

IN THE HIGH COURT OF SINDH, AT KARACHI

Special Criminal Bail Application No. 33 of 2014

Dates of hearing : 29.09.2014, 30.09.2014 and 01.10.2014.

Date of decision : .10.2014.

Applicant/accused Mumtazuddin through : Mr. Khawaja Shamsul Islam, Advocate.

Respondent, the State, through : Mr. Muhammad Javed K.K., Standing Counsel
alongwith Inspector Siraj, FIA (CCC), Karachi.

ORDER

IRFAN SAADAT KHAN, J: The applicant/accused is nominated in crime under Sections 2(s), 156(1)(8) of the Customs Act, 1969 (the Act) for the contravention of Import Policy 2013 bearing FIR No.13/2014, dated 21.08.2014, registered at P.S. FIA, Corporate Crime Circle, Karachi. A case bearing No.91/2014 in this regard is pending before the learned Special Judge (Customs & Taxation), Karachi.

2. Briefly stated the facts of the case are that on 21.08.2014 an information was received by the FIA authorities that a passenger namely Mumtazuddin S/o. Moinuddin (the present applicant/accused) is coming from abroad and is bringing some prohibited /banned items. Thereafter, Turkish Airline flight No.TK-708 was checked and the above named passenger was intercepted. The said passenger was then asked certain questions upon which he disclosed that he is bringing a consignment of arms and ammunition in his personal baggage and the said bag is available on the belt. Then the said passenger himself picked the said bag from the belt and brought it to the Incharge Officer; whereon the same was checked and taken into custody by the FIA authorities. The said bag contained 25 lower and middle parts of the Glock pistol and 97 magazines of the said pistol. The said items were taken into custody, seizure memo was prepared and then FIR was lodged. The said passenger was asked to show the documents of these prohibited /banned items upon which he confessed that he has brought these goods from abroad and previously also on four occasions he has brought such items. Thereafter, the said person was detained and necessary proceedings were carried out. A bail application was moved before the Court of Special Judge (Customs & Taxation), Karachi and the learned Judge, vide order dated 09.09.2014, dismissed the same. Thereafter, the present Special Criminal Bail Application has been moved.

3. Mr. Khawaja Shamsul Islam, Advocate, has appeared on behalf of the applicant/accused and submitted that the applicant/accused is innocent and no crime has been committed by him. While elaborating his viewpoint, he submitted that the applicant/accused is a married man having a suckling baby in Belgium and since other family members, including brothers and sisters, reside in Pakistan, the applicant/accused used to visit Pakistan quite frequently. He submitted that the applicant/accused was

arrested inside the plane and was not even allowed by the FIA authorities to file declaration about the items brought by him. Learned counsel states that had the applicant/accused allowed to pass through custom authorities, he would have declared the same but since he was intercepted in the plane hence there was no occasion to declare the said goods. He further states that as per the FIA Act, 1974, the FIA authorities have no jurisdiction on the airports and other designated areas, as defined in Customs Act, to intercept a person even though the said person is bringing prohibited /banned items, which is the exclusive domain of the customs authorities, hence, according to him, the very action taken by the FIA authorities was without jurisdiction. Learned counsel submitted that perusal of the documents would reveal that the FIR was registered on 21.08.2014 at 2200 hours, whereas the statement of the FIA authorities categorically show that the items were seized on 21.08.2014 at 0630 hours. According to the learned counsel it is beyond comprehension that how could the goods be seized much before the lodging of the FIR, hence, on this ground alone the applicant/accused is entitled for grant of bail. He further submitted that co-accused Col. (Retd.) Muhammad Hafeez has already been granted bail before arrest, hence on the rule of consistency the applicant/accused is entitled for bail. He further submitted that as per Section 103 Cr.P.C. it is the mandatory requirement that the evidence of independent witnesses are to be recorded, whereas in the instant case it is seen that there is no independent witness and all the mashirs are that of FIA. He further submitted that while the FIA authorities were intercepting the applicant/accused they should have taken the custom authorities alongwith them, which was not done, hence, according to him, since legal formalities have not been fulfilled, therefore, the applicant/accused is entitled for bail. He further submitted that the FIA authorities have no jurisdiction to make search in respect of the items as clearly stipulated in Section 2(s) of the Customs Act, which is the exclusive domain of the custom authorities. Learned counsel stated that in order to attract the provisions of Section 156(1)(8) of the Customs Act, first there has to be an offence and only thereafter punishment could be awarded and since in the present case no jurisdiction vests with the FIA authorities, under the provisions of Section 2(s) of the said Act, which is the exclusive domain of the custom authorities, the action taken under Section 156(1)(8) of the Customs Act is illegal and uncalled for. He further stated that, if the Import Policy is examined, as per PCT Heading 9303.0011, nobody is permitted to import a revolver and pistol of prohibited bore and the applicant/accused has also not brought in any revolver and pistol, hence, the applicant/accused has not committed any offence. He further stated that during investigation the applicant/accused was severally tortured, which aspect was noted by the Special Judge (Customs & Taxation). He further stated that there is a marked contradiction with regard to the time of the offence also, hence, if all above factors are taken into consideration the present case would become a fit case for grant of bail. In support of his above contentions the learned counsel has relied upon the following decisions:

