

**ORDER SHEET**  
**IN THE HIGH COURT OF SINDH AT KARACHI**  
Criminal Bail Application No. 1477 of 2024

---

Date	Order with signature of Judge
------	-------------------------------

---

For hearing of bail application

**Date of hearing and Order :- 23.07.2024**

Mr. Ahmed Hussain Jokhio advocate for the applicant.  
Ms. Seema Zaidi, APG along with Investigating Officer Rabnawaz and sub-Inspector Talib Hussain of PS Memon Goth Karachi.

-----  
**ORDER**

**Adnan-ul-Karim Memon, J** :-Through this bail application under Section 497 Cr.P.C., the applicant Mst. Yasmeen has sought admission to post-arrest bail in F.I.R No. 194/2024, registered under Section 9 C of CNS Amended Act of 2022 at Police Station Memon Goth Karachi.

2. The earlier bail plea of the applicant has been declined by the learned Additional District & Sessions Judge IV /Special Judge CNS Malir Karachi vide order dated 11.06.2024 in Criminal Bail Application No.2610/2024 on the premise that the quantity of 560 grams of heroin had been recovered from the possession of applicant/accused which falls u/s 9(c) of CNS Amended Act, 2022, thus, the offense with which the applicant is charged is falling within the prohibitory clause. Besides the accused is a habitual offender.

3. It is inter-alia contended that the applicant is innocent and has falsely been implicated in this case, he next contended that the place of the incident is a thickly populated area but no independent private person is cited as mashir, which is a clear violation of Section 103 Cr. P.C. makes the case highly doubtful. In support of his contention upon the cases of Ateebur Rehman v The State 2016 SCMR 1424, Muhammad Yousuf v The State 2023 P Cr. L.J Note 37 and Mst. Fahmida v The State 1997 SCMR 947 and argued that mere registration criminal cases is no ground to refuse bail. He has further argued that if the recovered narcotic weighed along with polythene bag if weighed might have come to certain grounds are less than date, in that eventuality the case of the applicant falls within the ambit of Section 9(b) of the CNS amended Act 2022 and falls within the ambit of Section 497(2) Cr.P.C. He has further argued that the degree of punishment under Section 9(C) of the CNS Act, increases with the quantity of narcotics recovered, that the proviso to Section 9 (c) entails that only when the quantity of narcotic exceeds 10 KG, then the

punishment could be enhanced. He lastly prayed for allowing the bail application.

4. Learned APG has opposed the application on the premise that the applicant is involved in narcotic cases as such she is not entitled to the concession of post-arrest bail. She prayed for the dismissal of the bail application.

5. I have heard learned counsel for the parties and perused the material available on record.

6. The accusation against the applicant is that she was found in possession of 560 grams of Heroin, the questions are whether in such circumstances the accused being a lady is entitled to a concession of post-arrest bail in terms of Section 497(1) Cr. P.C. and whether the applicant can be saddled with possession and transporting the narcotics in terms of Section 6/9 C of CNS Act 2022.

7. Prima facie these questions needs to be taken care of by the trial Court as the Supreme Court in the case of Zahid Sarfarz Gill v The State **2024 SCMR 934** has held that the police and members of the Anti-Narcotic Force failed to record or photograph at the time of search of the accused when search, seizure or arrest is made, as the law permits the use of modern device or techniques, however in the present case the police has failed to apply the test so directed by the Supreme Court therefore in all cases about Narcotics, this modern device is required to be used in future cases without fail in terms of the ratio of the decision of the Supreme Court in the case of Zahid Sarfaraz Gill.

8. To appreciate the first proposition so put forward, it is the undeniable legal position that under the first proviso to Section 497(1) Cr. P.C., grant of bail is a rule and refusal an exception, as held in the case of Tahira Batool v. State (PLD 2022 SC 764), so far as the lady accused is concerned. 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. In Tahira Batool's case, the Supreme Court granted bail to the accused lady for an offense punishable under Section 395 PPC, under the 1st Proviso to Section 497(1) Cr. P.C., however, in the present case the applicant has been charged with an offense under Section 9 C of the CNS Act of 2022, in the given circumstances whether the

maximum punishment of 14 years or alternative would be awarded or not is also a point of discussion.

