ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No. 928 of 2024

Date	Order with signature of Judge

For hearing of bail application

For hearing and Order: 03.07.2024

Mr. Naveed Ahmed Baloch advocate for the applicant.
Ms. Abid Parveen Cahnnar, Special Prosecutor ANF.

O R D E R

Adnan-ul-Karim Memon, J:- Through this bail application under Section 497 Cr.P.C., the applicant Ubaidullah has sought admission to post-arrest bail in F.I.R No.47/2022, registered under Section 6/9(c), 14/15 CNS Act, 1997 at Police Station ANF Muhammad Ali Society Korangi, Karachi in terms of the third proviso to Section 497 (1) Cr. P.C (statutory ground) as well as under Section 6 (5) of the Juvenile Justice System Act, 2018. As per the report submitted by NADRA dated 19.12.2023 whereby the date of birth of the applicant has been shown as 02.03.2009, as such at the time of arrest of the applicant, he was approximately aged about 14 years and this was the reason his case was bifurcated vide order dated 03.04.2022 and sent to the learned Additional Sessions Judge -1 Malir for trial. It is noted that the FIR of the subject crime was registered on 05.06.2022 and the applicant was arrested for the subject crime since then the case has been pending trial without progress and now two years have expired. This shocking delay in trial is a question mark on the part of the trial Court.

2. The earlier bail plea of the applicant on the aforesaid grounds has been declined firstly by the Special Court (CNS-I) Karachi vide order dated 12.07.2023 without touching the grounds raised by the applicant however in a cursory manner the bail plea of the applicant was declined; and after bifurcation of his case, being Juvenile offender, by the learned Additional Sessions Judge I (MCTC) Malir Karachi vide order dated 06.04.2024 in Criminal Bail Application No.1564/2024 with the following observation:-

> **"On perusal of R&Ps & material available on record, it has been transpired that earlier to this applicant/accused had preferred post-arrest bail application before the then trial Court, but it was dismissed vide order dated 12-07-2023 while discussing facts and merits of the case. So far ground of juvenility, as asserted by learned counsel, is concerned for which it has been observed that it was already available with the applicant/accused at the time of filing and decision of earlier post-arrest bail application as the declaration of applicant/accused as a juvenile was decided on documentary evidence i.e. FRC as such on the**

> **mere declaration of juvenility by the then trial Court & assigning R&Ps to the juvenile Court cannot be treated as new or fresh ground. Likewise, the ground of statutory delay, if any was also available at the time of the decision of the first post-arrest bail application, therefore, in view of the guideline of superior Courts second post-arrest bail application before the Court with concurrent jurisdiction is not competent hence, bail application merits no consideration and stands dismissed"**

3. The accusation against the applicant is that on 04.06.2022 the complainant party had apprehended the applicant along with his two accomplices from Mazda Truck and from the search of vehicle Mazda Truck, bearing Registration No. JV-0902, recovered Charas from the secret cavities, weighing 74.400 KG. The prosecution succeeded in obtaining a chemical report of the samples from the chemical examiner on 15.06.2022, which came in positive. However, the prosecution failed to prosecute the accused in between the period and in the intervening period two years passed as per the progress report submitted by the trial court which reads as under:-

> ***" 1. The R&Ps of the above cited sessions case had been assigned to this Court on 03.04.2024 by the Court of Honorable Sessions Judge, Malir for disposal in accordance with law however, at the very initial stage of supply of papers.***
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> ***2. police papers had been supplied to accused Ubedullah at Ex.01, and on 13.05.2024, he was formally indicted for the offence under Section 6/9-C CNS Act 1997 by the framing of charge at Ex.3, but he did not plead guilty and claimed trial.***
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> ***3. That, now case is fixed on 30.05.2024 for evidence.***

4. It is inter-alia contended that the applicant is innocent and has falsely been implicated in this case, he next contended that he pressed the bail application on statutory delay and the applicant being a juvenile offender and denial of his bail is against the dicta laid down by the Supreme Court in the cases of *Khawar Kayani v The State* **PLD 2022 SC 551** and the unreported case of *Mehran v Ubaid ullah and others* passed by the Supreme Court.

