ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.1123 of 2023

Date	Order with signature of Judge

For hearing of bail application

20.7.2023

Mr. Zahid Iqbal, advocate for the applicant/accused
Ms. Abida Parveen Channar, Special Prosecutor ANF alongwith Inspector Tahirullah Khan, complainant.

The applicant Haider Ali being aggrieved by and dissatisfied with the impugned order dated 13.05.2023 passed by learned Special Court-1, Control of Narcotics Substance Karachi, dismissing the bail application filed by the applicant, in FIR No.10/2023, registered under Section 6/9(2)-C of the Control of Narcotics Substance Act, 1997 at PS ANF Gulshan-e-Iqbal, Karachi.

2. Brief facts of the case as per FIR are that on 13.3.202, the complainant namely Inspector Tahir Ullah Khan was present at the Police Station at that time one spy informer informed the Superior officers of ANF that one drug smuggler namely Haider Ali son of Sher Ali will come to supply the drugs to his customer at about 0820 to 0900 hours opposite Al-Asif Square, main Super Highway inside the pedestrian Bridge and on immediate action the narcotics recovery and the arrest of the accused can be possible. On this information on the instruction of superior officer the complainant alongwith the ANF party i.e. HC Riaz Sarki, PC Usama Razi, PC Dilbar Hussain, PC Kaleem and Driver PC Najamuddin, on Mobile No.GP-3155 left police station under entry No.04 at 0810 hours and at 0830 hours he reached at the pointed place. On the pointation of spy informer, one person standing near the pedestrian bridge in suspicious condition alongwith one black shopper in his right hand, who was waiting for some person. The complainant apprehended the applicant/accused with the help of police officials and requested the public for evidence but they refused. In the presence of police officials namely HC Riaz Ahmed Sarki and PC Usama Razi the apprehended accused disclosed his name as Haider Ali son of Sher Ali resident of House No.667, Al-Hai Colony, Sector-3, Orangi Town, Karachi. On inquiry of complainant about the drug crystal, applicant/accused handed over the shopper to the complainant in presence of witnesses. Complainant checked the shopper

and recovered crystal from it. The recovered crystal has been weight through digital scale and found 250 grams. From the said recovery only 10 gram was separated for chemical examination and sealed the same on the spot. The other recoveries has also sealed on the spot. On the personnel search of accused Rs.600/-, one mobile phone and original NIC of the applicant/accused have been recovered. All the recoveries have been taken into custody and after preparation of memo of arrest and recovery arrested the accused and lodge the FIR.

3. Learned counsel for the applicant / accused has contended that the applicant/accused is quite innocent and did not commit the alleged offence mentioned in the FIR; that there are no reasonable grounds to believe that the accused/applicant would have committed the alleged offence; that according to the facts contained in the FIR and in the *mushirnama* only 10 gram crystal from the shopper has been dispatched for the purpose of chemical analysis, which creates doubts in veracity of the prosecution case; that as per the new amendment in the Narcotics Act 1997, the alleged offence does not provide sentence for death, life imprisonment or more than ten years imprisonment, as such does not cover by the prohibitory clause of Section 497(1) Cr.P.C and the basic rule is bail not jail while refusal is exception in such like cases. It is further contended by learned counsel for the applicant/accused that from the bare reading of FIR it is clearly obvious that the prosecution case is a novel story, as according to the prosecution the spy information was received by the police that one person was carrying drug to supply the other person but it is very strange to note that the other person is missing and also the name of other person has not been figured out; that the contents of FIR are silent and do not carry any detail about the purchaser of the alleged crystal from the accused/applicant, hence under the circumstances of the case Section 6 of the CNS Act, 1997 is not attracted or applicable in this case; that the FIR is further silent on the point that how and by which means the complainant got the quantity of the alleged recovered crystal, which shows that the alleged quantity shown by the complainant is presumptive and imaginary, which further creates doubts. It is next contended that nothing incriminating has been recovered from the possession of accused/applicant and the alleged recovery is false and foisted upon him; that there is no any private witness to the alleged recovery despite the fact that the place of alleged incident is a thickly populated area, but even though no any independent witness has been associated to the alleged recovery which creates serious doubts in veracity of the prosecution case and the benefit of doubt is to be given and extended to the accused as per rule of law. He added that in the FIR or in the recovery memo, gross weight of the

narcotics is 250 grams and only 10 gram was sent for chemical analysis thus liability is to be seen at the bail stage in terms of law laid down by the Supreme Court and in this eventuality it becomes a case between sub-sections (b) of section 9, C.N.S. Act, 1997 as amended up to date. Thus the benefit of doubt in this aspect shall go to the accused, in view of the principle of law laid down in the case of *Manzoor and others v. The State* (**PLD 1972 SC 81**). He next submitted that since this normal sentence provided for recovery of 250 grams of crystal, is not covered by prohibitory clause of section 497(1), Cr.P.C., therefore, the applicant is entitled for the concession of bail. He lastly contended that under the circumstances, the case against the accused/applicant is a fit case for further inquiry under Section 497(2) Cr.P.C. for the purpose of bail. Learned counsel contended that the applicant has no previous criminal record of such like case. In support of his contentions, learned counsel for the applicant/accused has relied upon the cases of *Ateebur Rehman v. The State* (**2016 SCMR 1424**), which involved recovery of 1014 grams of heroin and *Aya Khan and another v. The State* (**2020 SCMR 350**), which involved recovery of 1100 grams of heroin, and bail was granted by the Supreme Court in both cases. He also relied upon the cases of *Raees Khan v. The State* [**2017 YLR 2308**], *Rizwan v. The State* [**2020 MLD 59**] and *The State/ANF through DD Law v. Muhammad Asim Khan* [**2022 YLR Note 64**].

