

**ORDER SHEET**  
**IN THE HIGH COURT OF SINDH KARACHI**

Crl. Bail Application Nos. 388 & 205 of 2023

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**DATE**

**ORDER WITH SIGNATURE OF JUDGES**

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For hearing of bail application.

**03-03-2023**

Mr. Ghulam Shabbir Babber, Advocate for applicant in Crl. B.A. No.388 of 2023.

Mr. Muhammad Rehman Ghous, Advocate for applicant in Crl. B.A. No.205 of 2023.

Mr. Muntazir Mehdi, Addl.P.G.

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**Omar Sial, J:** Mohammad Sabir (through Crl. Bail App No. 388 of 2023) and Asmatullah (through Crl. Bail App No. 205 of 2023) have sought post arrest bail in crime number 383 of 2022 registered under sections 6 and 9(c) of the Control of Narcotic Substances Act, 1997. Earlier, their applications seeking bail were dismissed on 04.10.2022 and 25.11.2022 respectively by the learned 1<sup>st</sup> Additional Sessions Judge, Karachi West.

2. A background to the case is that a police party led by A.S.I. Khizer Hayat was on patrol duty on 15.09.2022 when it received spy information of 2 persons having a substantial quantity of charas in their possession. The police party reached the identified spot and apprehended the 2 suspects who were identified as Mohammad Sabir and Asmatullah (both the applicants herein). 3140 grams of charas were recovered from the possession of Mohammad Sabir whereas Asmatullah had 3650 grams in his possession. Both were arrested on the spot.

3. Learned counsel for the applicants have argued that section 21 of the CNS Act 1997 was not complied with; that the safe custody of the seized narcotics was doubtful; that both applicants are young persons and that they do not have a crime record. The learned Addl.P.G. opposed the grant of bail to both applicants. I have heard the learned counsels for the

applicants and the learned Addl.P.G. My observations and findings are as follows.

4. As the learned counsel has relied heavily on the alleged violation of section 21 CNS Act, 1997 in support of his prayer for grant of bail, it would facilitate reference if the said section, as well as its succeeding section 22 are both reproduced:

**21. Power of entry, search, seizure and arrest without warrant:**

(1). Where an officer not below the rank of Sub-Inspector of Police or equivalent authorized in this behalf by the Federal Government or the Provincial Government, who from his personal knowledge or from information given to him by any person is of opinion that any narcotic drug, psychotropic substance or controlled substance in respect of which an offence punishable under this Act has been committed is kept or concealed in any building, place, premises or conveyance, and warrant for arrest or search cannot be obtained against such person without affording him an opportunity for the concealment of evidence or facility for his escape, such officer may—

- (a) Enter into any such building, place, premises or conveyance;
- (b) Break open any door and remove any other obstacle to such entry in case of resistance;
- (c) Seize such narcotic drugs, psychotropic substances and controlled substances and other materials used in the manufacture thereof and any other article which he has reason to believe to be liable confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act; and
- (d) Detain, search and, if he thinks proper, arrest any person whom he has reason to believe to have committed an offence punishable under this Act.

- (2) Before or immediately after taking any action under sub-section (1), the officer referred to in that sub-section shall record the grounds and basis of his information and immediate action and forthwith send a copy to his immediate superior officer.

**22. Power to seizure and arrest in public places:** An officer authorized under section 21 may—

- (a) Seize, in any public place or in transit, any narcotic drug, psychotropic substance or controlled substance in respect of which he has reason to believe that an offence punishable under this Act has been committed, and, along with such drug, substance or any other article liable to confiscation under this Act, and any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act; and
- (b) Detain and search any person whom he has reason to believe to have committed an offence punishable under this Act, and if such person has any narcotic drug, psychotropic substance or controlled substance in his possession and such possession appears to him to be unlawful, arrest him.

Explanation; For the purpose of this section, the expression “public place” includes any public conveyance, hotel, shop or any other place intended for use by, or accessible to, the public.

Instead of a reference to section 21 perhaps it would have been more appropriate that the learned counsel would have relied on section 22 in support of his argument as it appears from the facts that the current case does not involve entry into a building or other dwelling. Be that as it may, the grievance is that section 22 requires an officer of the rank of at least a Sub-Inspector to effect a search and arrest under the CNS Act, 1997 and in

the current case neither a warrant was obtained (pursuant to section 20) nor was the search, seizure and arrest made by a Sub-Inspector. This issue has been decided by the Supreme Court of Pakistan in a number of cases. One such case to which a reference may be made is **Mohammad Younus and others vs The State (2007 SCMR 393)** when it held that:

*“Under sections 21 and 22 of the Control of Narcotic Substances Act, 1997, only an officer of the rank of Sub-Inspector or equivalent or above may exercise the powers of arrest and seizure of narcotics. But this is not an absolute rule. There may be cases of extreme urgency requiring prompt action, where an accused is caught with narcotics in his possession by a Police Officer of a lower rank. Can it be said that such Police Officer should just let him go with the narcotics? The answer would certainly be in the emphatic "No". The guilt or innocence of an accused does not depend on the question of competence or otherwise of a Police Officer to investigate the offence. A trial of an accused is not vitiated merely on the ground that the case has been investigated by an officer who is not authorized to do so unless a contrary intention appears from the language of a statute. The competent Court would proceed to determine the guilt or innocence of an accused on the basis of the evidence produced before it irrespective of the manner in which it is brought before it.”*

5. In view of the above, the fact that the arrest and seizure was made by an A.S.I. instead of an S.I. will hardly impact these bail proceedings.

6. As regards the safe custody of the narcotics, the record reveals that the seizure was made on 15.09.2022 and sent to the laboratory on 16.09.2022. Upon a tentative assessment it appears that the safe custody might not have been compromised on, however, if this was not the case and there has been a lapse on the part of the prosecution, is an issue which will be determined at trial as there is nothing on record at the moment to show that custody was compromised.

7. The fact that the applicants are young is indeed sad however it will unfortunately not serve as a ground at this stage for any concession. Perhaps the same can be taken into account at the time of sentencing if the applicants are convicted in the crime. Similarly, the argument that they are first offenders may also be taken into account at that stage.

8. Upon a tentative assessment the 2 applicants were apprehended red-handed in possession of a quantity of charas that exposes them to a potential capital sentence and thus the case falls within the prohibitory clause of section 497 Cr.P.C. The material seized was sent for analysis and the laboratory has opined that it indeed was charas – a narcotic the possession of which is prohibited under the CNS Act 1997. No ill-will or malafide has been argued nor is any borne out from the record which I have been shown. Prima facie it appears that the prosecution is in possession of sufficient material to at least establish a nexus of the applicants with the crime complained of.

9. Above are the reasons for the short order of 28.02.2023 in terms of which both applications were dismissed.

JUDGE