5. I asked the question from the prosecutor as to why the case has not yet been concluded by the trial Court. The learned Special Prosecutor simply opposed the bail on the ground that a huge quantity of contraband had been recovered from the vehicle wherein the applicant along with his accomplices was sitting. She further submitted that it is for the trial Court to explain the position. She lastly prayed for the dismissal of the bail application.

6. I have heard learned counsel for the parties on the ground of statutory delay as well as the underage of the applicant and have perused the record with their assistance and case law cited at the bar.

7. From the case diaries and progress report, prima facie shows that the applicant has been languishing in jail for more than two years from the date of his arrest i.e. 05.06.2022 without trial as such the ground of statutory delay is in his favor. However, at the same time learned counsel for the applicant has produced a record which shows that the applicant/accused as as per his birth certificate was born on 03-02-2009 and is presently below 16 years of age as such under the Juvenile Justice System Act, 2018 he is also entitled to the relief of bail. He submitted that the applicant has been in jail since his arrest on 5.6.2022 without trial as the only charge was framed on 13.5.2024, and that there is no record that the applicant was previously convicted in any case of a similar nature in the past.

8. Besides, there is another aspect of the case the applicant claims to be a juvenile aged about 14 years as per his birth certificate duly verified by the NADRA, such verification report is available in the police file in such a scenario, again the Supreme Court in the case of *Khawar Kayani Vs. The State* (**PLD 2022 SC 551**) has come to rescue the person incarcerated in jail by interpreting Section 6(5) of the Juvenile Justice System Act, 2018. The question of whether the case of the applicant, being a child as disclosed by the investigating officer in the charge sheet, falls within the exception contained in section 83 P.P.C., for ease of reference, is hereby reproduced infra:-

> "Act of a child above [ten] and under [fourteen] of immature understanding.- Nothing is an offense which is done by a child above [ten] years of age and under [fourteen], who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion."

9. The trial Court has dismissed the bail application of the applicant by ignoring the aforesaid grounds. The progress report, reveals that on 13.05.2024 only the charge was framed. It is a well-settled law that acts of a child above [ten] and under [fourteen] of immature understanding. Prima facie the trial court ought to have considered the case of the applicant in terms of the principles laid down by the Supreme Court in the cases of *Khawar Kayani Vs. The State* (**PLD 2022 SC 551**). 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. 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).

10. 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**).

11. No doubt, the offense of trafficking the narcotic is a heinous one and affects society at large but it is a settled principle of law that every case is to be decided on its facts and circumstances.

12. First this court will take up the applicability of the third proviso to Section 497(1) Cr. P.C., because of the bar contained in Section 51(1) of the Control of Narcotic Substances Act, 1997. The above proposition has been dealt with most lucidly by the Supreme Court in the case of *Gul Zaman vs. the State*, reported in **1999 SCMR 1271**, where it has unanimously been held by their lordship that despite the bar contained in section 51 of the Act, ibid, bail can be granted to an accused person charged for an offense under the Control of Narcotic Substance Act, 1997. In the year 2000, the same legal proposition came up before the Hon'ble Supreme Court in a case titled *The State through Deputy Director Anti Narcotic Force Karachi vs. Mobeen Khan*, **2000 SCMR 299**. The Supreme Court recalled the bail of the respondent-accused mainly on the ground that two years had not expired from the date of his arrest as the accused-respondent was charged under section 9 (c) CNS, Act, 1997, carrying punishment up to death. The relevant observations of their lordship in the cited case are reproduced below:-

> ***"As regards Mr. Motiani's above second submission, it may be observed that even if it is to be conceded for the sake of argument that the application of the third proviso to subsection (1) of Section 497 Cr. P.C, has not been excluded by subsection (1) of the Act (which seems to be incorrect), since clause (c) of section 9 of the Act, inter alia, carries a sentence of death), the statutory period of delay would be two years under clause (b) of the above third proviso to section 497 Cr. P.C as, admittedly, in the above case the period of the two years had not expired from the date of arrest (i.e., 4.2.1997) on 10.8.1998 when the bail was granted, and therefore, bail could not have been granted on the ground of statutory delay"***

13. Again, in the case of *Deputy Director ANF Karachi vs Syed Abdul Qayum, reported in* **2001 SCMR 14,** which was later, the Supreme Court ruled that despite the provisions contained in Section 51 of the Control of Narcotic Substances Act, 1997, the Sessions Court and High Court have the power to grant bail. For the sake of convenience and ready reference, the relevant part of the judgment is given below:-

