

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No. 1696 of 2023

Date

Order with signature of Judge

For hearing of bail application

22.8.2023

Mr. Ali Bux, advocate for the applicant

Mr. Siraj Ali Khan,, Additional PG

Through this bail application under Section 497 Cr.P.C., the applicant has sought admission to post-arrest bail in F.I.R No. 549/2023, registered under Section 6/9(i) 3(C) CNS Act at Police Station Saeedabad, Karachi. The earlier bail plea of the applicant has been declined by the learned XIV-Additional Sessions Judge (East) Karachi vide order dated 23.06.2023 in Cr. Bail Application No. 2784/2023.

2. The accusation against the applicant is that on 01.11.2022 he was found in possession of 1400 grams chars; such report of the incident was lodged with Police Station Saeedabad, Karachi on the same day under Section 6/9-C Act; and case property was sealed on the spot under a memo of arrest and recovery. The chemical Examiner report obtained by the police is positive.

3. 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, a black plastic shopping bag containing charas was recovered by the police from the applicant, which was found to be 1400 grams, according to the digital weighing scale; the recovered charas was seized and sealed on the spot; and, the incident took place in the presence of the patrolling police party as no other person was willing to act as mashir / witness.

4. At the outset, I asked learned counsel, that prima-facie the tentative assessment of the record as opined by the learned trial court could not be brushed aside; and, what could be the malafide intention of the police to book the applicant in the contraband case. It is contended by learned counsel for the applicant that there is malafide on the part of the police and the applicant has been falsely implicated in the subject crime with an ulterior motive ; the alleged recovery has been foisted upon the applicant by the police ; the applicant was picked up forcibly by the police from his house, where after the subject FIR was registered against the applicant; even though the alleged place of the arrest of the applicant was a public

place, no independent witness was associated by the police nor did they disclose the names of such independent persons who allegedly did not cooperate with them; he argued that alleged narcotics was sent to chemical examiner belatedly as such the matter requires further inquiry ; and, 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. Learned counsel referred to various documents attached with the memo of bail application and submitted that the case of the applicant is on the borderline as settled by the Supreme Court in its various pronouncements, thus post-arrest bail could be granted in such a situation. Learned counsel emphasized that the remedy of concession of bail is meant to save the innocent from false implication, rigors of trial, and humiliation. He next submitted that the grant of bail does not amount to the acquittal of the accused as the custody of the accused is shifted from jail lock-up to the hands of surety, who is made responsible for producing the accused before the Court as and when required. He added that the investigation has already been completed and the report under section 173, Cr.P.C. has been submitted before the learned Trial Court and there is no progress in the trial. He pointed out that the applicant was previously not involved in any criminal case, however, this factum has been denied by the learned APG on the premise that two cases of similar nature at the same police station are registered against him. He lastly prayed for allowing the instant bail application.

5. On the other hand, learned APG contends that the FIR clearly shows that a good quantity of narcotics substance was recovered from the applicant which was immediately seized and sealed on the spot and just after registration of F.I.R was sent to the examiner for opinion with the positive result; the role of the applicant to the commission of the subject offense is clear and specific in the FIR; there was no delay either in lodging the FIR or in sending the narcotic substance recovered from the applicant for chemical examination; the test report submitted by the Chemical Examiner supports the case of the prosecution. The allegation of malafide and ulterior motive on the part of the police officials has been specifically denied by learned APG. It is further contended by him that because of the amendments made in Section 9 of the Act of 1997 through The Control of Narcotics Substance (Sindh Amendment) Act, 2021, ('Sindh Amendment Act of 2021'), the offense committed by the applicant falls within the ambit of clause (c) of Section 9 of the Act of 1997, and accordingly it falls within the prohibitory clause of Section 497 Cr.P.C.

6. I have heard learned counsel for the applicant and learned APG and have carefully examined the material available on record including the test report submitted by the Chemical Examiner after examining the charas allegedly recovered from the applicant. According to the said test reports, the gross weight of charas was 1400 grams. The charas allegedly recovered from the applicant fall within category (i) and category (ii), respectively, specified in Clause (s) of Section 2 of the Act of 1997 substituted through The Control of Narcotics Substance (Sindh Amendment) Act, 2021. The net weight of The charas is more than the maximum limit of one kilogram (1,000 grams) prescribed in Clause (b) of Section 9 *ibid*, however, it cannot be termed as a borderline case. The quantity of ice falls within the ambit of clause (c) of Section 9, and being about 40% more than the maximum limit prescribed in clause (b), it significantly exceeds the maximum limit prescribed therein.

