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IN THE HIGH COURT OF DELHI AT NEW DELHI

Reserved On: 24th November, 2023

Date of decision: 5th December, 2023

+ BAIL APPLN. 3040/2023

BALI KHAN

..... Petitioner

Through: Mr. Kamal J.S. Mann, Advocate.

versus

STATE

..... Respondent

Through: Mr. Aman Usman, APP for the State
with SI Manish Kumar, P.S. Crime
Branch.
Dr. Adesh Kumar, FSL, SSO
(Chemistry), FSL, Rohini, Delhi.

CORAM:

HON'BLE MR. JUSTICE AMIT SHARMA

JUDGMENT

AMIT SHARMA, J.

1. The present application under Section 439 of the Code of Criminal Procedure, 1973 ('CrPC') seeks regular bail in case FIR No. 54/2020 under Sections 20/29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 ('NDPS Act') registered at PS Crime Branch.



2. The case of the prosecution is that on 24.02.2020 at 7:00 AM, an information was received with regard to one Masibur, coming to new Delhi Railway station *via* Apurva Express from Kolkata carrying *ganja* which will be delivered to the Bali Khan, the present applicant. Accordingly, after completion of necessary formalities, a raid was conducted and the present applicant was apprehended along with driver of the Eco Van from which *ganja* was recovered. Accused Masibur was able to run away from the station and was subsequently arrested. After completion of investigation, chargesheet in the present case was filed.

3. Learned counsel appearing on behalf applicant submitted that the latter has been falsely implicated in the present case. It was submitted that in the present case, result of the examination of the seized contraband was filed by the Forensic Sciences Laboratory, Delhi ('FSL) as Ex.PW-3/1 under the seal of Dr. Adesh Kumar and he appeared before the learned Trial Court as PW-3. In his cross-examination, he referred to the chemical test and stated '*I had conducted the Fast Blue B Test, During the chemical test, after mixing the chemical into contraband shows YELLOWISH COLOUR followed by sodium hydroxide*'.

4. It was submitted that the applicant moved an application under Section 91 of the CrPC before learned Special Court and *vide* order dated 11.10.2022, the same was allowed. In pursuance of the said order, the FSL officials filed relevant records and copies of the same were supplied to learned counsel appearing on behalf of the applicant. It was submitted that as per the Working Procedure Manual issued by Forensic Science Laboratory, Govt. of NCT of Delhi, two types of chemical tests, i.e., 'Fast Blue B Salt Test' and



‘Duquenois-Levine Test (1)’ are required to be conducted on the samples. It was pointed out that as per the ‘Fast Blue B Salt Test’, a purple-red colour would indicate a product containing cannabis and in ‘Duquenois-Levine Test (1)’, a violet colour would indicate the presence of cannabis. It was further pointed out that ‘Recommended Methods for the Identification and Analysis of Cannabis and Cannabis Products’ published by the United Nations Office of Drugs and Crime is part of the references with regard to methods of identification of cannabis in the aforesaid Working Procedure Manual issued by the FSL. Attention of this Court was drawn to the portion of the aforesaid United Nations document, wherein a similar colour combination is given with respect to the aforesaid tests as contained in the Working Manual issued by FSL. However, with regard to the Duquenois-Levine Test (1), it is stated that if the sample solution assumes a deep yellow colour, the same should be discarded.

5. It was further submitted that in the present case, notice under Section 50 of the NDPS Act was also not in compliance of a judgment dated 28.03.2023 delivered by coordinate bench of this Court in **BAIL APPLN. 1725/2022** titled ‘**Mohd. Jabir v. State of NCT of Delhi**’, wherein it has been held that as per Section 50 of the NDPS Act, ‘*Nearest Magistrate or Gazetted Officer*’ should be mentioned in the notice under Section 50 of the said Act. It was further submitted that the present applicant has been in judicial custody for more than 03 years since 24.02.2020. Out of 40 witnesses cited by the prosecution, only 21 witnesses have been examined so far and therefore, the trial is not likely to conclude in near future. Reliance was placed on the following judgments:



- i. Rabi Prakash vs. State of Odisha, Order dated 13.07.2023 passed by the Hon'ble Supreme Court in Special Leave to Appeal (Crl.) No. 4169/2023.
 - ii. Dilip v. State, 2010:DHC:3195-DB.
 - iii. Deep Chand Kumar v. Narcotics Control Bureau, 2023:DHC:3900.
- 6.** *Per contra*, learned APP for the State submitted that the bail application of co-accused Masibur Khan has been rejected by this court *vide* judgment dated 13.05.2023 passed in BAIL APPLN. 2894/2022. It was submitted that the recovery in the present case is that of a commercial quantity and therefore, the rigors of Section 37 of the NDPS Act would be attracted. It was pointed out that the ground taken with respect to discrepancy in the FSL Report is a matter of trial to be determined by the learned Trial Court after conclusion of evidence. It was further submitted that the FSL report clearly states that on physical, microscopic, chemical and TLC examination, the exhibits were to be found to be '*ganja*', i.e., cannabis. It was further pointed out that the analysis was, therefore, just not on the basis of chemical test but as well as other tests mentioned hereinabove. It was further submitted that even in the cross-examination of the expert recorded before the learned Trial Court, the yellow colour of the sample has been put to the said witness by the learned defence counsel and the said expert, in his answer to the same has tried to explain the various other factors taken into account before determining the exhibits to be *ganja* in the present case. Learned APP for the State submitted that as per the working manual of the FSL, the colour tests are presumptive in nature. Attention of this Court was drawn to the following portion of the said working manual:



“5.5.3 Colour tests:

Presumptive colour tests are only the presumptive indication of the possible presence of cannabis products. It is necessary for the analyst to confirm the presence of cannabis product by the use of an alternative technique.”

In view of the above, it was argued that the FSL report in the present case is based on physical microscopic and TLC examination and therefore, cannot be faulted on account of the colour test alone. Learned APP for the State placed reliance on the following observations made by a learned Division Bench of this Court in **Dilip (supra)**:

“16. In the Recommended Methods for Testing Cannabis issued by the United Nations, 1987, it is clearly stated that:-

“Because cannabis and cannabis resin are plant material it is mandatory that the analyst includes macroscopic and / or microscopic examination of the material as part of the testing protocol. The choice of the two other techniques or more, is left to the discretion of the forensic chemist.”

***”

7. Heard learned counsel for the parties and perused the record.
8. The primary ground on the basis of which bail has been sought in the present case is the discrepancy in the FSL Report with regard to the examination of the seized contraband. Learned APP for the State contended that the same is a matter for trial and the cannot be looked into at this stage. The said contention cannot be sustained because this Court, for the purposes of deciding the present application within the contours of Section 37 of the NDPS Act, has to examine the legal issues raised herein. The Hon’ble Supreme Court, in **Union of India v. Shiv Shankar Kesari, (2007) 7 SCC**



798, while explaining the term ‘reasonable ground’ used in Section 37(1)(b)(ii) of the NDPS Act, held as under:

“7. The expression used in Section 37(1)(b)(ii) is “reasonable grounds”. The expression means something more than *prima facie* grounds. It connotes substantial probable causes for believing that the accused is not guilty of the offence charged and this reasonable belief contemplated in turn points to existence of such facts and circumstances as are sufficient in themselves to justify recording of satisfaction that the accused is not guilty of the offence charged.

11. The court while considering the application for bail with reference to Section 37 of the Act is not called upon to record a finding of not guilty. It is for the limited purpose essentially confined to the question of releasing the accused on bail that the court is called upon to see if there are reasonable grounds for believing that the accused is not guilty and records its satisfaction about the existence of such grounds. But the court has not to consider the matter as if it is pronouncing a judgment of acquittal and recording a finding of not guilty.”

(emphasis supplied)

Further, more recently, in **Mohd. Muslim alias Hussain v. State (NCT of Delhi), 2023 SCC OnLine SC 352**, the Hon’ble Supreme Court held as under:

“21. The standard to be considered therefore, is one, where the court would look at the material in a broad manner, and reasonably see whether the accused’s guilt may be proved. The judgments of this court have, therefore, emphasized that the satisfaction which courts are expected to record, i.e., that the accused may not be guilty, is only *prima facie*, based on a *reasonable reading*, which does not call for meticulous examination of the materials collected during investigation (as held in *Union of India v. Rattan Malik*). Grant of bail on ground of undue delay in trial, cannot be said to be fettered by Section 37 of the Act, given the imperative of Section 436A which is applicable to offences under the NDPS Act too (ref. *Satender Kumar Antil* supra). Having regard to



these factors the court is of the opinion that in the facts of this case, the appellant deserves to be enlarged on bail.”

In view of the above, this Court, for the limited purpose of deciding the present bail application, has to arrive at a *prima-facie* finding with regard to the legal issues raised herein.

9. A perusal of the worksheets prepared by Dr. Adesh Kumar/PW-3, while examining the samples in the present case reflects that the following examinations were conducted

- i. Physical examination
- ii. Microscopic examination
- iii. Chemical Test
- iv. TLC

The same are also mentioned in the FSL report (Ex.PW-3/1). The aforesaid chemical expert, during his deposition before the learned Special Court, in his cross-examination stated as under:-

“I had not handed over my working notes to police. I had conducted the Fast Blue B Test. During the chemical test, after mixing the chemical into contraband shows “YELLOWISH COLOUR” followed by sodium hydroxide.”