9. According to the case of the prosecution, 560 grams of Heroin was recovered from the applicant, not only because the quantity of 60 grams exceeds the upper limit of 500 grams to bring the case within the prohibition contained in section 497(1) Cr. P.C. The Supreme Court in such circumstances granted post-arrest bail to the lady accused, keeping in view the (II) Proviso of Section 497 Cr. P.C. in the case of Mst. Kainat Bibi v. The State (2022 SCMR 609). The Supreme Court also in the case of Ateebur Rehman v. The State (2016 SCMR 1424), which involved the recovery of 1014 grams of heroin, and Ayaz Khan and another v. The State (2020 SCMR 350), which involved the recovery of 1100 grams of heroin, granted bail in both cases. In the present case, the guilt or innocence of the applicants is yet to be determined by the trial Court. The prosecution has not placed any material to establish that the applicant is a previous convict, mere involvement in the same and similar offenses in the past cannot be a ground to refuse bail as this case can be decided on merit, therefore past record cannot be cited as precedent to refuse bail on this point.

10. Apart from the above, it revealed from the record that the aforesaid narcotics were recovered from the applicant through common place though stated to be a deserted place but the Supreme Court in similar circumstances has held in the case of Zahid Sarfaraz Gill supra that though Section 25 of the Narcotics Act exclude the applicability Section 103 Cr.P.C which requires two or more respectable inhabitants of the locality to be associated when search is made, however Supreme Court emphasized that police failed to record or photograph when search, seizure or arrest is made in terms of Article 164 of the Qanoon-e-Shahadat 1984 which was prepared in this case, therefore, on this ground also case of the applicant requires further probe.

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. 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.”

12. It is a well-settled principle of law that mere heinousness of offense is no ground to reject the bail plea. The basic concept of bail is that no innocent person's liberty is to be curtailed until and unless proven otherwise.

13. The essential prerequisite for the grant of bail by subsection (2) of section 497, Cr.P.C. is that the court must be satisfied based on the material placed on record that there are reasonable grounds to believe that the accused is not guilty of an offense punishable with death or imprisonment for life. The condition of this clause is that sufficient grounds exist for further inquiry into the guilt of the accused which would mean that question should be such that it has nexus with the result of the case and can show or tend to show that the accused was not guilty of the offense with which he is charged. Grant or rejection of bail is a discretionary relief but such discretion should be exercised fairly and judicially. The word discretion when applied to court means sound discretion judiciously guided by law and to lessen the hardship of the people. It is the well-settled and basic principle of law that the bail is not to be refused as punishment.

14. In the present case, the applicant was arrested on 01.06.2024 and she had been detained for a continuous period exceeding around two months since her detention and her trial has not yet been commenced when she applied for the relief of bail before the trial Court. The trial Court declined the relief of bail to the applicant on the analogy that the offense was heinous based its reasoning on various provisions of CNS and law laid down by the Superior Court. Be that as it may, 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). The approach of the trial Court, in the present case, to decline the benefit of (II) Proviso of Section 497 Cr. P.C. to the applicant, merely by observing that the offense is “heinous” is not legally correct and against the principles laid down by the Supreme Court in the cases of *Khawar Kayani Vs. The State* (PLD 2022 SC 551) and *Tahira Batool v. State* (PLD 2022 SC 764). A fourteen Member Bench of the Supreme Court in

the case of Justice Khurshid Anwar Bhinder v. Federation of Pakistan (PLD 2010 SC 483), has concluded that where the Supreme Court deliberately and to settle the law, pronounces upon a question of law, such pronouncement is the law declared by the Supreme Court within the meaning of Article 189 and is binding on all the Courts of Pakistan. It cannot be treated as mere obiter dictum. Even the obiter dictum of the Supreme Court, due to the high place which the Court holds in the hierarchy in the country enjoys a highly respected position as if it contains a definite expression of the Court's view on a legal principle, or the meaning of law. Moreover, it has been held time and again by the Supreme Court that 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 in the case of Haji Muhammad Nazir v. The State (2008 SCMR 807).

15. Because of the above factual and legal position, as set forth by the Supreme Court, prima-facie, the applicant's case falls within the ratio of the decisions rendered by the Supreme Court in the aforesaid cases including the cases of Ateebur Rehman v. The State (2016 SCMR 1424), Aya Khan and another v. The State (2020 SCMR 350), Mst. Ghazala v. The State (2023 SCMR 887) and Sahib Ullah Versus State through A.G. Khyber Pakhtunkhwa (2022 SCMR 1806). Since the judgment rendered by the Supreme Court directed to record or take photographs at the time of search of the accused when search, seizure, or arrest is made as the law permits the use of modern devices or techniques but the police failed and neglected to adhere the dicta laid down by the Supreme Court, which is a constitutional command under Article 199 of the Constitution, therefore, appreciating whether the applicant was arrested with shopper bag containing 560 grams heroin requires deeper appreciation, therefore, the applicant is admitted to post-arrest bail, subject to her furnishing surety in the sum of Rs.300,000/- (Rupees three hundred thousand only) with P.R Bond in the like amount to the satisfaction of the trial Court.

16. The observation recorded hereinabove is tentative and shall not prejudice the case of either party at the trial.

JUDGE