

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Cr. Bail Application No.S- 1371 of 2022

Date of hearing: 02.01.2023.
Date of order: 02.01.2023.

Applicants: Sohrab Ali, Abdul Aziz, Asif Ali and Akhtar Ali
through Mr. Mian Taj Muhammad Keerio,
Advocate.

Respondent: The State
through Ms. Rameshan Oad, A.P.G.

ORDER

Muhammad Saleem Jessar, J.- Through instant bail application, applicants Sohrab Ali, Abdul Aziz, Asif Ali and Akhtar Ali seek their admission on post arrest bail in Crime No.191/2022 registered at PS Shahdadpur, District Sanghar u/s 9(1)(d) CNS Act, 1997 (after amendment of Section).

2. After registration of FIR u/s 3/4 PEHO, 1979, the applicants were granted bail by Judicial Magistrate-II, Shahdadpur in the sum of Rs.50,000/- each vide Order dated 04.10.2022; however, after completion of investigation, the police added Section 9(1)(d) CNS Act, 1997 therefore, the applicants filed pre-arrest bail application No.1103/2022 which was declined through common order dated 24.11.2022, then the applicants were taken into custody. However, after remand of accused, the applicants filed post arrest bail application No.1180 of 2022 before the trial Court which too was turned down by Order dated 03.12.2022. The case is now pending for trial before the Court of Sessions / Special Judge for CNS, Sanghar (trial Court) vide Special Case No.55/2022 re-The State v. Sohrab Ali and others. Hence this bail application.

3. It is pertinent to mention here that instant FIR bearing crime No.191/2022 was registered at P.S Shahdadpur under Article 3/4 PEHO, 1979 wherein the recovery of 50 kilograms Bhang has allegedly been shown to have been made from their possession; however, accused persons applied for post arrest bail before learned Judicial Magistrate-II, Shahdadpur, which was granted to them being offence under Article 3/4 PEHO of 1979. Since legislature made an amendment in Narcotic Substance Act 1997 on 6th September 2022 and according to newly amended provision of law, this case would fall under section 9(1)(d) CNS Act (the Act) and punishment for such offence provided under the said section is imprisonment which may extend to life imprisonment but shall not be less than fourteen years along with fine which shall not be less than two hundred thousand rupees. Therefore, in view of amendment in the Act, learned Judicial Magistrate-II, Shahdadpur returned the challan along with police papers to SHO/I.O of P.S Shahdadpur to be submitted before the Court having jurisdiction; and meanwhile also issued show-cause notice to all the accused persons for cancellation of their bail u/s 497(5) Cr.P.C.

4. Brief facts of the prosecution case, as disclosed in the FIR, are that on 16.09.2022 a police party headed by complainant ASI Rajab Ali Rind, Incharge PP Jatia of P.S Shahdadpur, accompanied by subordinate staff, left PP for patrolling vide Entry No.12 at 1500 hours. During patrolling when they reached link road Lundo Shakh at about 1530 hours, they saw one white colour Mehran car bearing No.AZA-240 coming from western side, the driver of the said car on seeing police mobile, tried to turn back the car but police party apprehended all four accused sitting inside the car being suspicious. The car was checked wherein police found three sacks containing Bhang. On inquiry, one of the accused disclosed his name as Asif Ali son of Allah Bachayo alias Bago by caste Sirewal resident of Ali Khan Sirewal, Taluka Tando Adam and from his personal search, two currency notes of Rs.100/- each were recovered. Second accused disclosed his name as Akhtar Ali son of Abdul Ghafoor Pathan, resident of Shaikh Muhammad Junejo Taluka Shahdadpur and from his personal search, one currency note of Rs.100/- was recovered. Third accused disclosed his name as Sohrab son of Sain Dad Jareko, resident of village Qasim Jareko Taluka

