

IN THE COURT OF SESSION FOR GR. BOMBAY AT MUMBAI

ORDER BELOW EXH.4

(BAIL APPLICATION)

IN

N.D.PS. SPECIAL CASE NO.624 OF 2021

Kerry Kelvin Mendes

Age : 21 years,

R/O : Mendes House, 2/135, Opp. Nazreni,

Apts., Kharodi Village, Marve Road, Malad,

West, Mumbai-95.

... Applicant/Accd.No.1

Vs.

Narcotics Control Bureau,

Mumbai Zonal Unit, Mumbai.

(C.R.No.36/2020)

... Respondent

Appearance:

Ld. Advs. Mr. S. R. Patil for applicant-accused No.1.

Ld. SPP Mr. Advait Sethana.

CORAM : HIS HONOUR ADDL.SESIONS
JUDGE M. G. DESHPANDE
(C.R.No.16)

DATED : September 27,2021

ORDER

1. Applicant Kerry Kelvin Mendes is accused No.1 in this case of which crime was registered with NCB vide NCB/MZU/CR-36/2020 under Ss. 8(c) r/w Ss 20(b) (ii) (A), 21 (b), 22 (a), 22 (c), 23 (c), 28 and Sec. 29 The Narcotics Drug, and Psychotropic Substances Act, (for short NDPS Act). He is praying to grant bail. Prosecution vide say (Exh.2 in RA) strongly opposed the same contending that the quantity 20 LSD blots weighing 0.3734 gram is commercial quantity. Rigors of section 37 are clearly applicable there is strong evidence against accused. That there is every possibility that once bail is granted, he will indulge in similar offences which is serious. That, there is every possibility of misusing the liberty, pressurizing the prosecution witnesses and absconding by frustrating the object of trial. With this it is contended to reject the application.

2. Heard Ld. Advocate Mr. S. R. Patil for accused No.1 and Ld. S.P.P. Mr. Advait Sethana at length. Following points arise for my determination. I am recording following findings thereon for the reasons discussed below.

POINT	FINDINGS
1. Whether the application is maintainable due to change in circumstances after rejection of earlier, as alleged ?	No
2. Whether rigors of Sec. 37 are applicable to facts involved in this case ?	Yes
3. Whether the accused No.1 deserves to be released on bail as prayed ?	No
4. What Order ?	Application stands rejected.

REASONS

ALL POINTS.

3. NCB got information that Kerry Kelvin Mendes (A1) is a drug peddler/trafficker. An information received on 22.11.2020 to the intelligence officer, NCB Mumbai that said Kerry Kelvin Mendes (A1) is going to deliver LSD and Ganja to someone around 17.40 to 18.00 hours. It was also informed that he would be coming on white Activa scooty having Reg. No.MH47-J2123 along with LSD, Ganja and other drugs. Accordingly, Mr. Vishwanath Tiwary, IO constituted a team. Two independent witnesses named Fazal Osmani and Mohd. Zahir Shaikh were requested to accompany the team for witnessing search procedure. After that Mr. Vishwanath Tiwary introduced his team comprising Mr. Samir Wankhede, Zonal Director, Mr. V.V. Singh Superintendent, Mr. P.S. Reddy, Mr. P.D. More and Mr. Anil Mane to effect the raid. Same

information was given to the panchas. NCB seal number 03 along with seizure kit and sealing proceedings were carried after due search offered by the team members. Accordingly, all of them took positions at Mcdonald, when a person wearing black shirt on Activa scooty matching the given number, arrived at the said spot and the team intercepted him. On asking his name, he was told about the information received by the team. Thereafter the said person Kerry Mendes (A1) took out small zip lock transparent polythene pouch containing some blots. On counting those were 20 multi colour blots. He further informed that he had come there to deliver the said blots to one person and was to get Rs.25,000/- for the said 20 blots.

