

IN THE HIGH COURT OF SINDH, KARACHI

Before:

Mr. Justice Mohammed Karim Khan Agha, J.

Criminal Bail Application No.958 of 2016

Applicant Gul Zaman	Through M/s. Muhammad Haseeb Jamali & Tariq Mahmood, Advocates for the applicant.
The State	Through Mr. Habib Ahmed, Special Prosecutor, A.N.F.
Date of hearing:	23.10.2017
Date of Order:	02.11.2017

ORDER.

Mohammed Karim Khan Agha, J: Through this Criminal Bail Application, the applicant seeks post arrest bail in Crime No.19/2012, under Sections 6/9 Control of Narcotic Sunstances Act1997 (CNSA) lodged at P.S. ANF-C, Karachi.

2. It is stated by the complainant in the FIR that on 08.07.2012, at 8.00 a.m. Inspector Khalid Rasheed of PS ANF-Chifton, Karachi lodged his report stating therein that on 08.7.2012 he was present at his P.S. when through his higher Officers special informer gave him report that the nominated accused Gul Zaman S/o Misri Khan, in FIR No.5 of 2011, PS. ANF Gulshan-e-Iqbal, Karachi, is present in his house situated at Muhallah Qadria, Sher Khanabad, Orangi Town, with huge quantity of narcotic and if immediate action will be taken then accused alongwith huge quantity of narcotic will be recovered. On receipt of said information in order to take immediate action and receiving direction from his higher

authorities he prepared a raiding party consisting of himself, S.I-Maqsood Ahmed Mazhar, ASI-Afzal Nazeer, PC-Muhammad Majid, PC-Mazharuddin, lady constable Saima and other ANF staff. As it was late at night he could not obtain search warrant, however there was apprehension of shifting of narcotic and removing the evidence. As per directions they alongwith special informer duly dressed and armed with official weapons on two government vehicles under the supervision of Deputy Director Asmatullah Khan under roznamacha entry No.12, at about 0500 hours, left their P.S. and at about 0600 hours, they reached at Muhallah Qadria, Sher Khanabad, Orangi Town, Sector 3. Then due to non-availability of private mashirs he cited S.I. Maqsood Ahmed Mahar and ASI Afzal Nazeer as mashirs and on the pointation of special informer they knocked the door of house No.232, Muhallah Qadria, Sher Khanabad, Orangi Town, Sector-3, Karachi, on which one person opened the door, who on seeing them tried to close the door but they apprehended him. On inquiry said person disclosed his name to be Gul Zaman S/o Misri Khan, R/o House No.232, Muhallah Qadria, Sher Khanabad, Orangi Town, Sector No.3, Karachi, original resident of Muhallah Haji Noor Ali, Kali Zargan Khail, Post Office Dara Adam Khail. District Mohat. He inquired about the narcotic from the accused on which he disclosed that narcotic is lying in Otaq situated near main gate of his house, whose door open towards Street. The accused lead them toward Otaq and got it opened and secured three white colour plastic bags below the quilt. Inspector/Complainant checked said three white plastic bags and found 20 packets wrapped with khaki solution tape, in second white plastic bag 22 packets wrapped with khaki solution tape and from 3rd white colour plastic bag complainant/Inspector found nine packets lying in blue colour foil packing, seven packets of golden colour packing viz. total 16 packets, therefore, Complainant recovered 58 packets from all three white plastic bags and he secured one pistol MP-446 VIKING alongwith arms licenses of

accused Gul Zaman, two magazines containing 15 live bullets and 10 live bullets near the white plastic secured bags and he weighed the secured 50 packets and weight of each packet become 1200 grams. Thus total weight of secured packets become **69.600 kilograms**. Complainant opened the secured 50 packets one by one and from each packet **charas was recovered**. Thereafter he kept the said packets of charas in each white colour plastic bag in same quantity and then sealed the same for chemical examination. Then he took personal search of the accused Gul Zaman and secured one brown colour purse in which four currency notes of Rs.1000/=, original CNIC of accused Gul Zaman, two U-Phone sims, two Zong sims and different chits were lying and secured one Nokia mobile phone with Telenor sim from front pocket of the shirt of accused. Later on he conducted search of the house of accused through lady police constable Saima and other gents staff, but no any other incriminating article was recovered from the house of accused. Thereafter he prepared memo of arrest and recovery on the spot and then read over the contents of the mashirnama and obtained signatures of both mashirs on it and so also sealed parcels. He arrested the accused and returned back to police station A.N.F. where he lodged the FIR.

3. After usual investigation challan was submitted, the charge was framed to which the applicant opted for trial and thereafter the trial proceeded.

