

**IN THE HIGH COURT OF SINDH
CIRCUIT COURT HYDERABAD**

Before:

Mr. Justice Mohammad Karim Khan Agha

Cr. Bail A. No.S-1079 of 2016.

Jan Muhammad alias Janu

v.

The State

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| Jan Muhammad alias Janu applicant | Through Mian Taj Muhammad Keerio Advocate. |
| Respondent the State | Through Mr. Shahid A. Shaikh, A.P.G. |
| Date of hearing: | 03.04.2017. |
| Date of order | 06-04-2017 |

ORDER

MOHAMMAD KARIM KHAN AGHA, J.-Through instant application, applicant seeks post arrest bail in Crime No.DO40403716, registered at PS: ANF, Hyderabad, under section 6/9/C Control of Narcotic Substances Act, 1997 (CNSA).

2. Precisely relevant facts are that on 20.10.2016, complainant SHO/Inspector Nisar Ahmed of PS: ANF Hyderabad along-with his subordinate staff after receiving spy information reached at Muhammadi Morr, Auto Bhan Road, Hyderabad and in presence of mashirs apprehended the accused / applicant Jan Muhammad and secured 4.500 kilograms of

Charas from his possession. Thereafter, the recovered charas was sealed in a white colour cloth bag for chemical analysis. Then narcotic substance and accused were brought at Police Station. FIR was registered against the applicant. After usual investigation he was sent up for trial.

3. Learned counsel for the applicant inter alia contends that applicant has been falsely implicated by ANF due to political rivalry with ruling party and has been foisted upon him by the ANF in order to show their efficiency; all prosecution witnesses are police personnel; that CIA police had arrested the applicant when he was standing at Badin Stop and then he was handed over to ANF and falsely involved in present case; despite place of incident being a thickly populated area no independent witness has been cited as mushir; applicant has no previous criminal record; punishment for the alleged offence as provided by statute can be up to 07 years and the same does not fall within the prohibitory clause; since last 05 months applicant is in jail and he is not further required for any investigation and thus for all the above reasons the applicant is entitled to be enlarged on post arrest bail.

4. In support of his contentions, learned counsel for the applicant relied upon the cases of **Jamal-ud-Din alias Zubair Khan v. The State** (2012 S C M R 573), **Mughulbaz v. The State** (1995 M L D 98), **Pir Bux and another v. The State** (2007 M L D 1696), **Abdul Rasheed v. The State** (P L D 2002 Karachi 453), **Muhammad Farooq Khan v. The State** (2007 P Cr. L J 89) and a recent unreported order passed by this Court in the case of **Nazar Muhammad v. The State** (Cr. B.A. No.S-625/2016) dated 23-01-2017.

5. Learned Special Prosecutor ANF opposed this application on the ground that the applicant is involved in heinous offence which has not been foisted upon him; that is a non bailable offense; that independent Mushirs are not required under CNSA; that this is not a fit case for the grant of a bail which differs from the concept of further inquiry; that this is a crime against society; that there is no evidence of any enmity between the parties; that it falls within the prohibitory clause; a huge recovery has been made; that the chemical report is positive; that there is sufficient material to connect the applicant to the commission of the offense; that the post arrest bail of the applicant has already been declined by the trial court by order dated 02-12-2016 and thus for all the above reasons the applicants application for post arrest bail should be declined.

6. Learned Special Prosecutor ANF in support of his contentions placed reliance on the following authorities **The State v. Javed Khan** (2010 SCMR 1989), **Socha Gul v. The State** (2015 S C M R 1077) and **Dolat Khan v. The State and others** (2016 S C M R 1447).

7. I have heard the learned counsel for the applicants, Special Prosecutor ANF, perused the record, considered the relevant law and the case law cited at the bar.

8. As per settled law I have only made a tentative assessment of the material placed before me and this order shall not prejudice the case of any party at trial which shall be decided by the trial court on merit based on the evidence before it.

