

ORDER SHEET
IN THE HIGH COURT OF SINDH, KARACHI
CR. B.A. NO. 1463 OF 2016

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

BEFORE:

MR. JUSTICE ARSHAD HUSSIAN KHAN

Siraj Muhammad Vs. The State

Mr. Inamullah, Advocate for applicant
Mr. Zafar Ahmed Khan, Addl. P.G.

Date of Hg: 07.11.2016.

Date of Order: 14.11.2016

ARSHAD HUSSAIN KHAN, J: Through this order, I intend to dispose of above bail application.

2. The applicant/accused namely, Siraj Muhammad son of Peer Muhammad, through the above bail application has sought post arrest bail in case bearing F.I.R. No.324/2016 registered under Section 6/9-C C.N.S Act 1997, at Police Station Shah Faisal Colony, Karachi.

3. Brief facts, as narrated in the F.I.R., are that on 05.09.2016 complainant Muhammad Yaqoob, ASI alongwith other officials of the PS Shah Faisal Colony, Karachi while patrolling the area in a police mobile received a spy information that at *Chakoor* (square) *Nala*, near Railway *Phattak*, Shah Faisal Colony, Karachi, one person is selling *Charas*. On such information, the complainant alongwith other officials reached at the spot about 0110 hours and on pointation of spy, apprehended the person standing there in suspicious condition. Upon inquiry, he disclosed his name as Siraj Muhammad son of Pir Muhammad whose personal search was made in presence of the accompanied police personnel due to non availability of private witness and recovered two pieces of *Charas* from a white color polythene shopper bag holding in his right hand, which was weighed at the spot through digital scale and found 1020 grams and upon further personal search cash amount of Rs.180/- as sale consideration was also recovered from the front pocket of his wearing shirt. With

recovered Charas the Act of the accused falls under Section 6/9-C Control of Narcotics Act, 1997 and he was arrested.

4. The case of the applicant/accused as averred in the bail application is that the applicant/accused is innocent and has been implicated in the case by the police with malafide intention and bad motives. It is also averred that nothing has been recovered from the applicant/accused and in fact the same has been foisted upon him due to the enmity of the area police. Further averred that FIR is blind as it does not mention describing of the recovered *Charas*, whether the same was *Charas Garda* or *Charas Pukhta*. Further averred that violation has been committed while registering the FIR as despite receiving spy information and thickly populated area of *Chakoor Nala* near Railway *Phathak*, Shah Faisal Colony, Karachi, the police could not bother to associate the credible witness from the place of occurrence that create doubt about the prosecution story. Furthermore, mandatory provision of Section 21 CNS Act, 1997, has been violated as envisaged in the said Section that ASI is not competent to arrest, seized and lodged FIR against a person having suspicion of commission of offence. It is also averred that present case is a borderline case as the same attracts the provisions of Sub-Section 9(b) & 9(c) of Control of Narcotic Substances Act, 1997. Further averred that the alleged offence does not fall within the prohibitory clause of Section 497 Cr.P.C. and the accused/applicant is a heart and Diabetic patient.

5. Learned counsel for the applicant/accused, during the course of his arguments while reiterating the contents of the application, has contended that the case of the applicant is a clear-cut case of further enquiry and the applicant is entitled to the grant of bail. Learned counsel in support of his arguments has placed reliance on the following case law.

(i) **2010 SLJ 32** *Awal Khan Vs. The State.*

In this case the bail, after arrest, was granted by this court on the ground that ASI was not empowered to effect recovery of narcotics. Mashirnama did not show that the case property was weighted and sample obtained from recovered charas was sealed at the spot, even the place of recovery was not mentioned in FIR, no

private person was taken as Mashir despite the advance information.

(ii) **2016 MLD 920** *The State Vs. Waris Khan*

In this case the state preferred appeal against the judgment passed by learned special judge Haripur, whereby he acquitted the accused from the charges under Section 9-C CNSA read with Article 3 & 4 of Prohibition (Enforcement of Hudood) Order. The learned Division Bench of Peshawar High Court while dismissing the appeal has held that despite prior information about selling of charas by accused, no independent witness had been associated, which could support the prosecution case. Further held that person below the rank of Sub-Inspector had no power to seize, search and arrest accused. Prosecution had failed to bring on record any history of conviction of accused in previous cases. It is also held that mere registration of other FIRs against accused, could not be made ground of his conviction. In the said case material contradictions were noticed in the statement of prosecution. Finally, it is held that Trial Court, in circumstances, had rightly acquitted accused from the charges levelled against him through impugned judgment, which needed no interference by the High Court.

