

Jose

IN THE HIGH COURT OF BOMBAY AT GOA

CRIMINAL APPEAL NO.5 OF 2023

Roque @ Rocky Fernandes,
S/o Manuel Fernandes,
Age 36 years,
R/o H. No. 1257, Gaunwadi,
Anjuna, Bardez, Goa.

Presently Lodged,
Judicial Custody,
Colvale Modern Jail,
Colvale-Bardez-Goa.

... Appellant.

Versus

1. STATE
(As represented by the
Officer In Charge,
Anti Narcotic Cell,
Panaji, Goa)

2. The Public Prosecutor
High Court Building
Porvorim, Goa.

... Respondents.

Mr Caroline Collasso with Mr Kamlakant Poulekar, Advocates for
the Appellant.

Mr Pravin Faldessai, Additional Public Prosecutor for the
Respondents.

CORAM: **BHARAT P. DESHPANDE, J.**

RESERVED ON: **31 August, 2023**

PRONOUNCED ON: **14 September, 2023**

JUDGMENT:

1. Appellant is challenging the judgment dated 28.10.2021 passed by
Additional Sessions Judge, North Goa, Mapusa in Special Criminal Case

No.22/2015. By this judgment, the Appellant/Accused was found guilty for the offences punishable under Section 8(c) and Section 22(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 and accordingly, convicted for the said offences and further, sentenced to suffer rigorous imprisonment for a period of ten years and to pay fine of ₹1,00,000/-. In default of payment of fine, Accused was further directed to undergo imprisonment for one year.

2. Heard learned Counsel Ms Caroline Collasso with Advocate Mr Kamlakant Poulekar for the Appellant and Mr Pravin Faldessai, learned Additional Public Prosecutor for the Respondent.

3. According to the charge framed against Accused, the case of the Prosecution is that on 20.12.2014, between 20:15 hours to 24:00 hours, at Blue Colour Kiosk, having Glowing sign board of Amul, situated at Starco Junction at Anjuna, Bardez, Goa, Accused was found in illegal possession of 24 pieces/papers weighing 0.25 grams suspected to contain LSD being commercial quantity and without any authority. Accordingly, FIR was registered on the same day vide Crime No.27/2014 by ANC Police Station, Panaji. After investigation, charge-sheet was filed before the NDPS Court at Mapusa which was registered as Special Criminal Case No.22/2015. On framing of charge and explaining it to the Accused, he pleaded not guilty. During trial, Prosecution examined seven witnesses. Accused denied entire case of the Prosecution while answering questions put to him under Section 313 Cr.P.C. Accused did not step into the witness box. The learned Trial Court found the Accused guilty for possessing commercial quantity of LSD and accordingly sentenced him to suffer ten years imprisonment and to pay fine of ₹1,00,000/- under Section 22(c) of NDPS Act.

4. Ms Collasso appearing for the Appellant/Accused raised multiple grounds thereby challenging the findings of the Trial Court. Firstly, she claimed that there is inordinate delay of conducting raid from the time of receipt of the information, which has not been explained. Secondly, she claimed that the search warrant was manipulated only to suit the case of the Prosecution. Thirdly, she claimed that statement of the witnesses are stereotypes and therefore, the investigation is only a farce. Fourthly, she claimed that Prosecution failed to prove what was attached during the alleged search is not the same which was forwarded to the laboratory. Fifthly, she claimed that the report of the Chemical Analyser is not at all reliable. Sixthly, she claimed that the so-called test conducted at the site has not been proved and the Raiding Officer failed to preserve the pieces used for such testing. Seventhly, she claimed that there is no compliance of Sections 50, 52-A and 55 of NDPS Act, Eightly, she claimed that the possibility of tampering with the property attached during the intervening period has not been ruled out. Lastly, she claimed that there are major discrepancies, variations, contradictions in the evidence of Prosecution for which benefit of doubt needs to be given to the Accused.

5. Mr Faldessai appearing for the State, submits that explanation is provided with regard to the time when information was received and the time at which raid was conducted. There is sufficient material to show that 24 pieces containing LSD were recovered from the possession of the Accused. The Field Testing Kit was used at the site and the Raiding Officer used a very small piece of paper for conducting such test which was then destroyed. He then submits that the report of CA clearly goes to show that what was found during the raid was forwarded to the CA and tested positive for LSD. The Chemical Analyser produced the worksheets, graph thereby

proving the type of tests conducted, confirming presence of LSD. He then submitted that the seal used for sealing of the contraband at the site was immediately handed over to the Dy.S.P. and it remains with Dy.S.P. till the articles were handed over to the Scientific Assistant. This shows that there was no possibility of tampering at all. He then submitted that the drug detection kit used at the site is only a presumptive test on the basis of chemicals available in the kit and the Investigating Officers/Raiding Officers are properly trained to conduct the test as per the instructions found in the manual. He then submitted that there is full compliance of Section 50 of NDPS Act and also other provisions. He then submits that the weight of LSD with the papers is required to be considered for the purpose of proving whether it is commercial quantity or otherwise. Finally, he claimed that impugned judgment needs no interference.