1. *Central Board of Revenue and another Vs. Khan Muhammad (PLD 1986 SC 192)*
2. *Shahzad Ahmed Corporation through Shahzad Ahmed Vs. Federation of Pakistan through Secretary, Ministry of Finance, Government of Pakistan (2005 PTD 23)*

3. *Muhammad Tahir Vs. The State (1991 P.Cr.L.J 644)*
4. *Tariq Bashir and 5 others Vs. The State (PLD 1995 SC 34)*
5. *Farid Khan Vs. The State (PTCL 1993 CL 722)*
6. *Ferozur Rahman Batla Vs. The State (1980 P.Cr.L.J 663)*
7. *Collector of Customs Vs. Muhammad Mehfooz (PTCL 1992 155)*
8. *Zahid Ali and 2 others Vs. The State (PTCL 1989 CL. 65)*
9. *Miss Beatrice Ben. Vs. Government of Pakistan (PTCL 1990 CL. 109)*
10. *Muhammad Afsar Vs. The State (1977 P.Cr.L.J 346)*
11. *Muhammad Javed Vs. The State (1980 P.Cr.L.J 116)*
12. *Muhammad Umair Feroz Vs. Appellate Tribunal and others (SBLR 2011 Sindh 1565)*
13. *Shah Faisal Vs. The State (2011 MLD 1075)*

4. Mr. Muhammad Javed K.K., learned Standing Counsel, who has appeared alongwith I.O. Inspector Siraj Panhwar, FIA, CCC, Karachi, has vehemently refuted the averments made by the learned counsel for the applicant/accused and submitted that Section 5 of FIA Act, 1974, Section 6 of the Customs Act, 1969, and Schedule of FIA Act clearly gives jurisdiction to the FIA authorities to take note of any offence, which is punishable under Section 156 of the Customs Act. He then invited my attention to Items 38 & 42 of the banned items of the Import Policy and submitted that ammunition and parts of the ammunition are banned items and are liable not only to be confiscated but also entail penal action, as provided under the above referred provisions of the law. Learned Standing Counsel submitted that arms and ammunition are always imported through a license, which is granted by the concerned Ministry and admittedly the applicant/accused does not have such license. He further submitted that 9MM pistol, which is a prohibited/banned item, contains three parts i.e. 1) upper portion, 2) middle and lower portion and 3) magazine. He stated that the applicant/accused has brought in magazines, middle and lower portions, which means that almost 70% portion of the pistol is being brought in Pakistan without any legal and lawful authority, however, so far as the upper portion is concerned it could be seen from the statement of the applicant/accused that previously also he has brought in some parts of the pistol, which means that by bringing these parts in piecemeal from time to time the applicant/accused is bringing in these prohibited items just to defraud the government agencies. He further stated that the goods brought in are worth Rs.40 to 50 Lacs and from March 2011 to August 2014 the applicant/accused has travelled as many as 39 times in Pakistan. He submitted that a link has been established and created between the co-accused Col. (Retd.) Muhammad Hafeez and the applicant/accused, since a number of credit entries have been found in the bank account of the applicant/accused, which were enrouted in the account of the applicant/accused from the account of co-accused Col. (Retd.) Muhammad Hafeez, who in turn has received amounts from one Zahid A. Qadri, who is an arms dealer. He further submitted that co-accused Col. (Retd.) Muhammad Hafeez was working in NADRA as a

