ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No.2779 of 2023

Date	Order with signature of Judge

For hearing of bail application

14.12.2023

Mr. Aftab Hussain advocate for the applicant
Syed Meeral Shah Bukhari, Additional PG alongwith SI Muzammil Shah
PS Pak Colony Karachi

Through this Criminal Bail Application, applicant seeks post-arrest bail in FIR No.310/2023, registered under Sections 4/8 of the Gutka Mawa Act at PS Pak Colony Karachi.

2. Learned counsel states that he applied for post-arrest bail before the trial Court by filing Bail Application No.5329/2023, which was rejected by the trial Court vide order dated 26.10.2023 on the premise that no malafide or enmity pointed out by the applicant / accused against the police officials to falsely implicate him in the subject crime. Learned counsel submits that the main accused, in whose name the subject premises is registered, has been allowed bail by the trial Court vide order dated 11.10.2023.

3. Learned APG has objected this bail application in the terms that the co-accused have been granted pre-arrest bail, which has been confirmed by the trial Court, therefore, rule of consistency is fully applicable in this case.

4. 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.

5. 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/-. 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.

6. 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."**

7. Perusal of the above-mentioned provisions of the Act of 2019 shows that 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.

8. 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 "manpuri" contained in clauses (vi) and (viii) of Section 2 of the Act of 2019.

9. The question of whether or not the above-mentioned items allegedly recovered from the applicant/accused were to be used as the raw material for preparing the mixture of any of the derivatives or substances 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 offense under the Act of 2019 or not.

10. The guilt or innocence of the applicant on the issue of his involvement in the aforesaid crime 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 , which needs to be completed within reasonable time.

11. The offense alleged against the applicant does not fall within the prohibitory clause of Section 497 Cr.P.C. Because of the above, the principle that grant of bail in such an offense is a rule and refusal an exception, authoritatively and consistently enunciated by the Supreme Court, is attracted in the instant case. Besides alleged recovery was affected from the populated area and the complainant has advance information regarding the presence of the applicant at the pointed place but no private person was associated as a witness or *mashir* either from the place of incident or from the place of information, even the Investigating Officer has not bothered to ascertain the ownership of the property in question wherefrom the alleged recovery has been made, which factum requires further inquiry. Besides, all the witnesses are police officials; therefore, there is no apprehension of tempering the evidence. The investigation of the case is completed and the challan has been filed before the Court having jurisdiction, therefore, the custody of the applicant is not required for further investigation.

12. Punishment provided in Section 8 of the said act is up to 03 years but shall not be less than 01 year and a fine of rupees two lacs. It is settled by now that while deciding the question of bail lesser sentence is to be considered. While considering the lesser sentence of the alleged offense for which the applicant is charged, the same provided a maximum punishment of up to 03 years which even does not fall within the prohibitory clause of Section 497 Cr. P.C and grant of bail in these cases are right while refusal is an exception as has been held by the Supreme Court in cases of *Tarique Bashir v. State* **(PLD 1995 SC 34),** *Zafar Iqbal v. Muhammad Anwar* **(2009 SCMR 1488),** *Muhammad Tanveer v. State* **(PLD 2017 SC 733)** and *Shaikh Abdul Raheem v. The State* **(2021 SCMR 822).**

13. In principle bail does not mean acquittal of the accused but only change of custody from police to the sureties, who on furnishing bonds take responsibility to produce the accused whenever and wherever required to be produced. On the aforesaid proposition, I am fortified with the decision of the Supreme Court on the case of *Haji Muhammad Nazir v. The State* (**2008 SCMR 807**).

14. It is now well-settled that in a case where the accused is either a minor under the age of sixteen years, or woman, or a sick or infirm person, even in a non-bailable offense of prohibitory clause, in the same manner as bail is granted or refused in offenses of non-prohibitory clause of Section 497(1) Cr. P.C.

15. It is a settled principle of law that the benefit of the doubt can be even extended at the bail stage. Reliance is placed on *Muhammad Ejaz v. The State* (**2022 SCMR 1271**), *Muhammad Arshad v. The State* (**2022 SCMR 1555**), and *Fahad Hussain v. The State* (**2023 SCMR 364**).

16. Because of the above factual and legal position as set forth by the Supreme Court in the cases discussed supra. The applicant is found entitled to the relief of bail under to Section 497(2) Cr.PC, including the reasons recorded hereinabove.

17. For the aforesaid reasons, this Criminal Bail Application is allowed. The applicant Abdul Wahid son of Hatim is enlarged to post-arrest bail in FIR No.310/2023, registered under Sections 4/8 of the Gutka Mawa Act at PS Pak Colony Karachi, subject to his furnishing solvent surety in the sum of Rs.100,000/- (Rupees one hundred thousand only) and PR bond in the like amount to the satisfaction of the trial Court.

18. Needless to mention any observations made in the above order are tentative and shall not influence the trial Court in any manner if the matter proceeds, however, if the applicant/accused misuses the concession of bail or creates hindrance in smooth proceedings of trial, the trial Court is at liberty to cancel his bail in terms of Section 497(5) Cr.P.C.

JUDGE

Zahid/*