

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, HYDERABAD.

Criminal Bail Application No.S-41 of 2025

Applicants : Ali Ahmed and Riaz Siyal present on interim pre-arrest bail through Mian Taj Muhammad Keerio, Advocate.

Respondent : The State through Mr. Shahid Ahmed Shaikh, A.P.G. Sindh along with SIP Hamid Ali Otho SHO Jhok Shareef.

Date of hearing : 27.01.2025

Date of Order : 27.01.2025

ORDER.

Amjad Ali Sahito, J:- Through instant bail application, the applicants/accused namely, Ali Ahmed and Riaz Siyal seek post-arrest bail in Crime No.122/2023 for the offence under section 9(1) (3) (D) of CNS Act, 2022 registered at Police Station B-Section, Tando Muhammad Khan. Earlier the bail plea of the applicants/accused was declined by the learned Sessions Judge/Special Judge for C.N.S.A. Tando Muhammad Khan vide order dated 29.11.2024.

2. Background of the case is that on 18.11.2023, between 12:00 PM and 3:00 PM, a police team from PS B-Section Tando Muhammad Khan, led by SIP Liaquat Ali Gopang, conducted vehicle checking at Check Post Shaheed Baba. During checking, a Blue Mazda bearing No.JZ-8708 was inspected, and while one person fled, two others were apprehended: Ali Ahmed Siyal (driver) and Riaz Siyal. They identified the third person, Muhammad Sarwar Punjabi, as an absconder. The vehicle contained 40 sacks, each weighing 40 kg, filled with brown cotton boxes containing bhang. Total 1600 kg of bhang was recovered. Samples i.e. 500 grams from each sack were sealed for chemical analysis and the remaining bhang was stored. The memo of arrest and recovery was prepared. Hence, instant case was registered.

3. After registration of the case, the Station House Officer submitted a report under section 173 Cr.P.C. to the Special Judge for CNS/MCTC, Tando Muhammad Khan. However, the Special Judge determined that the crime did not fall under the Control of Narcotics Substance Act, 1997, and held that it comes under the Prohibition (Enforcement of Hadd) Order, 1979. As a result, the learned Judge returned the report to the SHO to be submitted to the concerned Judicial Magistrate, as the case was exclusively triable by a Magistrate Court.

4. Learned counsel for the applicants has contended that since no case under the Control of Narcotic Substances Act was established, as such, the FIR was converted under Articles 3 and 4 of the Prohibition (Enforcement of Hadd) Order, 1979, and referred to the Civil Judge and Judicial Magistrate-III,

Tando Muhammad Khan, who took cognizance of the offense under the orders of learned Special Judge, Tando Muhammad Khan vide order dated 08.12.2023. The applicants then applied for post-arrest bail, which was granted. However, when the case was fixed for evidence, the ADPP for the State pointed out that the case comes under the Control of Narcotics Substances Act due to an amendment that included "BHANG", "SIDDHI" and "GANJA" in the definition of narcotics and that the alleged recovered property exceeded 20,000 grams, the punishment could be upto life imprisonment with a fine but shall not be less than 14 years with a fine; hence, the learned Magistrate referred the case to the Sessions Court under section 347 Cr.P.C./want of jurisdiction. The learned counsel has further contended that the ADPP instead to point out so, he should have challenged the order passed by the Special Judge on 08.12.2023, before this Court, as that order still remained in field. He further contended that even there is no application moved by the learned ADPP or Investigating Officer of the case in this regard. He has further contended that since after referring the case to the Court of Learned Special Judge, the applicants had apprehension that they may not be taken into custody, as such, bail application was filed, but which was dismissed without considering that they were already on bail granted by learned Magistrate. Learned counsel further contended that since the applicants/accused have been admitted to post arrest bail and they have not misused the concession of bail even show cause notice was not issued by the learned Magistrate to the accused persons that why not their bail already granted to them shall be recalled, as such, on jurisdictional point between two Courts, the applicants may not suffer and in fact no bhang was recovered from them but they were booked falsely. He, therefore, prayed that the interim pre-arrest bail granted to the applicants may be confirmed.

