



IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 29th DAY OF MARCH, 2021

BEFORE

THE HON'BLE MR. JUSTICE K.NATARAJAN

CRIMINAL PETITION No.8065 of 2020

BETWEEN

SRI ARJAV DEEPAK MEHTA
AGED ABOUT 27 YEARS
S/O DEEPAK MEHTA
R/AT PRAYAG MANSION
FLAT NO.503
5TH FLOOR, B.NO.37, No.2
1st MAIN, B BLOCK, VINAYAKANAGAR
KONENA AGRAHARA
BENGALURU-560 017

...PETITIONER

(BY SRI ASHOK HARANAHALLI, SR. COUNSEL
SRI SRINIVASA RAO, S.S., ADVOCATE)

AND

STATE OF KARNATAKA BY
JEEVAN BEEMANAGAR PS
BENGALURU-560 001
REPRESENTED BY SPP
HIGH COURT BUILDING.

...RESPONDENT

(BY V.S.HEGDE, SPP-II)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 439 OF THE CODE OF CRIMINAL PROCEDURE, PRAYING TO ENLARGE THE PETITIONER ON BAIL IN CR.NO.269/2020 REGISTERED BY JEEVAN BHEEMANAGAR POLICE STATION FOR THE OFFENCES PUNISHABLE UNDER SECTIONS 20(b), 8(c), 22(c) OF NDPS ACT.

THIS CRIMINAL PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 23.03.2021, THIS DAY THE COURT PRONOUNCED THE FOLLOWING:

ORDER

This petition is filed by the petitioner-accused under Section 439 of Cr.P.C. for granting bail in Crime No.269/2020 registered by the Jeevan Bheemanagar Police Station for the offences punishable under Sections 20(b), 8(c) and 22(C) of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act' for short).

2. The case of the prosecution is that a case came to be registered on the complaint of one Virupakashaswamy, a Police Officer, on 12.11.2020, alleging that he received a credible information that some people are purchasing MDMA Crystals, Ecstasy Pills, Hash, LSD Strips through Post from Netherland, Poland, Germany and other countries and they are selling the same to college students. On the same day, he received a message from Vimanapura Post Office that a parcel has come to the Post Office in the name of the petitioner-accused. Accordingly, at about 2.00 p.m., he went

near the house of the petitioner and while the petitioner was receiving the parcel from the Postman while delivering, the complainant apprehended the petitioner. Thereafter, he seized 200 LSD Strips in the presence of panchas and prepared the panchanama. After apprehending the arrest, a case was registered against the petitioner for the aforesaid offences and was remanded to judicial custody. The petitioner approached the Sessions Judge for bail, which came to be rejected. Hence, he is before this Court.

3. Sri Ashok Haranahalli.S., learned Senior Counsel appearing for petitioner contended that the petitioner is innocent of the alleged offence. He has been falsely implicated in the case. The Police Officer who conducted the search has not followed the provisions of Section 50 of NDPS Act. Though the Police Officer who went alongwith the Assistant Commissioner of Police (ACP) is a Gazetted Officer, he should not have seized the contraband articles, but he should have given the option of right to search to the accused before the rank of a Gazetted Officer or the

Magistrate. The ACP himself has seized the contraband articles, which amounts to violation of Section 50 of the NDPS Act. He has not informed about the right of search to the accused before the Magistrate or Gazetted Officer. Therefore, he prayed for grant of bail.

4. Learned Senior Counsel further contended that the quantity alleged is 200 LSD Strips and the paper weight has also been taken in to consideration but the paper weight should have been excluded. There is no proper weighing done by the raiding authority. The field test has not been conducted as per the guidelines of Narcotics Control Bureau No.1/88. They have to send the samples of seized articles within 72 hours for chemical analysis and the report shall be obtained within 15 days. Even after 4½ months from the date of seizure, the report has not been received by the prosecuting agency. Thereby, they have violated the procedures to be followed by them as per the guidelines issued by their own Department. Therefore, it cannot be presumed that the accused has committed any offence under

the NDPS Act. There is no material placed before the Court that the seized article is a contraband article and it is of a commercial quantity in order to bring it under the provisions of Section 37 of the NDPS Act. The petitioner is the permanent resident of Bengaluru and he is ready to abide by the conditions that may be imposed by this Court. Hence, prayed for granting of bail.