9. The applicant has been found in possession of a huge quantity of charas which has been recovered from him and would attract the provisions of S.6 CNSA. The applicant has come from Badin

whilst the arresting police are from Hyderabad and as such have no animus or nexus with the applicant to want to involve him in a false case. Furthermore, the applicant has produced no material to show any political victimization and has only made a bald allegation in this regard and as such this argument of a false and concocted FIR is not sustainable and is rejected as such. In this respect reference may usefully be made to the case of **Dolat Khan V The State** (2016 SCMR 1447)

10. With regard to the grant of bail this is limited to a certain extent by S.51 CNSA which is set out as under for ease of reference:

“51. No bail to be granted in respect of certain offences.--- 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 offence under this Act, or under any other law relating to narcotics where the offence is punishable with death.**

(2) In the case of other offences punishable under this Act, bail shall not be normally be 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 (bold added)

11. The next issue in terms of the grant of bail would therefore appear to be what would be the maximum sentence on conviction.

12. This is provided in S.9 CNSA which is set out as under for ease of reference:

“9. Punishment for contravention of Sections 6, 7 and 8.--- Whoever contravenes the provisions of Section 6, 7 or 8 shall be punishable with:---

- (a) Imprisonment which may extend to two years, or with fine, or with both, if the quantity of the narcotic drug psychotropic substance or controlled substance is ten grams or less;
- (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;
- (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 upto one million rupees, if the quantity of narcotics drug, psychotropic substance or controlled substance exceeds the limits specified in clause (b);

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

13. In this case the applicant has argued that S. 9(b) would apply to him i.e. his maximum sentence would be up to 7 years based on the sentencing guidelines provided in the case of **Ghulam Murtaza V State** (PLD 2009 Lah 362) and as such his case would also fall within the non prohibitory clause and as such he was entitled to bail as of right and not by way of concession.

14. However, it has been held in the recent 3 member Supreme Court bench case of **Socha Gul V The State** (SCMR 2015 1077) that **Ghulam Murtaza's case** (Supra) is not necessarily applicable at the bail stage in terms of its sentencing guidelines and has distinguished the same at P.1081 in the following terms.

“8. It is pertinent to mention here that offense punishable under C.N.S. Act of 1997 are by its nature heinous and considered to be the offences against the society at large and it is for this reason that the statute itself has provided a note of caution under section 51 of C.N.S. Act of 1997 before enlarging an accused on bail in the ordinary course. When we

refer to the standards set out under section 497, Cr.P.C. for grant of bail to an accused involved in an offence under section 9(c) of C.N.S. Act of 1997, even on that basis we find that an accused charged with an offence, prescribing various punishments, as reproduced above, is not entitled for grant of bail merely on account of the nature or quantity of narcotic substance, being four kilograms. Firstly, as deeper appreciation of evidence is not permissible at bail stage and secondly, in such situation looking to the peculiar features and nature of the offence, the trial Court may depart from the normal standards prescribed in the case of *Ghulam Murtaza (supra)* and award him any other legal punishment. Thus, in our opinion, ratio of judgment in the case of *Ghulam Murtaza (supra)* is not relevant at bail stage.

15. Therefore prima facie in this case where 4.5 KG's of charas has been recovered from the applicant and the chemical report has proved positive S.9 © of the CNSA would be attracted which would put the instant case within the prohibitory clause.

16. Furthermore, it is observed that the facts and circumstances of **Socha Gul's case** (Supra) were similar to the facts and circumstances of the instant case and that of **Jamal-ud-din alias Zubiar Khans case** (Supra) which the applicant has mainly relied upon and has not followed the same which was an earlier decision by a two member bench of this Court largely on the basis that it appears to have disagreed with the observation in **Jamal-ud-din alias Zubiar Khans case** (Supra) that, "that while hearing a petition for the grant of bail, the court is not to keep in view the maximum sentence provided by the Statute for the charged offense, but the one which is likely to be entailed" on account of the finding at Para 6 and 7 in **Socha Gul's case** (Supra) which is reproduced as under for ease of reference

