

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.1732 of 2023

Date	Order with signature of Judge
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For hearing of bail application

20.9.2023

Applicant/accused Basheer son of Muhammad Yameen is produced in custody.

Mr. Muntazir Mehdi, Additional PG

Through this bail application under Section 497 Cr.P.C., the applicant Basheer has sought admission to post-arrest bail in F.I.R No. 501/2023, registered under Section 9(1) 3(C) CNS Act at P.S Sachal Karachi.

2. The charge against the applicant is that on 29.04.2023 Complainant Inspector Nisar Ahmed Khoro of P.S Sachal, Karachi arrested the applicant and recovered Charas weighing 1070 grams, from his possession. After observing the required formalities at the spot the recovered narcotics and the applicant were brought to P.S Sachal Karachi where the subject FIR was lodged under Section 9(1) 3(C) CNS Act 1997 on the same day. The prosecution obtained the chemical report of the alleged recovered Narcotics with a positive result. The earlier bail plea of the applicant has been declined by the Additional Sessions Judge VI Malir vide order dated 14.05.2023 in Bail Application No. 3084/2023.

3. Applicant who is present in custody has submitted that he is innocent and has falsely been implicated in this case by Police without justification. He lastly prayed for allowing the bail application.

4. On the other hand learned Addl. PG argued that the applicant/accused was arrested on the spot and from his possession charas weighing 1070 grams was recovered; He added that the embargo contained in Section 51 of the Control of Narcotics Substance Act 1997 does apply to the case of the present applicant, which is not in derogation of Section 103 Cr. P.C. The learned Additional Special Prosecutor General has submitted that the Chemical Examiner report is positive and supports the case of prosecution. He further argued that there is no illegality in the impugned order, as such the applicant cannot take this defense at the bail stage to create doubt in the prosecution story. He further submitted that as per the recent amendment in the law, through Act No.XX of 2022 in the

Control of Narcotics Substance Act 1997, a punishment of 14 years is mentioned, which falls within the prohibitory clause of Section 497 Cr. PC. The learned APG submitted that the applicant/accused is not entitled to a grant of bail.

5. I have heard the applicant who has been brought in custody and learned APG and have carefully examined the material available on record including the test report dated 18.05.2023 submitted by the Chemical Examiner after examining the charas allegedly recovered from the applicant. According to the aforementioned test report, the gross weight and net weight of charas was 1052 grams. The charas (cannabis) allegedly recovered from the applicant was 1070 grams, as his case is on the borderline as the 52/70 grams quantity marginally exceeded the maximum limit of one kilogram (1,000 grams) which is required to be considered a case under Section 9 (b) of Act 1997 as it exceeds only 52/70 grams. Section 9(b), CNSA, which speaks as under:--

"9(b) imprisonment which may extend to seven years and shall also be liable to fine, if the quantity of the narcotic drug, psychotropic substance or controlled substance exceeds one hundred grams but does not exceed one kilogram."

6. The Statute has enshrined the figure up to one kilogram. The quantity of narcotic drug psychotropic substance exceeds the limits specified in the aforesaid amended Section 9(b), the sentence of death or imprisonment for life or extend to 14 years, etc. has been provided under section 9(c), CNSA, which speaks as under:--

"9(c) death or imprisonment for life, or imprisonment for a term which may extend to fourteen years and shall also be liable to fine which may be up to one million rupees, if the quantity; of narcotic drug psychotropic substance or controlled substance exceeds the limits specified in clause (b).

Provided that if quantity exceeds ten kilograms the punishment shall not be less than imprisonment for life."

7. As the matter in hand pertains to bail and under section 51, CNSA some conditions have been postulated to refuse bail in respect of certain offenses; therefore, to facilitate the matter, I would like to reproduce the aforesaid section as under:-

"51. No bail is to be granted in respect of certain offenses.--(1) Notwithstanding anything contained in

sections 496 and 497 of the Criminal Procedure Code, 1898 (V of 1898), bail shall not be granted to an accused person charged with an offense under this Act or under any other law relating to narcotics where the offense is punishable with death.

(2) In the case of other offenses punishable under this Act, bail shall not be normally granted unless the Court is of the opinion that it is a fit case for the grant of bail and against the security of a substantial amount."

8. From the language employed in a statute 'it can be gathered whether it is mandatory or directory in its nature. A reading of the aforesaid section reveals that no bail could be granted in respect of offences committed under CNSA and provisions of sections 496 and 497 have expressly been excluded. However, an elbow room was left at the discretion of the Court under subsection (2) of section 51, CNSA where a statute has laid down that bail should not normally be granted unless the Court thought that it was a fit case for grant of bail. The words "*fit case for grant of bail*" used in the statute would depend on facts of an individual case and are required rather than more favorable circumstances appearing on record in favor of the accused to get entitlement to the concession of bail.

9. Moreover, a tentative perusal of the police record, it is to be seen whether the applicant is prima facie, involved, in spreading narcotics in society whether his case is hit by prohibition contained in section 51, CNSA, and whether there is doubt that applicant could be awarded maximum sentence provided by the newly amended statute and whether it is a borderline case between subsections (b) and (c) in terms of the ratio of the decisions of the Supreme Court in the cases of *Saeed Ahmed v. State* (PLJ 2018 SC 812), *Aya Khan v. The State* (2020 SCMR 350) and *Ateebur Rehman v. The State* (2016 SCMR 1424), which involved recovery of 1014 grams of heroin and Aya Khan case, which involved recovery of 1100 grams of heroin, and bail was granted by the Supreme Court in both cases.

10. Because of the above, it is yet to be seen by the learned trial Court to what extent, the applicant could be saddled with the aforesaid provisions of law, which is possible only after recording the evidence. The applicant is not required for further investigation. Finding it a case between two provisions of law and which provision is to be invoked, it is for the trial court to take care of, thus this is a case of further inquiry within the ambit of Section 51(2) of the CNS Act.

11. In view of the above facts and circumstances, therefore, this bail application is allowed subject to furnishing solvent surety by the applicants in the sum of Rs.50, 000/- (fifty thousand only) and P.R. bond in the like amount to the satisfaction of the trial Court.

12. Needless to mention that the observations recorded in the instant bail application are based on tentative assessment, which ought not to prejudice the proceedings before the learned trial court. Let copy of this order be transmitted to the concerned Jail Superintendent for information.

JUDGE