

Yethul T vs State of Kerala

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Court : Kerala

Decided On : Feb-21-2023

Judge : Honourable Mr. Justice Alexander Thomas, Honourable Mrs. Justice Sophy Thomas

Appeal No. : Bail Appl./2473/2022

Appellant : Yethul T

Respondent : State of Kerala

Judgement :

(CR)

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT THE HONOURABLE MR. JUSTICE ALEXANDER THOMAS
& THE HONOURABLE MRS. JUSTICE SOPHY THOMAS TUESDAY,
THE 21ST DAY OF FEBRUARY 2023 / 2ND PHALGUNA, 1944 BAIL
APPL. NO.2473 OF 2022 (CRIME NO.34/2021 OF EXCISE RANGE
OFFICE, KANNUR)

APPLICANT/ACCUSED NO.2: YETHUL T, S/O.JAYADEVAN, AGED 25
YEARS PUTHIYANDI HOUSE, MUNDAYAD P.O, KANNUR, PIN -

670597 BY ADVS. V.JOHN SEBASTIAN RALPH VISHNU CHANDRAN
RALPH RETI JOHN APPU BABU SHIFNA MUHAMMED SHUKKUR
RESPONDENT/COMPLAINANT: STATE OF KERALA REPRESENTED
BY PUBLIC PROSECUTOR,HIGH COURT OF KERALA, ERNAKULAM,
PIN - 682031 BY ADVS. PUBLIC PROSECUTOR ADDL.DIRECTOR
GENERAL OF PROSECUTION SRI.K.A.ANAS-GOVERNMENT
PLEADER, SMT.SAIPOOJA-AMICUS CURIAE, SRI.TOM JOSE
PADINJAREKARA - AMICUS CURIAE, SRI.SUMAN CHAKRAVARTHY-
AMICUS CURIAE, S.MANU, DY.SOLICITOR GENERAL OF INDIA THIS
BAIL APPLICATION HAVING COME UP FOR ADMISSION ON
21.02.2023, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:

(CR) ALEXANDER THOMAS & SOPHY THOMAS, JJ.
===== B.A.No. 2473 of 2022 =====
Dated this the 21st day of February, 2023

ORDER

ALEXANDER THOMAS, J.

The aforecaptioned application has been instituted under Sec.439 of

the Code of Criminal Procedure (Cr.P.C), seeking for regular bail, in regard to the involvement of the sole applicant herein, as accused No.2, in the instant Crime No.34/2021 of Kannur Excise Range Office, which has been registered for offences punishable under Sec.22(c) read with Sec.29 of the Narcotic Drugs & Psychotropic Substances Act, 1985 (hereinafter referred to as the NDPS Act or as the Act, for short).

2. The gist of the prosecution case in the above crime is that on

15.12.2021 at about 7.25 PM, the two accused persons in this case were found in possession of 0.1586 grams of LSD, transported in a scooter, bearing registration No.KL 13 AJ 2850, at Payyambalam, near the office of the Postal Superintendent,

Kannur. The specific allegation is to the effect that, on seeing the Excise party, A-1 handed over some articles to the applicant herein (A-2) and he had put it in his pocket and on suspicion,

search was conducted and LSD was found in possession of A-2. The - : 2 :-

applicant was arrested on 15.12.2021 and has thereafter been remanded to judicial custody. A-1 had filed Crl. Miscellaneous Petition No.14/2022 and the applicant herein (A-2) had filed Crl.Miscellaneous Petition No.23/2022 before the Court of Sessions Judge (NDPS Act cases), Vadakara, Kozhikode District, seeking for regular bail under Sec.439 of the Cr.P.C. Since it was found that the alleged contraband of LSD was having a total weight of 0.1586 gm., and as the said weight of the contraband would fall within the notified commercial quantity limits, bail pleas were rejected in view of the restrictions contained in Sec.37 of the NDPS Act.

3. In this bail application, the prosecution has pointed out that it

has already been categorically held by a Three-Judge Bench of the Apex Court, in the celebrated case in Hira Singh & anr. v. UOI & anr., [(2020) 20 SCC 272] that, while determining as to whether the weight of the alleged contraband would fall within small quantity, intermediate quantity or commercial quantity, as envisaged in the notification S.O No.1055 (D) dated 19.10.2001, as amended from time to time, issued under the above Act, the weight of not only the pure drug quantity, but also that of the neutral substance should be taken into account for determining as to whether the weight of the contraband would come within small quantity or commercial quantity, etc., as the case may be.

- : 3 :-

4. It has been urged by the prosecution that the plea of the

applicant, that the actual weight of the pure drug quantity alone should be assessed and not the total weight of the LSD, as ingested in the blotter paper, etc., cannot be countenanced, in view of the authoritative pronouncement of law by the Apex Court in Hira Singh's case supra [(2020) 20 SCC 272]. The prosecution has

also urged that LSD ingested in blotter paper, etc., would also be a mixture and will be a preparation, within the meaning of Sec.2(xx) of the Act and hence, the total weight of the mixture for preparation of the psychotropic substance or narcotic drug, as the case may be, should be taken into account, as per the above dictum. Whereas, the applicant has urged that a learned Single Judge of the Bombay High Court, in the case in Hitesh Hemant Malhotra v. State of Maharashtra [(2020) SCC Online Bom 3581, para.11], has held that the paper only carries the LSD drug and facilitates its consumption, but the paper with the LSD drops as a whole, is neither preparation, within the meaning of Sec.2(xx), nor a mixture within the meaning of the NDPS Act and hence, the dictum laid down by the Apex Court in Hira Singh's case supra [(2020) 20 SCC 272], has no application in a case where the alleged contraband is LSD ingested in blotter paper, etc., and that, therefore, the actual weight of the pure drug quantity alone should be assessed for

- : 4 :- determining as to whether its weight would fall within small quantity, commercial quantity, etc. Further, it has also been urged by the applicant that there are Single Bench verdicts of this Court, in cases as in the order dated 8.3.2021 in B.A.No. 1718/2021 [Sreeraj v. State of Kerala - MANU/KE/0544/2021], order dated 26.4.2022 in B.A.No.

MANU/KE/1370/2022], etc. wherein, after placing reliance on the abovesaid Single Bench verdict of the Bombay High Court in Hitesh Hemant Malhotra's case supra, it has been inter alia held that an arguable case has been made out on that basis and that though the weight of the LSD paper stamp had fallen within the commercial quantity limits, the court had granted bail to the applicants in those cases. Hence, the applicant herein has also urged that regular bail may be granted to him, in tune with the perspective taken by the learned Single Judge of this Court in the aforecited orders, by placing reliance on Hitesh Hemant Malhotra's case supra.

5. After dealing with the rival pleas, the learned Single Judge in

this case has passed a reference order on 26.7.2022, holding that the aforecited decisions in the cases as in Hitesh Hemant Malhotra's case supra (Bombay High

Court), Sreeraj's case supra and Jagath Ram - : 5 :-

Joy's case supra rendered by this Court have not considered the findings and reasonings of the decision of the Three-Judge Bench of the Apex Court in Hira Singh's case supra [(2020) 20 SCC 272], which has held that the weight of the neutral material should also be taken into account while considering the weight of the contraband. It was also held in para 7 of the abovesaid order dated 26.7.2022, rendered by the learned Single Judge of this Court in this case, that a few other High Courts, including the Madras High Court in Krishansaran v. State [2022 SCC OnLine Mad 1165, paras 21 to 23] the Karnataka High Court in Rijesh Ravindran v. UOI [2020 SCC OnLine Kar 3401, para 12] and Registrar General, High Court of Karnataka v. A.Shahid & Ors. [ILR 2015 KAR 5411] have also taken the view that weight of the neutral substance should also be taken into consideration for assessing the total weight of the contraband and that the learned Single Judge would differ from the view taken in Hitesh Hemant Malhotra's case supra (Bombay High Court) and Sreeraj's case supra & Jagath Ram Joy's case supra rendered by this Court. In that view of the matter, the learned Single Judge, in exercise of the powers under the proviso to Sec. 3 of the Kerala High Court Act, has adjourned the case for being heard and determined by a Division Bench of this Court and accordingly, directed the Registry to place the matter before

- : 6 :- the Hon'ble Chief Justice, for passing appropriate orders in that regard. It is on this basis that the present application has come up before this Division Bench for determination.

6. Heard Sri.John Sebastian Ralph, learned Advocate instructed

and assisted by Sri.Ralph Reti John, learned counsel appearing for the applicant, Sri.K.A.Anas, learned Public Prosecutor appearing for the respondent State of Kerala, Sri. Suvin R. Menon, learned Central Govt. Counsel (CGC) appearing for the Union Government and Sri.Tom Jose Padinjarakkara, & Sri.Suman Chakravarthy, learned Amici Curiae, both instructed and ably assisted by Smt.Saipooja.