Shahdadpur and from his personal search, one I Tell simple mobile phone and two currency notes of Rs.100/- each were recovered and fourth accused disclosed his name as Abdul Aziz son of Haji Khan Jareko, resident of village Hameer Khan Jareko Taluka Shahdadpur and from his personal search, one simple Vegotel mobile phone, one currency note of Rs.100/- and two currency notes of Rs.50/- each were recovered. The weight of Bhang was carried out on computerized scale which became 50 kilograms. A small quantity of Bhang was taken out from each sack total one kilogram and was got sealed for chemical analysis whereas, remaining Bhang including sacks were sealed separately and cash amount as well as mobile phones were also sealed together. On further inquiry, accused disclosed that they brought Bhang for selling purpose and they used to drink it too. The car was checked and found its engine No.543781, chassis No.SB.3089.K.01082298, white colour model 2013. Due to non-availability of public mashir, memo of arrest and recovery was prepared in presence of PC Munawar Ali and PC Niaz Ali. Thereafter, they brought the accused and case property at P.S where FIR was registered against all the accused on behalf of the State.

5. Learned counsel for applicants submits that initially the FIR was registered under Article 3/4 of PEHO, 1979, the offence being triable by the Court of Magistrate where the applicants were bailed out vide Order dated 04.10.2022. However, after completion of investigation police have added Section 9(1)(d) CNS Act, 1997 whereupon show cause notice was issued to the accused by the Magistrate; however, bail granted to them was not recalled. After issuance of show cause notice the applicants filed pre-arrest bail application before the Court of Sessions / Special Judge for CNS, Sanghar (trial Court) which was declined and the applicants were taken into custody. He further submits that applicants also filed second bail application u/s 497 Cr. P.C. which too has been declined. He next submits that per contents of FIR all four applicants were boarded in Mehran Suzuki Car alongwith alleged contraband which is impossible due to narrow capacity in the vehicle. Besides, out of 50 kilograms only one kilogram has been segregated by police for its examination through laboratory. Leaned counsel emphasized that bail granted by Judicial Magistrate has not been

cancelled or recalled by any competent forum, which is still intact, even no notice to their surety, as required by Section 514 Cr. P.C., was issued. He, therefore submits that dismissal of their pre-arrest bail application and subsequently their custody was unjustified. At the most, the trial Court could have demanded to furnish fresh surety according to its satisfaction, instead of taking them into custody. He further submits that alleged car has not been verified by the police whether it was belonging to any of the accused or otherwise therefore, case against the applicants requires further enquiry.

6. On the other hand learned A.P.G appearing for State opposes the bail application on the ground that huge quantity of contraband has been recovered from the possession of applicants, therefore, they are not entitled to the grant of bail. She; however, could not controvert the fact that it has not been specified by the prosecution as to from whose exclusive possession alleged contraband was secured and that as to whom the Car in question was belonging. Learned A.P.G. on query raised by the Court, admits that bail granted to the applicants by Judicial Magistrate was not recalled and the same is still intact.

7. Heard. Record perused.

8. No doubt, the names of applicants do transpire in the FIR; however, the prosecution has failed to specify the exclusive possession of the alleged intoxicated contraband to any of the accused. The memo of recovery as well as arrest and the FIR do not show as to who out of four accused was driving the car at the time of incident and as to whom the said car does belong. During investigation, the IO had failed to verify the documents as well as registration papers from the concerned Department to prove the ownership of the accused over the car in question. In this connection, reference may be made to the case of **The State Vs. Imran Nazir & another** reported in 2019 SCMR 1227 decided by Hon'ble Supreme Court. In the cited case the facts of the case were that Anti-Narcotics Force, Peshawar on a tip off intercepted a Punjab bound truck bearing registration No.PRC-6168. Upon search, 2800 kilograms of charas were recovered from secret cavities of the vehicle; the inmates of the vehicle were apprehended and sent to face trial before the learned Judge, Special Court (CNS), Peshawar; they

were convicted under section 9(c) of the Control of Narcotics Substances Act, 1997. The said conviction was challenged before Peshawar High Court where a learned Division Bench of the Peshawar High Court acquitted the accused from the charge. Against such acquittal leave was sought to be granted from Hon'ble Supreme Court on the ground that there was no occasion for the learned High Court to acquit the accused merely on the ground that the prosecution witnesses failed to point out **as to who was on the wheel when ANF contingent apprehended them**. The Hon'ble Supreme Court refused to grant leave while holding as under:-

