

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Crl. Bail Application No. 1965 of 2021

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

03.11.2021 :

Mr. Muhammad Akbar Awan, advocate for the applicant / accused.

Mr. Hussain Bakhsh Baloch, Addl. P.G. a/w Chemical Examiner

Dr. Saleem Qadeer and Assistant Chemical Examiner Farooq Baig.

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NADEEM AKHTAR, J. – Through this bail application under Section 497 Cr.P.C., the applicant has sought admission to post-arrest bail in Crime No. 447/2021 registered against him on 15.09.2021 at P.S. Gadap Malir Karachi under Section 8(1) of the Sindh Prohibition of Preparation, Manufacturing, Storage, Sale and Use of Gutka and Manpuri Act, 2019 (**‘the Act of 2019’**).

2. The case of the prosecution, as set up in the subject FIR, is that during the patrolling of the area by the police party on the date and at the time and place mentioned in the FIR, two persons were found loading *chalia* in a vehicle ; upon seeing the police party, one of them managed to escape from the scene of the alleged crime, whereas the present applicant / accused was apprehended ; upon search of the said vehicle packets of *chalia* (betel nut), *choona* (lime powder), *katthah* (catechu), salt and bottles of water meant for batteries were recovered ; and, all the above mentioned recovered items are injurious to health and are used for manufacturing *gutka* and *mawa*. Upon registration of the FIR, the applicant / accused had filed Criminal Bail Application No.4040/2021, which was dismissed by the learned Sessions Judge Malir Karachi vide order dated 23.09.2021.

3. It is contended by learned counsel for the applicant that there is malafide on the part of the police as the applicant has been falsely implicated in the subject crime with an ulterior motive ; there is no independent witness of the alleged crime ; the matter requires further inquiry ; the applicant has no previous criminal record ; 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 ; the applicant is behind the bars since the date of his arrest i.e. since last about seven (07) weeks ; and, no substantial progress has been made in the trial before the learned trial Court.

4. While denying the allegation of malice on the part of the police, learned APG submits that there was no reason for the police to implicate the applicant without any justification. He further submits that the presence of the accused at the scene of the alleged crime and recovery of the above mentioned substance from the vehicle in his presence was sufficient to implicate him in the subject crime. It is urged by him that the applicant is not entitled to the concession of bail in view of the huge quantity of the substance recovered in his presence. He, however, concedes that the offence alleged against the applicant does not fall within the prohibitory clause of Section 497 Cr.P.C.

5. I have heard learned counsel for the applicant and the learned APG and have also examined the material available on record and the relevant provisions of the Act of 2019. Section 8(1) of the Act of 2019, under which the applicant has been booked, provides that whoever contravenes the provisions of Sections 3, 4, 5, 6 and 7 of the Act of 2019 shall be punishable with imprisonment that may extend to three years, but shall not be less than one year, and shall also be liable to fine which shall not be less than Rs.200,000.00. Sections 3, 4 and 5 of the Act of 2019 provide that the mixture or substance defined in clauses (vi) and (viii) of Section 2 of the Act of 2019 shall not be produced, prepared, manufactured, offered for sale, distributed, delivered, imported, exported, transported and dispatched by any person. Section 6 of the Act of 2019 prohibits the ownership and operation of premises or machinery for the manufacture of *manpuri*, *gutka* or their derivatives ; and, Section 7 of the Act of 2019 prohibits the acquisition and possession of the asset derived from *manpuri*, *gutka* and their derivatives. In order to invoke the provisions of Sections 3, 4 and/or 5 *ibid*, the mixture or substance must fall within the following definitions of “derivative” and “gutka and manpuri”, mentioned in clauses (vi) and (viii), respectively, of Section 2 of the Act of 2019 :

“(vi) “derivative” means any mixture under any name viz. panparag, gutka, or such other mixture which is prepared or obtained by any series of operations from the ingredients as given in clause (viii).” (Emphasis added)

“(viii) “gutka” and “manpuri” means –

(a) any mixture which contains any of the forms of chalia (betel nut), catechu, tobacco, lime and other materials as its ingredients which is injurious to health and not fit for human consumption within the meaning of section 5 of the Sindh Pure Food Ordinance, 1960, and is also in contravention to the provisions of rule 11 of the Sindh Pure Food Rules, 1965 ; (Emphasis added)

(b) any substance prepared for human consumption and is posing a serious threat to the health of people and includes such

substances as the Government may, by notification in the official Gazette, declare to be such substances.”

6. Perusal of the above mentioned provisions of the Act of 2019 shows that in order to invoke the provisions of Sections 3, 4 and/or 5 *ibid*, it is necessary for the prosecution to show that there was a “mixture” or “substance”, as defined in clauses (vi) and (viii) of Section 2 of the Act of 2019, and the accused was involved in the production, preparation, manufacture, sale, distribution, delivery, import, export, transportation and/or dispatch thereof. *Prima facie*, it appears that there was no mixture as all the items allegedly recovered from the applicant were found packed separately. It may be noted that if all or any of the said items viz. *chalia*, *choona*, *katthah*, salt and bottles of water meant for batteries, are possessed, transported, sold, etc., independently or individually, the provisions of Sections 3, 4 and/or 5 the Act of 2019 shall not be attracted. The word “mixture” used in Sections 2(vi), 2(viii)(a) and 3 of the Act of 2019 is significant which clearly shows that unless a mixture of the ingredients prescribed by the Act of 2019 is made, the aforesaid provisions will not be attracted. In the absence of a mixture, the substance shall not fall within the definitions of “derivative”, “*gutka*” or “*manpur*” contained in clauses (vi) and (viii) of Section 2 of the Act of 2019.

7. The question whether or not the above mentioned items allegedly recovered from applicant / accused were to be used as the raw material for preparing the mixture of any of the derivative or substance defined in the Act of 2019, requires further inquiry in my opinion. It will be for the learned trial Court to decide whether possession, transportation, sale, etc. of such items / raw material is an offence under the Act of 2019 or not. The guilt or innocence of the applicant is yet to be established as it would depend on the strength and quality of the evidence that will be produced by the prosecution and the defense before the trial Court. The offence alleged against the applicant does not fall within the prohibitory clause of Section 497 Cr.P.C. In view of the above, the principle that grant of bail in such an offence is a rule and refusal an exception, authoritatively and consistently enunciated by the Hon’ble Supreme Court, is attracted in the instant case. Thus, the applicant is entitled to the concession of bail.

8. It is clarified that the observations made herein are tentative in nature which shall not prejudice the case of either party nor shall they 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 applicant / accused Muhammad Umar son of Saindan is admitted to post-arrest bail subject to his furnishing solvent surety in the sum of Rs.100,000.00 (Rupees one hundred thousand only) and a P.R. bond for the same amount to the satisfaction of the learned trial Court. The instant bail application is allowed in the above terms.

J U D G E