(iii) **2016 SCMR 1424** *Ateeb Ur Rehman @ Atti Mochi Vs. The State and others*

In this case Hon'ble Supreme Court while granting the post arrest bail to the petitioner has held that the recovery memo available on the file of police record, could not show that the recovered heroin was weighed along with the polythene bag or otherwise. If the recovered heroin was weighed along with the polythene bag, prima facie, the weight of the heroin without the polythene bag, if weighed, might have come to 1000 grams or less than that and in that eventuality, the case of the present petitioner would have fallen within the ambit of section 9(b) of the Control of Narcotic Substances Act, 1997. In this backdrop, the case of the petitioner becomes one of further enquiry falling within the purview of section 497(2) of the Code of Criminal Procedure.

(iv) **2016 P.Cr.LJ 831** *Wajid alias Waji V. The STATE*

In the case, High Court while granting the bail to the accused has held that only 1500 grams of Charas was allegedly recovered from the accused hence the case appeared to be a borderline case, which attracted the provisions of Ss. 9(b) & 9(c) of Control of Narcotic Substances Act, 1997, and the benefit of such discrepancy was, therefore, to be extended to the

accused. It is also held that no private witness had been associated with, and no private person had signed the Mashirnama of arrest and recovery furthermore prosecution did not claim that the accused was previously involved in the same nature of cases. Besides, the State counsel had given his no objection to the grant of bail to the accused.

(v) **2009 PCr. LJ 315** *Sohail alias Gang Vs. The State*

In the case, High Court granted the bail to the accused on the ground of further inquiry as in the F.I.R., the accused was shown selling Charas, but no purchaser was present at the alleged time of sale of the Charas, because no statement of the purchaser seemed to have been recorded by the Investigating Officer. Further nowhere in the F.I.R., the complainant had stated that he knew accused previously. Accused was arrested after about more than six months from the date of alleged incident. It is held that Investigating Officer was obliged to get the identification parade of accused held before Magistrate from the other witnesses who were allegedly present at the time of arrest of accused, but no identification parade had been held, which had badly reflected on the case of the prosecution. No samples had been sent to Chemical Examiner after inordinate delay without just and sufficient explanation.

(vi) **2015 P.Cr.LJ Isb 224** *Muhammad Abid Farooq Vs. The State and another.*

In this case, the High Court, while granting the bail to the accused on the ground of further inquiry has held that alleged offence not falling under prohibitory clause of S.497, Cr.P.C. and further where offence did not fall within prohibitory clause of S.497, Cr.P.C. grant of bail had to be considered favourably as a rule and could only be declined in exceptional cases, namely, where accused was likely to abscond, tamper with prosecution evidence, repeat the offence if released and/or where accused was a previous convict. The court also noticed that F.I.R. was registered by delay of 3 months. It is also held that every person had to be presumed innocent until proved guilty. Presumption of innocence was basis of right to defence of an accused and key to fair trial. Further held that under Art.10-A of the Constitution right to fair trial was a fundamental right. Further held that person facing trial in multiple F.I.Rs. had independent right to defend himself in each case. Mere factum of registration of cases was not sufficient to form opinion that accused was a hardened, desperate or dangerous criminal in terms of fourth proviso to subsection (1) of S.497, Cr.P.C. Court could not allow itself to be prejudiced or influenced by registration of another case/multiple cases or even conviction as any

such influence would deny accused the right to fair trial and due process. It is also held that discretion to grant bail could not be exercised in arbitrary, fanciful or perverse manner. Where accused had made out a case for grant of bail on reasonable grounds, refusal of bail on ground of conviction in some other case would give rise to factor of bias which would deprive accused of the right to defence, due process and fair trial.

(vii) **2014 YLR Sindh 188** *Ali Hassan alias Hasan Vs. the State.*

In this case while granting the post arrest bail to the accused Bail, High Court held that the accused has made out the case of further inquiry on the grounds that (i) Non-association of private witnesses in spite of spy information, punishment for the offence not falling within prohibitory clause of S.497 (1), Cr.P.C., (ii) Accused was allegedly found in possession of 1540 grams of charas, (iii) Although police witnesses were good witnesses as others but simultaneously it was the duty of police officer to make all efforts to join independent witnesses when there was such a possibility, and in case of failure to do the same, it should be justified with explanation, (iv) Maximum punishment for the offence, if proved, did not fall within the prohibitory clause of S. 497(1), Cr.P.C., and (v) Record did not show that accused remained involved in offences similar to the present one.