7. The punishment of the offense falling under clause (c) of Section 9 *ibid* is death or imprisonment for life or imprisonment for a term that may extend to fourteen years. Thus, the prohibition contained in Section 51 of the Act of 1997 shall apply to this case, and it also falls within the prohibitory clause of Section 497 Cr.P.C. As per the prosecution, the applicant has already been involved in similar offenses bearing Crime Nos.294/2019 under Section 6/9-B of the CNS Act of police station Saeedabad and FIR No.363/2021 under Section 6/9-B of the CNS Act of the same police station. Keeping in view all the material available on record, this is not a fit case wherein post-arrest bail could be allowed, therefore, the applicant at this stage is not entitled to the concession of post-arrest bail and there appears to be no exception to the rule position as discussed *supra*.

8. The above view is fortified by *Muhammad Noman Munir V/S The State and another*, 2020 SCMR 1257, and *Bilal Khan V/S The State*, 2021 SCMR 460. In the former case, 1,380 grams of cannabis and 07 grams of heroin were recovered from the accused, and in the latter case, the quantity of the recovered ice was 1,200 grams. In both the said authorities, the concession of bail was declined by the Supreme Court by holding that the prohibition embodied in Section 51 of the Act of 1997 was applicable thereto. It was also held in *Muhammad Noman Munir* (*supra*) that the non-association of a witness from the public and his non-cooperation was usual conduct symptomatic of social apathy towards civic responsibility; and, even otherwise the members of the contingent being functionaries of the State are second to none in their status, and their acts statutorily presumed, *prima facie* were *intra vires*.

9. Adverting to the arguments to send the sample within a certain/specified period, this is not the correct position of the case, the alleged drug was sent to chemical examination on the second day of the F.I.R. even otherwise in this regard the Supreme Court in the case of Liaquat Ali Vs. The State (2022 SCMR 1097), held that the Control of Narcotic Substances (Government Analysts) Rules, 2001 virtually place no bar on the Investigating Officer to send the samples within a certain/specified period. These Rules are stricto sensu directory and not mandatory in any manner. It does not spell as to whether in case of any lapse, it would automatically become instrumental to discard the whole prosecution case. The Rules cannot control the substantive provisions of the Control of Narcotic Substances Act, 1997, and cannot in any manner frustrate the salient features of the prosecution case, which otherwise hinges upon (i) receipt of information, (ii) action by the concerned law enforcing agency, (iii) recovery of contraband narcotics, (iv) the report of chemical examiner regarding analysis of the recovered contraband, (v) the finding of fact by the courts below after recording of evidence i.e. (a) witnesses of the raiding party, (b) the recovery witnesses, (c) Investigating Officer and all other attending circumstances. Even otherwise, in terms of Section 29 of the Control of Narcotic Substances Act, 1997, the manner and standard of proof in cases registered under the Act is slightly different as in terms of the said Act the accused is presumed to have committed the offense unless the contrary is proved.

10. The record shows that the charge sheet has been submitted in this case before the trial Court. The guilt or innocence of the applicant is yet to be established as it would depend on the strength and quality of the evidence produced / to be produced by the prosecution and the defense before the trial Court.

11. The Supreme Court in the recent case has held that the menace of drugs has taken alarming dimensions in this country partly because of the ineffective and lackadaisical enforcement of the laws and procedures and cavalier manner in which the agencies and at times Courts of the country address a problem of such serious dimensions. Studies based on conferences and seminars have very often shown that the menace is deep-rooted. This menace is a great threat to a peaceful society and is affecting many lives, especially youngsters; therefore, immediate steps are required to be taken to curb these nefarious activities.

12. The learned trial has correctly concluded vide order dated 23.6.2023 which is in line with the guidelines enunciated by the Supreme Court on the subject. Learned counsel for the applicant has not been able

to make out the case of further inquiry in terms of Section 497(2) Cr.P.C., therefore, it is clarified that the observations made herein are tentative which shall not prejudice the case of either party or shall influence the learned trial Court in any manner in deciding the case strictly on merits under law.

13. In view of the above, the instant bail application is dismissed with direction to the learned trial Court to conclude the trial of the subject case within one (01) month strictly under the law and if the trial cannot be concluded strong reasons shall be put forward, however, the applicant would be at liberty to repeat the bail application and the observation recorded hereinabove shall not come in his way to agitate the grounds for bail which shall be decided on its merit.

JUDGE

Shahzad/*