6. Considering rival submissions, the points for determination are as under together with findings on it:-

- i. Whether there is compliance of Section 50 of NDPS Act?
- ii. Whether Prosecution succeeds in proving that what was attached from the Accused was forwarded to the laboratory for testing?
- iii. Whether the report of the Chemical Analyser needs to be accepted for proving the contention of Prosecution of possession of LSD?
- iv. Whether Prosecution succeeded in proving the guilt on the part of Accused?

7. Section 50 of NDPS Act mandate the conditions under which search of persons shall be conducted by the authorised officers. It specifies that the

officer duly authorised under Section 42 is about to search any person under the provisions of Section 41, 42 or 43, shall if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the departments mentioned in Section 42 or to the nearest Magistrate. Further, it provides that if such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate. In this respect, Ms Collasso strongly contended that there is non-compliance of Section 50 of the Act since the Accused was not produced before the Gazetted Officer or the Magistrate before conducting his search. She placed reliance on *Arif Khan vs. State of Uttarakhand*; AIR 2018 SC 2123 and more specifically on para 28.

8. She also placed reliance on some of the decisions passed by this Court relying upon *Arif Khan* (supra) and more specifically at the time of grant of bail.

9. Mr Faldessai appearing for the State strongly contended that *Arif Khan* (supra) is completely based on the earlier decision of a Three-Judge Bench of the Supreme Court in case of *Vijaysinh Chandubha Jadeja vs. State of Gujarat*; 2011 (1) SCC 609 and a Constitutional Bench judgment in the case of *State of Punjab vs. Baldev Singh*; 1999 6 SCC 712. He would submit that in para No.29 of *Jadeja* (supra), the Constitutional Bench has made it clear that mandate of Section 50 of NDPS Act is to apprise the person intended to be searched of his right to be searched before a Gazetted Officer or a Magistrate. Thereafter, the suspect may or may not exercise such right provided to him under the said provision.

10. The contention of Mr Faldessai is justified. A careful reading of para 32 of *Jadeja* (supra) would indicate that the Constitution Bench was not at

all referring to option which a suspect has of being searched before a Gazetted Officer or a Magistrate, but the reference really is to the option which empowered officer has to take the suspect either before the nearest Gazetted Officer or a Magistrate. In that context, the Constitutional Bench observed that if suspect requires, then the search must be held before a Gazetted Officer or a Magistrate and then only the empowered officer in the first instance, should endeavour to produce the suspect before the nearest Magistrate, as opposed to Gazetted Officer, since, the Magistrate would enjoy more confidence of the common man compared to any other officer. The Constitution Bench further observed that such a course of action would not only add legitimacy to the search proceedings, but it may verily strengthen the Prosecution case.

11. Para 32 of *Jadeja* (supra) reads thus:-

“32.- We also feel that though Section 50 gives an option to the empowered officer to take such person (suspect) either before the nearest gazetted officer or the Magistrate but in order to impart authenticity, transparency and creditworthiness to the entire proceedings, in the first instance, an endeavour should be to produce the suspect before the nearest Magistrate, who enjoys more confidence of the common man compared to any other officer. It would not only add legitimacy to the search proceedings, it may verily strengthen the prosecution as well.

12. In *Arif Khan* (supra), Two-Judge Bench of the Supreme Court considered *Jadeja* (supra) as found in para 23 which reads thus:-

“23.- Their Lordships have held in Vijaysinh Chandubha Jadeja (supra) that the requirements of Section 50 of the NDPS Act are mandatory and, therefore, the provisions of Section 50 must be strictly complied with. It is held that it is imperative on the part of the Police Officer to apprise the person intended to be searched of his right under Section 50 to be searched only before a Gazetted officer or a

Magistrate. It is held that it is equally mandatory on the part of the authorized officer to make the suspect aware of the existence of his right to be searched before a Gazetted Officer or a Magistrate, if so required by him and this requires a strict compliance. It is ruled that the suspect person may or may not choose to exercise the right provided to him under Section 50 of the NDPS Act but so far as the officer is concerned, an obligation is cast upon him under Section 50 of the NDPS Act to apprise the suspect of his right to be searched before a Gazetted Officer or a Magistrate.”

13. Thus, *Arif Khan* (supra) follows the decision of the Constitution Bench in *Jadeja* (supra). In other words, the mandate of Section 50 as interpreted by the Constitution Bench would show that the authorised officer is duty bound to apprise the suspect of his right to be searched in presence of a Gazetted Officer or a Magistrate. Once such appraisal is made known to the suspect, it is wholly upon the suspect whether to opt for such offer to be searched before a Gazetted Officer or a Magistrate or otherwise. Thus, the duty cast on the authorised officer is only to apprise the suspect of his right, before conducting search. Once such appraisal is made known to the suspect, there is full compliance of the mandatory provision of Section 50. Thereafter, it is for the suspect either to opt his search before the Gazetted Officer or a Magistrate or to be searched by the Raiding Officer himself. Secondly, if the suspect opts to be searched before a Gazetted Officer or a Magistrate, then the authorised officer is duty bound to take the suspect to the nearest Magistrate for the purpose of conducting search. The Constitutional Bench in *Jadeja* (supra) observed that the Magistrate enjoys more confidence of a common man as compared to any other officer. It would, therefore, be mandatory for the authorised officer to take the suspect, if he so desires, to the nearest Magistrate.

