

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No. 1464 of 2021

Date	Order with signature of Judge
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For hearing of bail application :

01.10.2021 :

Mr. Irshad Ali Shar, advocate for the applicant / accused.

Mr. Zafar Ahmed Khan, Addl. P.G.

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NADEEM AKHTAR, J. – This bail application under Section 497 Cr.P.C. has been filed by the applicant / accused Bilal son of Shah Jahan seeking admission to post-arrest bail in Crime No.1268/2021 registered against him on 17.07.2021 at 10:15 a.m. at P.S. Shah Latif Town Karachi under Sections 6 and 9(b) of The Control of Narcotic Substances Act, 1997 (**‘the Act of 1997’**). The applicant / accused had filed Criminal Bail Application No.3187/2021, which was dismissed by the learned Ist Additional Sessions Judge (Model Criminal Trial Court) Malir Karachi vide order dated 30.07.2021.

2. The case of the prosecution, as set up in the subject FIR, is that during the patrolling of the area on the date and at the time and place mentioned in the FIR, the police party intercepted two suspicious persons on a spy information who disclosed their names as Bilal (present applicant) son of Shah Jahan and Ahmed Khan (co-accused) son of Muhammad Khan Baloch ; one white plastic shopping bag each, containing ‘heroin’, was recovered by the police from the applicant and co-accused ; the weight of heroin recovered from the applicant and co-accused was found to be 585 grams and 425 grams, respectively, according to the digital weighing scale lying in the police mobile ; the recovered heroin was seized and sealed on the spot and the applicant and co-accused were arrested ; and, the incident took place in the presence of the patrolling police party as no other person was willing to act as *mashir* / witness.

3. It is contended by learned counsel for the applicant that there is malafide on the part of the police and the applicant has been falsely implicated in the subject crime with ulterior motive ; the alleged recovery has been foisted upon the applicant by the police ; despite the fact that the place of arrest of the applicant was a public place, no independent witness was associated by the police nor did they disclose the names of such independent persons who allegedly did not cooperate with them ; the matter requires further inquiry ; the

applicant has no previous criminal record ; and, there is no apprehension that the evidence will be tampered with or that the witnesses of the prosecution will be influenced by the applicant, or he will abscond if he is released on bail. In support of his above submissions, learned counsel relied upon Ateeb ur Rehman @ Atti Mochi V/S The State and others, **2016 SCMR 1424**, and Aya Khan and another V/S The State **2020 SCMR 350**.

4. On the other hand, learned Additional P.G. contends that the FIR clearly shows that heroin was recovered from the applicant which was immediately seized and sealed on the spot ; the role of the applicant in relation to the commission of the subject offence is specific and clear in the FIR ; there was no delay either in lodging the FIR or in sending the narcotic substance recovered from the applicant for chemical examination ; and, the test report submitted by the Chemical Examiner supports the case of the prosecution. The allegations of malafide and ulterior motive on the part of the police officials have been specifically denied by learned DPG. It is further contended by him that in view of the amendments made in Section 9 of the Act of 1997 through The Control of Narcotics Substance (Sindh Amendment) Act, 2021, (**'Sindh Amendment Act of 2021'**) the offence committed by the applicant falls within the ambit of clause (c) of Section 9 of the Act of 1997, and accordingly it falls within the prohibitory clause of Section 497 Cr.P.C. On my query, he states that the co-accused did not file any application for seeking the concession of bail, and he is in judicial custody.

5. I have heard learned counsel for the applicant and learned DPG and have carefully examined the material available on record particularly the test report submitted by the Chemical Examiner after examining the narcotic substance allegedly recovered from the applicant. According to the aforementioned test report, the gross weight and net weight of the narcotic substance was 585 grams and 581 grams, respectively, and it was classified as 'heroin' in the said test report. The heroin allegedly recovered from the applicant falls within category (ii) specified in clause (s) of Section 2 of the Act of 1997 substituted through The Control of Narcotics Substance (Sindh Amendment) Act, 2021, and the net weight thereof clearly falls within clause (c) of Section 9 *ibid* as it is ten (10) times more than the maximum limit of 50 grams prescribed in clause (b) of Section 9 *ibid*. Therefore, this is not a borderline case between the said clauses (b) and (c). The punishment of the offence falling under clause (c) is death or imprisonment for life or imprisonment for a term which may extend to fourteen years if the quantity in categories (i) and (ii) exceeds the limit specified in clause (b). Thus, the prohibition contained in

Section 51 of the Act of 1997 shall apply to this case, and it also falls within the prohibitory clause of Section 497 Cr.P.C. The applicant is, therefore, not entitled to the concession of bail and there appears to be no exception to this rule in the facts and circumstances of the instant case.

6. The above view is fortified by Muhammad Noman Munir V/S The State and another, **2020 SCMR 1257**, and Bilal Khan V/S The State, **2021 SCMR 460**. In the former case, 1,380 grams of cannabis and 07 grams of heroin were recovered from the accused, and in the latter case the quantity of the recovered ice was 1,200 grams. In both the said authorities, concession of bail was declined by the Hon'ble Supreme Court by holding that the prohibition embodied in Section 51 of the Act of 1997 was applicable thereto. It was also held in Muhammad Noman Munir (supra) that the non-association of a witness from the public and his non-cooperation was a usual conduct symptomatic of social apathy towards civic responsibility ; and, even otherwise the members of the contingent being functionaries of the State are second to none in their status, and their acts statutorily presumed, *prima facie*, were *intra vires*.

7. The cases cited and relied upon on behalf of the applicant are clearly distinguishable from the facts and circumstances of this case, and as such are of no assistance to him. The said cases were decided in January 2016 and May 2016 when the above mentioned amendments in the Act of 1997 were not in the field. Moreover, bail was granted in the said cases by treating them as borderline cases between clauses (b) and (c) of Section 9 *ibid* as the prosecution had failed to specify the gross and net weight of the narcotic substance separately.

8. The guilt or innocence of the applicant is yet to be established as it would depend on the strength and quality of the evidence produced / to be produced by the prosecution and the defense before the trial Court. Therefore, it is clarified that the observations made herein are tentative in nature which shall not prejudice the case of either party nor shall influence the learned trial Court in any manner in deciding the case strictly on merits in accordance with law.

9. In view of the above, the instant bail application is dismissed with direction to the learned trial Court to conclude the trial of the subject case within three (03) months strictly in accordance with law.

J U D G E