 1675, it was indicated as under:

"It is no more open to debate that convicts are not wholly denuded of their fundamental rights. However, a prisoner's liberty is in the very nature of things circumscribed by the very fact of his confinement. His interest in the limited liberty left to him is then all the more substantial."

13. The word "law" in its expression prescribed by Article 21 of the Constitution has been interpreted to mean in Maneka Gandhi's case AIR 1978 SC 592, that the law must be "right and just and fair" and not arbitrary, fanciful or oppressive; otherwise, it would be no procedure at all the and requirement of Article 21 would not be satisfied. But if it is arbitrary it would be violative of Article 14.

14. The question as to whether after conviction there existed presumption with regard to the guilt of the accused person has been the subjectmatter or debate in various cases. A Full Bench of the Kerala High Court in the case of Uthaman & Ors. v. State of Kerala (3), 1983 Cr LJ 74, observed as under:

"We find no warrant for any dogmatic approach that when once a person accused of an offence under Section 302 of the I.P.C. has been convicted and sentenced to life imprisonment the Appellate Court is not to enlarge the accused on bail

pendente lite. To state the proposition in such categorical terms would be to self impose a restriction on the exercise of power by the appellate Court under Section 398 read with Section 439 (1) of the Cr. P.C. That will be to read into the power of the High Court a limitation not warranted by the provisions of the Criminal Procedure Code. After referring to the decision, of the Supreme Court in Gudaikanti Narasimhulu v. Public Prosecutor, A. P., AIR 1978 SC 429:1978 Cr.LJ. 502; Babu Singh v. State of U. P., AIR 1978 SC 527:1978 Cr LJ 651 Kashmira Singh v. State of Punjab, AIR 1977 SC 2147 : 1977 Cr LJ 1746 and Gurcharan Singh v. State (Delhi Admn.), AIR 1978 SC 179 : 1978 Cr. LJ 129. the learned Judges of the Division Bench in Rajan v. State, 1981 Ker LT 285 :1981 Cr. LJ (NOC) 206. concluded thus:

"It follows that in disposing of an application for bail the High Court and the Court of Session are obliged to consider whether there are reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life. If that be so, the identical consideration should weigh with the High Court in the matter of suspension of sentence and grant of bail after the accused is found guilty of an offence punishable with death or imprisonment for life and is convicted for such an offence. It is true that Section 389 does not specify the grounds on which suspension of sentence can be allowed. But the very fact that the Section directs that reasons should be stated before suspension is allowed shows that suspension of sentence is not to be taken as a matter of course. Considerations which should weigh with the Court in the matter of granting bail pending trial should mutatis mutandis apply and should not be ignored while disposing of an application for suspension of sentence after a conviction is entered. In a case where the Sessions Judge has after taking evidence after a conviction for murder, it should not be assumed that there are no reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment for life. The presumption should be otherwise."

"It is the idea conveyed in the last two sentences of the passage quoted that is seriously objected to by learned Counsel for the petitioners Sri P. V. Ayyappan. May be in considering the possibility of the accused jumping bail the question whether there is reasonable ground to believe that the accused had committed a serious crime is relevant. It is in that view that the High Court takes notes of this circumstance under Section 439 (1) of the Code. If either because the evidence is so meagre that the accused is not likely to take the risk of jumping bail anticipating conviction in appeal or there are other reasons why on the facts of a case the Court could form the opinion that the accused would not jump bail if released then bail may be granted unless it be that the Court may have reason to believe that the release of the accused may be of danger to others or to himself or he may cause self effacement. In determining whether there are reasonable grounds for believing that the accused has committed an offence punishable with death or life imprisonment the Court looks into materials then available to it, whether it be at the stage of investigation or at the stage of trial. Such would be

the case even in the appeal. Merely because the appeal is against a conviction there should not be a presumption that the accused has committed the offence as that would be to foreclose on the plea of the accused that on the materials available there is no justification to refuse bail. Inasmuch as the learned Judges of the Division Bench have categorically indicated that a presumption of existence of reasonable grounds for believing that the accused has been guilty of an offence punishable with death or imprisonment would arise by reason of a conviction, we much respectfully disagree. That is not a correct statement of the law. To that extent the dictum laid down in the Division Bench decision requires to be read as modified."