14. In view of the above-settled proposition, let us examine whether Prosecution complied with the above provision.

15. The witnesses who were part of the raiding party and who deposed before the Court in connection with compliance of Section 50 are PW4-Sitakant Nayak, PSI, PW5-Altat Shaikh, pancha witness to the search panchanama at Exhibit 38, PW6-PI Suraj Halankar, PW7-PSI Dinesh Gadekar who produced the complaint at Exhibit 65. The panchanama and the complaint are the documents, whereas others are the witnesses. The search panchanama is provided through PW5 vide Exhibit 38 wherein it is found that after conducting the search of the kiosk, PSI Dinesh Gadekar/PW7 who was the Raiding Officer informed the Accused that he wants to take his personal search for presence of suspected narcotic drug. Before conducting such search, PW7/Dinesh Gadekar informed Accused that he has a right to be searched in presence of Gazetted Officer or a Magistrate and if he so desires, his search will be conducted in presence of a Gazetted Officer or a Magistrate. The panchanama which is proved through PW5 support the contention of Prosecution about compliance of Section 50 thereby apprising the Accused his right to be searched in presence of a Gazetted Officer or a Magistrate. This fact is further deposed by PW5-the pancha witness Altat Shaikh wherein he states that the Accused was informed that his personal search is required to be taken, however, the Accused was again given an offer that his search could be taken in presence of a Gazetted Officer or a Magistrate, but he declined such offer. However, it is also clear from the chief examination of PW5 itself which is on page No.4 that the Accused was informed that he has a right that his search of the shop and his personal search could be taken in presence of Gazetted Officer or a Magistrate, but the Accused declined such offer. During cross

examination, PW5 categorically answered that the panchanama was read over to him and that he did not find anything missing in the panchanama. Similarly, PW5 claimed that offers were given to the Accused twice. Surprisingly, there is no contradiction recorded during entire cross examination of PW5 qua the panchanama and its contents. PW5 is a layman and, therefore, when he says that contents of panchanama have been correctly recorded, he confirms the portion wherein there is strict compliance of Section 50 of NDPS Act as found recorded in the panchanama.

16. PW4/Sitakant Nayak the PSI being one of the members of the raiding party deposed that PSI Gadekar/PW7 informed the Accused that he has right to be searched in presence of a Gazetted Officer or a Magistrate if he so desires. Such offers were given on two occasions i.e. before starting the search of the kiosk and then prior to conducting personal search of Accused.

17. PW6/PI Suraj Halankar was one of the members of the raiding party who deposed that PSI Gadekar/PW7 informed the Accused that his personal search is required. Prior to commencing of the personal search, PSI Gadekar informed Accused that he has right to be searched in presence of Gazetted Officer or Magistrate if he so desired. Finally, PW7/PSI Gadekar confirmed this aspect in examination-in-chief. All these witnesses were cross examined at length. There is absolutely no discrepancy, omission or any contradiction in the evidence of these Prosecution witnesses about compliance of Section 50 of NDPS Act. Finally, the complaint at Exhibit 65 also supports compliance of Section 50 of NDPS Act. All these witnesses specifically deposed that Accused refused or declined such offer to be searched in presence of a Gazetted Officer or a Magistrate. Thus, the

investigating agency proved the mandate of Section 50 of NDPS Act by apprising the Accused of his right. It was for the Accused/suspect either to opt his search before a Gazetted Officer or a Magistrate. The evidence brought on record clearly shows that Accused declined such offer. In such circumstances, conducting search of the Accused by the authorized officer and that too after complying with the mandatory provision of Section 50 cannot be faulted with. In fact, the mandate of the Constitutional Bench in the case of *Jadeja* (supra) has been fully complied with. Thus, there is no need to discuss the decisions cited by Ms Collasso which refers only to *Arif Khan* (supra). As already observed that *Arif Khan* (supra) relies on *Jadeja* (supra) and thus, the mandate of the Constitutional Bench required to be followed, which is found to be followed in the present matter.

18. Section 42 of NDPS Act gives power to enter, search, seize without warrant or authorisation, to an authorised officer of the department mentioned therein which includes the department of central excise, narcotics, customs, revenue intelligence, other departments of Central Government including para-military forces, armed forces as empowered by general or special order issued by the Central Government and/or any such officer of revenue, drugs control, excise, police or other department of a State Government as empowered in this behalf by general or special order issued by the State Government. Wide powers are given to such authorised officers of different departments of Central as well as State Governments including the police, to enter, search, seizure and arrest without warrant.