7. The learned Advocates on both sides and the learned amici

curiae have submitted that the main issue in this case arises in many of the cases of this nature, both before the Sessions Courts as well as this Court and therefore, it is utmost necessary and imperative that the Division Bench may answer the reference in this case. From the submissions of both sides, it is brought to our judicial notice that the present issue, as to

whether the weight of the neutral substance, in relation to psychotropic substance, like LSD in blotter paper/LSD paper stamp, etc., should also be taken into account and as to whether the dictum laid down by the Three-Judge Bench of the Apex Court in Hira Singh's - : 7 :- case supra would apply in relation to reckoning the weight in relation to psychotropic substance, like LSD, has been recurringly falling for consideration both before the Sessions Courts concerned as well as before this Court.

8. Sri. John S.Ralph, the learned Advocate appearing for the

applicant, had submitted that the paper stamp or blotter paper, on which the LSD is ingested, cannot be understood as a mixture, as understood in the definition of preparation, as occurring in Sec.2(xx) of the NDPS Act. So also, the said paper stamp or blotter paper cannot be said to be a neutral substance vis-a-vis, the LSD. Hence, it is submitted that the learned Single Judge of the Bombay High Court has rightly held in Hitesh Hemant Malhotra's case supra [(2020) SCC Online Bom 3581], that the dictum laid down by the Three-Judge Bench of the Apex Court in Hira Singh's case supra [(2020) 20 SCC 272], will not apply to the case of LSD blotter paper, etc., and that therefore, only the weight of the pure LSD drug can be reckoned, for determining as to whether the weight of the seized contraband would fall within small quantity or commercial quantity, in terms of the afore notification dated 19.10.2001, etc. Further that, the seized contraband that was the subject matter of consideration by the Apex Court in Hira Singh's case supra [(2020) 20 SCC 272], was Heroin

- : 8 :- (Narcotic Drug).

9. In that case, it can be seen from paras 2 and 3 of the

impugned judgment of the Punjab & Haryana High Court *Hira Singh & anr. v. UOI* [2013 SCC Online P&H 17488] that the seized contraband in that case was 270 gms. of heroin and the chemical examiner's report showed that it was found to have only diacetylmorphine content of 1% and therefore, the quantity of the pure drug of heroin recovered was only 2.6 gms., which then would fall within the limits of small quantity, as per the

notification. In that case, the High Court held that, in view of the subsequent notification issued on 18.11.2009, the total weight of the entire mixture and not merely the weight of the pure drug should be taken into account and hence, the plea of the appellant accused was repelled. Further, it is urged that, unlike *Hira Singh's* case *supra*, which is in relation to a mixture of heroin (narcotic drug), the present case involves LSD

(Psychotropic substance) and since blotter paper or paper stamp, etc. cannot be treated as a mixture of neutral substance, for the above reasons, the dictum laid down by the three-Judge Bench of the Apex Court in *Hira Singh's* case *supra* [(2020) 20 SCC 272] will not apply to the present case. Further that, Sri. John S. Ralph, learned counsel appearing for the applicant has brought the attention of this Court to the contents of the

- : 9 :-

notification, S.O No.1055(E) dated 19.10.2001 and the notification issued thereunder thereafter, including SO No.2941(E) dated 18.11.2009, which has introduced Note 4 thereunder. It is pointed out that Entry No.133 of the notification dated 19.10.2001 deals with LSD and it is stipulated therein that if the seized quantity is less than 0.002 gm., then it is small quantity and if the seized quantity is above 0.1 gm., then it would fall within the commercial quantity, etc.

10. Sri. John S Ralph, learned counsel appearing for the applicant,

has pointed out the anomalies in the dosage content for the small quantity and commercial quantity of LSD, as per the Indian norms and U.S. Norms. Placing reliance on the decision of the Apex Court in *Hira Singh v. Union of India* [(2020)

20 SCC 272, para 2.9], the decision of the U.S Supreme Court in Richard L Chapman v. United States [1991 (2) SCC

Online US SC 85, Para 2] and the U.S. Sentencing Commission Report, the learned counsel for the applicant has prepared a tabular data, comparing the dosage specifications as well as the dosage calculations regarding the small and commercial quantities of LSD, as per Indian and U.S. norms. For such comparison, the calculations and specifications, with regard to the dosage of the small and commercial quantities of heroin, as per U.S. and Indian norms, as derived from the decision of the Apex Court

- : 10 :- in Hira Singh v. Union of India [(2017) 8 SCC 162, para 7], have been given by him, as below : Dosage of Narcotic Drugs and Psychotropic Substances
S.No. Narcotic drug/ Small Quantity Commercial Dosage per gm Psychotropic
Quantity substance US India US India

1. LSD 1 gm 0.002 gm 10 gm 0.1 gm 0.05 mg

2. Heroin 100 gm 5 gm 1 kg 250 gm 0.25 gm Dosage per Small and Commercial
Quantity LSD S.No. Narcotic drug/ Small Quantity Commercial Quantity
Psychotropic substance

1. USA 1gm / 0.05mg = 10gm / 0.05mg = 20,000 dosages 2,00,000 dosages

2. India 0.002gm / 0.05mg = 0.1gm / 0.05mg = 2,000 40 dosages dosages Small
quantity dosage of LSD in USA is 50 times more than the dosage in India
Commercial quantity dosage of LSD is 100 times more than that in India. Heroin
S.No. Narcotic drug/ Small Quantity Commercial Quantity Psychotropic substance

1. USA 100 gm / 0.25gm = 400 1 kg / 0.25gm = 4,000 dosages dosages

2. India 5gm / 0.25gm = 20 dosages 250gm / 0.25gm = 1,000 dosages

Small quantity dosage of LSD in USA is 20 times more than the dosage in India
Commercial quantity dosage of LSD is 4 times more than that in India.
Conversions: 1 gm = 1000 mg (1 mg = 0.01 gm) 1 kg = 1000gm (1 gm = 0.01 kg) -

: 11 :-

11. The sentencing norms in India for small quantity, as per

Sec. 22 of the NDPS Act, is imprisonment which may extend upto one year or fine or both and that for intermediate quantity is rigorous imprisonment upto 10 years and that for commercial quantity is not less than ten years or above, but may extend to 20 years and with fine, etc. Hence, it is argued by the accused that the ordinary limits, as per U.S. Norms, have been fixed in such a manner that the long sentence of not less than ten years, etc. can be imposed only in case of commercial quantity of two hundred thousand dosages or more for LSD. Whereas, the one fixed as per the Indian norms is only 2000 dosages. Hence, it is urged that the rational sentencing policy in U.S. is that the weight of the entire quantity should be taken into account, as the limit of the commercial quantity is fixed on a higher scale. Whereas the limit of the commercial quantity, as per the Indian norms, is fixed at a very low scale of only 2000 dosages and therefore, the rationality of the sentencing policy would make it clear that the total weight of the pure drug of LSD alone is to be taken into account. So it is argued that, otherwise, if the total weight of the mixture, inclusive of the pure drug, is taken into account, then the concept of small quantity, as per the Indian norms, would be illusory and rather meaningless. In that regard, the learned counsel for the applicant would also place reliance on the

- : 12 :- observations of the Apex Court in the celebrated case in Sunil Batra v. Delhi Admn. [(1978) 4 SCC 949], wherein the Apex Court has warned against longer and harsh sentences in the following words: 52.For what is punitively outrageous, scandalizingly unusual or cruel and rehabilitatively counter-productive, is unarguably unreasonable and arbitrary and is shot down by Articles 14 and 19 and if inflicted with procedural unfairness, falls foul of Article 21.

In that regard, Sri. John S. Ralph, learned counsel appearing for the applicant, would submit that if the interpretation projected by the prosecution that the total weight of the mixture should be reckoned even for LSD (Psychotropic substance), then the rationale and objective of the sentencing policy of the Legislature, as per the Statement of Objects and Reasons of the NDPS Amendment Act, 2001 (made effective from 19.10.2001), which envisages to rationalise the sentence structure,

so as to ensure that, while drug traffickers who traffic in significant quantities of drugs are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment, will be completely defeated. This, he would so urge, by pointing out that, if the

total weight of the LSD blotter paper is even above 0.1 gm. (2000 dosages), the accused will have to suffer the heavy sentence of not less than 10 years, which could be even more. That, whereas, the said heavy sentence of 10 years or more can be invoked in the USA law, only if the - : 13 :-

weight of the LSD blotter paper is above 10 gm. (2,00,000 dosages, viz., 2 lakh dosages). On this basis, the learned counsel for the applicant would urge that the inexorable consequence is arbitrarily high sentences, which has been frowned upon by the Apex Court's verdict (rendered by Justice V. R. Krishna Iyer) in *Phul Singh v. State of Haryana* [(1979) 4 SCC 413], para 3, which reads as follows:

3. . Punitive therapeutics must be more enlightened than the blind strategy of prison severity where all that happens is sex-starvation, brutalisation, criminal companionship, versatile vices through bio-environmental pollution, dehumanised cell drill under zoological conditions and emergence, at the time of release, of an embittered enemy of society and its values with an indelible stigma as convict stamped on him - a potentially good person successfully processed into a hardened delinquent, thanks to the penal illiteracy of the Prison System. The Court must restore the man.