> **"Moreover, this Court in the case of Gul Zaman V the State reported in 1999 SCMR 1271, has elaborately dealt with the application of sections 496, 497, and 498 Cr.P.C. in view of the bar contained in section 51 of the Act and it has been unanimously held that despite the provisions contained in section 51 of the Act, the Sessions Court and High Court have the power to grant bail."**

14. In view of the above, the arguments of the learned Special Prosecutor that the third proviso of Section 497(1) Cr. P.C., in view of the bar contained in Section 51 (1) of CNSA is not applicable and is without any substance.

15. Now, I may take up the ground of statutory delay a bare perusal of the above quoted third proviso would show that the Court is obliged to release a person on bail, who, being accused of an offense not punishable with death if he has been detained for such an offense for a continuous period exceeding one year and whose trial for such offense has not been concluded. Similarly, under clause (b) of the above proviso, the Court is obliged to release a person, who, being accused of an offense punishable with death, has been detained for such offense for a continuous period exceeding two years and whose trial for such offense has not been concluded. However, this is subject to the condition provided in the above third proviso, i.e., the delay in the trial of the accused should not have occasioned by any act or omission of the accused or any other person acting on his behalf, while, the fourth proviso provides a further rider on the above statutory right of an accused person to bail on the above ground of statutory delay by laying down that the third proviso to above subsection shall not apply to a previously convicted offender for an offense punishable with death or imprisonment for life or a person who in the opinion of the Court is a hardened, desperate or dangerous criminal or involved in terrorism. In principle the right of an accused to be enlarged on bail under the proviso, referred to ibid, is a statutory right that cannot be denied under the discretionary power of the Court to grant bail, however, if the case falls under the fourth proviso, bail can be refused by the Court.

16. In such a shocking delay in the conclusion of the Narcotic Case the judgment rendered by the Supreme Court of Pakistan in the case of

Imtiaz Ahmed Vs. The State, through Special Prosecutor ANF, (**2017 SCMR 1194**) provides via media which reads as under-

> ***"18. After careful perusal of all the order sheets of the Trial/Special Court, we are constrained to observe that the Presiding Officer has shown negligent conduct in the progress of the trial, neglecting his obligatory duty to conclude the same in the minimum possible time. Majority of the order-sheets are written in Urdu version, which appears to be in the hand of the Reader or some other official of the Court, while the Presiding Officer has put initials thereon.***
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> ***19. The co-accused, namely, Irfan Ali (since dead) was seriously sick, he applied to the Court for providing specialized treatment in some government hospital, however, the Presiding Judge of the Court did pay proper attention to it and left the fate of the said accused at the mercy of the jail authorities and the Prosecution. The Jailor reported to the Court that permission of the Home Department, Punjab had been sought and on getting the same, he would be taken to the hospital for treatment and management through specialized medical experts. It was in this background that in not getting timely specialized treatment in some government hospital, his disease aggravated to an unmanageable extent thus, he was shifted to the hospital in a serious emergency, however, after staying 2/3 days in the hospital, his life could not be saved by then and he died there. This is an unconscionable default on the part of the Presiding Judge, who had surrendered his judicial authority to the Jailor to regulate the custody of the under-trial prisoner and to take care of his health. It must be borne in mind that custody of under-trial prisoners, including health care and other facilities has to be regulated strictly by the Judges, before whom the trials are pending. The jail authorities can only deal with the custody of those prisoners who are sentenced to imprisonment. Thus, we are of the view that the Presiding Judge of the Special Court was fully oblivious to his judicial authorities to enforce the writ of the Court, keeping in view the urgent and sensitive nature of the matter. Even in the case of hardened, desperate, and dangerous criminals, they are entitled to similar treatment, however, to ensure that they may not abscond from custody, the Court may direct that while staying in the government hospital for treatment sufficient number of security guards should be provided, however, on that ground alone urgent treatment from specialist doctors whenever is seriously needed, cannot be denied to them, being a fundamental right of every citizen, as the provision of the Constitution has not drawn any distinction between an under-trial prisoner or citizens at large.***
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> ***20. The petitioner himself is also suffering from sickness as on, while in custody, he has undergone eye surgery after considerable efforts were made in that regard. He is also at an advanced age as was stated at the bar by his learned counsel, which was not controverted at the bar by the Prosecution.***