4. After that, he took out another small polythene packet from his wallet containing dark green leafy substance which looked like Ganja and handed the same to Mr. Vishwanath Tiwary. He then handed one brown rolling paper and one semi/less than half broken cigarette having Gold flake mark and stated that the said Ganja, rolling paper and broken cigarette are for his own consumption. He had come to the said spot to deliver LSD to someone whom he had met once before and stated his name as Ahmed Shaikh (A3). He was told for helping the team. Again the team scattered and waited for Ahmed Shaikh. Around 17.56 hours three persons came there and started misbehaving with the team. The said three persons tried to push NCB team members to free Kerry Mendes (A1). Even after disclosing the identities by the team members, they started fighting, shouting and abusing NCB team, therefore, Mumbai police help was taken. They arrived and dispersed the crowd. Mumbai Police then took those three persons to Goregaon West police station along with NCB team and Kerry Mendes.

5. FIR was lodged. Weight of LSD blots was recorded and the same was found 0.3 grams. Again the 20 LSD blots were kept in polythene pouch having zip-lock with marking as 'L'. Kerry Mendes (A1) put his dated signature and the same was sealed with NCB seal No.03. Thereafter, weight of dark green leafy substance, Ganja, was taken and same was found 0.95 grams. It was kept in polythene pouch and brown envelope with mark 'G'. Signatures were taken. Half broken cigarette was kept in transparent polythene pouch and marked as 'P' with signatures. In this way 0.3 grams LSD, 0.95 grams green leafy substance purported to be Ganja, a rolling paper and half cut/broken Gold Flake cigarette were seized. Even mobile phones of Kerry Mendes (A1) and other three were seized. On 22.11.2020 notice under Section 67 of NDPS Act was issued to Kerry Mendes (A1). Mudemaal was deposited in the Malkhana and receipt thereof was taken. On 23.11.2020 statement of Kerry Mendes under Section 67 of the NDPS Act was recorded, wherein he disclosed that he has been involved in dealing with LSD blots and Ganja since long. He was arrested for his involvement in conspiracy to procure, possess, transport, sale, purchase of contraband under the NDPS Act.

6. Similarly on 24.11.2020 and 25.11.2020 statement of Neal D'Silva (A2) was recorded under Section 67 of NDPS Act. Wherein he disclosed how he has been involved in dealing with LSD blots since long. He was arrested on 25.11.2020. Ahmed Sajid Shaikh (A3) was notified and his statement was recorded on 25.11.2020 under Section 67 of the NDPS Act, wherein he disclosed how he has been involved in dealing with LSD blots since long. He was arrested on 25.11.2020. Similarly Shaikh Adnan Salim (A4) was notified, his statements under Section 67 of NDPS Act were recorded on 27.11.2020 and 28.11.2020.

He disclosed his involvement in dealing with LSD blots. He was arrested.

7. On 25.11.2020 house search of Ahmed Shaikh (A3) was conducted, but no contraband either recovered or seized. However, some documents were seized vide panchanama of his house-search. On 27.11.2020 house-search of Kerry Mendes (A1) was conducted. But no illicit contraband was recovered/seized from his house. On 27.11.2020 house-search of Shaikh Adnan Salim (A4) was conducted, but no illicit contraband was recovered/seized from his house. But some documents were seized. On 29.11.2020 house-search of Neal D'Silva (A2) was conducted, but no illicit contraband was recovered/seized from his house. On 01.12.2020 house of Akib Behlim was searched, but no illicit contraband was recovered except some documents. Statements of various persons were recorded on various dates. Seized samples were forwarded to CFSL. Correspondence was made with various mobile network companies and CDR of the mobile numbers of accused and others were collected. CFSL report received positive for LSD and Ganja. LSD blots possessed by accused was a commercial quantity, hence, charge sheet was filed against them.

8. **GROUND FOR BAIL :**

- a. Charge sheet has been filed. Hence, there is change in circumstances
- b. The complaint is not filed within 180 days or the period prescribed for small quantity and C.A. report was not filed with the complaint, hence, there is incomplete complaint/charge sheet which entitles the accused under Section 167 Cr.P.C. to get default bail.

