

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 2ND DAY OF FEBRUARY, 2022

BEFORE

THE HON'BLE MR. JUSTICE H.P. SANDESH

CRIMINAL PETITION NO.6916/2021

BETWEEN:

JOSWIN LOBO

... PETITIONER

(BY SRI HASHMATH PASHA, SENIOR COUNSEL FOR
SRI NASIR ALI, ADVOCATE)

AND:

STATE OF KARNATAKA
BY BYADARAHALLI POLICE STATION,
BENGALURU CITY-560091,
REPRESENTED BY SPP
HIGH COURT OF KARNATAKA
BENGALURU-560 001.

... RESPONDENT

(BY SRI KRISHNA KUMAR K.K., HCGP)

THIS CRIMINAL PETITION IS FILED UNDER SECTION 439
OF CR.P.C PRAYING TO ENLARGE THE PETITIONER ON BAIL IN
CR.NO.224/2021 OF BYADARAHALLI POLICE STATION,
BENGALURU, FOR THE OFFENCES PUNISHABLE UNDER

SECTIONS 8(c), 20(ii)(b), 21(c), 22(c), 23(c), 27(A) OF NDPS ACT.

THIS CRIMINAL PETITION HAVING BEEN HEARD AND RESERVED FOR ORDERS ON 20.10.2022, THROUGH VIDEO CONFERENCE THIS DAY, THE COURT PRONOUNCED THE FOLLOWING:

ORDER

This petition is filed under Section 439 of Cr.P.C seeking regular bail in favour of the petitioner in Cr.No.224/2021 for the offences punishable under Sections 8(c), 20(ii)(b), 21(c), 22(c), 23(c), 27(A) of Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'NDPS Act').

2. The factual matrix of the case is that on receipt of credible information at 1.00 p.m, that the five persons who were indulged in trafficking the narcotic drugs i.e., Ecstasy pills, Ashes and LSD Strips to the college students, ITBT employees in order to destroy the social heal of the society, hence, on 22.06.2021 at about 2.45 p.m., the complainant – R.Virupakshaswamy along with staff and panchas went and apprehended the accused persons in the room and after apprehending them, secured the Assistant Commissioner of Police at 3.45 p.m. and subjected them for personal search and drawn the panchanama from 3.00

p.m. to 7.00 p.m. Each MDM ecstasy pill cost around Rs.4,000/- to Rs.5,000/-, one LSD strip will cost around Rs.4,000/- to Rs.5,000/- and ganja for 100 grms will cost around Rs.5,000/-.

3. The learned counsel for the petitioner vehemently contend that the search and seizure is not done before the Gazetted Officer and though it claims that the same was done in the presence of the Gazetted officer, the said Gazetted Officer is also the part of the raid, hence, he cannot be termed as Gazetted Officer. The counsel would contend that the Officer is not an authorized person and also not an in-charge of the police station who conducted the raid. The Assistant Commissioner of Police himself searched the accused persons and hence, the search and the seizure is not in accordance with the procedure established under the NDPS Act. The learned counsel for the petitioner would submit that the complainant police have falsely implicated this petitioner and it is clear abuse of process of law. The alleged drugs are known as MDM ecstasy pills and 250 grams of Hashish said to have been recovered from the possession of the petitioner but the same has not been

recovered from the possession of this petitioner. The FIR clearly discloses that drugs were seized in the room hence, the bifurcation of the drugs in the name of this petitioner is erroneous. The complainant police would not have been classified that 54 Ecstasy pill and 250 grams of Hashish were recovered at the instance of this petitioner since, the alleged recovery is from a famous PG situated at 1st Floor, bearing No.11, near East West College, Bharathnagar, Nanjaiah Layout, Vishwaneedam Post. The accused never resided in that address and also not at all in the said address. This petitioner has been arrested on 19.06.2021 and the police did not show his arrest at all and the drugs which were recovered is from other persons and this petitioner implicated by registering the case on 22.06.2021, but on 22.06.2021, there is absolutely no raid of whatsoever nature and in fact, the CCTV camera footage and other electronic equipments clearly demonstrate that the police have never conducted the raid on the particular date. The counsel vehemently contend that the phone location of the petitioner from 19.06.2021 to 22.06.2021 is clear that he was illegally detained and falsely framed the case against him and

investigation does not disclose that drugs were seized from the custody of this petitioner. It is contended that there is no any fairness on the part of the police in the alleged seizure and this petitioner was arrested under mysterious circumstances. The counsel also contend that Investigating Officer has totally failed to comply with the procedure established under Section 50 of NDPS Act and also Sections 42 of the NDPS Act and it shows clear violation of Section 52(3) of NDPS Act as the Officer who arrested is not an Officer in-charge of police station and hence, prayed to allow the petition.