"We are not going into the facts of the bail petition as we think it is appropriate that the Division Bench, which has referred the petition to a Full Bench only because of the question of law involved, deals with the petition. Therefore, we direct reporting of the bail petition for final orders before the Division Bench."

15. In Gudaikanti's case (supra) Hon"ble Supreme Court observed as under:

"We are concerned with the penultimate stage and the principal rule to guide release on bail should be to secure the presence of the applicant who seeks to be liberated, to take judgment and serve sentence in the event of the Court punishing him with imprisonment. In this perspective, relevance of consideration is regulated by their nexus with the likely absence of the applicant for fear of a severe sentence, if such be plausible in the case."

16. The accused were granted bail despite the fact that they had the conviction by the High Court against them. The Court was persuaded to do so by reason of the benefit of an intermediate acquittal. The nexus of such acquittal to the release on bail is indicated by Krishan Iyer, J. thus:

"The panic which might prompt the accused to jump the gauntlet of justice is lean, having enjoyed the confidence of the Courts verdict once. Concurrent holdings of guilt have the opposite effect."

17. Hon"ble Krishna Iyer, J. in Babu Singh v. State of U. P. AIR 1978 SC 527, referred to another circumstance which would tilt the scales of justice in favour of releasing on bail pendente lite. The thought expressed by Justice Bhagwati on this question in Kashmira Singh v. State of Punjab, AIR 1971 SC 2147 at 2148 : 1977 Cr LJ 1747 was noticed by the learned Judge in that context. Justice Bhagwati referring to the practice in regard to the bail in cases where a person has been sentenced to life imprisonment for an offence under Section 302 of the I.P.C. found that there may be circumstances which justify departure from the practice and one such circumstance which the learned Judge dealt with in that case was that of the Court being unable to dispose of the appeal within a reasonable time."

18. It is as settled position that merely because an appeal against the conviction is pending there should not be a presumption that the accused had committed an

offence as that would be to a fore close on the plea of the accused that on the materials available, there is no justification to reduce bail. The view that presumption of existence of reasonable grounds believing that the accused is guilty of an offence would arise only by reason of a conviction which is affirmed by the appellate Court but that presumption cannot be taken till the final verdict of guilt is pronounced and confirmed by all the Courts.

19. An order on a bail application does not finally determine the guilt or innocence of a person accused or convicted of an offence. All that such an order postulates that pending inquiry or trial and in the case of a convicted person pending an appeal it is not absolutely necessary that his liberty should be curtailed. The following observations of Hon''ble Mr. Justice Krishna Iyer, as the then was, in Gudaikanti's case (supra) are significant:

"The significance and sweep of Article 21 make the deprivation of liberty a matter of grave concern and permissible only when the law authorizing it is reasonable, even handed and geared to the goals of community good and State necessity spelt out in Article 19. Indeed, the considerations I have set out as criteria are germane to the constitutional proposition I have deduced. Reasonableness postulated intelligent care and predicates that deprivation of freedom by refusal of bail is not for punitive purpose but for the bifocal interests of justice to the individual involved and society affected."

"We must weigh the contrary factors to answer the test of reasonableness, subject to the need for securing the presence of the bail applicant. It makes sense to assume that a man on bail has a better chance to prepare or present his case than one remanded in custody. And if public justice is to be promoted, mechanical detention should be demoted. In the United States, which has a constitutional perspective close to ours, the function of bail is limited, community roots of the applicant are stressed and, after the Vera Foundations' Mahattan Bail Project, monetary suretyship losing ground. The considerable public expense in keeping in custody where no danger of disappearance or disturbance can arise, is not a negligible consideration. Equally important is the deplorable condition, verging on the inhuman, of our subjails, that the unrewarding cruelty and expensive custody of avoidable incarceration makes refusal of bail unreasonable and a policy favoring release justly sensible."