5. On the other hand, the learned A.P.G. for Sindh has contended that the case involves a jurisdictional issue related to the recovery specifically whether it falls under special or ordinary law. He further contended that initially the learned Special Judge ordered on the report under section 173 Cr.P.C. that the case is falling under the Prohibition (Enforcement of Hadd) Order, 1979; however, after having look at an amendment in the CNS Act, the learned Magistrate referred the case with opinion on the pointaiton of learned ADPP that the case falls under CNS amended Act and its Court is incompetent to try the case, as such, the jurisdiction lies with the Sessions Judge/Special Judge. The A.P.G. further contended that the only issue is whether the case should have been referred to the Court of learned Magistrate first or, later, to the Sessions Judge/Special Judge. The A.P.G. pointed out that before referring the case, the Magistrate should have issued a show cause notice to the accused, asking why their bail should not be canceled, as such, the Magistrate has wrongly passed the order.

6. Heard and perused.

7. The case of prosecution is that the police arrested the applicants and recovered 1600 kg of Bhang while one accused made his escape good. As such, FIR was registered under sections 9 (1) (1) (D) of CNS Act, 2022. After completion of the investigation, a report in terms of section 173 Cr.P.C. was submitted before the learned Special Judge for CNS cases/MCTC, Tando Muhammad Khan; however, learned Special Judge vide order dated 08.12.2023 returned the FIR and directed to the Station House Officer Ashiq Balouch for submitting the same before the concerned Judicial Magistrate having jurisdiction. In compliance thereof, the Investigating Officer submitted challan/police report before the learned Civil Judge & Judicial Magistrate-III, Tando Muhammad Khan.

8. It is important to note here that when learned Sessions/Special Judge returned the report filed under section 173 Cr.P.C. the police officer has submitted the challan under section 3 and 4 of Prohibition (Enforcement of Hadd) Order, 1979. It would be appropriate to reproduce the relevant para of the order dated 08.12.2023 passed by learned Sessions Judge, which reads as under:-

“The instant crime does not fulfill the requirement of Control of Narcotics Substance Act 1997 and comes under Prohibition (Enforcement of Hadd) Order, 1979 and as per Schedule of Prohibition (Enforcement of Hadd) Order, 1979,

1. The leaves, small stalks and flowering or fruiting tops of the Indian hemp plant (cannabis Sativa L) including forms known as Bhang Siddhi or Ganja).
2. Charas that is, the resin obtained from the Indian hemp plant, which has not been submitted to any manipulations other than those necessary for packing or transport.
3. Any mixture, with or without natural materials or any of the articles mentioned in entries 1 & 2, or any drink prepared therefrom.
4. Opium and opium derivatives as defined in the Dangerous Drugs Act, 1930 (II of 1930).
5. Coca leaf and coca derivatives as defined in the aforesaid Act.
6. Hashish.

9. During pendency of the case, application under section 497 Cr.P.C. was filed and both the applicants were admitted to post-arrest bail in the sum of Rs.30,000/- each and PR bond in the like amount. after grant of bail by the learned Civil Judge & Judicial Magistrate-III Tando Muhammad, a charge was framed and at the time of recording evidence, the learned ADPP for the State pointed out that instant case comes under the Control of Narcotic Substances (Amendment) Act, 2022 and as per amendment of the Act, the “Bhang, Sidhhi or ganja” are inserted in Section 2 under clause (b) of the Act. On such basis, the

learned Magistrate referred the case to the learned Sessions/Special Judge under section 347 Cr.P.C.

10. It would be relevant to mention here that the National Assembly/Majlis-e-Shoora (Parliament) has made amendments in the Control of Narcotic Substances Act, 1997 and this is called the Control of Narcotic Substances (Amendment) Act, 2022. In the said Act, the bhang is also inserted in view of clause (b) in section 2 of CNS Act. The said insertion of bhang under clause (b) of section 2 is reproduced as under:-

“(b) in clause (d), in paragraph (ii) after the word “known”, the words “and include all forms known as *bhang, siddhi or ganja*” shall be inserted;”

In the said amendment the Table was prepared wherein the punishment provided for bhang in its quantity clause (a) upto 999 grams is imprisonment which may be extended to three years but shall not be less than six months along with the fine and lastly in clause (d) for the quantity of 20000 grams or more imprisonment which may be extended to life imprisonment but shall not be less than fourteen years along with fine. In the instant case, learned Sessions/Special Judge was not properly guided by the learned ADPP or Police Officer, as such, an improper order was passed treating the case under section 3 and 4 of Prohibition (Enforcement of Hadd) Order, 1979; although, in fact, the bhang was also inserted in the Control of Narcotic Substances (Amendment) Act, 2022, as stated above.

