

IN THE HIGH COURT OF SINDH AT KARACHI**Crl. Bail Application No. 2388 of 2023**

Applicant : Abdul Karim
through Mr. Aamir Mansoob Qureshi, Advocate

Respondent : The State
through Mr. Altaf Ahmed Sahar,
Assistant Attorney General a/w S.I. Aftab Ahmed
Soomro, FIA, I.O.

Date of hearing : 21st November, 2023

ORDER

OMAR SIAL, J.: Abdul Karim owns and operates an electronic goods shop. The accusation against him is that he gets people (referred to as “khapiyas” in the local terminology) to bring phones and electronic tablets from Dubai to sell here but makes payments to the sellers through the informal banking channel of “hawala” (interchangeably known as “hundi”). On 18.09.2023, the applicant was stopped by the F.I.A. while he was driving his car. Documents allegedly showing his nexus with the purchase of phones and tablets were found in the vehicle. F.I.R. No. 11 of 2023 was registered against him under sections 4, 5, 8 and 23 of the Foreign Exchange Regulations Act, 1947 (FERA) and 156(1)(8)(89) of the Customs Act, 1969 and section 109 P.P.C. at the F.I.A.’s State Bank Circle, Karachi on 19.09.2023. Abdul Karim was arrested and applied for bail, but his application was dismissed on 11.10.2023 by the learned Sessions Judge, Karachi South, acting in his capacity as a Tribunal under the FERA.

2. I have heard the learned counsel for the applicant and the learned Assistant Attorney General. It is essential to record that the investigating officer has submitted two challans in two different courts. The challan of offences under the customs legislation has been filed in the court of Special Judge (Customs and Taxation) Karachi. This bail application is restricted to

the offences according to the FERA. I understand from the learned counsel that as far as the offences under the Customs Act are concerned, he has yet to file a bail application before the relevant trial court.

3. The learned Additional Attorney General submitted that the case under the FERA against the applicant is that he had made payments to foreign sellers through informal, illegal and parallel banking channels. Buying and selling foreign currency from anybody who is not an authorised dealer is prohibited under section 4 of the FERA. He further submitted that the evidence against the applicant is that he had receipts of purchases and incriminating messages on his phone's WhatsApp messenger. These messages are yet to be thoroughly scrutinised, and it is yet to be determined how payments were made abroad, the exact mode, and to whom they were made. Evidence which will stand the test of legal scrutiny is yet to be obtained by the F.I.A. On the contrary, the F.I.R. seems to reflect that the applicant paid Pakistan Rupees to specific suppliers, whose details are mentioned in the F.I.R. The order impugned seems to have taken the smuggling of electronic items as its basis, whereas the Tribunal was not seized of that part of the alleged crime. 1500 Saudi Riyals and 5 Omani Riyals were found in the applicant's possession. Possessing foreign currency is not a crime, and that is not a large amount for a person to keep. The applicant should be allowed to explain at trial and provide a record of the mode in which he has made payment to people from whom he claims he has bought the electronic items. The electronic items in question have all been seized and are in the possession of law enforcers. As mentioned, this bail application does not pertain to the alleged offences under the Customs Act 1997. The case against the applicant is one of further inquiry.

4. The offence with which the applicant is charged under the FERA carries a potential sentence of up to 5 years and, although not bailable, falls within the non-prohibitory clause of section 497 Cr.P.C. No apprehension of the applicant being a flight risk has been raised by the F.I.A. Law enforcement has already taken electronic goods and foreign currency into their possession. Considering his profile, the monetary loss already caused

to the applicant is of such a nature that the chances of him repeating the offence are greatly diminished. Apart from the forensics of the applicant's phone, the investigation is complete, and the chances of the applicant tinkering with the evidence are also low. I find no extraordinary or exceptional grounds to deny the applicant bail. He does, however, have some explaining to do at trial; thus, while granting him bail, the surety amount is fixed at Rs. five hundred thousand (Rs. 500,000) and a P.R. Bond in the like amount to the satisfaction of the learned trial court.

5. There has been a substantial rise in cases originating from alleged offences, the punishment of which falls within the non-prohibitory clause of section 497 Cr.P.C. A high volume of bail applications coming to the High Court pertains to such cases. Surprisingly, some learned trial courts have denied bail even in cases of bailable offences. Consequently, the High Court is further burdened, apart from the drain on the State exchequer and the litigants' expenses. This is neither fair to a person nor in compliance with the principles enunciated by the Supreme Court on the grant of bail falling within the non-prohibitory clause of section 497 Cr. P.C.. The High Court has to ensure that fundamental rights of fair trial and due process are enforced. When the Supreme Court of Pakistan has laid down principles to follow, it is incumbent upon all to comply. I take the opportunity in this bail order to make some general observations; however, these observations are equally applicable to the case at hand.

6. As early as 1977, the Supreme Court had observed in the case of **Mansha Khan and 2 others vs The State (1977 SCMR 449)** that:

“An offence under section 325, P. P. C. is punishable with seven years' rigorous imprisonment and is not one of those in which bail is refused because of the prohibition in section 437, Cr. P. C. Therefore, bail should not be refused merely because the offence is non-bailable. The learned Assistant Advocate-General opposed the bail on the same consideration the Courts below have not exercised their discretion. However, in the absence of any strong reason to refuse

bail, we feel that the Courts below have not properly exercised their discretion in refusing bail based on the number of injuries suffered by Lal Hussain.”