- c. Alleged quantity is small excluding weight of paper strip.
- d. Application filed by accused No.1 bearing No.1153/2020 for directing the respondent to ascertain weight of contraband, yet the C.A. report does not show the exact weight of the contraband and quantity thereof is not mentioned.
- e. Description of contraband in panchanama and C.A. report is different.
- f. There is non-compliance of mandatory provisions of NDPS Act.
- g. Accused is college student and in custody for more than six months, which is likely to spoil his career.
- h. There is no likelihood of beginning the trial in near future.
- i. Applicant has fixed place of residence.
- k. He is ready to abide conditions imposed if the application is allowed.

9. Prosecution filed say of Intelligence Officer, NCB, Mumbai and strongly opposed the application and contended to reject the same. Kerry Mendes (A1) was possessing commercial quantity 0.3 gram 20 LST blots, which is far excessive than the commercial quantity prescribed in the schedule i.e. 0.1 gm. The then Court vide order dt.09.03.2021 had rejected the application of this accused bearing M.A.No.1153/2020 for weighing the LSD blots, therefore, allegation about compliance of the said application as alleged has no significance. Bail Applications of Kerry Mendes (A1), Neal D'Silva (A2) and another were also rejected vide orders dt.23.12.2020 and 01.02.2021

respectively. The present accused No.1 was apprehended with conscious possession of seized commercial quantity 0.3 gram of LSD blots. In the investigation it is clearly revealed that this accused along with others are involved in serious offence under Section 8(c) r.w. 20 (b)(ii)(A), 22(c), 27(A), 28 and 29 of NDPS Act. Provisions under Section 35 of NDPS Act clearly attract reflecting essential ingredients of intention, motive and knowledge regarding the possession of commercial quantity.

10. It is further contended that the question regarding calculation of exact weight of LSD with or excluding the paper is pending before the Hon'ble High Court in CrI. Writ Petition No.277/2021 in the matter of Union of India Vs. Anuj Keshwani. However, the judgment of Hon'ble Supreme Court in the case of Hira Singh is applicable to the present case. Therefore, whatever contended regarding reference for determining the weight is irrelevant when the Court has already rejected the said prayer vide order dt.09.03.2021. The C.A. report dt.17.05.2021 read with panchanama dt.22.11.2020 undoubtedly reveal that contraband seized on 22.11.2020 was LSD, a Psychotropic substance. Age of accused ought not to be considered as held by the Hon'ble Supreme Court for grant of bail, especially when the offences are grave and serious, especially when Section 37 is applicable. Offence is grave, hence, there is every possibility of repetition of crime in future and also tampering with the evidence by influencing other witnesses. With this it is contended to reject the application.

11. All Grounds referred above are generally common in all bail applications i.e instant one, Bail Application No.474/2021 and

application Exh.3. It is material to note that, similar application having identical grounds was preferred by the accused Kerry Mendes, when the investigation was pending. The then Court vide order dt.09.03.2021 pleased to reject the same by precisely dealing with all the grounds (a) to (k), which are referred above. It was also held that Kerry Mendes (A1) was found possessing commercial quantity of LSD blots by rejecting his contention that alleged quantity of contraband is small. The application regarding question in respect of weight/quantity of LSD blots raised by one of the accused for making its reference, were rejected by my Ld. Predecessor. The said orders were not challenged by any of the accused persons but allowed the same to become absolute and final.

12. It is settled legal position that mere filing of charge sheet does not amount change in circumstance. Therefore, that cannot be a ground to file this another application without any change in circumstance when all the grounds which are canvassed in this application were already heard and the then Court has rejected the same. Therefore the application and all the grounds herein being same with the grounds in previously rejected application, prima-facie indicate that the application is not maintainable. The Hon'ble Supreme Court in the case of **Virupakshappa Gouda and Ors., Vs. The State of Karnataka and Ors., (2017) 5 SCC 406**, held as, "On a perusal of the order passed by the learned trial Judge, we find that he has been swayed by the factum that when a charge-sheet is filed it amounts to change of circumstance. Needless to say, filing of the charge-sheet does not in any manner lessen the allegations made by the prosecution. On the contrary, filing of the charge-sheet establishes that after due investigation the investigating agency having found materials, has

placed the charge-sheet for trial of the accused persons.” Therefore, in the present case filing of charge sheet cannot be equated with change in circumstance when all grounds which were canvassed for earlier application, though pleaded differently in the present application, do not amount any change in circumstance when they were already rejected on merit.