19. Section 43 of the NDPS Act deals with power of seizure and arrest in a public place by such authorised officers. Thus, the difference between Sections 42 and 43 of the said Act is quite clear and distinct. In case of search of any building, conveyance or enclosed place, a warrant is required

to be issued by the authorised officer as provided in Section 41(2). Similarly, there is power to the authorised officer to enter any premises and carry out the search at any time between sunset and sunrise but after recording the grounds of his belief that it is not possible to obtain warrant of search or authorisation due to the possibility of escaping of the offender. In the light of above provisions, Section 50 of NDPS Act needs to be looked into, more specifically with regard to the offer which the authorised officer must give to the suspect. In other words, the authorised officer is duty bound to apprise the suspect of his right to be searched in presence of nearest Gazetted Officer or Magistrate if he so desires. Sub-sections (5) and (6) inserted by Amendment Act 9 of 2001 to Section 50 assumes more importance which says that when an officer duly authorised under Section 42, has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance or control substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under Section 100 of the Code of Criminal Procedure. After the search is conducted as provided in Sub-section (5), the authorised officer shall record the reasons for such belief which necessitated such search and within seventy-two hours send a copy thereof to his immediate official superior.

20. The contention of learned Counsel Ms Collasso, therefore, cannot be accepted for the simple reason that offer was given to the Accused which he declined as found in the evidence. Her contention was that inspite of declining such offer by the Accused as alleged, he ought to have been produced before the nearest Magistrate, cannot be accepted. In that case,

the intention of Legislature to incorporate Section 50 Sub-section (1), Sub-section (5) and Sub-section (6) would have no meaning at all. The intention of the Legislature is very much clear and as held by *Jadeja* (supra), the authorised officer must apprise the Accused/suspect of his right and only if he demands that his search is required to be conducted before the nearest Gazetted Officer or a Magistrate, it is the duty of the authorised officer to take such suspect without further delay before the nearest Magistrate or Gazetted Officer. Here, by inserting Sub-sections (5) and (6), the intention of Legislature is again made clear that even if a suspect claims that his search be conducted before the nearest Gazetted Officer or Magistrate, but authorised officer is of the belief that such suspect while taking him to the nearest Magistrate or the Gazetted Officer may part with possession of narcotic drug or substance or control substance as the case may be, he may conduct personal search of the suspect by recording reasons thereto. Thus, the discretion of conducting search by the authorised officer is clearly depicting from Section 50 of the said Act and it cannot be said that the suspect has to be produced before the nearest Magistrate once he opts for his right. Even in that case, the discretion is that the authorised officer may carry out his search by recording reasons as found in Sub-section (5) of Section 50 of NDPS Act. Accordingly, submissions advanced by learned Counsel for the Appellant in this regard are of no substance.

21. It is further contention of learned Counsel for the Appellant that Prosecution has miserably failed to prove the fact that what was attached from the Accused was the same forwarded to the laboratory for examination. In other words, it is her contention that possibility of tampering cannot be ruled out.

22. First of all, she contended that Prosecution failed to comply the provisions of Section 52-A of NDPS Act which is mandatory in nature. She claimed that after seizure of the contraband from the Accused, the same were not forwarded to the officer in-charge of the nearest police station or to the officer empowered under Section 53 of the said Act. She then claimed that no inventory of such contraband was prepared for the purpose of certifying correctness, drawing representative samples, etc. In this respect, the contraband which is attached from the Accused consists of 24 pieces of paper having square shape with some design on it. The total weight of these papers/pieces were found to be 0.26 grams. The record shows that entire contraband was forwarded to the laboratory for the purpose of testing. Therefore, the question of taking samples would be of no use. Secondly, Raiding Officer was himself the authorised officer who handed over the attached contraband to the P.I. of ANC Police Station, Panaji being officer empowered under Section 53, which is the police station only looking after the matters under the NDPS Act. Therefore, the contention that there is non-compliance of Section 52-A of NDPS Act has no substance.

23. In this respect, the learned Counsel for the Appellant placed reliance in the case of *Simarnjit Singh vs. State of Punjab* in *Criminal Appeal No. 1443/2023 (Arising out of SLP (Cri) No.1958/2023 decided on 09.05.2023* by the Supreme Court and mainly relying upon the decision in the case of *Union of India vs. Mohanlal & Anr.*; (2016) 3 SCC 379. It is no doubt true that *Mohanlal* (supra) mandate that compliance of Section 52-A is mandatory wherein upon seizure of contraband, the same has to be forwarded either to the officer in-charge of the nearest police station or to the officer empowered under Section 53 who shall prepare an inventory and make an application to the Magistrate for purposes of certifying the

correctness of the inventory, certifying photographs of such drugs or substances taken before a Magistrate as true and to draw representative samples in presence of Magistrate certifying correctness of the list of samples so drawn. This provision of Section 52-A was inserted by Act No.2 of 1989 mainly with the view of disposal of seized narcotic drugs and psychotropic substances which are considered as hazardous in nature, vulnerable to theft, substitution and constrained of proper storage place. However, in this case, considering the size of contraband i.e. 24 square shaped pieces contained in an auto press polythene, the seized articles were immediately handed over to officer in charge of ANC Police Station, Panaji in compliance with Section 53 of NDPS Act, who then forwarded the entire substance/contraband for the purpose of chemical analysis. Thus, the said decision will not help the Appellant in any manner.