10. It is pertinent to note that as per the worksheet placed on record, the chemical tests stated to have been conducted are:

- (a) Duguenois Test (Negm’s Test)
- (b) Fast Blue B Test.

As per the Working Procedure Manual issued by Forensic Science Laboratory, Govt. of NCT of Delhi, one of the references with regard to recommended documents pertaining to methods of identification of cannabis



or cannabis products is one issued by United Nations Office of Drugs and Crime. Attention of this Court has been drawn to the portion of manual containing the 'Recommended Methods for the Identification and Analysis of Cannabis and Cannabis Products' issued by United Nations Office of Drugs and Crime, wherein at Para 5.4.3.1.3, it is mentioned as under:

Recommended Methods for the identification and analysis of cannabis Products

Method

Same procedure as with Fast Corinth V Salt.

Results

A purple red coloured stain at the centre of the filter paper is indicative of a cannabis containing product.

The colour is a combination of the colours of the different cannabinoids which are the major components of cannabis: **THC=red. CBN=purple, CBD=orange**

Note

Note Fast Blue B salt keeps very well when stored in a refrigerator, but when kept at room temperature, it tends to deteriorate with time and the powder becomes a solid rock (especially in Warm regions).

** Fast Blue B salt= Di-o-anisidinetetrazolium chloride

5.4.3.1.3 Rapid Duquenois test (Duquenois Levine test)

In a test tube

Reagent A:

Acetaldehyde (A1)
Vanillin (A2)

0.5 ml (A1) and
0.4 g (A2) in 20
ml ethanol

**Solution must be
stored at a cool
dark place and
discarded if
assumes a deep
yellow colour.**



Reagent B:	Concentrated hydrochloric	
Reagent C:	Concentrated hydrochloric	
<i>Method</i> Place a small amount of the suspect material in a test tube and shake with 2 ml reagent A for one minute. Add 2 ml of reagent B and shake the mixture. Allow to stand for ten minutes. If a colour develops, and 2 ml of reagent C, mix gently.		
<i>Results</i> If the lower (chloroform) layer becomes violet coloured this indicates the presence of a cannabis product. <i>Notes</i> This test is not as sensitive as the two filter paper tests above.”		

(emphasis supplied)

11. In this background, the following portion of the cross-examination of Dr. Adesh Kumar/PW-3 is relevant :-

“Question: Have you gone through any literature, FSL SOP, UNODC or other reference book (written by C. Clark) in which it is defined that during the colour/ chemical test of bhang, ganja and charas give the same colour?

Ans. To differentiate bhang, ganja and charas some other chemical tests are also conducted i.e. Vanillin Test, Duquenois Test etc. and other techniques were also used as microscopic and physical examination to ascertain whether exhibits are Ganja, Charas or Bhang.

The colour depend on the presence of Delta THC i.e. the basic constituent of cannabis.

Q:- Is it correct that Delta THC is present in Charas and Bhang also?

Ans. Delta THC is present in Charas. I am not sure whether it is present in Bhang or not.”

(emphasis supplied)

12. A perusal of the worksheet prepared by Dr. Adesh Kumar/PW-3 reflects that the details of colour combination which are results of aforesaid two tests conducted



by the said expert are not recorded. The portion with regard to the chemical tests conducted by the said expert records as under (typed version):

3. **CHEMICAL TEST**

- | | | |
|----------------------------------|---|---|
| (a) Duguenois Test (Negm's Test) | } | Positive in Ex-1A, 2A, 3A, 4A,
5A, 6A, 7A, 8A & 9A |
| (b) Fast Blue B Test | | |

A perusal of the aforesaid portion shows that no colour combinations of the test have been recorded. However, the fact remains that in his cross-examination, the said expert, clearly stated that on chemical test after mixing the chemical contraband showed yellowish colour, which as per the 'Recommended Methods for the Identification and Analysis of Cannabis and Cannabis Products' issued by United Nations Office of Drugs and Crime, should have been discarded.

13. It is not the case of the prosecution that physical and microscopic examination alone would be the determining factor for opining the samples to be cannabis (ganja) after an examination by an expert. The physical description and the smell of the contraband at the time of seizure *prima facie* could be indicative that the contraband is a cannabis product. However, it is the chemical examination and report thereof, which would ultimately cover the case of the prosecution under the NDPS Act.