13. Recently the Hon'ble Bombay High Court at Goa in the case of **Manas Krishna T K Vs. State, (Criminal Misc. Application (Bail) No.88 of 2021 (F), decided on September 17,2021)** resolved the controversy about the entitlement of accused for default bail holding that police report under Section 173 (2) of Cr.P.C. filed without C.A. report is a complete police report or a charge sheet or a challan and the accused cannot insist upon a default bail. Therefore, this ground is not available to the accused.

14. My Ld. Predecessor while deciding previous bail application had considered the quantity of LSD blots in question being commercial quantity and rejected the said application. There is no change in circumstance to this aspect nor this Court again and again decide the same issue in two different ways, as pressed into service by the Ld.Adv for the applicant. So this ground for the application deserves to be rejected.

15. In Section 2 (definitions) N.D.P.S. Act has so many definitions. Section 2 (iii)(c) indicates cannabis means any mixture, with or without any neutral material or any of the above forms of cannabis. Section 2 (c) (vi)(b) defines Coca leaf means the leaf of the Coca plant except a leaf from which all ecgonine, cocaine and any other

ecgonine alkaloids have been removed, (b) any mixture thereof with or without any neutral material. Section 2 (xv) (b) deals with opium means any mixture, with or without any neutral material of the coagulated juice of opium poppy. Everywhere in Section 2 N.D.P.S. Act word 'mixture' is mentioned to indicate that any narcotic drug or psychotropic substance is consumed with mixture, the same comes within the definitions under Section 2. LSD is a droplet on a small strip of paper like blotting paper (like litmus), which immediately absorbs the said droplet, gets spread all over the strip and once dried as such, can be used for consumption thereof **as a whole**. Paper, Gelatin are carrier materials. Paper contains fiber. Once the blot is dropped on such paper, it occupies all fibers thereof. One, who consumes LSD, cannot separate the blot/droplet from the strip, fibers of the paper and requires to consume the whole mixture of blot/droplet and paper strip containing the same. What is consumed is a whole mixture of paper and blot/droplet of LSD.

16. It has to be noted that the object of the NDPS Act and concern expressed by the Hon'ble Supreme Court about welfare and future of young generation of our Nation cannot be ignored while dealing with bail application. At the same time there cannot be a roving enquiry and mini trial at the stage of bail. In my opinion whatever found with Kerry was far more than a commercial quantity of LSD blots i.e. 0.3734 gram. Which casts heavy burden on him. In **Durand Didier Vs. Chief Secretary, Union Territory of Goa, (1990) 1 SCC 95** The Hon'ble Supreme Court held that, "Onus of proof of the drugs recovered from his possession were meant for personal consumption and not for sale or distributions, lies on such person as per Explanation 2 of ec. 27 of the Act. Hence, prima-facie the same indicates that he is involved in

a very serious offence for which his age is immaterial while considering bail application.

17. It is material to note that when he was apprehended, that day there were huge exchanges of phone calls among Kerry (7506202030), Neal (9136447180) – 35 calls; Ahmed Sajid Shaikh (96195011440) – 114 calls, 9 calls and 8 calls, Neal another phone No.9167228988 – 8 calls, Adnan Shaikh 9167250235 – 114 calls to Ahmed Shaikh and 17 calls to Aakib (8828342420). This clearly indicates that the whole syndicate involved in LSD drug chain had deep impact of this fact hence, contacted each other repeatedly. This fact has great significance.