"A few other weighty factors deserve reference. All deprivation of liberty is validated by social defence and individual correction along an anticriminal direction. Public justice is central to the whole scheme of bail law. Fleeing justice must be forbidden but punitive harshness should be minimised. Restorative community service, meditative drill, study classes or other resources should be innovated and playing foul with public peace by tampering with evidence, intimidating witnesses or committing offences while on judicially sanctioned "free enterprise", should be provided against."

20. In the case of G. S. Sibbia v. State of Punjab, AIR 1980 SC 1632, it has been

observed as under:

We find a great deal of substance in Mr. Tarkunde's submission that since denial of bail amounts to deprivation of personal liberty, the Court should lean against the imposition of unnecessary restrictions on the scope of Section 438, especially when no such restrictions have been imposed by the Legislature in the terms of that section. Section 438 is a procedural provision which is concerned with the personal liberty of the individual, who is entitled to the benefit of the presumption of innocence since he is not, on the date of his application for anticipatory bail, convicted of the offence in respect of which he seeks bail. An over generous infusion constraints and conditions which are not to be found in Section 438 can make its provisions constitutionally vulnerable since the right to personal freedom cannot be made to depend on compliance with unreasonable restrictions. The beneficent provision contained in Section 438 must be saved, not jettisoned. No doubt can linger after the decision in *Maneka Gandhi case*, (1978) 1 SCC 248: AIR 1978 SC 597 that in order to meet the challenge of Article 21 of the Constitution, the procedure established by law for depriving a person of his liberty must be fair, just and reasonable. Section 438, in the form in which it is conceived by the Legislature, is open to no exception on the ground that it prescribes a procedure which is unjust unfair. We ought at all costs, to avoid throwing it open to a constitutional challenge by reading words in it which are not to be found therein. The aforesaid observations were made in the context of the provisions of Section 438, Cr. P.C. which provide for the grant of anticipatory bail.

21. The question involved in this case, which is of a paramount importance, is that as to whether the Parliament by enacting provisions of Section 32A can take away the right of a convicted person to bail while his appeal has been pending when such a right is available to the convicts of more heinous crimes like murder, robbery and rape etc.

22. It was submitted on behalf of the opposite parties that this provision is intra vires for the reason of the fact that persons charged with the commission of the offences in the Act fall in a category, which is distinct from the class of persons charged with the commission of offences under the Indian Penal Code or other Acts. The person indulging in the offences under the Act form a member of well organised class. In the case of *Bimal Kaur Khalsa v. Union of India & Ors.*, 1988 Cr. LJ (Punj. & Har.) 869 (FB) it was indicated as under:

"Neither public policy nor the supposed interest of the society would justify the ban on the Designated Court or the High Court to grant bail inter alia only if it is in a position to give a finding that when on bail, the accused was not likely to commit any offence. This would amount to making an impossible demand on the Court, more so for the reason that an investigating officer while releasing the accused on bail in exercise of provision of Section 169, Code of Criminal Procedure, is not required to entertain any such belief of the further behaviour of the accused nor when the Designated Court decides to discharge an accused in

terms of the provisions of Section 227 of the Code of Criminal Procedure. Therefore, the last portion of clause (b) of subsection (8) of Section 24 of the Act, which reads:

"and that he is not likely to commit any offence while on bail alone is ultra vires."