5. Learned Senior Counsel in support of his argument in respect of violation of Section 50 of NDPS Act and the procedures of Narcotics Control Bureau relied upon the judgments of the Hon'ble Supreme Court, High Courts of Delhi, Calcutta and Bombay apart from the judgment of a Co-ordinate Bench of this Court.

6. Per contra, learned SPP-II, appearing for the respondent-State objected the bail petition and contended that the petitioner purchased the drugs through online booking by opening the Play Store and creating a Dark Web and through Dark Web, he has placed the order of purchase of this contraband articles and paid money through Bit Coins.

Subsequent to placing of the order, the accused deleted the App. It has to be retrieved by the Police. The Technical Team is working for retrieving the deleted messages and collecting the information for placing the order and the payment made through Bit Coins. Though the samples were sent to the Forensic Science Laboratory (FSL), the Forensic Lab is at Madiwala and it requires much time due to work pressure. The guidelines issued are only for following the same by the Investigating Officer. They have sent the articles within the prescribed time and the result is awaited. The investigation is still under progress. The parcel so seized from the hands of the accused which was delivered from the Post Office does not come under the purview of personal search to show it as violation of Section 50 of the NDPS Act. The ACP who is the rank of Gazetted Officer has given the option to the accused about his right of search before the Gazetted Officer or Magistrate. The accused himself opted for search before the Gazetted Officer and the ACP himself introduced that he is the Gazetted Officer and thereafter, the accused has given the consent for search and therefore,

there is no violation of the mandatory provision of Section 50 of the NDPS Act. A co-ordinate Bench of this Court, in a similar case, considered all the grounds urged by the learned counsel and dismissed the petition. The investigation is still pending. If the petitioner is released on bail, the possibility of tampering with the prosecution witnesses and destroying the technical evidence is not ruled out. Hence, prayed for dismissal of the bail petition.

7. Upon hearing the arguments and on perusal of the records, it shows that the Police Officer Virupakshaswamy along with a team of Police Officers and panchas went to arrest the petitioner-accused when the Postman delivered the parcel to the accused on 12.11.2020. While apprehending the accused, they informed the accused that they are suspecting if the parcel contains the contraband articles and Narcotic Drugs which is an offence. After questioning the accused about the contents of the parcel, they gave an option to the accused whether he wants search before the Gazetted Officer or the Magistrate. For that the accused

opted for search before the Gazetted Officer. Then, the ACP who accompanied the complainant informed the accused that he is also the rank of a Gazetted Officer and the accused gave consent to search before the ACP. Thereafter, the parcel was opened and the ACP saw 200 LSD Strips. They weighed it as 3.95 gms. Later, it was weighed with cover which was 50 gms. and after removing the cover, it weighed 3.95 gms. They also removed 7 gms. of powder as sample for the purpose of chemical analysis. The same has been mentioned in detail in the seizure panchanama. Thereafter, the accused was arrested and remanded to judicial custody.

8. Learned Senior Counsel contended that there is violation of Section 50 of NDPS Act and in support of his contention, he relied upon the judgment of the Hon'ble Supreme Court in the case of **Gorakh Nath Prasad vs. State of Bihar** reported in **(2018) 2 SCC 305**; the judgment of Jammu and Kashmir in the case of **Pawan Kumar vs. Union Territory of J & K and another** reported in **2020 SCC Online J & K 618** and the judgment of

Bombay High Court in the case of ***Hitesh Hemant Maihotra vs. State of Maharashtra through Vartak Nagar Police Station*** reported in ***2020 SCC Online Bom. 3581***.

9. Perused the judgment of the Hon'ble Supreme Court as well as Jammu & Kashmir and Bombay. As regards the violation of mandatory provision, the entire procedure of search and seizure has been violated. There is no second thought in respect of the guidelines and principles laid down by the Hon'ble Supreme Court in respect of Section 50 of NDPS Act.

10. Even a co-ordinate Bench of this Court has held in the case of ***Dharmasingh vs. State of Karnataka*** reported in ***ILR 1992 Kar. 3137***, that on the violation of mandatory provision, the accused is entitled for bail, due to non-compliance of mandatory provision prejudice would be caused to the accused.