4. Learned counsel for the applicant/accused mainly sought bail on account of statutory delay/hardship since the trial of the applicant had not been concluded after a lapse of almost 5 years and there was no sign of its conclusion in the near future because the prosecution witnesses were not coming forward and the delay was not caused due to any fault on his behalf. He pointed to various diary sheets in support of his contentions.

5. He also, in support of his contentions, placed reliance on the following case law **Muhammad Ismail V. Muhammad Rafique & another** (PLD 1989 SC. 585), **Amir V. The State** (PLD 1972 SC 277), **Iqbal V. The State** (2001 YLR 743), **Muhammad Hussain V. The State** (2012 YLR 768), **Khalilur Rehman V. The State** (2008 YLR 1575), **Muhammad Khan V. Muhammad Bashir & others** (2003 SCMR 427), **Muhammad Aslam V. The State** (1999 SCMR 2147), **Gul Zaman V. The State** (1999 SCMR 1271), **Muhammad Afzal Butt alias APhi V. The State & others** (2015 SCMR 1696), **The State through Deputy Director Anti Narcotic Force, Karachi V. Syed Abdul Qayyum** (2001 SCMR 14), **Jamal-uddin alias Zubair Khan V. The State** (2012 SCMR 573), **Imtiaz Ahmed V. The State through Special Prosecutor, ANF** (2017 SCMR 1194), **Anwar Ali & another V. The State** (2002 P Cr. L.J. 186), **Muhammad Anwar V. The State** (2001 YLR 611), **Anwar Zaman V. The State** (2017 MLD 32), **Dildar Ali, P.C. V. The State** (2009 M L D 133), **Ziarat Khan V. The State** (2010 MLD 1908), **Christophe Yakibongay V. The State** (2012 MLD 1503) and an order passed in **Special Case No. 58/2013** dated 12-09-2103 by the learned trial Court

6. Learned Special Prosecutor, ANF vehemently opposed the grant of bail to the applicant who contended that the delay had been caused largely because one of the accused who had been granted bail had absconded and it took time to recapture him; that statutory bail on the grounds of delay was not available in cases under the CNSA; that now the trial could be concluded in a short span of time since the co-accused had been arrested and was in custody especially as he agreed that after the present PW who had already given his evidence in chief the prosecution would only examine a maximum of 2 further PW's which included the IO who was ready and available. In support of his contentions he placed reliance on **The State through Deputy Director, Anti**

Narcotic Force, Karachi V. Mobin Khan (2000 SCMR 299),
Rana Shahid Mashi V. The State (2012 P Cr. LJ 878)

7. I have heard the learned counsel for the parties, perused the material available on record and considered the case law cited at the bar.

8. In deciding such cases in my view it is always a question of balance and the authorities cited on both sides tend to be either for the grant of bail in such cases or against it. It appears that much will depend on the particular facts and circumstances of each case.

9. In this case in my view it is a question of how long a person can be kept behind bars prior to the conclusion of his trial i.e. hardship verses all other relevant factors.

10. It appears that the applicant has been behind bars for around five years without conclusion of the trial mainly not on account of his fault and the last direction to by this Court to the trial court to complete the trial within a specified period of time has not been complied with by the trial court. The applicant has a right to an expeditious trial as is guaranteed under A.10(A) of the Constitution. Thus, there need to be strong reasons for keeping the applicant behind bars for any longer which we shall now consider.

11. Factors militating against grant of bail on hardship grounds.

(a) S.51 CNSA provides that bail is not available in cases where the **death sentence** may be awarded. S.51 CNSA reads as under:

“51. No bail to be granted in respect of certain offences.---(1) Notwithstanding anything contained in sections 496 and 497 of the Criminal Procedure Code, 1889 (V of 1898), **bail shall not be granted to an accused person charged with an offence under this Act or under any other law relating to narcotics where the offence is punishable with death**”.

(b) The case has been challaned under S.9 (C) CNSA which due to the quantity involved may lead to the death penalty or a life sentence at the minimum. S.9 CNSA reads as under:

9. Punishment for conviction of sections 6, 7 and 8----Whoever contravenes the provisions of Sections 6, 7 or 8 shall be punishable with—

(a) imprisonment which may extend to two years, or with fine, or with both, if the quantity of the narcotic drug, psychotropic substance or controlled substance **is one hundred grams or less;**

(b) imprisonment which may extend to seven years and shall also be liable to fine, if the quantity of the narcotic drug, psychotropic substance or controlled substance **exceeds one hundred grams but does not exceed one kilogram;**

(c) death or imprisonment for life or imprisonment for a term which may extend to fourteen years and shall also be liable to fine which may be upto one million rupees, if the quantity of narcotic drug, psychotropic substance or controlled substance exceeds the limits specified in clause(b):

Provided that if the quantity exceeds ten kilograms the punishment shall not be less than imprisonment for life." (bold added)

(c) In this case a massive amount of charas (69.6 KG) has been recovered which potentially could lead to the death penalty and therefore the exclusion of bail.