23. The aforesaid observations were made in a case falling under Terrorist and Disruptive Activities (Prevention) Act, 1987. In the present case the right of an accused for the grant of bail was not taken away during the trial of the case but the same was taken away after conviction even while his appeal against the conviction had been pending. The Parliament did not put a complete embargo on the right of an offender under the Act to be released on bail. The Parliament has, undoubtedly provided deterrent punishment against the persons committing the offences under any provisions of the Act, but even allowed the persons so charged to be released on bail during the trial of the case but had taken away the right of a person to be released on bail after conviction, while his appeal has been pending. Thus, it is clear that the persons who are charged with the Commission of any of offences under the Act, as far as the grant of bail to such persons during the trial is concerned are similarly situated with the commission of offences, under Indian Penal Code, as far as the grant of bail to such persons during the trial is concerned, are similarly situated and they have not been classified as different classes; but persons charged with the commission of offences under the Act have been differently treated, after conviction with the other convicted persons committing offences under the provisions of Indian Penal Code or any other law, for purposes of refusing or granting bail to such persons. If the purpose and object of the Act was to treat the persons indulging with drug trafficking, a different class; for the reason that such persons are a menace to the society, the power of the Court to release such persons on bail, even at the stage of trial could have been altogether abolished or restricted. But the Legislature in its wisdom did not prefer such a course, but instead, completely fettered the power of the Courts to suspend the sentence after conviction.

24. Learned Chief Standing Counsel on behalf of Union of India has failed to explain the reasonableness of the provisions contained in Section 32A. He has also failed to explain as to why a person dealing with narcotic drugs can be granted bail during the pendency of the trial but he could not avail the same benefit after conviction. The explanation which has been submitted is limited only to the extent that after conviction there would be a presumption of guilt against the person convicted. No such presumption could be drawn till the conviction is affirmed by the Appellate Court.

25. The provisions of Section 32A cannot be said to have been enacted in consonance with the objects and purpose of the Act. There appears to be no nexus with the purpose and object of the Act.

26. It is apparent that the Act has provided deterrent punishment to the persons involved in drug trafficking or dealing with drugs undoubtedly such persons

belong to a different class. The Legislature was justified in treating such persons differently by providing severe punishment to such persons. But the question, with which this Court is concerned is limited to the extent as to whether the Court shall have a right to suspend, remit or commute the sentence or not. In this regard a passage from paragraph 116 of the *Bimal Kaur* (supra) is relevant:

"As to the challenge of vires of Section 27(7) of the Act, it may be observed that the provision of Section 438 was incorporated for the first time in the revised Code of Criminal Procedure, 1973. Right to anticipatory bail did not flow from Article 21 of the Constitution either expressly or impliedly. This right has been conferred by the statute enacted by the Parliament. The Parliament by enacting another law or by amending the Code of Criminal Procedure can take it away also. One may, however, with some justification argue that right to anticipatory bail cannot altogether be denied in some cases, while at the same time it is being made available to some other. This would be clearly discriminatory and therefore would be violative of the mandate of Article 14 of the Constitution, unless the persons who have been denied this right constitute a class distinct from those to whom such a right remains available." (emphasis ours).

It was further held:

"In my opinion Section 27(7) is intra vires the provisions of Article 14 of the Constitution in that the persons charged with the Commission of Terrorist Act fall in a category which is distinct from the class of persons charged with commission of offences under the Penal Code and the offences created by other statute. The persons indulging in Terrorist Act from a member of well organised secret movement. The enforcing agencies find it difficult to lay their hands on them. Unless the Police is able to secure clue as to who are the persons behind this movement, how it is organised, who are its active members and how they operate it cannot hope to put an end to this movement and restore public order. The police can secure this knowledge only from the arrested terrorists after effective interrogation. If the real offenders apprehending arrest are able to secure anticipatory bail then Police shall virtually be denied the said opportunity."