(vii) **2011 YLR Karachi 1723** *Ghulam Abbas v. The State*

In the case, High Court while granting the bail to the accused on the ground of further inquiry has held that complainant party despite receiving the alleged spy information had failed to associate any private witness to attest the alleged recovery of charas; and no purchaser of the charas in question had been cited in the F.I.R., though accused was allegedly selling the charas. Further held total quantity of alleged charas being 1100 grams, marginally exceeded to the borderline, falling between the offence under S.9 (b) & 9(c) of Control of Narcotic Substances Act, 1997 therefore the case of accused, in circumstances, needed further inquiry. Besides the accused was in jail since 19-11-2009 after his arrest.

(viii) **2012 SCMR 606** *Jafar @ Jafari Vs. The State*

In this case, the Hon'ble Supreme Court set aside the conviction/sentence of the appellant on the ground that the parties have compromised the matter and the learned Sessions Judge, Okara vide his reports dated 2-2-2011 and 8-6-2011 has proved the genuineness of the

compromise, enabling the parties to have good relations in future and since right of Qisas and Diyat has also been exercised by the complainant party wherein they have forgiven the accused/appellant in the name of Allah Almighty. In this case, it is also noticed that no sufficient evidence is available on record to conclude that the accused/appellant is habitual offender, coupled with the fact that although another F.I.R., referred to by the learned Additional P.G., has been registered against him but it, itself is not sufficient to prove the appellant to be so, unless it is proved/established that he has been convicted in the said F.I.R. and the said conviction has been finally maintained by the superior Courts.

(ix) **SBLR 2016 Sindh 676** Arbab alias Arbab Ali Vs. The State.

In this case, FIR registered under Section 9 (c) CNS Act. 1997 in respect of 1250 grams Charas recovered to the accused. High Court granted the bail to the accused on the ground that the case of accused does not fall within the prohibitory clause and as such required further inquiry.

(x) **SBLR 2016 Sindh 29** Muhammad Hanif Vs. The State

In this case, High Court while granting the post arrest bail to the accused in the case has observed that admittedly alleged contraband narcotics is Charas weighing about 2500 grams. No private witnesses have been associated though recovery place was thickly populated area required further probe. Furthermore, the case does not fall within the prohibitory clause of Sub-section (1) of Section 497 Cr.P.C. and also the prosecution did not claim that accused was previously involved in the same nature of cases.

Underlining is made just to distinguish the factors of the present case with the cited cases

6. The learned Addl. P.G. for the state has vehemently opposed the bail application and argued that present case falls within the exceptions of the general rule. Learned Addl. P.G. has further argued that the applicant/accused is previously convicted in crime No.1143/2014 under Section 6/9-A, CNS Act 1997 and he is habitual offender, and as such he is not entitled to the concession of bail in the present case. Learned Addl.P.G has also relied upon the following case law:-

(i) **2008 SCMR 1254** Zafar Vs. The State.

In this case, the Hon'ble Supreme Court while

dismissing the appeal has held that sections 20 to 22 of C.N.S. Act. being directory, non-compliance thereof would not be a ground for holding the trial/conviction bad in the eyes of law. Further held that the police employees are the competent witnesses like any other independent witness and their testimony cannot be discarded merely on the ground that they are the police employees.

(ii) **2009 SCMR 306** *Abdul Rasheed Vs. The State.*

In this case, the Hon'ble Supreme court while dismissing the appeal has observed that non-association of the public witnesses at the time of raid by the raiding party is concerned, suffice it to observe that application of provisions of section 103, Cr.P.C. has been excluded under section 25 of the Act, as laid down by this Court in *Fida Jan v. The State* 2001 SCMR 36.