4. The learned counsel for the petitioner in support of his argument relied upon the unreported decision of this Court in **Crl.P.No.9045/2021** wherein this Court in paragraph 7 held that alleged recovery was not at the presence of the Gazetted Officer and FIR discloses only received information and not subjected for raid and thereafter seizure was done and granted bail and the said decision is applicable to the facts of the present case also. The counsel also relied upon the judgment of the Apex Court reported in **2021 SCC ONLINE SC 324** in the case

of **BOOTA SINGH AND OTHERS vs STATE OF HARYANA** wherein it is held that non-compliance of requirement of Sections 42 and 50 is impermissible and set aside the order of conviction and acquitted the accused/appellant. The counsel relying upon the judgment reported in **(2016) 11 SCC 687** in the case of **STATE OF RAJASTHAN vs JAGRAJ SINGH @ HANSA** would contend that compliance of Section 42 is mandatory and search conducted is in breach of Section 42(1) and (2) which causes serious prejudice to the accused and acquitted the accused. The counsel also relied upon the unreported decision of this Court in **Crl.P.No.1298/2020** in the case of **NANSO JOACHIN UDEDIKE vs STATE OF KARNATAKA** and in this case, this Court while considering the bail petition has taken note of the judgment of **PAULSAMY** regarding technicality is concerned. The counsel also relied upon the judgment of the Apex Court reported in **(2021) 10 SCC 100** in the case of **UNION OF INDIA vs MD. NAWAZ KHAN**. Though the Apex Court set aside the bail granted in favour of accused, in paragraph 31 made an observation that due to non-compliance of the procedural requirement under Section 42 of

the NDPS Act, the respondent should be granted bail. On receipt of credible information, the officer have to write down the information and send it to a superior officer within 72 hours.

5. Per contra, the learned High Court Government Pleader appearing for the respondent-State would submit that heinous offence is committed by this petitioner along with other accused persons and MDMA was seized to the extent of 56.50 grams and apart from that 250 grams of Hashish was recovered at the instance of this petitioner and total five accused persons including this petitioner were arrested and when this petitioner subjected for search, recovery was made at the instance of him and hence, there is a prima facie case against his petitioner.

6. The counsel for the State also relies upon the judgment of the Apex Court in **NAWAZ KHAN's** case in which the petitioner's counsel also relied and brought to notice of this Court that non-compliance of Section 42 will not be a ground to enlarge the petitioner on bail and it is a matter of trial and the same has to be considered during the course of trial and the Apex Court would have acquitted the petitioner only after trial

and acquittal is not a ground at the stage of exercising the discretion under Section 439 of Cr.P.C. The counsel also brought to notice of this Court the unreported judgment in **Crl.P.No.1298/2020** referred supra, in paragraph 15 of he said decision, this Court held that the Court has to take note of the wisdom of the legislature in bringing the special enactment and the very object of bringing this enactment is to combat the menace in the society and categorically held that the principles laid down in the Apex Court in the judgment of **Paulsamy** is clear that while exercising the discretion, that too during the bail stage, it would be too early to take into account and judge the matter regarding non-compliance with the formalities and hence, at this juncture, again this Court cannot evaluate the evidence with regard to the admissibility and non-compliance and the Court has to take note that it is an offence against the society at large.

7. Having heard the respective counsel for the parties and also the grounds urged in the petition, the points that arise for consideration are:

- (1) Whether it is a fit case to exercise powers under Section 439 of Cr.P.C in favour of the petitioner?
- (2) What order?

Point No.1:

8. Having heard the respective counsel and also on perusal of the material available on record, a specific allegation is made in the complaint that on credible information, the raid was conducted and at the instance of this petitioner, 56.50 grams of MDMA, 250 grams of Hashish and mobile were seized. The very contention of the learned counsel for the petitioner before the Court is that the officer who conducted the raid is not an in-charge of the said police station and hence, there is a violation of Section 52(3) of the NDPS Act. Apart from that the other allegation is that the Gazetted Officer is none other than the Assistant Commissioner of Police who is also a part of the raid and the complaint is also not registered by the officer of the police station and the Assistant Commissioner of Police himself searched the accused. On perusal of the complaint, it discloses

that the Police Inspector of CCB has received the credible information that accused persons have indulged in trafficking the narcotic drug and based on that credible information, the raid was conducted along with staff and panchas and mahazar was drawn from 3.00 p.m to 7.00 p.m, securing the Gazetted Officer i.e., Assistant Commissioner of Police and subjected this petitioner for search and nowhere it is found that the Assistant Commissioner of Police is also a part of the raid. It is clear that after apprehending the accused persons, Assistant Commissioner of Police came and asked the accused persons whether the other Gezetterd Officer to be called or he himself can search them. The accused persons given consent to search them by the Assistant Commissioner of Police only and thereafter, the search was conducted with the consent of the accused persons. On perusal of mahazar, it clearly discloses that panchanama was drawn between 3.00 p.m. to 7.00 p.m. and in terms of the panchanama 56.5 grams of MDMA pills were recovered from this petitioner and apart from that 250 grams of Hashish also recovered and the same is also weighed through the electronic scale and the same was also recovered from his pant pocket. When the

personal search is made in the presence of Assistant Commissioner of Police who is also a Gazetted Officer and the very contention that he belongs to the same department cannot be a ground to disbelieve the case of the prosecution and the learned counsel of the petitioner also not disputing the fact that the said Assistant Commissioner of Police is also a Gazetted Officer and this Court already held that conducting of the search by the officer of the said department is not a bar and no law prescribes that he should be subjected to the personal search in the presence of the Gazetted Officer not belongs to the particular department. In **Cri.P.No.1293/2020** referred supra, the petitioner's counsel himself relied upon in paragraph 13 of the said decision in which it is observed that the provision says that he should be subjected for personal search in the presence of the Gazetted Officer and in the case on hand also in the presence of the Gazetted Officer only, the personal search was made and hence, there is a compliance of Section 50 of NDPS Act.