12. Per contra, the learned Prosecutor appearing for the

respondent (State) and the learned Amici Curiae would submit that the main matter in issue is covered by the dictum laid down by the Three- Judge Bench of the Apex Court in *Hira Singh's case* supra [(2020) 20 SCC 272] that, the total weight of the mixture of the seized contraband, including the neutral substance, like blotter paper, etc., would have to be reckoned for assessing as to whether the seized quantity is within the notified limits of small quantity, commercial quantity,

etc., for the purpose of Sec.22 of the NDPS Act. Though the facts of Hira Singh's case supra [(2020) 20 SCC 272] dealt with heroin (narcotic substance), the dictum

- : 14 :-

would apply not only to narcotic drugs, but also to psychotropic substances, including LSD. Further that, the above view has been taken by another Single Bench verdict of the Bombay High Court in the case in Narcotics Control Bureau v. Anuj Keshwani & anr. [(2021) SCC Online Bom 4548], wherein the seized contraband was LSD in blotter paper. That later, the Division Bench of the Bombay High Court in the case in H.S.Arun Kumar v. State of Goa [2022 SCC OnLine Bom 4696], has held that the view taken by the Single Bench verdict in Hitesh Hemant Malhotra's case supra [(2020) SCC Online Bom 3581], is not in consonance with the dictum laid down by the Three-Judge Bench of the Apex Court in Hira Singh's case supra [(2020) 20 SCC 272] and that, the view taken in the other Single Bench verdict in Anuj Keshwani's case supra [(2021) SCC Online Bom 4548], is correct, in which case also the seized contraband was LSD in blotter paper and it was held that the blotter paper used for the ingested LSD thereon, would be a mixture, so as to satisfy the definition of preparation, as per Sec.2(xx) of the NDPS Act and that, the total weight of the mixture, including the neutral substance and the pure drug, should be assessed for reckoning the notified limits of small quantity, commercial quantity, etc.

- : 15 :-

13. We have heard both sides in extenso and have considered the rival pleas and the various case laws cited before us.

14. We may refer to some of the relevant provisions of the NDPS Act. In the instant case, the seized contraband is LSD (LYSERGIDE).

Sec.2(xxiii) defines Psychotropic substance to mean as follows: Sec.2(xxiii) Psychotropic substance means any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule.

15. The list of Psychotropic substances specified in the Schedule,

as mentioned in Sec.2(xxiii), is contained in the Schedule to the NDPS Act framed under Sec.2(xxiii). The said list contains 111 entries. Item No.4 of the said list appended to the schedule deals with LSD.

16. Entry 111 thereunder, is a residuary entry and the same reads as follows :
"111. Salts and preparations of above."

So, it can be seen that Sec.2(xxiii) defines Psychotropic substance, to mean any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule. In view of the item, as per Entry 111 in the said list, salt and preparations of any of the above previous entries therein, including entry No.4 (LSD), would also be a

- : 16 :- Psychotropic substance, going by the very definitional parameters of Sec.2 (xxiii).

17. Further, the expression "preparation" occurring in

Sec.2(xxiii), is defined as per Sec.2(xx), which reads as follows : "Sec.2. Definitions.-In this Act, unless the context otherwise requires,- xxx xxx xxx xxx xxx xxx

(xx) preparation, in relation to a narcotic drug or psychotropic substance,

means any one or more such drugs or substances in dosage form or any solution or mixture, in whatever physical state, containing one or more such drugs or substances;" It appears that the terms "solution" or "mixture", are not explicitly defined in the Act.

18. "Narcotic drug" is defined as per Sec.2(xiv), which reads as follows : "Sec.2. Definitions.-In this Act, unless the context otherwise requires,- xxx xxx xxx xxx xxx xxx

(xiv) narcotic drug means coca leaf, cannabis (hemp), opium, poppy straw and includes all manufactured drugs;"

19. The term "neutral substance" is not explicitly defined in the NDPS Act, but the same appears in various definitions in Sec.2 of the Act, as can be seen from a reading of Sec.2(iii)(c), dealing with cannabis

(hemp). Sec.2(vi)(b), dealing with coca leaf, Sec.2(xv)(b) dealing with opium & Sec.2(xvi)(a) dealing with opium derivative. Sec.2(x) defines "manufacture" as follows : "Sec.2. Definitions.-In this Act, unless the context otherwise requires,- xxx xxx xxx xxx xxx

(x) manufacture, in relation to narcotic drugs or psychotropic - : 17 :- substances, includes-

(1) all processes other than production by which such drugs or substances may be obtained;

(2) refining of such drugs or substances;

(3) transformation of such drugs or substances; and

(4) making of preparation (otherwise than in a pharmacy on prescription) with or containing such drugs or substances;"

20. Sec.2(xi) defines "manufactured drug" as follows : "Sec.2. Definitions.-In this Act, unless the context otherwise requires,- xxx xxx xxx xxx xxx xxx

(xi) manufactured drug means-

(a) all coca derivatives, medicinal cannabis, opium derivatives and poppy straw concentrate;

(b) any other narcotic substance or preparation which the

Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention,

by notification in the Official Gazette, declare to be a manufactured drug, but does not include any narcotic substance or preparation which the Central Government may, having regard to the available information as to its nature or to a decision, if any, under any International Convention, by notification in the Official Gazette, declare not to be a manufactured drug;"

21. "Small quantity" has been defined as per Sec.2(xxiii) as follows :

"Sec.2. Definitions.-In this Act, unless the context otherwise requires,- xxx xxx xxx xxx xxx xxx small quantity, in relation to narcotic drugs and psychotropic substances, means any quantity lesser than the quantity specified by the Central Government by notification in the Official Gazette;"

22. "Commercial quantity" is defined as per Sec.2(via), which reads as follows :

"Sec.2. Definitions.-In this Act, unless the context otherwise requires,- xxx xxx xxx xxx xxx xxx "(via) commercial quantity, in relation to narcotic drugs and psychotropic substances, means any quantity greater than the quantity specified by the Central Government by notification in the Official Gazette;" - : 18 :-

23. Sec.22 deals with punishment for contravention involving

small quantity, intermediate quantity & commercial quantity, and the same reads as follows : "Sec.22. Punishment for contravention in relation to psychotropic substances.-

Whoever, in contravention of any provision of this Act or any rule or order

made or condition of licence granted thereunder, manufactures, possesses, sells, purchases, transports, imports inter-State, exports inter-State or uses any psychotropic substance shall be punishable,-

(a) where the contravention involves small quantity, with rigorous imprisonment for a term which may extend to 5 [one year], or with fine which may extend to ten thousand rupees, or with both;

(b) where the contravention involves quantity lesser than commercial

quantity but greater than small quantity, with rigorous imprisonment for a term which may extend to ten years, and with fine which may extend to one lakh rupees;

(c) where the contravention involves commercial quantity, with

rigorous imprisonment for a term which shall not be less than ten years but which may extend to twenty years, and shall also be liable to fine which shall not be less than one lakh rupees but which may extend to two lakh rupees: Provided that the court may, for reasons to be recorded in the judgment, impose a fine exceeding two lakh rupees."

24. Sec.37 inter alia deals with certain restrictions in consideration for the grant of bail, for offences involving commercial quantity. Sec.37 reads as follows : "Sec.37. Offences to be cognizable and non-bailable.-(1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),-

(a) every offence punishable under this Act shall be cognizable;

(b) no person accused of an offence punishable for offences under section 19 or section 24 or section 27A and also for offences involving commercial quantity] shall be released on bail or on his own bond unless-

(i) the Public Prosecutor has been given an opportunity to oppose the application for such release, and

(ii) where the Public Prosecutor opposes the application, the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that he is not likely to commit any - : 19 :- offence while on bail.