"Now coming to that part of the provision of subsection (8) of Section 20 of the Act, which imposes restrictions on the granting of bail to a person accused of an offence under the Act, it may be observed that neither public policy nor the supposed interest of the society would justify the ban on the Designated Court or the High Court to grant bail, inter alia only if it is in a position to give a finding that when on bail, the accused was not likely to commit any offence. This would amount to making an impossible demand on the Court, more so for the reason that an investigating officer while releasing the accused on bail exercise of provision of Section 169, Cr. P.C. is not required to entertain any such belief of the future behaviour of the accused nor when the Designated Court decides to discharge an accused in terms of the provisions of Section 227 of the Cr. P.C. The abovesaid provisions are in the following terms:

"Section 169. Release of accused when evidence deficient If, upon an investigation under this Chapter it appears to the officer in charge of the police station that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer, shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear if and when so required, before a Magistrate empowered to take cognizance of the offence on a police report, and to try the accused or commit him for trial."

"Section 227. Discharge. If, upon consideration of the record of the case and the documents submitted therewith, and after hearing the submissions of the accused and the prosecution in this behalf, the Judge considers that there is not sufficient ground for proceeding against the accused, he shall discharge the accused and record his reasons for so doing."

27. There is no doubt that the persons dealing with Narcotic Drugs and Psychotropic Substances are a separate and distinct class or category distinct from the class of persons charged with commission of offences under the Penal Code and the offences under any other statute, but even then the provision of Section 32A of the Act cannot stand on the scale of test of reasonableness which is the very basis and foundation of Article 14 of the Constitution particularly for the reason of the fact that during trial a person charged with offences under the Act could be enlarged on bail but provisions of Section 32A of the Act put a complete embargo on the right of a person to be released on bail after conviction by the trial Court even when his guilt has not yet been determined.

28. Hence, it cannot be said that persons charged with the commission of offence or offences under the Act in question who have been denied the right to be released on bail, after conviction constitute a distinct class from those whom such a right remains available, during the trial of the case. The provisions of Section 32A of the Act are clearly discriminatory for the reason that similarly situated persons have been treated distinctively and differently without any nexus to the object sought to be achieved.

29. Section 32A, undoubtedly, amounts to a sentence and this provision has made the right of an appeal illusory, redundant, rather nugatory and nonexistent, for the reason of the fact that even when after a lapse of seven or eight years, when the appeal would come up for disposal, the person would have to undergo an ordeal by remaining in detention, for such a long period. In case the appeal would result into acquittal after a lapse of considerable period, a citizen would have to remain incarcerated for no fault of his own. Learned Chief Standing Counsel on behalf of Union of India relying upon the case of *Usmanbhai Dawoodbhai Menon v. State of Gujarat* AIR 1988 SC 922 submitted that the Act in question is limited in its scope and effect and the intention is to provide a stringent measure to combat the growing menace of smuggling and drug addiction and hence the power of the appellate Court to entertain an application for bail after conviction was barred. In the case of *Usmanbhai* (supra) the Hon

ble Supreme Court indicated as under:

"Subsection (8) of Section 20 in terms places fetters on the power of a Designated Court on granting on bail and the limitations specified therein are in addition to the limitations under the Criminal Procedure Code. In view of the more stringent conditions subsection (8) a Designated Court should carefully examine every case coming before it for finding out whether the provisions of the Act apply or not. Since before granting bail the Court is called upon to satisfy itself that there are reasonable grounds for believing that the accused is innocent of the offence and that he is not likely to commit any offence while on bail, the allegations of fact, the police report along with the statements in the case diary and other available materials should be closely examined. A prayer for bail ought not to be rejected in a mechanical manner".

In the instant case, it was held:

30. "The Designated Officer had not examined whether the case could be dealt with under the ordinary procedure prescribed by the Criminal Procedure Code, before rejecting bails and therefore, the orders rejecting bails were set aside, 1987 Cr. LJ 1955 (Guj.) Reversed.

31. It is evident that the Terrorist and Disruptive Activities (Prevention) Act, 1987, is a special Act and the same was enacted to treat the terrorism as an heinous offence and created a Special Court called as Designated Court to deal with a grave problem and provided special treatment for the trial of the said offences.

32. The Act in question although can also be treated to such an Special Act, which treats drug addiction, smuggling or manufacture of drugs as a special criminal problem and has created special court to try such offences. Undoubtedly the Act is drastic in nature and punishment for offences have been made severe.