11. When it was confronted from learned counsel for the applicants that if after the order is passed by learned Sessions/Special Judge whether the Magistrate can yet continue to try the case despite fact that after Amendment made in the year 2022 in the CNS Act, on recovery of 1600 kg of bhang, the accused is liable for punishment upto life imprisonment but shall not be less than fourteen years years along with fine as described in clause (d) of the column of Quantity in the Table for contravention of sections 6, 7 and 8 of the Act besides the Judicial Magistrate is not empowered to award such amount of sentence, the learned counsel replied in positive and stated that it is prime duty of Magistrate to obey the judicial order whether it is right or wrong. Learned counsel, however, stated that if any wrong order is passed in this regard, then it was duty of the Prosecutor or police either to challenge the same or to file application for its review within the prescribed time.

12. I have also minutely perused the order passed by learned Judicial Magistrate, which reflects that when case was fixed for recording evidence, the ADPP for the State pointed the jurisdictional point of the case after the Control of Narcotic Substances (Amendment) Act, 2022 the instant case comes under CNS Act, as such, the learned Magistrate has rightly referred the case to the Court of Sessions/Special Judge under sections 347 Cr.P.C. This is a special enactment

and the case became triable by the Court of Special Judge. More so, when the case came under the category of Narcotic Substance Act, the Magistrate is not empowered to try the same as it carries punishment beyond its powers as enunciated under section 32 of the Code of Criminal Procedure, 1898 whereby under clause (a) the Magistrate of the first class is only empowered to award imprisonment for a term not exceeding three years including such solitary confinement as is authorized by law as well fine not exceeding forty five thousand rupees (arsh; daman). After passing the order dated 21.10.2024 by the learned Magistrate neither it was challenged by the applicants nor they raised any objection at the time of passing such order. However, learned counsel for the applicants filed pre-arrest bail before the Court of Sessions/Special Judge for CNS Cases. After hearing the parties, the said bail application was dismissed.

13. It is important to note here that if the charges or the nature of the case changes which may result that the accused may face a more severe trial, a show-cause notice is necessary to inform the accused about the change in the court's jurisdiction and to allow them an opportunity to respond. Even no show cause notice was issued by the learned Magistrate to the accused that why their bail granting order shall not be recalled. This is an essential procedural safeguard to ensure fairness in the criminal justice system as it allows the accused to challenge the transfer or adjust their defense strategy in light of the more serious charges, which they may face. In this case, the learned Magistrate should have issued such a notice to the applicants to uphold procedural fairness.

14. Admittedly before reference of the case, the applicants were on bail. Even, learned Magistrate has not recalled the bail granting order, which is still in field. In the case of 'MUHAMMAD ANWAR v. The STATE and another' [2024 SCMR 1567], the Honourable Supreme Court has held that;

"10. Liberty of a person is a precious right which has been guaranteed by the Constitution of the Islamic Republic of Pakistan, 1973. By now it is also well settled that it is better to err in granting bail than to err in refusal because ultimate conviction and sentence can repair the wrong resulted by a mistaken relief of bail;"

15. The applicants are continuously attending the trial Court. There is also no complaint that they have misused the concession of bail. The bail cannot be denied to the accused merely on the aforementioned reasons. Since the applicants were admitted to bail subject to their furnishing a solvent surety in the sum of Rs.30,000/- each; however, keeping in view the above circumstances of the case, their interim pre-arrest bail already granted to them in the sum of Rs.50,000/- each is confirmed with enhancement of surety that the applicants shall have to furnish more surety of Rs.50,000/- each with PR bond in the like amount. At this juncture, learned counsel appearing on behalf of the applicants

seeks a week's time to furnishing surety by the applicants as ordered today. One week's time is allowed.

16. In view of the above position, the order dated 08.12.2023 passed by learned Special Judge for CNC/MCTC, Tando Muhammad Khan shall not be treated in field and the same being unlawful is set aside.

17. Needless to mention here that the observations made hereinabove are tentative in nature and would not influence the learned trial Court while deciding the case of the applicants on merits.

JUDGE

Abdullah Channa/PS