(2) The limitations on granting of bail specified in clause (b) of sub-

section (1) are in addition to the limitations under the Code of Criminal Procedure, 1973 (2 of 1974) or any other law for the time being in force on granting of bail."

25. For laying down the limits of small quantity and commercial

quantity, as envisaged in Sec.2(xxiiia) & Sec.2(viia) of the Act, the competent authority (Union Government), has initially issued statutory notification, as published in the official Gazette, as per S.O No.1055 (E) dated 19.10.2001. Various narcotic drugs and psychotropic substances and the respective limits of small quantity and commercial quantity, for each of those substances, have been separately enumerated in the Table appended to the abovesaid notification. Item 133 of the said Table, appended to the above notification, deals with LSD and the limits of small quantity and commercial quantity, respectively, for LSD are notified therein as 0.002 gm & 0.1 gm respectively. Various other psychotropic substances and narcotic drugs are also included in the said Table. Entry Nos. 55, 56 & 134 of the said table deals with Ganja, heroin & MDMA, respectively. Entry No. 239 deals with any mixture or preparation that of with or without a neutral material, of any of the above drugs. Entry No. 133 dealing with LSD, Entry No. 239 dealing with mixture, etc., and the other provisions thereunder, including the Notes (except Note.3, which is not relevant for

- : 20 :- our purpose), are extracted as hereunder :

[See sub-clause (viia) and (xxiiia) of section 2 of the Act] S.I. Name of
Other non- Chemical Small Commercial No. Narcotic Drug propriety
Name Quantity quantity and name (in gm.) (ingm/kg) Psychotropic
Substance (International and non- proprietary name (INN)) 1 2 3 4 5 6 1
2 133 (+) LSD, 9, 10- 0.002 0.1 gm. LYSERGIDE LSD-25 didehydro-N,
N-diethyl-6- methylergoli ne-8 Beta- carboxamide 134 . 135 . 239 Any
mixture or * ** preparation that of with or without a neutral material, of
any of the above drugs *Lesser of the Small quantity between the
quantities given against the respective narcotic drugs or psychotropic

substances mentioned above forming part of the mixture. **Lesser of the Commercial quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture. Note : (1) The small quantity and the commercial quantity given against the respective drugs listed above apply to isomers, within specific chemical designation, the esters, ethers and salts of these drugs, including salts of esters, ethers and isomers; whenever existence of such substance is possible. - : 21 :-

(2) The quantities shown against the respective drugs listed above also apply to the preparations of the drug and the preparation of substances of note 1 above.

(3) Note.4 was subsequently inserted as per Notification S.O No.2941 (E) dated 18.11.2009 and the same reads as follows :

(4) The quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomers, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.)

26. It appears that there were quite a few decisions of the Apex

Court and various High Courts, even before the insertion of Note. 4 supra, as per notification dated 18.11.2009, wherein it was held that the total weight of the mixture, including the neutral substance as well as the pure drug quantity, should be assessed for determining as to whether the seized contraband, would fall within the limits of small quantity, commercial quantity, intermediate quantity, etc., for the purpose of punishment and sentence, in terms of Sec.22 of the Act. Before the insertion of Note.4 supra, as per the supra notification dated 18.11.2009, a Two-Judge Bench of the Apex Court in the decision rendered on 11.03.2008, in the case in E.Micheal Raj v. Intelligence Officer, NCD (Narcotic Control Bureau)

[(2008) 5 SCC 161], has held, in para 15 thereof that, it appears from the Statement of Objects and Reasons of the amending Act, 2001,

- : 22 :-

that the intention of the Legislature was to rationalise the sentence structure, so as to ensure that, while drug traffickers who traffic in significant quantities of drugs, are punished with deterrent sentences, the addicts and those who commit less serious offences are sentenced to less severe punishment and that, under the rationalised sentence structure, the punishment would vary, depending upon the quantity of the offending material. The Apex Court further held therein, that in the case of a mixture of a narcotic drug or a psychotropic substance(s) with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration, while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and that it is only the actual content, by weight of the narcotic drug, which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity. Later, after the insertion of the supra Note.4, as per the supra notification, S.O No.2941 (E) dated 18.11.2009, as per the decision rendered on 30.08.2013 in the case in Hira Singh's case supra [(2013) SCC Online P&H 17488], by placing reliance on a Division Bench of the Delhi High Court in the case in Abdul Mateen v. Union of India

[(2012) SCC Online 5662] = [(2012) 194 DLT 425] (paras 9 to 10), has held

that, in view of the subsequent insertion of Note 4 supra from 18.11.2009, - : 23 :-

the total weight of the mixture of the psychotropic substance, including the neutral material, should be taken into account for determining as to whether the contravention is for small quantity or commercial quantity, etc. A reading of paras 2 & 3 of the decision of the Punjab & Haryana High Court in Hira Singh's case supra [(2013) SCC Online P&H 17488] , would indicate that in the said case, the seized contraband was 270 gms. of Heroin and the chemical examiner's report contended that it contained diacetylmorphine (chemical name of heroin) content as

1% and therefore, it was taken that the quantity of the pure drug recovered from the accused therein would come to only 2.6 gms. of heroin, which then would fall within the small quantity limits. However, the High Court held therein that the total weight of the mixture included the neutral substance, instead of only taking into account the actual weight of the pure drug component. The aforesaid decision of the Punjab & Haryana High Court, in Hira Singh's case supra [(2013) SCC Online P&H 17488] as well as the decision of the Delhi High Court in Abdul Mateen's case supra [(2012) SCC Online 5662], were the subject matter of consideration before a Two- Judge Bench of the Apex Court in the case in Hira Singh & anr. v. Union of India & anr. [(2017) 8 SCC 162]. The Two-Judge Bench of the Apex Court, in Hira Singh's case supra [(2017) 8 SCC 162], in para 11

- : 24 :-

thereof, considering the significance of the issues raised by the respondents therein and the grounds of challenge of the petitioners therein, concerning the impugned notification dated 18.11.2009, amending the notification dated 19.10.2001, referred the matter to a Three-Judge Bench for an authoritative pronouncement on the matters in issue. The Two-Judge Bench, as per order dated 03.07.2017 of the Apex Court in Hira Singh's case supra [(2017) 8 SCC 162], had referred five issues as paras 12.1 to 12.5 thereof, for the consideration of a Three-Judge Bench. Later, the Three-Judge Bench of the Apex Court in Hira Singh & anr. v. Union of India & anr. [(2020) 20 SCC 272], has answered the reference, as per order dated 22.04.2020.

27. The questions in the reference order and the issues raised

before the Three-Judge Bench are contained in para 1 of the Three-Judge Bench decision, which is the reiteration of paras 12.1 to 12.5 of the order of reference rendered by the Three-Judge Bench. The issues answered are contained in paras 12.1 to 12.4 of the decision of the Three-Judge Bench in Hira Singh's case supra [(2020) 20 SCC 272]. Each of the five questions referred for consideration and the answers thereof, are extracted for easy perusal as follows :

Qn.1 Whether the decision of this Court in E. Micheal Raj's case supra [(2008) 5 SCC 161] requires reconsideration having omitted to take note of Entry 239 - : 25 :-

and Note 2 (two) of the Notification dated 19-10-2001 as also the interplay of the other provisions of the Narcotic Drugs and Psychotropic Substances Act, 1985 with Section 21? Ans: The decision of this Court in E. Micheal Raj's case supra [(2008) 5 SCC 161] taking the view that in the mixture of narcotic drugs or psychotropic substance with one or more neutral substance(s), the quantity of the neutral substance(s) is not to be taken into consideration while determining the small quantity or commercial quantity of a narcotic drug or psychotropic substance and only the actual content by weight of the offending narcotic drug which is relevant for the purpose of determining whether it would constitute small quantity or commercial quantity, is not a good law. Qn.2 Does the impugned notification issued by the Central Government entail in redefining the parameters for constituting an offence and more particularly for awarding punishment? Does the NDPS Act permit the Central Government to resort to such dispensation?

Ans: In case of seizure of mixture of narcotic drugs or psychotropic substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and to be taken into consideration along with actual content by weight of the offending drug, while determining the small or commercial quantity of the narcotic drugs or psychotropic substances.

Qn.3 Does the NDPS Act envisage that the mixture of narcotic drug and seized material/substance should be considered as a preparation in totality or on the basis of the actual drug content of the specified narcotic drug?