4. Learned Special Prosecutor, ANF assisted by the complainant/I.O. opposed this bail application on the ground that good quantity of ICE has been recovered from the applicant. She argued that the offence with which the applicant is charged is an offence against society at large and is heinous in nature. Since the instant case involves huge 250 grams ICE and this is not an ordinary drug like other narcotic and it is for this reason that the statute itself has provided a note of caution under section 51 of the C.N.S Act of 1997 before enlarging an accused on bail in the ordinary course; that no enmity or ill-will has been pointed out against the ANF officials by the defence counsel. She further added that prosecution witnesses have supported the prosecution case and prima facie there has been placed nothing on record to establish any mala fide or serious enmity against such ANF officials. In absence of substantial proof, the plea of enmity legally cannot be entertained at bail stage because such like plea is readily available but to make it substantial shall require proof, which could not be considered at bail stage. With regard to the contention of the learned counsel for the applicant that no private person of the locality was associated as a witness or *mashir* though recovery was effected from public place. She added that in view of section 25 of the Control of Narcotic Substances Act, 1997 the

applicability of section 103, Cr.P.C. has been excluded in the cases of recovery of narcotics; that defects or irregularities, if any, could well be agitated but during trial and not at bail-stage; that plea of applicant that ICE was foisted upon him cannot be entertained at such stage as this fact could only be ascertained after recording of evidence. She argued that any plea which requires deeper examination and comments of nature, likely to prejudice to plea / case of either defence or prosecution, must always be avoided at bail-stage because criterion for tentative assessment and evaluation of evidence are completely different from each other. Thus, tentative assessment of material available on record, prima facie does not lead to a conclusion that there are no reasonable grounds exist to believe it is a case of further enquiry, therefore, she prayed for dismissal of the instant bail application.

5. I have heard learned counsel for the applicant, learned Special Prosecutor ANF, complainant/I.O. and have perused the record of the case with their assistance and case law cited at the bar.

6. According to FIR, the complainant Inspector Tahir Ullah Khan along with the ANF party arrested the applicant and recovered 250 grams of crystal from his possession, and 10 gram was separated for chemical examination and sealed the same on the spot. In such circumstances, whether the prosecution would be able to bring home the guilt of the accused, are the fatal questions to be answered by the prosecution during the trial, however, at the moment makes the case of the applicant arguable for bail so far as not sending the entire substance for FSL to ascertain whether the recovered contraband is Methamphetamine (Ice), the reason for not sending the aforesaid material has not been explained by the complainant who is present in Court. As to why I.O extracted a sample of 10 grams out of 250 grams of substance for FSL though he could have sent the entire 250 grams for FSL, this question needs to be taken care of by the trial court in its true perspective; the second question is whether this court can only consider the quantity of substance sent for FSL for considering the case of the applicant for bail, in such a scenario, I seek guidance from the decision of the Supreme Court in the case of *Para Din and others Vs the State* (**2016 SCMR 806**). The Supreme Court has already set at naught the aforesaid point, and need no further deliberation on my part.

7. In narcotic cases the Supreme Court's earlier view in the case of *Ameer Zeb v. The State* (**PLD 2012 SC 380**), is clear that if any narcotic substance is allegedly recovered, a separate sample is to be taken from every separate packet, wrapper, or container, and every separate cake, slab

or another form for chemical analysis and if that is not done, then only that quantity of the narcotic substance is to be considered against the accused person from which a sample was taken and tested with a positive result.

8. Keeping in view the aforesaid principle in bail matters, in the present case it appears that the Chemical Examiner received only 10 grams of narcotic substance thus it would be sufficient to say that in light of the judgment (supra), at the moment, prima-facie, only the quantity of 10 grams shall be taken into consideration against the applicant as per the chemical report, while dealing with his plea of bail, which surely is still to be thrashed out by the trial Court. However, since the recovery of 250 grams of narcotic substance, the weight of which seems to be covered by Section 9(b), C.N.S. Act, 1997, which does not fall within the ambit of prohibitory clause of Section 497(1), Cr.P.C., besides amendment brought in the CNS Act, 1997 vide Act No. XX of 2022, punishment for contravention of Sections 6, 7, and 8 provides that if the quantity of psychotropic substances is more than 100 grams and up to 500 grams, the imprisonment may extend to five years, therefore, the applicant who is in jail since his arrest is entitled to the concession of bail keeping in view the quantum of punishment as well as dicta laid down by the Supreme Court as discussed supra. On the subject issue, the decisions of the Supreme Court and High Courts are clear in terms, thus no further deliberation is required on my part.

9. As the quantity of the alleged recovered 250 grams of narcotic substance marginally does not exceed the limit where the punishment is life imprisonment or death as set by the newly amended law. Under such circumstances whether the maximum punishment would be awarded or not, the same would be determined at the trial Court. Even it is by now well-settled that where two quantum of sentences is provided in the statute, for bail, the lesser shall be considered, without dilating upon the other points involved in the matter or agitated by the parties for and against, therefore, in the instant case, the question of quantum of sentence is required to be considered for bail; and the same would fall within the purview of further inquiry as provided under Section 497(2) Cr.P.C.

10. For what has been discussed above, this application is accepted and the applicant is admitted to bail. He shall be released on bail provided he furnishes bail bonds in the sum of Rs.300,000/- (rupees three lacs only) with two reliable and resourceful sureties each in the like amount to the satisfaction of the learned trial Court. However, the learned trial Court shall endeavor to examine the complainant positively within one month

and if the charge has not been framed the same shall be framed before the next date of hearing, and compliance report shall be submitted through MIT-II of this Court. The MIT-II shall ensure compliance with the order within time.

11. The observation recorded hereinabove is tentative and shall not prejudice the case of either party at trial.

JUDGE

Zahid/*