7. After giving careful consideration to the arguments of the learned counsel for applicant/accused and Addl.P.G, as well as perusal of record, I find that the applicant/accused is nominated in the FIR with specific role and further the applicant/accused was arrested at the spot at day time and a contraband narcotics have been recovered from the exclusive possession of the accused. Furthermore, there is no denial of previous conviction of the applicant/accused in same nature of the case. By now the law and principles for granting and/or rejecting the bail are well settled. It is important to note that in the case of *Zafar Iqbal v. Muhammad Anwar and others* (2009 SCMR 1488), a larger Bench of the Honourable Supreme Court has elucidated the principles for considering the grant of bail, where offences fall within the non-prohibitory clause. In the light of the said principles it has been held that where offences fall within the non-prohibitory clause, the granting of bail has to be considered favourably as a rule, but may be declined in exceptional cases. Examples whereof, given in the cited case are as follows:-

- I. Where there is likelihood of abscondance of the accused;
- II. Where there is apprehension of the accused tampering with the prosecution evidence;
- III. Where there is danger of the offence being repeated, if, the accused is released on bail; and
- IV. Where the accused is a previous convict.

8. As regards the contention of the learned counsel for the

applicant/accused that no credible witness and private person was associated as Mashir in this case, the same is misconceived as much as by virtue of section 25 of the Act non-citing of public witness is not fatal to the prosecution case as section 103, Cr.P.C. has been excluded from its application in cases of narcotics. In this context reference can be placed on a case of *Zulfiqar Ahmed vs. The State (2006 SCMR 800)*. Furthermore, the Hon'ble Supreme Court in the cases of *Muhammad Khan v. The State (2008 SCMR 1616)*, *Tariq Mehmood vs. The State through Deputy Attorney-General, Peshawar (PLD 2009 SC 39)* has held that mere fact that the witnesses belong to police is no ground to discard their evidence. They are as good and respectable witnesses as other public witnesses and their statement cannot be discarded for the reasons that they were the police employees.

9. As regards the other contention of the learned counsel of the applicant/accused, that violation of Sections 21 and 22 of the Control of Narcotic Substance Act 1997, is concerned, this question has been elaborately decided in a case of *Muhammad Younas and others v. Mst. Parveen alias Mano and others (2007 SCMR 393)* by the Hon'ble Supreme Court of Pakistan wherein para-7 it has been held as under:-

"The other argument of the learned counsel for the respondent No.1 as to the violation of the provisions of sections 21 and 22 of the Act needs to be dealt with. Ordinarily, only an officer of the rank of Sub-Inspector or equivalent or above may exercise the powers of arrest and seizure of narcotics. But this is not an absolute rule. There may be cases of extreme urgency requiring prompt action, where an accused is caught with narcotics in his possession by a Police Officer of a lower rank. Can it be said that such Police Officer should just let him go with the narcotics? The answer would certainly be in the emphatic "No". The guilt or innocence of an accused does not depend on the question of competent or otherwise of a Police Officer to investigate the offence. A trial of an accused is not vitiated merely on the ground that the case has been investigated by an officer who is not authorized to do so unless a contrary intention appears from the language of a statute. The competent Court would proceed to determine the guilt or innocence of an accused on the basis of the evidence produced before it irrespective of the manner in which he is brought before it."

In addition to the above, the Hon'ble Supreme Court in the

case of Zafar (supra) has very categorically held that Sections 20 to 22 of C.N.S. Act. are directory in nature, non-compliance thereof would not be a ground for holding the trial/conviction bad in the eyes of law.

10. Reverting back to the case in hand, it appears that the applicant/accused was arrested at the spot at day time and a contraband narcotics have been recovered from the exclusive possession of the accused, who is previously convicted in the similar nature of the case as well, hence the case of the applicant/accused falls in exceptional case as mentioned in the case of *Zafar Iqbal (supra)*.

11. So far the case law relied upon by the learned counsel for the applicant/accused are concerned the same are distinguishable to the facts of present case. Even otherwise, it is settled law that every criminal case is to be decided on its own merits.

12. In view of the foregoing, I am satisfied that on the basis of facts as available on the record, the prosecution has succeeded in making out a reasonable case which prima facie connects the applicant with the possession of the narcotics substances, which constituted an offence under section 6 of the C.N.S. Act, and therefore, I am of the view that the applicant has failed to make out a case for grant of bail. Accordingly, this bail application is hereby dismissed.

13. Needless to say the observations made in this order are of a tentative nature and only for purposes of this bail application. Nothing herein shall affect the determination of the facts at the trial or influence the trial Court in reaching its decision on the merits of the case.

JUDGE