24. Learned Counsel for the Appellant then would submit that there is doubt with regard to conducting field testing by the Raiding Officer at the spot. She submitted that the so-called small piece removed by the Raiding Officer from one of the papers/pieces was not preserved. There are different statements of the witnesses with regard to preservation of such small piece of paper used for the field testing. According to her, no field testing was conducted at the site. She then submitted that the Chemical Analyser categorically stated all 24 square-shaped pieces were intact which means no part of a single piece of paper was utilised while conducting alleged field testing at the spot. She then submitted that only on the basis of such field testing result, Accused remained in custody till the receipt of the report from the Chemical Analyser. She submits that if the field testing allegedly carried out at the spot is not accepted, there was no material at all for the custody of the Accused till the report from the Chemical Analyser is

received. According to her, the Raiding Officer must preserve the result or the part of the contraband used while conducting field testing so as to establish it during trial and also justifying the detention of the suspect.

25. In this regard, admittedly there is contemporaneous evidence to show that field testing kit was with the Raiding Officer which provides the method by which and the solutions found in the said kit to be used as per the chart found in the said kit. These tests are admittedly colour tests by using some chemical against the contraband. The purpose of conducting field testing is to collect prima facie evidence of the existence of drug or the substance with the suspect.

26. The witnesses categorically deposed that a small piece out of 24 pieces found with the Accused was taken for field testing and after dropping some liquid from the testing kit, the colour changed. The Raiding Officer who is authorised to use such testing kit and who knows the procedure, informed the panchas and the raiding party that the substance found with the suspect contains LSD.

27. It is no doubt true that the Raiding Officer claimed that he took a very small piece for conducting field test and thereafter, such small piece was destroyed. The other raiding party members showed their ignorance as to what happened to such small piece used for testing. The pancha witness claimed that the piece used for testing was also packed and sealed. However, the panchanama which is proved through the witnesses clearly goes to show that a small piece was used for testing which was found positive for LSD.

28. The NDPS Act as well as the rules nowhere provide any procedure to be adopted for the purpose of the use of field testing kit and more

specifically about the preservation of the piece or substance used by the Raiding Officer for carrying out such field testing at the spot. No provision has been cited by the learned Counsel for the Appellant in this regard. Thus, in absence of any rule or provision, it is difficult to accept the contention that the Raiding Officer must preserve the piece or part of substance used for the purpose of testing it while conducting the raid. The main purpose of using field testing kit is to prima facie confirm presence of drug or substance or control substance. The contemporaneous evidence is that of the report of the Chemical Analyser showing the presence of the drug or the substance in the property attached from the suspect. Therefore, it is difficult to accept the contention raised by the learned Counsel for the Appellant that the Raiding Officer ought to have preserved such piece used at the time of testing.

29. Another aspect has been raised that all 24 pieced were found intact by the Chemical Analyser and therefore, possibility of conducting any field test by removing some small piece is clearly ruled out. It is necessary to note here that 24 square-shaped pieces were found with the Accused. Such pieces were of blotting paper allegedly containing on it LSD. Thus, for the purpose of field testing, even a small piece is sufficient. The contention of the Chemical Analyser that all pieces were intact would no way to be taken as the one which has been suggested on behalf of the Appellant. The very small piece could have been removed for the purpose of field testing, which appears to be unnoticeable for the Chemical Analyser. Such contention, therefore, is of no substance.

30. It is then claimed that there are different versions with regard to the witnesses about the handling of sealed parcel. In this regard, it is claimed that the evidence of PW2 the Scientific Assistant would go to show that the

parcel remained with him without any proper authority. Such contention is of no substance. PW2 clearly deposed that he is working as Scientific Assistant in the office of S.P. CID and his duty includes visit to the scene of offence, assisting the Investigating Officer, receiving sealed exhibits from various police stations and forwarding it to the different laboratories. In this case, he received a sealed parcel with all seals intact on 21.12.2014 at 11:10 a.m. along with a forwarding note of the same date addressed to Director, CFSL, Hyderabad. He then deposed that such sealed envelope was kept in his custody under lock and key and on 22.12.2014, it was forwarded to Director, CFSL, Hyderabad by special messenger. During cross examination, he deposed that the office of Scientific Officer is at Verna, whereas the office of S.P. CID Crime is at Ribandar. He specifically claimed that on 21.12.2014, when he was at Verna in his office, he received the said sealed parcel. He also claimed that he is authorised by S.P. Crime to receive such exhibits. It was tried to point out that the day when he received such parcel was a Sunday and, therefore, his office was closed. Such contention as far as the officers of police department is concerned, cannot be accepted. Their duty is considered as a prime duty and, therefore, they have to report even on holidays and Sundays.