“A huge quantity of contraband notwithstanding we have not been able to take exception to the view taken by the learned High Court inasmuch as in the presence of two individuals in the cabin it was incumbent upon the witnesses to unambiguously point out the person on the vehicle in order to establish conscious possession of the seized stuff and in the face of wavering positions taken by the prosecution itself, respondents cannot be denied the benefit of the doubt, a golden thread in our criminal jurisprudence. We do not feel inclined to interfere with the impugned judgment, however the forfeiture of vehicle impounded by the ANF is kept intact. Appeals are dismissed”.

There also seems weight in the submission of the learned counsel for the applicants that Mehran Suzuki Car is not capable enough to retain four inmates alongwith 50 kilograms Bhang contained in 03 sacks. All these factors are yet to be substantiated by the prosecution after recording evidence of prosecution witnesses and then trial Court has to determine as to whether the applicants could be boarded in the said Mehran Suzuki Car having a small capacity alongwith the alleged contraband and that as to who out of four accused persons, could be said to be in exclusive possession of the contraband. From all these factors, it can safely be held that either the applicants were not found in possession of the intoxicated material having boarded in the Car in question or the offence has not taken place in a manner as reported. The applicants have been charged with two different statutes and punishment provided by the law for two statutes is also different. It is settled law that when the statute provides two punishments or the

accused has been charged with two different provisions of law, the law carrying lesser punishment should be considered particularly at bail stage.

9. Since the FIR was registered under Article 3/4 of PEHO, 1979 which being triable by the Court of Judicial Magistrate, the accused had filed bail application in terms of Section 497 Cr. P.C. which after hearing the prosecutor was allowed by means of order dated 04.10.2022. However, after completion of investigation, the police have added Section 9 (1) (d) CNS Act, 1997 (Amended Act 2022) which is triable by the Court of Sessions / Special Judge, CNS therefore, the Judicial Magistrate returned the challan to I.O for submitting the same before the Court having jurisdiction. The Judicial Magistrate after submission of challan and perusal of the police papers issued show cause notice to the applicants for cancellation of their bail; however, the applicants filed anticipatory bail application which too was declined by the trial Court vide order dated 24.11.2022 and the applicants were taken into custody. Later they filed post arrest bail application which too met with same fate vide order dated 03.12.2022. Admittedly, the bail granted to applicants by the Judicial Magistrate was not recalled / set aside or cancelled which still is intact. However, the trial Court instead of asking for furnish fresh surety to its' satisfaction, ordered the applicants to be taken into custody therefore, the legal ambiguity has been created which has not been resolved by any forum. The question, as to whether before committing them into custody, the bail granted to the applicants by Judicial Magistrate was to be cancelled / set aside or recalled by the competent forum or the applicants should have been directed by the trial Court to furnish fresh surety to the satisfaction of learned trial Court, has not been responded to, therefore, the dilemma still accrue which needs to be discussed and decided.

10. Be that as it may, in view of above peculiar circumstances of the case, I am of the opinion that prosecution has to establish charge against the accused before trial Court. It is well settled principle of law that every accused is presumed to be blue eyed boy of law until and unless he is found guilty of alleged charge and law cannot be stretched upon in favour of prosecution particularly at bail stage. It is also well

settled law that bail cannot be withheld as premature punishment. In the case of ***Pir Mazharul-Haq v. The State*** reported in PLD 2005 SC 63, Hon'ble Supreme Court held as under:

"In criminal cases the general rule is that the accused must always be presumed to be innocent and the onus of proving everything essential to the establishment of the offence is on the prosecution."

11. In the circumstances and in view of above, case against the applicants requires further enquiry within meaning of sub-section 2 to Section 497 Cr. P.C. Consequently, instant bail application is hereby allowed. The applicants are granted bail. They shall be released on bail subject to their furnishing solvent surety in the sum of Rs.100,000/- (Rupees one lac) each and P.R. Bonds in the like amount to the satisfaction of the trial Court.

JUDGE

Tufail