33. As stated above, inspite of the harshness of the Act a person involved in any of the offences enumerated in various sections of the Act during trial can be released on bail under Section 37 of the Act in question. This provision is similar to the provisions contained in subsection (8) of Section 20 of the Terrorist and Disruptive Activities (Prevention) Act, 1985. As stated above, the Full Bench of Punjab and Haryana High Court in the case of BimalKaur Khalsa (supra) pronounced a verdict that the last portion of clause (b) of subsection (8) of Section 20 of the Act which reads "and that he is not likely to commit any offence while on bail"; is ultra vires.

34. We are in respectful agreement with the aforesaid observations of the Hon'ble Judges of Punjab and Haryana and we are of the firm view that subclause (ii) of clause (b) of subsection (1) of Section 37 which reads "and that he is not likely to commit any offence while on bail" cannot stand on the scale of reasonableness but we refrain ourselves in declaring it as ultra vires for the reason that the said provision had not been challenged in the present petition.

35. There is no denial of the fact that the Terrorist and Disruptive Activities is more drastic in nature, for the reason that terrorism had assumed such a problem which has even threatened the security of the country, but even such a drastic act did not altogether put an embargo upon the right of the Designated Court to grant bail in appropriate cases. Subsection (8) of Section 20 of the said Act only places certain restrictions and fetters on the power of the Designated Court to grant bail to an accused during the trial; and even after conviction the powers of the Court to grant bail was not taken away.

36. In the case of Usmanbhai (supra) the High Court dismissed the bail applications for the grant of bail under Section 439 of Code of Criminal Procedure. The Hon'ble Supreme Court set aside the orders passed by the various Designated Courts in dismissing the applications for bail and Hon'ble Supreme Court directed the Courts to consider each particular case on merits as to whether it falls within the purview of Sections 3 and 4 of the Terrorist and Disruptive Activities (Prevention) Act, 1987 and if so, whether the accused in facts and circumstances of the case were entitled to bail while keeping in view the powers of limitation under Section 20(8) of the Act. Hon'ble Supreme Court further directed that where the Designated Courts find that the acts alleged in the police report or complaint of facts under Section 14 (1) do not fall within the purview of Section 3 and/or 4 of the Act, they shall in exercise of powers under Section 18 of the Act, transfer the cases for trial to the ordinary criminal Courts. The accused persons who have been enlarged on bail by this Court shall continue to remain on bail until their applications for bail are dealt with by the Designated Courts with advertance to observations made above.

37. It is not disputed that right of appeal is only a statutory right and that right has not been conferred by the Constitution and it is not a constitutional right. Even this Act has conferred only a statutory right to an accused person to prefer an appeal against the conviction. But the importance of filing an appeal and the right of the Appellate Court to suspend, remit or commute the sentence cannot be minimised. It is needless to emphasis that the Courts and other authorities, suspend, remit or commute the sentence only when its denial results into miscarriage of justice. The suspension of sentence and grant of bail only in appropriate cases is, undoubtedly, essential for the healthy, objective and fair administration of justice. It serves as forceful instrument for creating confidence in the people in the fairness, objectivity and impartiality of the administration of justice. Public confidence in the administration of justice is of such a great significance that there can be no two opinions on the broad propositions that in discharging their functions, Courts must generally hear cases which inspire confidence amongst the people at large. The power to suspend sentence and to grant bail, particularly in heinous offences is always exercised by the Court with great caution and the bail is granted only when the Court is satisfied, beyond a doubt, that the ends of justice would be defeated if either the sentence is not suspended or the bail is not granted but to deny existence of such power to the Court would be, to ignore the primary objective of adjudication of an appeal.

Since it is the Court which is interested (entrusted ?) with the task of imparting justice, it is alone, the best Judge to decide as to whether the circumstances warrant the suspension of the sentence and grant of bail or not.

