ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA.
1st Crl. Bail Appln. No.S-639 of 2024

Date	Order with signature of Hon'ble Judge

1. For orders on office objection.
2. <u>For hearing of Bail Application.</u>

Applicant : Zakir Brohi, through Mr. Nisar Ahmed G. Abro, Advocate.

The State : Through Mr. Aitbar Ali Bullo, Deputy Prosecutor General.

Date of hearing : <u>14.11.2024.</u>
Date of Order : <u>14.11.2024.</u>

<u>O R D E R</u>

<u>ARBAB ALI HAKRO, J.-</u> Applicant Zakir, son of Muhammad Qasim, by caste Brohi, seeks post-arrest bail in crime No.129 of 2024, registered at Police Station Waleed, Larkana, for offence under Sections 9-3(c), Control of Narcotics Substances (Amendment) Act, 2022, after dismissal of his bail application by the learned I-Additional Sessions Judge/Special Judge for CNS (MCTC), Larkana vide order dated 23.8.2024.

2. The prosecution case, in brief, is that on 02-8-2024, at about 1130 hours, a police party led by ASI Pandhi Khan Brohi, being on patrolling, on a tip-off, apprehended the applicant/accused Zakir Brohi near Ameer Shah Graveyard situated on the Rice Canal Road, who was already wanted in Crime No.125/2024 of PS Waleed, Larkana, registered u/s 324, 353, 401, 399, 34, PPC. Charas weighing 2000 grams, lying in a black shopper, was allegedly recovered from the possession of the accused.

3. Learned counsel for the applicant contends that the applicant is innocent and he has been falsely implicated by the police; that all the witnesses are police personnel and sub-ordinates of the complainant hence false implication of the applicant cannot be ruled out; that the alleged recovery was made on the basis of spy information received in advance and the place of recovery is also a busy area of Larkana town, but even then no private person was associated from the way or picked at the spot to witness

the alleged recovery proceedings; that neither photographs nor video recording of the seizure and arrest were made, therefore, such aspect of the case comes within the scope of further inquiry; the case has been challaned and the applicant is not required to police for any further investigation. Under these circumstances, learned counsel prays the applicant may be enlarged on bail.

4. On the other hand, Learned DPG vehemently opposed the grant of bail on the ground that the applicant was apprehended red-handed with 2000 grams of charas and he has not shown any *mala fide* on the part of the police to implicate him falsely in this case, hence he does not deserve the concession of post-arrest bail. Learned DPG, in support of his contentions, has referred to the case reported as *Noor Khan v. The State* **(2021 SCMR 1212).**

5. I have heard the learned counsel for the parties and gone through the material placed on record.

6. From the tentative assessment of the record, it appears that complainant ASI Pandhi Khan Brohi has stated in the FIR that during patrolling, they came to the Miro-Khan Chowk where he received the spy information that an accused, Zakir Brohi, who was wanted in Crime No.125/2024, U/S 324, 353, 401, 399, 34 PPC, was available at the rice canal road near Ameer Shah graveyard holding a shopper containing contraband Charas. On such information, they proceeded to the pointed place; if, for the sake of argument, it is believed that they proceeded to the pointed place on spy information, then they were under lawful obligation to have associated with them an independent person to witness the possible arrest and recovery. Indeed, nobody was taken from there nor from the route to the incident or even arranged at the place of recovery, and the timing of recovery was also broad hours of the day, i.e. 1130 hours. In fact, no effort was made to take someone to witness the arrest and recovery. No doubt, in the cases of narcotics, an association of mashirs from the public is not so essential, but compliance of Section 103 Cr.P.C is to ensure transparency and fairness on the part of police during the course of recovery, curb false implication and minimize the scope of foisting of fake recovery upon accused. If people from the public are easily available, it would be advisable to associate them to add sanctity to the recovery proceedings. Reliance in this regard is placed upon

the case of **Lal Bux alias Lal vs The State** reported in **2023 Y L R 321,** wherein it was held as under:-