18. The chart filed with the charge sheet showing link in the drug LSD chain, coupled with the statements recorded under Section 67 of NDPS Act indicates that Shaikh Adnan Salim procured LSD from Dark Web and transferred the same to Ahmed Sajid Shaikh, who then transferred it to Neal D'Silva for selling who further transferred it to Kerry Mendes, who was to return the same to Sajid Shaikh as the same could not be sold through Neal D'Silva and others. But the same could not happen as one after another they were apprehended. Copies of Whatsapp conversation indicate words like 'weed' 'Ganja' etc. referring the narcotic drug or psychotropic substance. Statements under Section 67 of NDPS Act indicate that Kerry Mendes (A1) was to deliver LSD blots to Ahmed Shaikh on 22.11.2020. Neal D'Silva (A2) gave him the same to deliver them to Ahmed Shaikh as the said Ahmed Shaikh had given the same to Neal for selling, but he (Neal) could not sell the same to anyone. In the statement, Neal (A2) has mentioned that he always get Weed/Ganja from Ahmed Shaikh. The statement of Ahmed Shaikh

indicates that on 22.11.2020 he was supposed to receive LSD blots from Kerry (A1), which he had given to Neal D'Silva (A2) and the same he had brought from Ahmed Shaikh. The statement of Adnan Salim indicates that he used to purchase NDPS through Dark Web, by making virtual currency i.e Crypto-Currency in the form of Bitcoins. All this prima-facie indicates innovative ideas of all the accused in possessing, procuring, dealing, consuming, selling, trafficking and peddling NDPS. There are not only the statements under Section 67 of NDPS Act but also sufficient other material like Whatsapp chats, huge exchange of calls among them as per the chart. Therefore, this material sufficiently corroborates facts revealed in the investigation. It is not only the statements under Section 67 but sufficient corroborative material pointing out involvement of all accused in the offence alleged against them.

19. All the Ld. Advocates representing this and other accused, placed their reliance on **Toofan Singh Vs. State of Tamilnadu, (Criminal Appeal No.152 of 2013)** . The ratio thereof indicates that confessional statements under Section 67 of NDPS Act are not admissible. It is argued that those statements under Section 67 of NDPS Act cannot be looked into even at the stage of bail. Careful reading of this authority indicates that the Hon'ble Supreme Court has held as follows,

“155. We answer the reference by stating :

(i) That the officers who are invested with powers under section 53 of the NDPS Act are “police officers” within the meaning of section 25 of the Evidence Act, as a result of which any confessional statement made to them would be barred under the provision of section 25 of the Evidence Act and **cannot be taken into account in order to convict an accused under the NDPS Act.**

(ii) That a statement recorded under section 67 of the NDPS Act cannot be used as a confessional statement **in the trial of an offence under the NDPS Act.**”

It is, therefore, clear that effect of statements under Sec.67 of the NDPS Act is a matter of appreciation of evidence under Section 3 of the Indian Evidence Act. In the present case when there is sufficient corroborative material indicating innovative ideas of accused persons in procuring, dealing with, possessing, trafficking, peddling, selling and consuming NDPS by way of Crypto-currency i.e Bitcoins, through Dark Web and by way of online transaction, is sufficient evidence at the stage of their bail applications.

20. Even if the statements under Section 67 of NDPS Act are considered as non-admissible, yet other corroborative material referred above cannot be ignored. Further this is not a stage of a trial wherein evidence is over and the same is to be appreciated under Section 3 of Indian Evidence Act. If such deeper examination at the stage of granting bail is made by ignoring the basic object of NDPS Act and deep concern expressed by the Hon'ble Supreme Court regarding the fate of young generation of this Nation, the same will amount roving inquiry amounting a mini trial which will frustrate the very object of NDPS Act.

21. Also, it is vehemently argued that provisions of Section 50 (i) of NDPS Act are not complied with, hence the accused persons are entitled to be released on bail. The Hon'ble Supreme Court in the case of **Vijay Singh Chandubha Jadeja Vs. State of Gujarat (AIR 2011 SC 77)** has clearly held as follows,

“We are of the opinion that the concept of “substantial compliance” with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said

Section in Joseph Fernandes (supra) and Prabha Shankar Dubey (supra) is neither borne out from the language of Sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh's case (supra). Needless to add that the **question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial.**”

Therefore, all that which is argued by all Ld. Advocates for this as well as other accused persons is negated by the ratio in the above authority of the Hon'ble Supreme Court.