9. The other contention that the officer who registered the case is not an officer in-charge of the police station, is a matter of fact and the same to be decided during the course of the trial. The Apex Court in the judgment reported in **(2000) 9 SCC 549** in the case of **SUPERINTENDENT, NARCOTICS CONTROLS BUREAU, CHENNAI vs R.PAULSAMY** held that provisions of Section 37 of the NDPS Act; it is held that it would be too early to take into account and judge the matter regarding non-compliance with the formalities during the bail stage. Since recording of findings under Section 37 of the NDPS Act was a *sine-qua non* for granting bail under the Act. The Apex Court also referring Sections 37 and 52, 57 of the NDPS Act set aside the bail granted in the said case and made an observation that non-compliance of Sections of NDPS Act is not a ground to enlarge him on bail and the same has to be tested during the course of trial. The Apex Court also in the judgment of **UNION OF INDIA vs BAL MUKUND AND OTHERS** reported in **(2009) 12 SCC 161** discussed with regard to Section 37 of the NDPS Act and also referred the earlier judgment of **Paulsamy** and come to the conclusion that the material would indicate that

there is a material against the petitioner and hence, does not find any reasons to enlarge him on bail. The Apex Court in the recent judgment relied upon by both the parties in the case of **Nawaz Khan** discussed with regard to the scope of the conscious possession of contraband and also summarized the principles how to be ascertained and also categorically held that mere absence of possession of the contraband on the person of the accused does not *ipso facto* mean that the accused was not in conscious possession of the contraband rather the knowledge of possession of contraband has to be gleaned from the facts and circumstances of a case. The term "possession" could mean physical possession with animus; custody over the prohibited substances with animus; exercise of dominion and control as a result of concealment; or personal knowledge as to the existence of the contraband and the intention based on such knowledge. The entry applies in the case of transportation of the contraband in the vehicle, but in the case on hand, it has to be noted that MDMA pills i.e., 150 number of packets weighing 56.5 grams which is commercial quantity and apart from that 250 grams of Hashish was seized in the presence of the Assistant

Commissioner of Police from the petitioner in the room which is the manufactured drugs. Mere completion of investigation and filing of charge-sheet is not a ground to enlarge the petitioner on bail when he has been apprehended along with a manufactured drugs of commercial quantity and apart from that the Special Enactment is brought into force when the IPC is not sufficient to combat the offences which are against the society at large and only in order to prevent the menace in the society, the Special Enactment is brought into force. Under Section 37 of the NDPS Act, the Court cannot enlarge the petitioner on bail unless there is a reasonable ground that the petitioner is not guilty and he is not likely to involve in similar offences in future. The Court also has to look into the fact that the drugs which are seized are manufactured drugs which are in conscious possession of this petitioner which was recovered from the pocket of this petitioner and the same is also a commercial quantity and it is also settled law that while granting bail, the Court has to look into the interest of the society at large and if such acts are considered in a lenient way, it affects the society at large. The very information received from the arresting officer is clear that this

petitioner along with others were indulging in trafficking the manufactured drugs to the college students, ITBT employees and to the general public and when such allegation is made and the recovery is made at the instance of this petitioner that too a commercial quantity, i.e., 56.5 grams of Ecstasy pills as well as 250 grams of Hashish, I am of the opinion that it is not a fit case to exercise the discretion in favour of the petitioner to enlarge him on bail and non-compliance of the mandatory provisions also to be considered at the time of trial and the same is a matter of fact whether same is complied with or not. Hence, at this juncture, this Court cannot evaluate the evidence on record while exercising the discretion under Section 439 of Cr.P.C. Hence, I do not find any merit in the petition to enlarge the petitioner on bail that too on the ground of non-compliance of mandatory provisions and the Court not to look into the technicalities at the time of considering the bail petition to enlarge the petitioner on bail. The decisions of the Apex Court quoted by the petitioner will not come to the aid of the petitioner and those judgments are delivered at the stage of appeal on merits and not at the time of considering the bail

application and the judgments referred by this Court and the Apex Court are clear that the bail cannot be granted on the ground of technicality and non-compliance of formalities cannot be considered during the bail stage. Accordingly, Point No.1 is answered as Negative.

Point No.2

10. In view of the discussions made above, I pass the following:

ORDER

The bail petition is rejected.

**Sd/-
JUDGE**

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