Ans: The Notification dated 19-10-2001 specifies the small quantity and commercial quantity with respect to respective narcotic drugs and

psychotropic substances. As observed hereinabove, by abundant caution and to make it further clear, Note 4 has been added. Therefore, it cannot be said to be ultra vires the scheme and the relevant provisions of the NDPS Act. Challenge to the Notification dated 18-11-2009 adding Note 4 to the - : 26 :-

Notification dated 19-10-2001, fails and it is observed and held that the same is not ultra vires the scheme and the relevant provisions of the NDPS Act. Qn.4 Whether Section 21 of the NDPS Act is a standalone provision or intrinsically linked to the other provisions dealing with manufactured drug and preparation containing any manufactured drug? Ans: Section 21 of the NDPS Act is not a standalone provision and must be construed along with other provisions in the statute including provisions in the NDPS Act including Notification No. S.O. 2942(E) dated 18-11-2009 and Notification No. S.O. 1055(E) dated 19-10-2001.

28. The relevant and important paragraphs of the Three-Judge Bench decision in Hira Singh's case supra [(2020) 20 SCC 272], are those contained in paras 10.2, 10.3, 10.4, 10.5, 11, 12.2, etc.

29. There is no necessity to extract the entirety of the abovesaid

paragraphs in the decision of the three-judge Bench of the Apex Court in Hira Singh's case supra [(2020) 20 SCC 272]. However, a brief outline of those paragraphs may be apposite in the present case. In para 10.2, the Apex Court has held that considering the Statement of Objects and Reasons and the Preamble of the NDPS Act and the relevant provisions of the said Act, it was clear that it was never the intention of the legislature to exclude the quantity of neutral substance and to consider only the actual

content by weight of offending drug, for the purpose of determining whether it would constitute small quantity or commercial quantity, etc. - : 27 :-

Note 2 of the aforesaid table, appended to the statutory notification dated 19.10.2001, specifically provides that the quantity shown against the respective drugs listed in the said Table also apply to the preparations of the drug and the

preparations of substances of Note 1 supra. As per Note 1, the small quantity and commercial quantity given against the respective

drugs and substances listed in the Table apply to isomers, esters, ethers and salts of these drugs, including salts or esters, ethers and isomers, wherever existence of such substance is possible. Entry 239, listed in the said table, deals with any mixture or preparation that of with or without any neutral material of any of the drugs included in the various entries in the said table. The asterisk and the double asterisks, noted in Column No.5 and Column No.6 pertaining to supra Entry 239, clearly provides that lesser of the small quantity between the quantities given against the respective narcotic drugs or psychotropic substances, mentioned above, forming part of the mixture, is to be taken into account. Also that, lesser of the commercial quantity between the quantities given against the respective narcotic drugs or psychotropic substances, mentioned in the

said table, forming part of the mixture, is to be reckoned. Further, it has been stated that, for the purpose of determination of the small quantity or commercial quantity, in case of entry 239 the entire - : 28 :-

weight of the mixture / drug, by whatever name called, the weight of neutral material is also to be reckoned, etc. It was on this basis that the Apex Court has categorically held that the earlier dictum laid down by the two-Judge Bench in E. Micheal Raj's case supra [(2008) 5 SCC 161], to exclude the weight of the neutral material, etc. does not reflect the correct legal position.

30. In para 10.3 supra the Apex Court has taken note of the actual sale practices in case of narcotic drugs and psychotropic substances in the market. It has been noted therein that illicit drugs are seldom sold in a

pure form and they are almost always adulterated or cut with other substance. When caffeine is mixed with heroin, it causes that heroin to vaporise at a lower rate and that could allow users to take the drug faster and get a big punch sooner. After citing the example of heroin, it has been stated therein that this drug can easily be cut with a variety of different substances. This means that the drug dealer will add other drugs or non- intoxicating substances to the drug, so that they

can sell more of it at a lesser expense to themselves. Brown sugar/ smack is usually made available in powder form and it may be only about 20% heroin and the heroin is mixed with other substances like chalk powder, zinc oxide and because of these, impurities in the drug, brown sugar is cheaper but more

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dangerous. These are only few examples to show and demonstrate that even mixtures of narcotic drugs or psychotropic substance are more dangerous and that what is harmful or injurious is the entire mixture/tablets with neutral substances and narcotic drugs or psychotropic substances. Hence, it was held that, if only the actual weight is reckoned, after excluding the weight of the neutral material, for the purpose of reckoning small quantity or commercial quantity, then the object and purpose of the enactment would be frustrated and that would not have been the intention of the legislature.

31. Further, in Para 10.4 supra, the Apex Court has considered

the definition of manufacture, manufactured drug and preparation conjointly and has held that 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. Reference to drug addicts and the working of the international drug mafia has also been made in para 10.5 supra. Further, very crucially in para 11 thereof, the Apex Court, after considering the impact of Note 4 supra, added as per notification dated 18.11.2009, has held that the said Note 4 has been added only by way of abundant caution (*ex abundanti cautela*) and that, even if Note 4 was not added, the same would not make any

- : 30 :-

difference or change, in view of various other provisions in the Act and the notification issued thereunder, more particularly Entry 239 supra, Note 1 and Note 2 supra thereunder. It is thereafter, that the Three-Judge Bench of the Apex Court has answered the various points of reference as can be seen from a reading of paras 12.1 to 12.4 of the said decision. It is thus, categorically held that the dictum

laid down by Two-judge Bench of the Apex Court in E. Micheal Raj's case Supra [(2008) 5 SCC 161], that the only the weight of the pure drug component alone should be taken into account and that the weight of the neutral material, etc. should be excluded, does not reflect the correct legal position. It was thus, held that,

in the case of seizure of a mixture of narcotic drugs or Psychotropic Substances with one or more neutral substance(s), the quantity of neutral substance(s) is not to be excluded and should be taken into consideration, along with the actual content, by weight of the offending drug, while determining whether it is small or commercial quantity, etc. Further, very crucially, it was held that the challenge to the vires of the afore notification dated 18.11.2009, adding Note 4 supra to the notification dated 19.10.2001, fails and that the said notification dated 18.11.2009, adding Note 4, is not ultra vires the scheme and provisions of the NDPS Act and Writ Petitions and Civil Appeal, challenging the vires of the abovesaid

- : 31 :-

notification dated 18.11.2009 adding, Note 4 supra, were thus dismissed. In view of the abovesaid categorical legal position enunciated by the three- judge Bench of the Apex Court in Hira Singh's case supra [(2020) 20 SCC 272], the only point to be determined in this case is as to whether the said dictum laid down in Hira Singh's case supra [(2020) 20 SCC 272], though held in the factual context of heroin, which is a narcotic drug, would also apply to a mixture of psychotropic substances with or without the neutral material, like LSD in blotter paper, LSD paper stamp and also as to whether in such cases, the entire weight of the LSD blotter paper, etc. should be taken into account or only the weight of the pure LSD drug alone should be reckoned, after excluding the weight of the neutral substance.

32. Moreover, it is also to be noted that, the Three Judge Bench of

the Apex Court, in the decision rendered on 7.3.2022 in Criminal Appeal No. 363/2022 [arising out of SLP (Crl.) No. 10741/2018], in the case in Intelligence Officer v. Syed Musafar Sadiq & Ors. [2022 SCC OnLine SC 1820] has inter alia

set aside the impugned order therein, i.e.

order dated 25.6.2018, rendered by the Madras High Court in Crl. R. C. No.

impugned order would go against the principles laid down by the Three- Judge Bench of the Apex Court in Hira Singh's case supra [(2020) 20 - : 32 :- SCC 272].

33. A reading of the impugned order therein, rendered by the

Madras High Court on 25.6.2018, in the case in Syed Musafar Sadiq & Ors. v. Directorate of Revenue Intelligence [2018 SCC OnLine Mad 13899], would indicate that the seized contraband therein was Alprazolam, which is a psychotropic substance (as per item No.30 of the table to the Act). So, it is clear that the seized contraband, which is the subject matter of consideration in the Apex Court's decision in Syed Musafar Sadiq's case supra, is a psychotropic substance and this would clearly show that the Three Judge Bench of the Apex Court has applied the dictum earlier laid down by the Three-Judge Bench in Hira Singh's case supra [(2020) 20 SCC 272] in the case of psychotropic substances as well. In other words, the contra plea of the accused, as if the dictum in Hira Singh's case supra can apply only to narcotic drugs like Heroin and not to a psychotropic substance, like LSD in blotter paper, etc., cannot hold good.