22. It is heavily argued that whatever weighed is gross quantity and the net quantity of LSD is nowhere calculated. Hence, there is confusion about quantity which is shown as commercial when actually the same is small. I have carefully examined this aspect. I have also noted above that what is consumed by the addicts or the drug consumer is the whole blot including the droplet on a paper spread in each and every fiber of such paper. While consumption LSD cannot be separated from the blot as it was already in the dry form and mixed with paper blot. The Hon'ble Supreme Court in the case of **Hira Singh and another Vs. Union of India and another, (Criminal Appeal NO.722 of 2017, decided on 22.04.2020)** placed reliance on the Hon'ble U.S. Supreme Court judgment in Chapman v. United States, 500 U.S. 453 (1991) and held as follows,

“... Therefore, if it is accepted that it is only the actual content by weight of offending drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, in that case, the object and purpose of enactment of NDPS Act would be frustrated. There may be few punishment for “commercial quantity”. Certainly that would not have been the intention of the legislature. 8.4. Even considering the definition of “manufacture”, “manufactured

drug” and the “preparation” conjointly, the total weight of such “manufactured drug” or “preparation”, including the neutral material is required to be considered while determining small quantity or commercial quantity. If it is interpreted in such a manner, then and then only, the objects and purpose of NDPS Act would be achieved. Any other intention to defeat the object and purpose of enactment of NDPS Act viz. to Act is deterrent.”

23. Therefore, applying the ratio of Hira Singh Vs. Union of India and another (supra) it is clear that what was found with Kerry Mendes were 20 LSD blots and the same had come to him through accused Neil, who was given the same by another accused for selling. Therefore, involvement of all accused in the chain of possessing, procuring, peddling, selling and consuming the NDPS is patent from the record. Another argument is made that age of all accused may be considered and benefit thereof be given to them for enlarging on bail. I have already noted above that age of the accused is immaterial when their involvement is patent from the record in serious offences under the NDPS Act. On the contrary I strongly feel that once they are released, they will again indulge in the same activities spoiling other other young boys.

24. Similarly the next argument is that except Kerry, nothing was found in possession of any other accused i.e accused No.2 and 4. I have carefully examined this argument. The impact of narcotics in the life of the present generation is of such a magnitude and enormity that the Governments across the globe have brought stringent measures to deal with trafficking of such substances and stringent punishments are also envisaged for any infraction of the same. However, inspite of such stringent laws and penal actions, the trafficking in the said commodity

is only on the increase, thereby spreading its arms far and wide to engulf within its fold the next generation, who are the pillars of the country and, thereby destroying their life. Drug traffickers have found innovative methods and ways to transport across the globe the narcotic drugs, which totally demolishes the life of very many persons and threatens the safety and security of our future generations. Drug traffickers, with least regard to the health and life of the persons, and only with a view to their betterment, distribute the narcotic drugs among the younger generations, which is the root cause of many evils that are being perpetrated by the persons under the influence of the said drugs.

25. The Hon'ble Supreme Court in **Union of India Vs. Ram Samujh and ors (1999) 9 SCC 429**, has laid down that the legislative mandate under Section 37 of the NDPS Act to be adhered and followed. It should be borne in mind that in murder case accused commits murder of one or two persons, while those persons who are dealing in narcotic drugs are instruments in causing death or inflicting death blow to number of innocent young victims who are vulnerable; it causes deleterious effects and deadly impact on the society; they are hazard to the society; even if they are released temporarily, in all probability, they would continue their nefarious activities of trafficking and/or dealing with intoxicants clandestinely. These guidelines are squarely applicable to the present case when the age of accused persons herein is capitalized for bail.