"6. In the case of *Ghulam Murtaza v. the State* (PLD 2009 Lahore 362), which is not an order in a reference arising out of an appeal under the CNS Act 1997, and is frequently referred in the context of sentencing the accused

convicted under C.N.S Act 1997, *inter alia*, keeping this aspect in mind, the larger Bench of the Lahore High Court, while categorizing the sentence of an accused on the criteria of nature of narcotic substance recovered and its quantity, has aptly observed as under:-

“10. It goes without saying that in a particular case carrying some special feature relevant to the matter of sentence a Court may depart from the normal standards prescribed above but in all such cases the Court concerned shall be obliged to record its reasons for such departure.”

7. Again, in the case of *Nadeem Ashraf v. State* (2013 SCMR 1538), making reference to the judgment in the case of *Ameer Zeb v. State* (PLD 2012 SC 380), in a narcotics case, while refusing bail, the issue of quantity of recovered narcotics substance qua method/mode of its sampling and its relevancy at bail stage has been dilated by the Court in the following words:

“(4) Admittedly the trial has yet to commence and it would be rather presumptuous on the part of the petitioner to infer that the prosecution would lead evidence only to the extent of the weight to which reference has been made by the petitioner’s learned counsel. It is always open for the parties and in this case for the prosecution to lead further evidence and to request the court that it be allowed to send the entire narcotics allegedly recovered from the petitioner for chemical analysis.”

17. Thus since the unreported order passed by this Court in the case of **Nazar Muhammad v. The State** (Cr. B.A. No.S-625/2016) which the applicant placed great reliance on was based primarily on **Jamal-ud-din alias Zubiar Khans case** (Supra) I find it of little assistance to the applicant bearing in mind the later finding of a 3 member bench of the Hon’ble Supreme Court in **Socha Gul’s case** (Supra).

18. I also do not consider the absence of independent mushirs to be of much assistance to the applicant since this requirement

is explicitly excluded by S.25 of the CNSA which provides as under:

“25. Mode of making searches and arrest.— The provisions of the Code of Criminal Procedure, 1898, **except those of Section 103**, shall, *mutatis mutandis* apply to all searches and arrests insofar as they are not inconsistent with the provisions of Sections 20, 21, 22 and 23 to all warrants issued and arrests and searches made under these sections” (bold added).

19. CNSA is a special law and has deliberately excluded the operation of S.103 Cr.PC. Even otherwise in my view in this day and age very few persons, if any, would like to associate themselves as Mushirs in a narcotics case where they may expose both themselves and their family to retribution by the drug mafia. In this day and age the law needs to be both practical and flexible to meet the needs of the time and realizing the reluctance of persons to associate themselves as Mushirs in narcotics cases perhaps this was the reason why this requirement was deliberately excluded from the CNSA. In my view to allow bail on this ground alone is unlikely to meet the ends of justice in this case especially when the other particular facts and circumstances of the case are taken into account.

20. I also note that a massive amount of charas (4.5 KG) has been recovered from the applicant and the offenses involving narcotics have been classified as a crime against society in **Socha Gul's case** (Supra), that the chemical report is positive, recovery was made from the applicant from the spot and the fact that prima facie at the bail stage the case falls within the prohibitory clause and bail is to be granted very cautiously and sparingly in narcotics cases especially where massive recoveries have been made and prima facie there appears to be sufficient

material to connect the applicant with the offense for which he is charged.

21. Pursuant to the above discussion I am **not** inclined to grant the applicant post arrest bail at this stage and as such his application for post arrest bail stands dismissed. However the trial court is directed to decide the matter within 3 months of the date of this order bearing in mind that the applicant has already been in custody for approx 5 months. The office is directed to provide a copy of this order to the concerned trial court for compliance

22. This application stands disposed on in the above terms

Hyderabad

Dated: 06-04-2017