Director but when the above allegation has been found against him, his contract was not extended. He further submitted that the colour of the lower portion of the pistol would clearly demonstrate that the said pistol was designed for armed forces. He further submitted that had these item passed away through the airport unnoticed by the government agencies one could imagine what damage these items would have caused in the prevailing law and order situation of the city, as well as of the country. He further submitted that the lower Court, after a detailed deliberation, has rightly rejected the bail application of the applicant/accused. He in the end submitted that the concession of bail may not be extended to the applicant/accused.

5. Mr. Shams, in his rebuttal, has submitted that there is no criminal record of the applicant/accused. He further submitted that no opportunity of declaration was given to the applicant/accused. He further submitted that a perusal of Sections 6 & 9 of the Customs Act, would reveal that FIA authorities have no jurisdiction to deal with such type of cases. He further submitted that the items brought in neither fall under the definition of arms nor ammunition. He further submitted that the weapons are available for sale on internet, hence, the same cannot be considered to be prohibited/banned items. He further submitted that even if, for arguments sake, it is assumed that the applicant/accused is bringing arms and ammunition, which is a prohibited item, but perusal of the record would reveal that the applicant/accused has brought in the parts of those arms and ammunition but not arms and ammunition itself, hence, the treatment which is to be given to arms and ammunition could not be given to its parts. He further submitted that at the time of interception no recovery has been effected from the applicant/accused and no mashirnama was prepared at that time. He, therefore, has prayed that since the case of the applicant/accused is full of contradictions /confusions etc. and in view of the decisions quoted supra the case of the applicant/accused is that of bail, which may be granted to him.

6. I have heard both the learned counsel at considerable length and have perused the available record, the law and the decisions relied upon.

7. It is a well-settled law that at bail stage only a birds' eye-view of evidence is taken into consideration. A deeper appreciation of evidence is neither permissible nor required. However, if it appears to the Court at any stage of trial that there are no reasonable grounds for believing that the accused had committed a non-bailable offence and there are sufficient grounds for further inquiry into his guilt, the accused may be released on bail. In every criminal case some scope for further inquiry into the guilt of accused exists, but on that consideration alone it cannot be claimed by the accused as a matter of right that he is entitled to bail. For bringing the case in the ambit of further inquiry, there must be some evidence, which on the tentative assessment, may create doubt with respect to involvement of accused in the crime. What is important is that the Court while granting bail has to satisfy itself whether reasonable grounds exist or not against the accused for believing that he is connected with the offence alleged against him. Each case has its own foundation of facts, therefore, it is not possible to put each and every case in the cradle of further inquiry to provide relief to the accused by releasing him on bail.