34. At the outset, it has to be noted that no cogent reasons are

given in the Single Bench verdict of the Bombay High Court in Hitesh Hemant Malhotra's case supra [2020 SCC OnLine Bom 3581] para No.11, wherein it was held that the blotter paper in which the LSD is ingested cannot be treated as a neutral substance and that the blotter - : 33 :-

paper with the ingested LSD thereon cannot be treated as a mixture, as envisaged in the definition of preparation as per Sec.2(xx) of the NDPS Act. Other than merely opining that the blotter paper component cannot be treated as a neutral substance and that the blotter with the ingested LSD thereon cannot be treated as a mixture, as above, no discussion or reasonings are given for arriving at such a conclusion. Whereas, the contra view taken in the latter Single Bench verdict of

the Bombay High Court in Anuj Keshwani's case supra [2021 SCC OnLine Bom 4548, para Nos.29 and 30] has given detailed reasons. Para 30 of the Single Bench verdict of the Bombay High Court in Anuj Keshwani's case supra [2021 SCC OnLine Bom 4548] reads as follows:

30. LSD put on a blotter paper, is capable of being swallowed, after placing it on the tongue. It is thus evident that the blotter paper is capable of being swallowed and is used as one of the methods for consuming LSD. Merely because the said blotter paper can be licked or put in a glass of water, does not necessarily mean that the blotter paper has to be excluded whilst determining the LSD on the blotter paper. Take for example, a capsule containing a drug or a psychotropic substance. The said capsule is capable of being opened and its contents, can either be consumed directly or added to any other mixture/swallowed with the cover. The fact remains that if a drug is put in a capsule, the same will have to be weighed as a whole. It is important to bear in mind the legislative intent, the object and reasons, and, the preamble of the NDPS Act, whilst considering, whether LSD is to be weighed sans the blotter paper. As noted in Hira Singh (supra), it was never the intention of the legislature to exclude the quantity of the neutral substance and to consider only the actual content by weight of the offending drug. It is also pertinent to note that illicit drugs are seldom sold in a pure form. They are always adulterated or cut with other substance or put in a gelatin or blotter paper, as in the present case. Heroin, for example, is capable of being mixed with other substances like chalk powder, zinc oxide, because of these, impurities in the drug, brown-sugar is cheaper but more dangerous. The blotter paper impregnated or ingested with LSD is, in a sense, a dose. The blotter paper is made out of an extraabsorbent material and generally includes ingredients - : 34 :-

such as rice, cotton and even flax seed, thus, making it edible and as such, a substance in a dosage form/a mixture for consumption. It is thus evident, that a blotter paper, a carrier material, ingested with LSD, forms

an integral part of the ingestion by the user of the drug and thus, constitutes preparation of the psychotropic substance i.e. LSD, which is capable of being consumed, and as such, forms a substance in a dosage form or a mixture. Infact, at the first blush, one may ask how paper?, but once it is accepted that a blotter paper ingested/impregnated with LSD, is used as a medium of consumption, the same will squarely fall within the definition of the term preparation, as defined in Section 2 (xx) of the NDPS Act. Like cutting agents used with other drugs that are ingested, the blotter paper, gelatine capsules or sugar cubes carrying LSD can be and often is ingested with the said drug. The object of the NDPS Act is to deal with the street weight of the drug in the diluted form in which they are sold and not only the weight of the active component. Thus, having regard to the dictum of the Apex Court in Hira Singh (supra), and the legislative intent of the NDPS Act, the blotter paper impregnated or ingested with LSD will have to be considered as a whole, whilst determining whether the quantity is a small or commercial quantity.

35. Later, a Division Bench of the Bombay High Court in H.S. Arun Kumar's case supra [2022 SCC OnLine Bom 4696] has resolved the controversy emerging out of the aforesaid the two Single

Bench verdicts of that High Court and it has been authoritatively held

therein, after giving detailed reasonings that the view taken by the learned Single Judge in Hitesh Hemant Malhotra's case supra [2020 SCC OnLine Bom 3581], is not correct and the view in Anuj Keshwani's

case supra [2021 SCC OnLine Bom 4548] reflects the correct legal position. Cogent and detailed reasonings have been given by the Division Bench of the Bombay High Court in H.S. Arun Kumar's case supra [2022 SCC OnLine Bom 4696] for holding as to why the NDPS Act and the notification issued thereunder has clearly provided that the entire quantity

of the seized contraband should be taken into account, for determining as to whether the small quantity, commercial quantity, etc., and not just pure component, etc. The reasonings in that regard are contained in para 64 of the decision in H.S. Arun Kumar's case supra [2022 SCC OnLine Bom 4696], which reads as follows:

64. There is an express indication in the NDPS Act about taking into account the entire quantity of the drug or the psychotropic substance seized in a case for determining the quantum of punishment and not just the pure drug content alone. This is evident from the following:

(i) The statement of objects and reasons to the amendment Act 16 of 2014, in

terms provides that since the NDPS Act duly provides for punishment for the preparation of drugs also, this amendment seeks to clarify the legislative intent to take the entire quantity of drug seized in a case for determining the quantum of punishment and not the pure drug content. As noted hereafter, preparation in relation to a narcotic drug or psychotropic substance specifically includes mixture in whatever physical state containing one or more such narcotic drugs or psychotropic substances. Thus, the legislative intent is clear that the entire quantity of the preparation is to be taken into account and weighed for determining the quantum of punishment and not merely the pure drug content for such preparation or mixture;

(ii) Section 2 (xx) defines preparation in relation to a narcotic drug or

psychotropic substance means any one or more such drugs or substances in dosage form or any solution or mixture, in whatever physical state, containing one or more such drugs or substances. Thus, it is evident that preparation includes a mixture, in whatever physical state, containing one or more such drugs or substances. So, the L.S.D. and a substance that may or may not be either a drug or a psychotropic substance, i.e., a neutral substance. The definition explicitly provides that

such mixture may be in whatever physical state, but as long as such a mixture contains one or more such drugs or substances, the same would constitute a preparation under Section (xx) of the NDPS Act.

(iii) Section 2 (xxiii) defines psychotropic substance to mean any substance, natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule. The Schedule at Entry 4 includes - : 36 :-

L.S.D., L.S.D. 25. Therefore, there is no dispute about the L.S.D. being a psychotropic substance. However, Section 2(xxiii) includes not only a psychotropic substance specified in the Schedule but also a preparation of such substance or material included in the list of psychotropic substances specified in the Schedule. As noted earlier, the definition of preparation explicitly includes a mixture, in whatever physical state, containing one or more psychotropic substances. Thus, it is clear that a mixture of L.S.D. and blotter would constitute a psychotropic substance as defined under Section 2(xxviii) of the NDPS Act.

(iv) Section 2(xxiii) refers to a list of psychotropic substances specified in the

Schedule. As noted earlier, the L.S.D. finds a mention in Entry 4. Entry 111 of this Schedule refers to salts and preparations of the above. This means Entry 111 refers to salts and preparations of the psychotropic substances listed in Entries 1 to 110. A preparation, as noted earlier, would include a mixture containing L.S.D. Thus, even the preparation of L.S.D. will amount to a psychotropic substance in terms of Section 2(xxiii) of the NDPS Act.

(v) Even the definition of manufacture in Section 2(x) includes making of

preparation (otherwise than in a pharmacy on prescription) with or containing such drugs or substances. The expression makes it clear that even making a preparation (which includes a mixture) with L.S.D. or containing L.S.D. would

constitute manufacture as defined under Section 2(x) of the NDPS Act.

(vi) Sections 2(xxiii) and 2(vii) define small quantity and commercial

quantity in relation to narcotic drugs and psychotropic substances. In terms of these definition clauses, the Central Government has issued a notification dated 19.10.2001, as amended from time to time. Entry 133 of this Notification specifically refers to L.S.D., L.S.D. 25. However, what is more relevant is Entry 239, which refers to any mixture or preparation with or without a neutral material or any of the above drugs. From the context, it is apparent that the expression drugs would include both the narcotic drugs and psychotropic substances listed in Entries 1 to 238. Therefore, no contrary contention on this aspect was even raised before us. Thus, it is clear that the Notification contemplates not only the narcotic drugs and psychotropic substances but also any mixture or preparation that of with or without neutral material of any of the narcotic drugs and psychotropic substances listed in entries 1 to 238 of the Notification. (vii) The Notification dated 19.10.2001, in the context of Entry 239, provides the mode of determining the small or commercial quantity of the mixture or preparation. It provides that lesser of the small quantity between the quantities given against the respective narcotic drugs or psychotropic substances mentioned above forming part of the mixture will have to be considered. The same also applies to the determination of commercial quantities. Note 4 below this Notification is most important because it - : 37 :-

states that the quantities shown in column 5 and column 6 of the Table relating to the respective drugs shown in column 2 shall apply to the entire mixture or any solution or any one or more narcotic drugs or psychotropic substances of that particular drug in dosage form or isomer, esters, ethers and salts of these drugs, including salts of esters, ethers and isomers, wherever existence of such substance is possible and not just its pure drug content.