11. On perusal of the case on hand and the seizure panchanama, it is indicated that the Police team gave an

option to the accused about the right of search before the Gazetted Officer or Magistrate, for that, the accused opted for search before the Gazetted Officer and later, the ACP informed that he himself is a Gazetted Officer and the accused gave consent and later the search was conducted. It is also pertinent to note that Section 50 of NDPS Act applies to personal search of the accused. In this case, the Postal authorities delivered the parcel and the Police apprehended the accused. It is nothing but catching red-handedly, while the accused was receiving the parcel. The Hon'ble Supreme Court held in the case of ***State of Himachal Pradesh vs. Pawan Kumar*** passed on **08.04.2005** in ***Appeal (Crl.) 222/1997 (Pawan Kumar)*** that Section 50 of NDPS Act has no application when the contraband article was recovered from the bag which was being carried by the accused and Section 50 of NDPS Act applies only in respect of personal search of the accused if the contraband article is kept in the pocket or hidden in the body of the accused persons. The Hon'ble Supreme Court in the case of ***Pawan Kumar's case***, by considering the judgment of the Hon'ble

Supreme Court held by the Constitution Bench in the case of ***State of Punjab vs. Baldev Singh*** reported in **1999(6) SCC 172** has held at paragraphs 13 and 14 as under:

"13. The above quoted dictum of the Constitution Bench shows that the provisions of Section 50 will come into play only in the case of personal search of the accused and not of some baggage like a bag, article or container, etc. which he may be carrying.

14. Learned counsel for the State has referred to large number of decisions of this Court wherein Section 50 was held inapplicable in the case of search of some baggage or article etc., which was in immediate possession or was being carried by the accused. We do not consider it necessary to burden this judgment by referring to all the authorities cited but would only give a gist of some of the cases which is as under :

I. Abdui Rashid Ibrahim Mansuri v. State of Gujarat 2000 (2) SCC 513 This is a decision by a Three Judge Bench presided over by Dr. A.S. Anand, C.J., who wrote the opinion of the Court in the Constitution Bench decision in State of Punjab v. Baldev Singh. In this case four gunny bags were found in an auto rickshaw which the accused was driving and there was no other person present. The argument based on

non-compliance of Section 50 as explained in the case of Baldev Singh was rejected on the ground that the gunny bags were not inextricably connected with the person of the accused.

II. Madan Lal v. State of H.P. 2003 (7) SCC 465 (para 16) It was held that Section 50 would apply in the case of search of a persona as contrasted to search of vehicles, premises or articles.

III. Gurbax Singh v. State of Haryana 2001 (3) SCC 28 Accused got down from a train carrying a Katta (gunny bag) on his shoulder. Held that Section 50 was not applicable.

IV. State of Punjab v. Makhan Singh 2004 (3) SCC 453 The accused was apprehended while alighting from a bus with a tin box in his hand in which contraband was found. The High Court acquitted the accused on account of non-compliance of Section 50. On the finding that Section will not apply, the judgment of the High Court was reversed and the accused was convicted.

V. Kanhaiya Lal v. State of M.P. 2000 (10) SCC 380 One kg. of opium was found in a bag which was being carried by the accused. The argument based on Section 50 was rejected on the ground that it was not a case of search of the person of the accused.

VI. Birakishore Kar v. State of Orissa 2000 (9) SCC 541 Accused was found lying on a plastic bag in a train compartment. Argument based on Section 50 was rejected on the ground that the accused was sitting on the plastic bag and it was not a case of the search of the person of the accused.

VII. Krishna Kanwar v. State of Rajasthan 2004 (2) SCC 608 (para 19) Held, Section 50 applies where search has to be in relation to a person as contrasted to search of premises, vehicles, articles or bag.

VIII. Sarjudas v. State of Gujarat 1999 (8) SCC 508 The accused were riding a scooter on which a bag was hanging in which charas was found Section 50 was held not applicable as it was not a case where the person of the accused was searched.

IX. Saikou Jabbi v. State of Maharashtra JT 2003 (9) SC 609 Heroine was found in a bag. It was held that Section 50 was not applicable as it applies to search of a person."

The Hon'ble Supreme Court by considering various judgments has held that Section 50 of the NDPS Act applies only to personal search of the accused. Here in this case, the parcel was seized while the accused was accepting the same from the Postal authorities. Therefore, the contention raised

by learned Senior Counsel for the petitioner that there is violation of the mandatory provision is not acceptable.