31. With regard to the third point, Ms Collasso strongly contended that the report of Chemical Analyser cannot be accepted as there are lot of discrepancies with regard to whether the contraband tested was actually LSD and whether it was in commercial quantity. She then claimed that the procedure of examination of LSD adopted by the Chemical Analyser is also incorrect and prejudicial to the interest of the Accused. While elaborating this, she first of all claimed that only colour test was conducted and initially no details were placed on record. Subsequently, the witness brought the

worksheet which according to her are all manipulated and not related to the matter in question. Secondly, she claimed that certificate under Section 65-B of Evidence Act was issued when the witness was in the box whereas the reports were prepared much earlier. Thirdly, she claimed that all 24 pieces were dipped in the solution which, according to her, is incorrect procedure. She would submit that the Chemical Analyser ought to have tested each piece separately in order to find out whether such piece contains LSD. At this stage, she submits that even if one piece contains LSD whereas all remaining 23 pieces are blank or without LSD, the contraband in one piece will infect all the other papers dipped in the same solution and accordingly, the Prosecution would be entitled to consider weight of all 24 pieces as containing LSD. She then claimed that quantitative test was not conducted and the Chemical Analyser admits that he was not having the sample at the relevant time.

32. Mr Faldessai appearing for the State would submit that first of all, the testing is always carried out of the entire material/contraband and it is not necessary to carry out test of each piece of paper separately. He then claimed that the worksheets produced by the Chemical Analyser gives all details of different tests. His statement that the representative sample was not available cannot be stretched to the period when the present test was carried out. The question put to him has to be considered as the date on which he was in the witness box.

33. In the case of *HS Arun Kumar v/s State of Goa*, reported in (2022) 4 BomCR (Cri), a Division Bench of this Court while deciding the reference as to whether combined weight of blotter impregnated with LSD is determinative, answered it that the blotter paper formed an integral part of LSD (drug) when put on it for consumption and as such, weight of the

blotter paper containing LSD will have to be considered for determining the small or commercial quantity of the offending drug/substance under the NDPS Act, 1985. It was further observed that the blotter paper that carries the drug (LSD drops) which facilitates its consumption as a whole, is a preparation, mixture, or neutral substance within the meaning of NDPS Act, 1985.

34. While deciding the said reference, it was observed by considering the case of *Richard L. Chapman vs. United States*; 1991 SCC OnLine US SC 85, in para 35 and 36 as under:-

“Chapman (supra) decided by the United States Supreme Court records that: 35. According to the Sentencing Commission in the US, LSD in an average dose weighs 0.05 milligrams; there are therefore 20,000 pure doses in a gram. The pure dose is such a tiny amount that it must be sold to retail customers in a "carrier." First, pure LSD is dissolved in a solvent such as alcohol, either the solution is sprayed on paper or gelatin, or paper is dipped in the solution. The solvent evaporates, leaving minute amounts of LSD trapped in the paper or gel. Then the paper or gel is cut into two "one-dose" squares and sold by the dose. Users either swallow either the squares, lick them until the drug is released, or drop them into a beverage, thereby releasing the drug.

Chapman (supra) also records that: 36. Although LSD is not sold by weight, but by dose, and a carrier medium is not, strictly speaking, used to "dilute" the drug, that medium is used to facilitate the distribution of the drug. Blotter paper makes LSD easier to transport, store, conceal, and sell. It is a tool of the trade for those who traffic in the drug, and therefore it was rational for Congress to set penalties based on this chosen tool. Congress was also justified in avoiding arguments about the accurate weight of pure drugs which might have been extracted from blotter paper had it chosen to calibrate sentences according to that weight. The Court also noted that the blotter paper seems to be the carrier of choice, the vast majority of cases will therefore do exactly what the sentencing scheme was designed to do -- punish those who deal in larger amounts of drugs more heavily. The US

Supreme Court held that the combined weight of not just weight of pure LSD is relevant for Petitioner.”

35. The above paragraph is quoted only for the purpose of how the pure LSD is dissolved in solvent such as alcohol and then either sprayed on the paper or gelatin or paper is dipped in the solution thereby allowing the solvent to evaporate leaving minute amount of LSD trapped in the paper or the gel. Then the paper or gel is cut into one dozen squares and sold by the dozen. Thus, one square of either gelatin or a blotter paper is considered to be a dozen containing 0.05 milligrams of LSD. It is a fact that it is dangerous to consume pure LSD in liquid form directly without dissolving in any solvent. It is also difficult to segregate the pure LSD into one dozen weighing 0.05 milligrams by normal method. Such procedure has to be adopted by dissolving the relevant amount of pure LSD into some solvent such as alcohol and then it is sprayed either on the paper or gelatin or a paper is dipped in such solution so that equal amount of LSD could be absorbed in the blotter paper or on the gel. After the solvent evaporates, only a tiny amount of LSD remains on the blotter paper or on the gel.

36. This practice which is observed by the US Supreme Court and even by our Courts, is the method by which LSD blotter papers in square shape with different designs on it are prepared and sold to the customers.