36. After hearing both sides and considering the various

provisions in the NDPS Act and the notifications issued thereunder as well as various decisions cited before us, we are of the view that the broad reasonings given by the Division Bench of the Bombay High Court in H.S. Arun Kumar's case supra [2022 SCC OnLine Bom 4696] deserve our acceptance. We would accept and approve the broad reasonings given by the Bombay High Court H.S.Arun Kumar's case supra [2022 SCC OnLine Bom 4696], more particularly in para 64 thereof. It may be noted that preparation, as defined as per Sec.2(xx), in relation to a narcotic drug or psychotropic substance, means any one or more such drugs or substances in dosage form or any solution or mixture, in whatever physical state, containing one or more such drugs or substances. So, it is statutorily postulated that preparation includes a mixture in whatever physical state, containing one or more such narcotic drugs or psychotropic substances. So, a psychotropic substance as LSD and another material, that may or not be either a narcotic drug or psychotropic substances, could be treated as a neutral substance for the purposes of definitional contours of

- : 38 :-

preparation as per Sec.2(xx). It is all the more so, because the definition as per Sec.2(xx) explicitly provides that such mixture may be in whatever physical state. But such a mixture should contain one or more such drugs or substances. It is common ground that there is no serious dispute that the actual practice of illicit sale of psychotropic substance like LSD, the same is seldom sold in pure drug form and it is now the accepted practice in the illicit market that the same is sold by ingesting LSD in the paper blotter. There is no dispute that blotter paper is a material which can never fulfill either the definition of narcotic drug or psychotropic substance, as per the notification issued thereunder. Where the seized contraband is LSD ingested in blotter paper, paper stamp, etc., then there cannot be any doubt that the pure drug LSD and the blotter paper in which the drug is ingested would form a mixture, the latter being a neutral substance and certainly, the same will also fulfil the definitional contours of "preparation" as per Sec.2(xx). Further, "psychotropic substance" is defined as per Sec.2(xxiii) to mean any substance,

natural or synthetic, or any natural material or any salt or preparation of such substance or material included in the list of psychotropic substances specified in the Schedule. LSD is included as Entry No.4 of the List of Psychotropic

substances notified under the Schedule to the Act. Entry No.111 - : 39 :- thereunder is a residuary entry, which refers to 'salts and preparations of above', i.e., it means salts and preparations of the psychotropic substances listed in Entries 1 to 110. In view of the definitional contents of "preparation" as per Sec.2(xx), we have already held that, preparation

would also include a mixture containing LSD, as above. So, such a preparation of LSD i.e. LSD ingested on blotter paper, paper stamp, etc., would also fulfill the definitional parameters of Entry No.111, appended to the List of Psychotropic substances notified under the Schedule to the Act. In other words, blotter paper/paper stamp ingested with LSD etc., would fulfill the definition of "preparation" as per Sec.2(xx) as well as the definition of "psychotropic substance" as per Sec.2(xxiii) read with Entry No.111 of the afore List.

37. It is also to be noted that, going by the definition of

"manufacture" as per Sec.2(x), the same would also include making of preparation (otherwise than in a pharmacy on prescription) with or containing such drugs or substances. So, it is clear that, even making a preparation, which includes a mixture like LSD ingested in a blotter paper/paper stamp, etc., would also fulfill the definition of "manufacture" defined in Sec.2(x) of the NDPS Act.

38. Further, we are of the view that, even without the addition of - : 40 :-

Note (4) supra, a mixture like LSD ingested in blotter paper, etc., would also fulfill the definitional parameters of Entry No.239 of the afore Notification dated 19.10.2001, issued under Clauses (xxiia) and (viiia) of Sec.2, dealing with "small quantity" and "commercial quantity", etc. Entry No.239 supra deals with "any mixture or preparation that, with or without a natural material, of any of the above drugs". Entry No.133 thereof, explicitly includes LSD as one of the drugs/substances.

39. Since we have already held that LSD ingested with blotter

paper would be a mixture as well as a preparation and the blotter paper could be treated as a neutral material, there cannot be any doubt that, even before the addition of Note (4) supra, such a seized contraband, like LSD ingested on blotter paper/paper stamp, etc., would squarely fall within Entry No.239 supra. Still further, Note (2) thereunder, explicitly provided that, even before the insertion of Note (4) supra, the quantities shown against the respective drugs, listed as various entries in the abovesaid Notification dated 19.10.2001, would also apply to preparation of drugs and the preparation of substances of Note (1) above. Since the seized contraband in question, i.e. LSD in blotter paper, would fulfill the definition of "preparation", there cannot be any further doubt that the same would lead to the position that the entire quantity of LSD blotter

- : 41 :- paper should be taken into account for determining as to whether the seized contraband is "small quantity" or "commercial quantity". This is going by the fall out of Note (2) supra.

40. The abovesaid position has also been reiterated and

reclarified, as per Note (4) added later as per Notification dated 18.11.2009. That apart, the Three-Judge Bench of the Apex Court in Hira Singh's case supra [(2020) 20 SCC 272] has categorically held, in para 11 thereof, that, Note (4) supra is only clarificatory in nature and has been introduced by way of abundant caution, as the same does not alter the pre-existing legal position and that the contra view, earlier taken by the Two Judge Bench of the Apex Court in E.Micheal Raj's case supra [(2008) 5 SCC 161] is not legally correct. Further, it has to be noted that, Note (4) supra explicitly mandates that the weight of the entire mixture is to be reckoned and not just its pure drug component. In the instant case, the seizure of the LSD contraband is said to be on 15.12.2021, which is much after the introduction of Note (4) supra with effect from 18.11.2009.

41. The details of the preparation of LSD in blotter paper have

been dealt with in the afore Division Bench verdict of the Bombay High Court in H.S.Arun Kumar v. State of Goa [2022 SCC OnLine Bom 4696]. It is stated that there is no dispute that LSD dissolved in a solution - : 42 :- like alcohol is dropped on the blotter paper and the mixture of LSD on the blotter paper is then ingested (See para 67 thereof). In this connection, the expression in whatever physical state, appearing in the definition of "preparation" as per Sec.2(xx), would be highly relevant.

42. H.S.Arun Kumar's case supra [2022 SCC OnLine Bom

4696] has also dealt with the contention of the accused that, there was no chemical fusion between the LSD and the blotter paper to give rise to a different substance and that, therefore, LSD impregnated in a blotter paper is not a mixture. It was held by the Division Bench of the Bombay High Court, in para 82 thereof, that, chemical fusion is not essential for the formation of a mixture and in a mixture, the mixed elements retain their original properties. When two or more substances are combined by physical methods in any proportion and no new substance is formed, it is

called a mixture. This was held to be the basic difference between a mixture and a compound, as mixtures can be homogeneous or heterogeneous. An example cited therein was a case of a mixture of heroin and chalk powder and it was observed that, it is not as if the heroin is chemically fused with chalk powder or loses its properties. In para 106 thereof, the Court noted that, since there was no explicit definition of mixture as per the Act, the ordinary dictionary meaning of mixture

- : 43 :-

could be adopted and that, mixture is defined as matter consisting of two or more substances that are so thoroughly blended together that the particles of one are diffused among the particles of the other but nonetheless maintain a separate existence. In para 102, the Division Bench of the Bombay High Court noted certain foreign judgments as well as the chemical meaning and dictionary meaning of the word mixture. Some of the dictionary meanings of the word mixture would also be apposite. A mixture includes a portion of matter consisting of two or more

components that do not bear a fixed proportion to one another and that, however thoroughly commingled, are regarded as retaining a separate existence [Webster's Third New International Dictionary]. A mixture may consist of two substances blended together so that the particles of one are diffused among the particles of the other [The Oxford English Dictionary]. Further, it has been noted therein that, LSD is applied to blotter paper in a solvent, which is absorbed into the paper and ultimately evaporates. After the solvent evaporates, the LSD is left behind in a form that can be said to mix with the paper. The LSD crystals are inside of the paper, so that they are commingled with it, but the LSD does not chemically combine with the paper. Thus, it retains a separate existence and can be released by dropping the paper into a liquid, or by swallowing

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the paper itself. The LSD is diffused among the fibers of the paper. Like heroin or cocaine mixed with cutting agents, the LSD cannot be distinguished from the blotter paper, nor easily separated from it. Like cutting agents used with other drugs that are ingested, the blotter paper, gel, or sugar cube carrying LSD can be and often is ingested with the drug (See para 102).