26. Even if the statements under Section 67 are excluded and the aspect under Section 50 of the NDPS Act has to be dealt with at the time of trial, yet it has to be noted that Kerry was found possessing 20

LSD blots through the chain shown in the charge sheet by way of transit chart. Even if the argument of Ld. Adv. is assumed that it was a small quantity LSD, yet the onus of proof that the drugs recovered from his possession were meant for personal consumption lies on him i.e Kerry. The Hon'ble Supreme Court in the case of **Durand Didier Vs. Chief Secretary, Union Territory of Goa, (1990) 1 SCC 95**, held that, "it may not be out of place to mention that even if a person is shown to have been in possession of a small quantity of narcotic drug or psychotropic substance, the burden of proving that it was intended for the personal consumption of such person and not for sell or distribution, lies on such person as per Explanation (2) of Section 27 of the NDPS Act." In the present case this heavy onus is on Kerry and there is no satisfactory explanation for the same.

27. For other accused persons it is argued that, none of them except Kerry, was allegedly found possessing anything. As such nothing was possessed by them. In the case of **Union of India Vs. Rattan Mallik, (2009) 2 SCC 624**, the Hon'ble Supreme Court held that, "We find no substance in the argument of learned Counsel for the respondent that the observation of the learned Judge to the effect that "nothing has been found from his possession" by itself shows application of mind by the Ld. Judge tantamounting to "satisfaction" within the meaning of the said provision." Even last week itself, the Hon'ble Supreme Court in **Union of India through NCB, Lucknow Vs. Md. Nawaz Khan (Criminal Appeal No.1043 of 2021, decided on 22.09.2021)** has placed reliance on the law laid down in **Union of India Vs. Rattan Mallik**, and held that even if nothing is found in the possession of accused, such accused cannot be absolved from the rigors of Section 37 of the NDPS Act. Even in **Abdel Basit Parihar Vs. Union of India, (2020 SCC OnLine Bom**

8032), the Hon'ble High Court referred such argument of Ld. Adv. Mr. Taraq Sayed in para 24 and negated the same by referring Union of India Vs. Rattan Mallik and held that, "Recovery/possession of the contraband with the accused is immaterial and the same is not absolute necessity for prosecuting and punishing the accused."

28. Hence, in my opinion, the age of accused persons in all applications, the fact that except Kerry no other was found possessing any contraband is not relevant consideration to disbelieve the investigation nor the investigation team can be doubted at the stage of bail. Even it has to be noted that bail applications cannot be decided by isolating the object of NDPS Act and the requirements under Section 37 of the NDPS Act. The effect of the Act charged against all accused is an important consideration as the same has acted as a catalyst to spoil the young generation of this Nation. Quantity of LSD i.e 0.3 gm. is far more than the commercial quantity i.e 0.1 gm. Involvement of all accused under all sections charged against them, is prima-facie patent from the record. Ld. S.PP Mr. Advait Sethana was given an opportunity to oppose all applications filed by all the accused. On his opposing the same, I am not satisfied that there are reasonable grounds for believing that this accused and other accused persons are not guilty of such offence and they are not likely to commit any offence while on bail. Therefore, I hold that all the accused, including the present, are found prima-facie involved in serious offence under Sections 8 (c) r.w. Ss. 20 (b)(ii)(A), 21 (b), 22(a), 22(c), 23 (c), 28 and Section 29 of the NDPS Act, 1985. Rigors of Section 37 of the NDPS Act are squarely applicable. Offence against them is grave and very serious. The same provides severe punishments. Therefore, they are not entitled to be released on bail.

29. It is necessary to take note that after rejection of earlier bail application of Kerry (A1), Neil (A2) this application is simply filed under the label of change in circumstance. I have already noted above how there is absolutely no change in circumstance and filing of charge sheet cannot be the change in circumstance, on the contrary a strong evidence against all the applicants to prosecute them by way of trial. I am constrained to note that the applicants are consuming time in filing such successive bail applications, hence, it is necessary to note the law laid down by the Hon'ble Supreme Court in the case of **Virupakshappa Gouda and Ors., Vs. The State of Karnataka and Ors., (2017) 5 SCC 406** wherein it is held as follows,

“The Trial Judge had not been guided by the established parameters for grant of bail. He had not kept himself alive to the fact that twice the bail applications had been rejected and the matter had travelled to this Court. Once this Court has declined to enlarge the Appellants on bail, endeavours to project same factual score should not have been allowed. It is absolute impropriety and that impropriety call for axing of the order. It was not a case where the Trial Court could have entertained a bail application by elaborate dissection of facts and appreciation of statements recorded Under Section 161 Code of Criminal Procedure. The High Court performed its legal duty by lancinating the order passed by the Trial Judge.”