12. The second contention raised by learned Senior Counsel is that the Police Official has not done field Test in respect of the contraband article and not received the samples. In this regard, learned Senior Counsel relied upon the order passed by a Co-ordinate Bench of this Court in the case of ***Kelsi Katta Mahammed Shakir vs. The Superintendent of Customs, Bengaluru***, passed in ***Crl.P.No.5402/2018***, wherein it has been held that the instructions issued by the Narcotics Control Bureau to the Investigating Officer to carry the test kit while raiding and getting result from the FSL within 15 days, there is violation of the mandatory procedure. Similar view is taken by the same co-ordinate Bench in the case of ***Keval M. Lohith vs. State of Karnataka*** passed in ***Crl.P.No.4969/2020*** and contended that the petitioner is entitled for bail for not receiving the FSL report within time. However, learned SPP-II has contended that in a similar case where FSL report

was not received, a Co-ordinate Bench of this Court has rejected the bail in CrI.P.No.7386/2020 dated 06.02.2021. On perusal of the records, admittedly, the Police raided the accused on 12.11.2020 and seized the contraband articles of 200 LSD Strips and on an enquiry with the accused, the accused himself has stated that he has purchased the LSD Stripes from Netherland and it was weighed by the petitioner which contained 3.95 gms. and with cover it weighed 50 gms. Out of which, 7 gms. was taken out for test. Though the Police sent the samples to the FSL, but the report was not received. The guidelines of Narcotics Control Bureau No.1/88 shows that the result of the sample shall be received within 15 days. This guidelines issued by the Narcotics Control Bureau is for the purpose of the procedure to be followed by the Investigating Officer while dealing with the drug case. It is only guidelines which is directory in nature but not mandatory in nature in respect of receiving the result of the FSL on the samples sent by the Investigating Officer. These guidelines say that the report has to be received within 15 days. The said guidelines are not binding on the FSL to

give the result of the samples within 15 days. Since there is only one FSL in Bengaluru for the entire Karnataka and huge number of cases were registered and huge number of samples were sent in a day, it is not possible for the FSL to give report within 15 days as per the guidelines issued by the Narcotics Control Bureau to the Police Officials. If at all, the guidelines issued by the Narcotics Control Bureau in respect 1/88 instructions should be followed mandatorily then, it is the duty of the Narcotics Control Bureau to have their own Forensic Science Laboratory for the purpose of chemical analysis to find out the result within 15 days, as per their guidelines. The Central Government also shall make an endeavor to establish separate Forensic Science Laboratory for the purpose of analysis of narcotic drugs within the prescribed time without waiting for long time. Until the Union of India or Narcotic Control Bureau have their own Forensic Science Laboratory, the question of getting the result within 15 days is not practically possible. Therefore, I hold that getting the result within 15 days is only directory in nature and not mandatory. Therefore, merely the result of

the sample is not received that itself is not a ground to grant bail to the petitioner.

13. As regards the field test kit being not carried by the raiding officer while going for raid, in this regard, the Narcotics Control Bureau issued guidelines to the Drug Law Enforcement Officers (DLEO) shall carry the test kit while raiding. But, here in this case, the Jeevan Bheemanagar Police raided and apprehended the accused and the Police is not a Special Police or Narcotics Control Bureau to carry the narcotic drug kit for conducting field test prior to sending the sample for chemical analysis to FSL. Whether such a narcotic drug kit has been provided to the ordinary Police Station or not is required to be elicited only in the trial, but not at this Stage. Here, in this case, the petitioner was found in possession of 3.95 gms. of LSD strips and as per the Schedule, 0.5 gms. is the commercial quantity. Such being the case, the contraband article is more than the commercial

quantity and the investigation is still pending. Therefore, the petitioner is not entitled for bail.

14. Accordingly, the Criminal Petition is dismissed.

However, learned SPP shall make an endeavour to persuade the Home Department to provide Field Test Kits to all the Police Stations in Karnataka, if not already provided. He shall also make an endeavour to persuade the Government to establish a separate Forensic Science Laboratory for conducting tests for Narcotic Drugs and contraband articles under the NDPS Act.

The Registry is directed to send a copy of this order to the Chief Secretary, Government of Karnataka, and the Additional Chief Secretary, Government of Karnataka, Home Department, Vidhana Soudha, Bengaluru.

**Sd/-
JUDGE**

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