> ***21. The petitioner is in Jail for almost 3 years, while the conclusion of the trial is not in sight because the prosecution witnesses are not turning up, in spite of a coercive process has been issued against them whereas, the investigating officer in this case, who is a star witness for the prosecution, as stated earlier is fugitive from law in another criminal case, therefore, to expect the conclusion of the trial in the near future, would be nothing but a far fetched dream. In the case Mr. Asif Ali Zardari v. The State (1993 PCr.LJ 781) a Full Bench of the Sindh High Court, granted him bail on the basis of statutory delay in the trial, The Full Bench of the Sindh High Court at Karachi held that in case of shocking delay in the conclusion of trial, the accused was entitled to the concession of bail on the strength of third proviso to section 497, Cr.P.C., which view has not been set aside by this Court till date.***
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> ***22. In view of the above legal and factual position, in our view, the petitioner has become entitled to grant of bail as of right on the basis of shocking delay in the conclusion of the trial, more so, if further time is allowed to the prosecution, it would be absolutely impossible to conclude trial before the Trial Court, in view of the circumstances narrated above.***
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> ***23. Accordingly, this petition is converted into appeal and the same is allowed".***

17. The scheme of the legislator is quite clear about the quantum of prescribed punishment under section 9 (c) (ibid), which could either be death or imprisonment for life or imprisonment for a term that may extend to fourteen years, in addition to a fine up to one million rupees. However, in the present case situation is altogether different as the trial of the applicant has been commenced and concluded and so far as the delay of two years in the conclusion of his trial is concerned, as is evident from the record, it is not attributed to him and, hence, the applicant can be given the benefit of statutory delay, more so, when no evidence is forthcoming on record which could show that his case falls within the ambit of fourth proviso.

18. The question is whether the presence of the applicant along with the two accused in the aforesaid Mazda Truck is liable to be prosecuted /punished for transporting the contraband in the Mazda vehicle where he is sitting in the middle of the seat. The Supreme Court in the case of *Khan Zeb vs. the State* **2020 SCMR 444**, has held as under:-

> "**3. In this view of the matter, in the light of the judgment rendered in the cases of The State through the Director General, ANF v. Said Ahmed (2011 SCMR 908) and Javed v. The State (2017 SCMR 531), the petitioner being a passenger in the vehicle and since no connection, prima facie, has come on record, therefore, a case for further inquiry is made out. Accordingly, this**

> **petition is converted into an appeal and the same is allowed. The appellant-Khan Zeb is admitted to bail subject to furnishing bail bonds in the sum of Rs.100,000/ - (rupees one hundred thousand) with two sureties in the like amount to the satisfaction of the learned trial Court."**

19. The question is whether the case of the applicant falls within the ambit of the third proviso to Section 497(1) Cr.P.C. The Supreme Court in the cases of *Nadeem Samson v The State* **PLD 2022 SC 112** and *Shakil Shah v The State* **2012 SCMR 1** has decided the subject issue needs no further deliberation on my part.

20. The legal position as set forth by the Supreme Court in the cases of *Khawar Kayani Vs. The State* **(PLD 2022 SC 551)** and unreported Judgment dated 05.06.2024 passed by the Supreme Court in Cr. Petition No. 239 of 2024 (*re-Adnan Shafai v The State)*. The applicant is found to be entitled to the relief of bail under the first proviso to Section 497(1) Cr.PC, including the reasons recorded hereinabove and this bail application is accepted, subject to his furnishing solvent surety in the sum of Rs.500,000/- (Rupees five lacs) and PR Bond in the like amount to the satisfaction of the trial Court, However, the learned trial Court is directed to proceed with and conclude the trial expeditiously, within two months.

21. Before parting, it is reiterated that the observations made hereinabove are tentative. The trial court is at liberty to independently adjudicate the case on its own merits, without being influenced by the observations made hereinabove with further direction to the trial court to conclude the trial within two months positively without fail in case of failure on the part of the trial court the matter shall be referred to MIT-II of this Court for placing the matter before the competent authority for appropriate orders on administrative side

JUDGE

Shafi