Somewhat same situation is here after rejection of earlier bail applications of Kerry (A1) and Neil (A2). Even there was an attempt through one of the accused for obtaining default bail and the same was rejected by my Ld. Predecessor. The Hon'ble Bombay High Court at Goa in the recent judgment cited supra left no room for any confusion as such. Even if charge sheet is without C.A. report that cannot be a ground for default bail.

30. Ld. Adv. Mr. Taraq Sayed has taken an additional ground that what was seized was not LSD nor the sample of contraband analyzed revealed LSD. Forensic analyses revealed something different as 'MS', which is not a narcotic drug nor a psychotropic substance. Therefore, the question of attracting provision under NDPS Act does not arise nor any question regarding small or commercial quantity thereof and accused No.3 is entitled to be released on bail. This ground is not taken by Kerry (A1) and Neil (A2), but argument of Ld. Adv. Mr. Taraq Sayed is heavily adopted by Ld. Adv. Mr. Ayaz Khan, Ld. Adv. Mr. Mishra and Ld. Adv. Mr. Patil.

31. I have carefully examined documents with the charge sheet. In the charge sheet there is report of FSL and having mention as 'MS' rather than 'LS' or 'LSD'. Page 131 of the charge sheet is a proceeding through the Metropolitan Magistrate and his signature is appearing for the reference of sample and the sample of contraband referred is mentioned as 'LS' and not 'MS'. Page 132 dt.09.02.2021, paragraph 2 has a clear mention as 'LS' and 'GS'. So it is prima-facie clear that what was sent to the FSL is 'LS'. Page 133 para 2 again clearly shows the sample as 'LS' and not 'MS'. Page 169/170 para 14.1 indicates one LSD (Lysergide) i.e. LS. Everywhere in the proceedings of sampling and forwarding the same to FSL there is a clear mention of LS, which demonstrates LSD. Therefore, what was sent to the FSL was 'LSD' and not anything like 'MS'. Even if the only place in the reports of analysis where 'MS' is mentioned, does not mean that it is something different than psychotropic substance and not LSD. What appears is an apparent typing mistake and same does not entitle the accused for getting bail. **It is necessary to note that all accused persons being under-trial prisoners have to be tried as expeditiously as possible and**

the trial has to be expedited for the same. However, cooperation of accused is necessary for the same by way of pursis for beginning the trial by framing charge, without consuming time in filing bail applications.

32. In this background, Point No.1 is answered in the negative, Point No.2 in the affirmative and Point No.3 in the negative and following order is passed :-

ORDER

1. Bail Application (Exh.4) stands rejected.
2. Accused is UTP, hence trial will begin soon by framing charge.

Dt.: 27.09.2021

(M.G. Deshpande)
Addl. Sessions Judge.
C.R.No.16, Gr.Bombay at Mumbai

Dictated on : 27.09.2021
Transcribed on : 27.09.2021
Signed on : 27.09.2021

“CERTIFIED TO BE TRUE AND CORRECT COPY OF THE ORIGINAL SIGNED JUDGMENT/ORDER”	
27.09.2021 at 17.45 hours UPLOAD DATE AND TIME	(KISHOR PRAKASH SHERWADE) NAME OF STENOGRAPHER
Name of the Judge	HHJ M. G. DESHPANDE (COURT ROOM NO.16)
Date of pronouncement of judgment/order	27.09.2021
Judgment/order signed by P.O. on	27.09.2021
Judgment/order uploaded on	27.09.2021