7. Further clarity in this regard was brought by the Supreme Court of Pakistan in the case of **Tariq Bashir and 5 others vs The State (PLD 1995 SC 34)**, where it laid down the following principles:

“It is crystal clear that the grant of bail [in bailable] cases is a right and not favour, whereas, in non-bailable offences, the grant of bail is not a right but concession/grace. Section 497, Cr.P.C. divided non-bailable offences into two categories, i.e. (i) offences punishable with death, imprisonment of life or imprisonment for ten years, and (ii) offences punishable with imprisonment for more than ten years. The principle to be deduced from this provision of law is that in non-bailable offences falling in the second category (punishable with imprisonment for less than ten years), the grant of bail is a rule and refusal an exception. So the bail will be declined only in extraordinary and exceptional cases, for example- _ -

- (a) where there is likelihood of absconding of the accused;
- (b) where there is apprehension of the accused tampering with the prosecution evidence;
- (c) where there is a danger of the offence being repeated if the accused is released on bail and
- (d) where the accused is a previous convict.”

8. In **Subhan Khan vs The State (2002 SCMR 1797)**, the court said:

“An accused for an offence which does not fall within the prohibitory clause of S.497, Cr.P.C. cannot claim concession of bail as of right, but in the light of general principle, the bail in such cases is granted as a rule.”

9. In **Zafar Iqbal vs Mohammad Anwar and others (2009 SCMR 1488)**, it was observed:

“As far as section 489-F, P.P.C. is concerned, it prescribes a sentence of 3 years. In such cases where the offence falls within the non-prohibitory clause, the courts consider favourably by granting bail as a rule but decline to do so in exceptional cases. As far as exceptional circumstances are concerned, those are to be taken into consideration depending upon each case.”

10. In **Riaz Jafar Natiq vs Mohammad Nadeem Dar and others (2011 SCMR 1708)**, it was observed:

“Thus, keeping in view the law laid down in the case of Zafar Iqbal v. Muhammad Anwar and others (2009 SCMR 1488) ordaining that where a case falls within a non-prohibitory clause, the concession of granting bail must be favourably considered and should only be declined in exceptional cases.”

11. In **Mohammad Tanveer vs The State and another (PLD 2017 SC 733)**, the Supreme Court observed that:

“We are shocked and disturbed to observe that in cases of this nature, not falling within the prohibition contained in section 497, Cr.P.C., invariably, the grant of bail is refused on flimsy grounds. This practice should end because the public, particularly accused persons charged for such offences, are unnecessarily burdened with extra expenditure, and this Court is heavily taxed because leave petitions in hundreds are piling up in this Court. The diary of the Court is congested with such petitions. This phenomenon is growing tremendously and, thus, cannot be lightly ignored as precious time of the Court is wasted in disposing of such petitions. This Court is purely a constitutional Court to deal with intricate questions of law and Constitution and to lay down a guiding principle for the Courts of the

country where law points require interpretation.” In the same case, it was also observed:

"Once this Court has held in categorical terms that grant of bail in offences not falling within the prohibitory limb of section 497, Cr.P.C. shall be a rule and refusal shall be an exception then, the Courts of the country should follow this principle in its letter and spirit because principles of law enunciated by this Court are constitutionally binding on all Courts throughout the country including the Special Tribunals and Special Courts."

"Grant of bail in offences not falling within the prohibitory limb of S. 497, Cr.P.C. was a rule and refusal an exception; therefore, all subordinate courts, special courts and tribunals should follow said principle in its letter and spirit."

12. **Mohammad Imran vs The State and Others (PLD 2021 SC 903)** was a case in which bail was denied when the punishment fell within the non-prohibitory clause; however, the rule was reiterated in the following words:

"We are cognizant of the fact that the offence under section 489-F, P.P.C. does not fall within the prohibitory clause of section 497(1), Cr.P.C. and bail in such a matter is a rule and refusal an exception. The grounds for the case to fall within the exceptions meriting denial of bail include (a) the likelihood of the petitioner's abscondence to escape trial; (b) his tampering with the prosecution evidence or influencing the prosecution witnesses to obstruct the course of justice; or (c) his repeating the offence keeping in view his previous criminal record or the desperate manner in which he has prima facie acted in the commission of offence alleged. The prosecution has to show if the case of the petitioner falls within any of these exceptions on the basis of the material on the record."

13. The High Courts of this country have reiterated the same principles in many cases; however, as reference to cases decided by the Supreme Court has been given, they will supersede the wisdom of the learned High Courts.

14. The Supreme Court, by laying down clear principles, provides all courts with guidelines to follow. All courts must do so. The only exception is that a court gives its reasons to distinguish the case before it from the ambit of cases to which the Supreme Court ruling applies. In many orders of the learned trial courts, it has been noticed that the principles enunciated above are not complied with. As mentioned earlier, bail inailable cases has also been denied. Pakistan is a country that follows the doctrine of *stare decisis*. We often lose sight of this fact. The Constitution itself provides a backing to this system. All courts are bound by principles regarding precedent. Article 189 of the Constitution provides that: "Any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan".

15. Trial courts are urged to strictly comply with the Supreme Court's guidelines. Evaluate bail applications in the light of those principles. Bails should only be denied in accordance with the law. A person's liberty should not be infringed upon arbitrarily or un-reasoned. Sufficient room has been allowed in these precedents to deny bail in cases falling under the non-prohibitory clause, but courts should ensure that they give reasons to drift from those principles. A legal system that has people's confidence will otherwise remain a dream.

16. The learned Registrar is directed that a copy of this order, subject to the approval of the Honorable Acting Chief Justice, should be sent to all trial courts of the province which deal with bail cases to take note of paragraphs 5 to 15 above.

JUDGE