14. It is pertinent to note that presence of Tetrahydrocannabinol ('THC') is a requirement for a sample to be labeled as that of cannabis. Presence of THC is detected by way of a colour test, as pointed out hereinabove. Although, the percentage of the THC would not be relevant to determine the category in terms of commercial, intermediate or small quantity, nevertheless, presence of



THC is essential, which is admitted by the expert Dr. Adesh Kumar/PW-3, as pointed out hereinbefore.

15. A learned Division Bench of this Court, in **Dilip v. State, 2010:DHC:3195-DB**, held as under:-

“18. The working Procedure Manual of Narcotics issued by the Directorate of Forensic Science, Government of India, New Delhi deals with cannabis in Section 5 of the said Manual. Section 5.5.1 deals with microscopic examination and its provisions are virtually identical to the examination method given in the “Recommended Methods for Testing Cannabis” by the United Nations in 1987. **Apart from microscopic examination, the Working Procedure Manual also prescribes colour tests, which include Fast Blue B Salt Test employing two different methods: Filter Paper Method and Test Tube Method.**

20. Other tests, including thin layer chromatography, gas liquid chromatography, high performance liquid chromatography and mass spectrometry techniques have also been specified. **But, from the above testing procedures indicated in the Working Procedure Manual, it is clear that the presence of cannabis can be determined by simple microscopic examination and the various colour tests which clearly reveal the presence of cannabis.** It is not at all a scientific requirement to determine the content of THC in a sample of contraband to arrive at the conclusion as to whether the contraband is cannabis or not. In fact, a simple colour test also differentiates the type of cannabis, namely, whether it is charas or ganja or bang (which has not been specifically included as cannabis under the NDPS Act). There is, therefore, no necessity of determining the percentage content of THC in a sample of cannabis, be it charas or ganja. Neither the NDPS Act nor the said notification prescribing small and commercial quantities make any reference to the purity of charas or ganja. Once the contraband has been determined to indicate cannabis, whether in the form of charas or in the form of ganja or as a mixture containing either of the two, with or without other neutral substances, the entire weight of the contraband would have to be considered for determining whether the recovery was of a small quantity, intermediate quantity or a commercial quantity.”

(emphasis supplied)



16. In view of the above, even if the answer by the expert in cross-examination regarding the colour of the solution to be yellow is discarded, there is nothing on record as per the working sheets to show the colour combination by as a result of the aforesaid two chemical tests showing the presence of THC.

17. Be that as it may, it is pertinent to note that if the sample could only be determined on the basis of physical or microscopic examination then why would there be a requirement for a chemical test to be conducted on the sample for determining the present of THC. It is pertinent to note that all the four tests are to be conducted before giving the report. The expert Dr. Adesh Kumar/PW-3, in the present case has given a report showing the result of the colour test as positive, without making any observation with regard to the colour combination to arrive at the said conclusion. The worksheet placed on record, admittedly, does not record any finding showing the result of such test. These aspects cannot be ignored by this Court while determining the present bail application.

18. As per the nominal roll, the applicant has been in incarceration since 25.02.2020 and has been in judicial custody for nearly three years. It is further reflected in the nominal roll that the applicant was released on interim bail on three occasions and he duly surrendered without misusing the liberty granted to him. It is further pertinent to note that out of 21 witnesses cited by the prosecution only 9 have been examined so far and out of the said 9 witnesses, 2 have been examined in part and, therefore, the trial is not likely to conclude in near future.



19. In totality of the facts and circumstances of the case, the present application is allowed. The applicant is admitted to bail upon his furnishing a personal bond in the sum of Rs. 50,000/- alongwith two sureties of like amount to the satisfaction of the learned Trial Court/Link Court, further subject to the following conditions:

- i. The nominal roll shows that the applicant is residing at C-11/02, Gali No. 6, Braham Puri, Delhi. In case of any change of address, the applicant is directed to inform the same to the learned Trial Court and the Investigating Officer.
- ii. The applicant shall not leave India without the prior permission of the learned Trial Court.
- iii. The applicant is directed to give all his mobile numbers to the Investigating Officer and keep them operational at all times.
- iv. The applicant shall not, directly or indirectly, tamper with evidence or try to influence the witnesses in any manner.
- v. The applicant shall join the investigation, as and when required by the Investigating Officer.
- vi. In case it is established that the applicant tried to tamper with the evidence, the bail granted to the applicant shall stand cancelled *forthwith*.

20. The application stands disposed of along with all the pending application(s), if any.

21. Needless to state, nothing mentioned hereinabove is an opinion on the merits of the case and any observations made are only for the purpose of the present bail application.



22. Let a copy of this judgment be communicated to the concerned Jail Superintendent for necessary information and compliance.
23. Judgment be uploaded on the website of this Court, *forthwith*.

AMIT SHARMA
JUDGE

DECEMBER 05, 2023/nk/sn