(d) That a brief review of the prosecution evidence tends to show that there is sufficient material on record to connect the applicant to the offense for which he has been charged and thus on merits his post arrest bail would be declined. For example, all the PW's support the prosecution case, the recovery was made from the applicant on the spot in his own home; the amount recovered was of a huge quantity, a positive chemical report is available. Though such finding in this order is only tentative and will have no bearing on the case of the trial of the applicant which will be decided on merit on the basis of the evidence which is lead before the trial court.

(e) That the applicant hails from KPK so the possibility of his absconsion if he is granted bail cannot be ruled out keeping in view the material against him as other co-accused have already absconded in the same case

when granted bail despite having lesser roles than the applicant in the commission of the offense. Hence the bail granting order to some of the co-accused dated 23-09-2013 is of little assistance to him in terms of the rule of consistency especially as some of those co-accused who were granted bail through that order subsequently absconded.

(f) That this is the 3rd separate case under the CNSA which the applicant has been involved in which suggests that if not a habitual offender he is probably a hardened criminal.

(g) That trial court not complying with a Courts direction to complete a trial within a specified period of time does not automatically give the right to bail nor does it even amount to a fresh ground for bail as it is noted that the applicants last bail application was disposed of vide order dated 25-02-2016 with a direction to complete the trial within two months. In this respect reference may be made to the case of **Nisar Ahmed v. The State & others** (PLD 2016 S.C. 11)

(h) That drug dealing is a heinous crime which is regarded as a crime against society and hence the possibility of capital punishment. In the case of **Socha Gul V State** (2015 SCMR 1077) it was held as under at P.1081

"It is pertinent to mention here that offences punishable under C.N.S. Act of 1997 are by its nature heinous and considered to be the offences against the society at large and it is for this reason that the statute itself has provided a note of caution under section 51 of C.N.S. Act of 1997 before enlarging an accused on bail in the ordinary course. When we refer to the standards set out under section 497, Cr.P.C. for grant of bail to an accused involved in an offence under section 9(c) of C.N.S. Act of 1997, even on that basis we find that an accused charged with an offence, prescribing various punishments, as reproduced above, is not entitled for grant of bail merely on account of the nature or quantity of narcotic substance, being four kilograms. Firstly, as deeper appreciation of evidence is not permissible at bail stage and secondly, in such situation, looking to the peculiar features and nature of the offence, the trial Court may depart from the normal standards prescribed in the case of Ghulam Murtaza (*supra*) and award him any other legal punishment. Thus, in our opinion, ratio of judgment in the case of Ghulam Murtaza (*supra*) is not relevant at bail stage." (bold added)

(i) It is true that the Superior Courts have on occasion granted bail in a CNSA case which was subject to the death penalty however this has only been done sparingly and in cases distinguishable on their own particular facts and circumstances from the current case. For example, in the case of **Gul Zaman V. The State** (1999 SCMR 1271). However in that case the charge had not been framed and the material against the applicant was flimsy to say the least and appeared to be more based on suspicion than solid evidence. In the case of **Jamal-ud-din alias Zubair Khan V. The State** (2012 SCMR 573) in considering the imposition of the death penalty under S.9 © of the CNSA it was held that while hearing a bail petition the court was not to keep in view the maximum sentence provided by Statute **but the one which was likely to follow bearing in mind the facts and circumstances of the case.** In the case in hand in my view based on the particular facts and circumstances of this case on conviction the applicant is likely to be sentenced to life imprisonment if not the death penalty due to the huge recovery and strong evidence against him. In the recent case of **Imtiaz Ahmed V. The State through Special Prosecutor, ANF** (2017 SCMR 1194) where the trial had taken almost 3 years to complete the applicant was granted bail because the PW's were not turning up **and the IO who was the star witness of the prosecution was a fugitive from law and therefore would not turn up and as such the completion of the trial was not foreseeable in the near future.** This is distinguishable from this case where the IO is very much available and ready to give evidence.

(j) That in the instant case the ANF special prosecutor has agreed to call a maximum of 2 more witnesses and since there are only 2 accused the trial can be completely relatively quickly now **and as such can be completed in the near future.**

12. Thus; although I condemn the prolonged delay in conclusion of the trial in the strongest possible terms taking into account all of the above factors I am of the considered view that this matter can be dealt with by issuing a further direction to the trial court to complete the trial within a given period.

13. Hence, this bail application is dismissed and the trial court is directed to hear the matter on a day to day basis and

complete the trial within 3 months of the date of this order. The office shall transmit a copy of this order immediately to the concerned trial court for compliance which shall submit fortnightly progress reports to this court through MIT II.

14. The above petition is disposed of in the above terms.

Announced by me.