43. In para 86 supra, the Division Bench has referred to various

decisions or materials and has noted that blotter paper is made up of extra absorbent material, including ingredients like rice, cotton, and flax seeds. Such blotters absorb LSD in their tiny perforations, separable only on dipping it into a liquid or placing it on the tongue. The blotter becomes an integral part of the mixture of the LSD impregnated blotter. Moreover,

blotters made up of rice, flax seeds etc., are consumable. Hence, it was held

that they qualify as neutral substances in ordinary parlance, just as chalk or talcum powder would, in the context of the drugs with which they are mixed. This was so held, based on the reasonings of the Three-Judge Bench of the Apex Court in Hira Singhs case supra [(2020) 20 SCC 272].

44. It has been inter alia noted by the Three-Judge Bench of the Apex Court in Hira Singh's case supra [(2020) 20 SCC 272], in para 2.3 thereof (page 282) that mixture can be defined as mechanical mixture - : 45 :-

of two or more substances as distinct from chemical combination or a fluid with foreign substance in suspension or foreign element in a composition. That solution is defined as a liquid or semi-liquid preparation obtained by the combination of a solid with the solvent. The word dosage means a definite quantity or something regarded as analogous to medicine in use or effect. Further, it has been held therein that it is apparent that a drug or substance can be mixed with one or more substances (mixture) or change its physical state by means of any fluid or solvent (solution) or be divided or apportioned (dosage). That, the NDPS Act, as originally enacted, dealt not only with the pure content of the drug or psychotropic substance but its preparation in a mixture, solution or dosage, etc. It has also been brought to our notice that there are very few State forensic laboratories in India, having the technological facilities to ascertain the actual weight of the pure drug quantity in a mixture or preparation, like LSD blotter paper/paper stamp [See also para 2 of Hira Singh-(2017)8 SCC 162, P. 164, para 2].

45. We are also in agreement with the said views of the Division

Bench of the Bombay High Court in H.S.Arun Kumars case supra [2022 SCC OnLine Bom 4696] on these aspects, more particularly, blotter paper would also be neutral substance in a case where the seized contraband is LSD ingested on blotter paper/paper stamp, etc. So also, we - : 46 :-

are in agreement with the afore views of the Division Bench of the Bombay High Court that, blotter paper LSD could be treated as a mixture and preparation, as already noted hereinabove. On this basis, the Division Bench of the Bombay High Court, in para 115 of the decision in H.S.Arun Kumars case supra [2022 SCC OnLine Bom 4696], has held that, their Lordships of the Division Bench would endorse the view taken by the learned Single Judge of the Bombay High Court in Narcotics Control Bureau v. Anuj Keshwani [2021 SCC OnLine Bom 4548] and that, the combined weight of the LSD and the blotter should be reckoned to determine small quantity or commercial quantity and that, the contra view taken by

the learned Single Judge of the Bombay High Court in Hitesh Hemant Malhotra v. State of Maharashtra [2020 SCC OnLine Bom 3581], that, only the weight of the pure LSD is to be taken, etc., is not correct and the reference was answered accordingly.

46. What remains is the specific contention urged by Sri. John S.

Ralph, learned counsel appearing for the appellant, regarding the anomalies based on disproportion in the dosage contents for commercial quantity and small quantity of LSD in the Indian norms vis-a-vis the U.S. Norms. The contents of the Notification dated 19.10.2001, more particularly, the contents of small quantity and commercial quantity,

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as notified for each of the drugs and substances mentioned therein, particularly that of LSD, are not in challenge before us. The vires of the subsequent Notification dated 18.11.2009, inserting Note (4) supra, has been upheld and the same has been held to be intra vires the provisions of the Act. The quantification of small quantity and commercial quantity are essentially on the basis of legislative policy and we are not in a position to hold that, merely because of such anomalies, if any, the actual weight of the pure drug of LSD alone should be taken into account for the above purpose, after excluding the weight of the neutral substance. That apart, as submitted by the learned Central Government Counsel appearing for the Union Government, and the learned Prosecutor appearing for the State, the quantification of the afore small quantity, commercial quantity, etc., as per the Indian law, cannot necessarily be tied down to the legislative policy of the United States of America in their understanding of such quantification for the purpose of their sentencing policy. Further, even going by the facts and figures projected by Sri. John S. Ralph, learned counsel appearing for the applicant as well as the tabular data given by him, the afore anomalies appear to be applicable even in the case of narcotic substances, like heroin and not merely psychotropic substances, like LSD. The Three-Judge Bench of the Apex Court in Hira Singh's case

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supra, has already held the afore position of law in the case of a mixture of heroin (narcotic drug). So, this Court is bound by the law declared by the Apex Court therein and for the reasons given earlier hereinabove, the said dictum would also apply in the case of a mixture of LSD (psychotropic substance) and merely because these anomalies may not have been considered by the Apex Court, it will not enable this Court to take a contra view. Further, as urged by the learned Prosecutor and the learned Central Govt. Counsel, in view of the enormity of the drug abuse problems in the society, particularly among the young generation, the afore legal perspective on sentencing issues, is justified. As held by the Apex Court, in *Noor Aga v. State of Punjab* [(2008) 16 SCC 417, para 34], the NDPS Act contains draconian provisions which has been enacted having regard to the mandate contained in the International Convention on Narcotic Drugs and Psychotropic Substances. The Apex Court, in decisions as in *State of Punjab v. Saurabh Bakshi* [(2015) 5 SCC 182, para 1] has observed in the context of sentencing issues, after quoting the eminent thinker, Sophocles, that Laws can never be enforced unless fear supports them . In the verdict rendered, as early as on 29 th August, 1989, at the infancy stage of the enforcement of NDPS Act, 1985, in the case *Durand Didier v. Chief Secretary, UT of Goa*, (1990) 1 SCC 95 (para 24), the Apex Court has

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prophetically held as follows : With deep concern, we may point out that the organised activities of the underworld and the clandestine smuggling of narcotic drugs and psychotropic substances into this country and illegal trafficking in such drugs and substances have led to drug addiction among a sizeable section of the public, particularly the adolescents and students of both sexes and the menace has assumed serious and alarming proportions in the recent years. Therefore, in order to effectively control and eradicate this proliferating and booming devastating menace, causing deleterious effects and deadly impact on the society as a whole, the Parliament in its wisdom, has made effective provisions by introducing this Act 81 of 1985 specifying mandatory minimum imprisonment and fine..... Hence, in

view of these aspects, the above contentions of the applicant will also stand overruled.

47. CONCLUSIONS ON THE REFERENCE ISSUE :-

(a) The upshot of the above discussion is that, the dictum

laid down by the Three Judge Bench of the Apex Court in Hira Singh & Anr. v. Union of India & Anr. [(2020) 20 SCC 272], though held in the context of mixture of narcotic drug like Heroin for determining small quantity, commercial quantity, etc., would also equally apply in the case of mixture of psychotropic substance like, LSD on blotter paper/ LSD paper stamp, etc., and the entire weight of the seized LSD on blotter paper/paper stamp, etc., should be taken into account and not merely the pure drug component for determining small quantity, commercial quantity, etc., for the application of Sec.22 of the NDPS Act.

(b) Consequently, it is held that the legal perspective taken - : 50 :-

in the Single Bench verdicts of this Court, in cases as in Order dated 08.03.2021 in Bail Application No. 1718/2021 [Sreerajs case supra - MANU/KE/054/2021], Order dated 26.4.2022 in Bail Application No.2530/2022 (Jagath Ram Joy's case supra - MANU/KE/ Bombay High Court in Hitesh Hemant Malhotras case supra [2020 SCC OnLine Bom 3581], that the accused therein have made out arguable case in that regard, does not reflect the correct legal position. The reference is answered accordingly.

48. Coming to the facts of the case in the instant case, going by

the prosecution version, the seizure of the LSD paper stamp was on 15.12.2021 and the total weight of the seized contraband was within the limits of commercial quantity, as per Entry No.133 of the Notification dated 19.10.2001. In other words, the restrictions in the grant of bail, emanating from Sec.37 of the NDPS Act, would apply. So, the Court below cannot be said to have committed any illegality in

rejecting the bail plea of the applicant. Further, going by the mandate contained in Sub-clause (ii) of Clause (b) of Sec.37(1) of the NDPS Act, if the Public Prosecutor opposes the application, bail could be granted only if the court is satisfied that there are reasonable grounds for believing that he is not guilty of such offence and that, he is not likely to commit any offence while on bail, etc. No grounds are made out in the bail proceedings to get over the restrictive

- : 51 :- stipulations in Sec.37, in the instant case and so, the applicant is not entitled for bail. No other orders and directions are called for. With these observations and directions, the above Bail Application will stand disposed of. Sd/- ALEXANDER THOMAS, JUDGE Sd/- SOPHY THOMAS, JUDGE sdk+

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