8. A perusal of the Import Policy 2013 clearly stipulates that ammunition and parts of ammunition fall under the category of banned items /negative list. The terms “arms” has been defined in Section 3(b) of West Pakistan Arms Ordinance, 1965, which includes a pistol, whereas the expression “ammunition”, as defined in various dictionaries, means “any firearm which includes any item capable of use as a firearm”. Even, for arguments sake, if it is assumed that parts of the arms and ammunition are being brought by the applicant/accused but this fact could not be denied that the parts brought in “are capable of being used as arms and ammunition”, hence, in my view, the same squarely falls under the definition of arms and ammunition. The Appendix “A” of the Import Policy 2013, which prescribes negative list, clearly denotes that import of certain commodities mentioned in the said table are not permissible, meaning thereby that the items falling under Appendix “A” are prohibited/banned, whatever the case may be. A perusal of FIR again clearly shows that when the applicant/accused was intercepted, he candidly conceded /disclosed that he is bringing in such consignment of arms in his personal baggage, which aspect has not been denied by the learned counsel for the applicant/accused, as Mr. Shams has not said a single word on this aspect. I have also noted that it is the applicant/accused who took the FIA authorities to the belt and picked up his own bag containing the prohibited/banned items and brought it to the Incharge Officer, where it was checked and taken into FIA custody. This aspect has also not been denied. The only submission made by the learned counsel for the applicant/accused was that had the applicant/accused given a chance for declaration, he might have declared the said goods. In my view, this argument of Mr. Shams contradicts the very admission made by the applicant/accused in the FIR, since when he was intercepted the applicant/accused admitted carrying the prohibited/banned items, hence, the ground that at a subsequent time the applicant/accused could have declared the items does not carry any force. It is also seen that as per FIA Rules, 1974, the FIA authorities have been given the authority under the law to make investigation in respect of the provisions of Section 156 of the Customs Act, this is what exactly the FIA authorities have done. Section 2(s) no doubt has to be read with Section 156 but Section 2(s) of the Customs Act only talks about bringing in arms and ammunition in Pakistan, which are prohibited/banned items, while the penalty for various offences is provided in Section 156. Hence, here again I disagree with the contention of Mr. Shams that FIA authorities have no jurisdiction to initiate proceedings under Section 2(s) of the Customs Act. So far as the emphasis of Mr. Shams with regard to the contradiction in the timings as given in the seizure memo and the FIR is concerned, it is noted that the flight came in the early hours of morning of 21.08.2014 and seizure memo was prepared at 0630 hours and thereafter FIR was lodged on the same date i.e. 21.08.2014 at 2200 hours, hence, there does not appear any contradiction on this aspect also. So far as various decisions relied upon by the learned counsel for the applicant/accused are concerned, these mostly are in respect of the procedure to be adopted by the Custom authorities while examining certain goods, which aspect, in my view, could only be considered and determined at the stage of trial.

9. It is also a well-settled principle of law that where direct evidence is available the matter is not that of bail. In the instant case it is an admitted position that when the

applicant/accused was intercepted it is he who took the FIA authorities to the belt and it is the applicant/accused upon whose pointation the prohibited/banned items were required from the bag owned by him, meaning thereby that a direct evidence is available against him and in such circumstances the applicant/accused is not entitled for concession of bail.

10. In the light what has been stated above, I am of the view that the applicant/accused does not deserve the facility of bail as in bail matters one only has to make a tentative assessment and no deeper appreciation of evidence is involved. Reference in this regard may be made to the decision given in the case of Asif Ayyub Vs. The State (2010 SCMR 1735) wherein a Bench of the Hon'ble Supreme Court of Pakistan comprising of three Hon'ble Judges, while rejecting the bail application, has observed that in bail matters facts of the case are not to be appreciated in depth. In the said decision the Hon'ble Supreme Court has further observed that a Court at bail stage has to look into the material available on record to prima facie determine the involvement of the accused in the commission of the offence or otherwise. Similar view was adopted by the Hon'ble Supreme Court of Pakistan in the cases of Muhammad Aslam Vs. The State (PLD 1967 S.C. 539), Khalid Javed Gilaan Vs. The State (PLD 1978 S.C. 256), Syed Maqbool Muhammad Vs. The State (2005 SCMR 635) and Syed Lakht-e-Hasnain Vs. The State (2010 SCMR 855). I, therefore, find no merit in the instant Special Criminal Bail Application and reject the same, accordingly. However, I direct the trial Court to conclude the trial preferably within a period of four months from the date of receipt of this order.

11. Needless to state that my above findings are based upon tentative assessment only.

J U D G E