38. As stated above, an order of suspension of the sentence or an order on bail application does not finally determine the guilt or innocence of an accused or convicted of an offence. All that such an order postulates is that pending an inquiry or trial and in the case of a convicted person pending an appeal by him, it is not absolutely necessary that his liberty should be curtailed.

39. By means of the aforesaid provision the power of the appropriate Government under Sections 432 and 433, Cr. P.C. to suspend, remit or commute the sentence has also been snatched away. Even in cases where a sentence of imprisonment of life is imposed on conviction of a person, for an offence for which death is one of the punishment provided by law or where a sentence of death imposed on a person has been commuted under Section 433, Cr. P.C. in which there is life imprisonment such a person who had served at least fourteen years of imprisonment may be released by the appropriate Government, but by means of Section 32A a blanket ban has been imposed on the right of the appropriate Government to suspend, remit and commute the sentence of a convict. When in offence like murder, dacoity with murder, sedition, waging war against State etc. which are more heinous in nature, the sentences could be suspended, remitted and commuted by the Courts during the stage of the trial or of an appeal after conviction and the appropriate Government have also been given the power to suspend, remit or commute the sentences after conviction, there exists no rational basis for putting a complete embargo upon the rights of the Courts as well as the appropriate Government not to suspend, remit or commute the sentences in offences falling under the Act which are less heinous in nature in comparison of the aforesaid offences. There is no doubt in our mind that the drug trafficking is a great social menace and it should be curbed with relentless efforts by the Government but we cannot accept this proposition advanced on behalf of opposite parties that sentence or conviction, for an offence passed, against a person by the trial Court, finally determines his guilt and during the pendency of his appeal the sentence cannot be suspended, remitted or commuted either by the Court or appropriate Government. If this proposition is accepted then the right of an appeal will become redundant and illusory.

40. The provisions of Section 32A of the Act, leave on discretion to the Court in the matter of deciding, as to whether after conviction the sentence deserves to be suspended or not and also under what circumstances, restrictions or limitations, the suspension of sentence or grant of bail could be passed. This section also does not provide any guideline regarding the early disposal of the appeal within a specified short period. There is no doubt in our mind that the said provision also suffers from arbitrariness and is violative of the mandate of Articles 14 and 21 of the Constitution of India for the reason that it cannot be tested on the scale of reasonableness as it provides a procedure which cannot be

said to be fair, just and reasonable.

41. We cannot shut out eyes also, from the fact that the Legislature after enacting the Prevention of Illicit Traffic in Narcotic Drugs and Psychotropic Substances Act, 1988, has assumed enormous powers to detain a person as well as a foreigner, without trial, to prevent him from indulging into such activities. Appropriate Governments may resort to those provisions in suitable cases. We are of the view that there existed no rational or reasonable basis to deny the right of a person to claim suspension, commutation or remission of sentence or to be released on bail if the Court passes such an order, even after conviction while his appeal against the conviction has been pending or otherwise provided under law for the time being in force.

42. In view of what this Court has indicated hereinabove, we are of the view that this writ petition deserves to be allowed.

43. In the result, the writ petitions succeed and are allowed. The provisions of Section 32A of the Narcotic Drugs and Psychotropic Substances Act, 1985, are hit by Articles 14 and 21 of the Constitution of India and are declared ultra vires and the same cannot be given effect to. In the circumstances of the case there will be no order as to costs.

44. Per Hon'ble D. K. TRIVEDI, J. I have had the advantage of going through the judgment prepared by brother S. H. A. Raza, J. and I am in general agreement with him. However, by this order I am giving some more reasons in support of the same.

45. In the instant case the petitioners were convicted under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (N. D. P. S. Act) and sentenced to undergo ten years' rigorous imprisonment and pay a fine of Rs. 1 lac. The petitioners filed appeal before this Court and also applied for bail but in view of the provisions of Section 32A of the Act their bail applications were rejected. The petitioner through these writ petitions, therefore, challenged the vires of Section 32A of the Act on the ground that the provisions of Section 32A debarring the High Court from releasing them on bail are unconstitutional, ultra vires, unreasonable, unjust and improper as well as against the principles of natural justice.