> *"We are conscious of the fact that provisions of section 103, Cr.P.C. are not attracted to the cases of personal search of accused in narcotic cases but where the alleged recovery was made on a street (as has happened in this case) and the peoples were available there, omission to secure independent mashirs, particularly, in police case cannot be brushed aside lightly by this court. Prime object of Section 103 Cr.P.C is to ensure transparency and fairness on the part of police during course of recovery, curb false implication and minimize the scope of foisting of fake recovery upon accused. There is also no explanation on record why no any independent person from the vicinity has been joined to witness the recovery proceedings. No doubt police witnesses were as good as other independent witnesses and conviction could be recorded on their evidence, but their testimony should be reliable, dependable, trustworthy and confidence worthy and if such qualities were missing in their evidence, no conviction could be passed on the basis of evidence of police witnesses. But here in this case, we have also noted number of contradictions in between the evidence of prosecution witnesses which cannot be easily brushed aside. Above conduct of the police shows that investigation has been carried out in a casual and stereotype manner without making an effort to discover the actual facts/truth."*

7. Moreover, in the present case, it has come to light that the police officials who allegedly affected the recovery of Charas have failed to record any photographic or video evidence at the time of alleged recovery. It needs no mention that modern devices and techniques, such as mobile phone cameras, are readily available and expressly permitted under Article 164 of the Qanun-e-Shahadat, 1984. The Hon'ble Supreme Court of Pakistan, in the case of **Zahid Sarfaraz Gill vs The State** reported in **2024 SCMR 934,** has addressed the issue of lack of recording or photographing by the police and Anti-Narcotics Force (ANF) during searches, seizures and arrests, which is reproduced as follows:-

> *5. We are aware that section 25 of the Act excludes the applicability of section 103 of the Code of Criminal Procedure, 1898 which requires two or more respectable inhabitants of the locality to be associated when search is made. However, we fail to understand why the police and members of the Anti-Narcotics Force ('ANF') do not record or photograph when search, seizure and/or arrest is made. Article 164 of the Qanun-e-Shahadat, 1984 specifically permits the use of any evidence that may have become available because of modern devices or techniques, and its Article 165 overrides all other laws.*
>
> *6. In narcotic cases the prosecution witnesses usually are ANF personnel or policemen who surely would have a cell phone with an in-built camera. In respect of those arrested with narcotic substances generally there are only a few witnesses, and most, if not all, are government servants. However, trials are unnecessarily delayed, and resultantly the accused seek bail first in the trial court which if not granted to them is then filed in the High Court and there too if it is declined, petitions seeking bail are then filed in this Court. If the police and ANF were to use their mobile phone cameras to record and/or take photographs of the*

> *search, seizure and arrest, it would be useful evidence to establish the presence of the accused at the crime scene, the possession by the accused of the narcotic substances, the search and its seizure. It may also prevent false allegations being levelled against ANF/police that the narcotic substance was foisted upon them for some ulterior motives.*

8. The punishment provided by law for the offence, as per quantity so recovered, is not less than nine years and not more than fourteen years. Hence, when the statute provides two punishments, then a lesser quantum of sentence should be considered, particularly at the bail stage. The lesser quantum of punishment is nine years which does not exceed the limit of prohibitory clause of section 497(i) Cr.P.C. Reliance can be placed upon the cases of **JAMAL-UDDIN alias ZUBAIR KHAN Versus THE STATE vide 2012 SCMR 573** and case of **ZAHID SARFARAZ GILL Versus THE STATE vide PLJ 2024 SC (Cr.C) 8.** The mere heinousness of crime will not disentitle an accused from concession of bail when ultimate conviction, if any, can repair the wrong caused by the mistaken relief granted to him; however, if after a lengthy trial, he/she is found innocent, then golden days of his/her life spent under incarceration cannot be repaired with. The applicant is not a previous convict, and the investigation has already been completed, and his further incarceration would serve no useful purpose.

9. It is a settled principle of law that while deciding the bail plea of the accused, a deeper appreciation of evidence is not permissible, and the material is to be assessed tentatively. From the tentative assessment of material available on record, as discussed above, the applicant has been able to make a case for further inquiry into his guilt. Resultantly, this bail application is allowed, and the applicant is granted post-arrest bail subject to his furnishing solvent surety in the sum of Rs. 100,000/- (rupees one lac only) and P.R bond in the like amount to the satisfaction of the trial court.

10. Needless to say, the observations made hereinabove are tentative and would not influence the trial Court while deciding the case of the applicant on merits.

JUDGE

Qazi Tahir PA/*