37. The person who is dealing with drugs i.e. selling such LSD papers will not mix the blotter papers or pieces having LSD and the blotter papers which are not containing such LSD, for the simple reason that it will be difficult for him to identify which piece is actually containing LSD and the one which is not. Therefore, the contention of the learned Counsel for the Appellant that Chemical Analyser has to examine each and every square

piece independently on the ground that some pieces may not be having LSD in it, has to be outrightly rejected. First and foremost aspect is that no dealer will make such pieces of square shape with the one having LSD and the one which are without LSD. For the purpose of sale, he will have to first identify which paper contains LSD. If he himself is unable to identify it, it is impossible for him to pick and choose the one containing LSD and handover to the customers. It is no doubt true that the Prosecution needs to prove that the contraband recovered from the suspect contains LSD. However, asking the Chemical Analyser to examine each square piece independently would be unreasonable. All 24 pieces were found with the Accused in one pouch. It is practically difficult for even the Accused to segregate the piece having LSD on it with the one which does not contain LSD.

38. No rule or provision is pointed out on behalf of the Appellant to show that the Chemical Analyser has to examine each and every piece independently.

39. In the present matter, the procedure adopted by the Chemical Analyser is deposed in detail by PW1-P. Sudhakar who is having vast experience in the field. In fact, he has examined more than 1,000 exhibits in narcotics and other related matters. He deposed that the envelope received from the ANC Police was containing 24 square shaped pieces of paper in one auto press packet. First he took the weight of all 24 square shaped pieces without the auto press packet and found to weigh 0.2562 grams. At this stage, it is necessary to note that as per the decision of this Court in the case of *H.S. Arun Kumar* (supra), the weight of the blotting paper with LSD forms an integral part and therefore, the entire weight has to be considered as the weight of the substance.

40. PW1-Sudhakar then claimed that he analysed the said 24 square-shaped pieces by conducting fluorescent test, Ehrlich test, Marquis test, Thin Layer Chromatography and UV Visible Spectrophotometry methods. The result of these tests shows positive for presence of LSD.

41. During re-examination of PW1, he described the method of different tests and the result of each test. Similarly, he described how to identify presence of LSD. He also produced the certificate under Section 65-B of Evidence Act along with his worksheets and the graph. The learned Trial Court rightly accepted the certificate as well as the worksheets and the graph. The arguments which are now raised with regard to such certificate prepared later on has no substance at all. The provision shows that whenever such document is produced in the Court, the same should be accompanied by a certificate under Section 65-B of Evidence Act. Thus, the submissions regarding the worksheets, the graph/chart and the certificate under Section 65-B, raised on behalf of Appellant are of no substance.

42. The method of testing of 24 pieces of LSD was mentioned/deposed by PW1 on page 4 wherein he states that all 24 pieces were dipped in an organic solvent and then the solvent was tested for presence of LSD. This he also confirmed during cross examination. The learned Counsel for the Accused/Appellant did not point out any discrepancy in conducting such test. As already mentioned that it is impossible for a person who is dealing with such type of substance (LSD) to keep square shaped pieces mixed in a polythene bag containing LSD on some of the papers whereas the remaining without LSD. There are no markings on these square shaped pieces showing which piece of square shape contains LSD and which piece is plain paper, so as to facilitate the dealer or the person to sell such LSD paper to the customer. As earlier observed by taking the clue from *Chapman* (supra),

the method of preparation of LSD papers, the square shaped pieces are separated only after the entire sheet of blotter paper is dipped into the solvent containing LSD. In such circumstance, it is difficult to accept that some pieces contains LSD whereas some are not, when separated from one sheet.

43. Learned Counsel for the Appellant then tried to take advantage from the statement of PW1 on page 10 wherein he claimed that at present, we do not have standard sample for doing confirmatory test for LSD. The said statement clearly goes to show that when his deposition was recorded on 10.10.2017, his laboratory was not having standard sample for doing confirmatory test. This statement cannot be relegated to the date when he conducted the test with regard to the contraband which he received in December, 2014. If the contention of the learned Counsel is accepted, it would be a distorted version. Therefore, such submission has no substance at all.

44. Since the entire weight of 24 square shaped pieces containing LSD was found to be 0.2562 grams, it is above the minimum prescribed for commercial quantity as found in the table as per the notification issued in 2001 and at Serial No.133. The scientific name is Lysergide (LSD, LSD-25) wherein a small quantity is 0.002 grams whereas commercial quantity is 0.1 grams. Thus, the quantity found with the Accused is clearly more than commercial quantity as provided under the said notification. Considering this, there is no substance in the submission with regard to the non-acceptance of report of Chemical Analyser. In fact, the report gives all details of the test conducted. The deposition of PW1-Mr Sudhakar is found to be cogent and convincing and no infirmities could be derived from it.