46. Section 36B of the Act provides appeal against the order of the trial Judge to High Court. It is settled law that right of appeal is a creation of Statute and it is not mere right of procedure but substantive right (See *Garekapati Veeraya v. N. Subbiah Chowdhry*, AIR 1957 SC 540 and *P. Mohd. Meera Lebbhai v. Thirumalaya Gounder Ramaswamy Gounder*, AIR 1966 SC 430. It is also settled principle of law that such right can be taken away by a subsequent enactment but after the decision of the case of *Smt. Maneka Gandhi v. Union of India*, AIR 1978 SC 597, It has been settled that the concept of reasonableness must be projected in the procedure as contemplated under Article 21 of the Constitution of India and the procedure must be right, just and fair and not arbitrary, fanciful or oppressive.

We cannot also overlook the fact that in normal course appeals filed in the High Court come up for hearing after a lapse of several years. At present the appeals are listed for hearing after a lapse of 78 years. It may also be pointed out that preventive of illicit traffic in the Narcotic Drugs and Psychotropic Substances Act, 1988 has also been enforced.

47. Keeping in mind the above noted facts if we consider the procedure provided under Section 32A of the Act then we would find that the procedure prescribed under this section without providing any other special procedure for early disposal of appeal is on the face of it unjust, unfair and violative of Article 21 of the Constitution of India. The question is whether by introducing Section 32A the concept of reasonableness has been projected as contemplated by Article 21 of the Constitution of India or not. In cases where appeal has been admitted and there is fear that sentence would expire before appeal can be disposed of. In my opinion it would not be proper to debar the Court from considering the question of release of accused on bail because in the said event it cannot be said that an effective right of appeal has been given to the accused. In my opinion, if right of appeal has been provided by the Legislature then it will be presumed that effective right of appeal has been given to the accused. It cannot be said that the Legislature has provided a right of infructuous appeal. However, in no case this right of infructuous appeal can be said to be fair, right and not arbitrary, fanciful or oppressive. In fact the procedure provided under Section 32A of the Act without further providing any special procedure for disposal of appeal within a limited period, in my opinion, is arbitrary and unfair. In my opinion, it cannot be said that the concept of reasonableness has been projected in the said procedure as contemplated in Article 21 of the Constitution of India. There will be no question of filing an appeal if the entire sentence of imprisonment would have run out before the appeal comes up for hearing, thereby rendering the purpose of appeal infructuous. The accused should not be allowed to continue in jail and serve out full sentence of imprisonment imposed by the trial Judge because the High Court has neither power to release him on bail in view of Section 32A of the Act nor it can dispose of the appeal. The High Court even after scrutinizing the judgment and record and after coming to the conclusion that serious infirmities have been committed by the trial Judge could not grant bail to the accused in view of Section 32A of the Act. As pointed out above, on the other hand, if the State comes to the conclusion that a particular person is in the habit of committing offence under the N. D. P. S. Act then it can pass an order of detention under Prevention of Illicit Traffic under the Narcotic Drugs and Psychotropic Substances Act, 1988. In view of the above mentioned facts in my opinion taking away of this power by Section 32A of Act and permitting the appeal to become infructuous to the extent of imprisonment cannot be said to be fair and just. In any case, in my opinion, the intention of the Legislature cannot be said to provide ineffective right of appeal to the accused and; therefore, also the provisions of Section 32A of the Act are ultra vires and liable to be struck down.

48. In view of separate judgment passed by us, the provisions of Section 32A of Narcotic Drugs and Psychotropic Substances Act, 1985, are declared ultra vires and the same cannot be given effect to.

49. A copy of this order may be given to the learned Counsel on payment of requisite charge within a week. Petitions allowed.