45. The last submission of the learned Counsel for the Appellant is that the Prosecution has failed to prove the charge against the Accused beyond all reasonable doubt. In this respect, she claimed that first of all, the seal used by the Raiding Officer was with him and the same was never handed over to any higher officer. She would submit that there is no seal movement register maintained by ANC Police Station, Panaji. Secondly, she claimed that forwarding note produced by the Prosecution bears the crime number and other details and it shows that it was never prepared at the spot. She then claimed that Government vehicles were not used for the purpose of raid and Government employees were not called as pancha witnesses which creates serious doubt. She then claimed that even though the information was received during the day time and even warrant was issued for search of kiosk, there is inordinate delay in reaching the spot which has not been explained. She then claimed that the search warrant was prepared subsequently as there is no reference with regard to the search of the lady i.e. the wife of the Accused though present at the spot.

46. First of all, as far as the question of seal movement register is concerned, it is the contention of the concerned officers including the Dy.S.P. that the seals are allotted to the authorised officers and therefore, there is no seal movement register maintained at ANC Police Station, Panaji. Secondly, it has been brought on record that the seal is immediately removed from the Raiding Officer after the sealing is over and handed over to the Dy.S.P. who retains the said seal till the attached property is forwarded to the office of Scientific Assistant at Verna. This procedure clearly goes to show that there is no possibility of tampering of the sealed property. Same procedure has been adopted by ANC Police Station, Panaji. The main purpose is to prove that there is no possibility of tampering of

sealed contraband material. Therefore, once such aspect is proved, the question of not maintaining a seal movement register is of little importance.

47. The second aspect is regarding appearance of crime number on the forwarding note. A perusal of such forwarding note would clearly go to show that the handwriting with regard to the nature of crime and the address, is quite different from the handwriting with regard to the case number, police station, sections and the date. Admittedly, the forwarding note along with sealed parcel was handed over by the Raiding Officer to the P.I./In-charge who then forwarded it to the Scientific Assistant by mentioning case number and other details. Such procedure cannot be faulted with. Only because the witness did not disclose that some part was blank of the forwarding note, the Accused cannot take advantage of it by claiming that such forwarding note was not prepared at the spot when all the witnesses categorically stated about preparing it at the spot.

48. The aspect of not using Government vehicles and taking private vehicles is again inconsequential. It needs to be noted that the officers who were supposed to conduct raid, were in plain clothes. If they used the police vehicles, there is every possibility of the suspect being alerted. There is no hard and fast rule that only Government vehicles are required to be used.

49. As far as calling the Government servants as pancha witnesses, it has been claimed by the learned Counsel for the Appellant that on 22.12.2014 when the sealed packet was handed over to PW2-Scientific Assistant, it was a Sunday. In Goa, all the Government offices are having a five-day week. This also further shows that on 21.12.2014 being Saturday, all Government offices were closed. The question of summoning or requisitioning Government officers on a Saturday being a holiday was difficult as all offices

were closed. In such circumstances, calling two independent pancha witnesses cannot be faulted with.

50. It was argued that intimation was received during the morning time whereas the raid was conducted only at around 8:15 p.m. There is no explanation for such delay. Such contention first of all has no substance at all. Evidence of Raiding Officer/PW7 discloses the procedure adopted by him from the time of receipt of the information i.e. at around 11:40 hours, sending it to the Dy.S.P. for the purpose of obtaining house search at around 1:00 p.m., securing the pancha witnesses during the afternoon time, briefing all the panchas, forming the team and then proceeding towards Anjuna at Starco Junction. The details given by the Raiding Officer clearly shows that there is no question of delay. Even otherwise, when a warrant to search the said kiosk was obtained, the raid was conducted on the same day and hence, such aspect will not detain this Court any further.

51. The last contention is about obtaining warrant wherein there is only reference to the word “he” i.e. the Accused and not about the lady i.e. the wife of Accused. Perusal of the search warrant produced at Exhibit 23 would go to show that such search warrant was issued in respect of the search of blue colour kiosk having glowing signboard of Amul operated by the Accused and his wife at Starco Junction, Anjuna, Bardez, Goa. There is clear reference with regard to the Accused by name Rocky and his wife. The warrant gives power to the Raiding Officer to enter and search all parts of the kiosk run by Accused and his wife. Thus, such contention raised on behalf of the Appellant has no substance at all. The warrant was only with regard to the search of the kiosk and according to the information, it was operated by Accused and his wife. During the course of cross examination of the Raiding Officer, it has been brought on record that said kiosk is

registered in the name of mother of Accused. Accordingly, the aspect which has been raised on behalf of Appellant regarding such warrant, has no substance at all.

52. Learned Counsel for the Appellant placed reliance on some orders which were passed in connection with bail applications. There is no need to consider such orders as it is well settled that the observations while granting or rejecting bail are only on considering prima facie material, whereas, the present appeal is after a full fledged trial.

53. Having said so, all the four points framed in para 6 are answered against the Appellant and in favour of Prosecution. There is no valid ground to interfere with the order/judgment of Trial Court.

54. The appeal, therefore, must fail and hence, the following

ORDER

- i. Appeal stands rejected.
- ii. Proceedings closed.

BHARAT P. DESHPANDE, J.

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DSOUZA

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