

IN THE HIGH COURT OF SINDH COURT AT KARACHI

Criminal Bail Application No. 1373 of 2018

Lutufullah Applicant
Versus
The State Respondent

Mr. Muhammad Ijaz Tanoli, Advocate for the Applicant.

Mr. Habib Ahmed, Special Prosecutor for ANF.

Date of hearing : 25.10.2017

ORDER

Adnan-ul-Karim Memon, J. – The Applicant namely Lutfullah is seeking post arrest bail in F.I.R No. D 0107010/2017 registered at Police Station Anti-Narcotic Force, Clifton Karachi, for offences punishable under section 6 read with section 9 (c), Control of Narcotic Substances Act, 1997.

2. Brief facts of the prosecution case are that on 08.03.2017 at about 1600 hours Sub-Inspector Atif Sagheer of Police Station Anti-Narcotics Force, Clifton, Karachi lodged F.I.R against Applicant on the basis of information that Narcotic Smuggler Muhammad Khan Afridi's people namely Shakeel and Lutufullah have to deliver Narcotic drugs to special customer at Korangi Industrial area Bilawal round about near petrol pump at about 1300 hours, in vehicle bearing registration-AWZ-105. On receipt of said information a raiding party was formed, consisting of complainant, ASI Nawab Alam, HC Muhammad Rafz PC Saghram Das, PC Waqas Ahmed, PC Sher Bahadur, PC Sajid Ali, P.C Taufeeq-ul-Hassan, SIP Fida Hussain and driver Muhammad Ahsan and other Anti-Narcotic Force staff, under the supervision of D/D Ahsan-ul-Haq

Incharge Police Station Anti-Narcotics Force, Clifton Karachi, vide roznamcha Entry No.5. At 1215 hours, they reached at expected scene of crime and started conducting secret surveillance and at about 1315 hours they saw that from the southern sides a Core Car bearing registration no. AWZ-105 silver color stopped at the main road of Bilal colony and the two people found seated within it were apprehended. Police officer asked the people of the locality to act as witnesses but they refused, then PC Sajid Ali and PC Taufeeq were directed to act as Mashirs. The name of the apprehended people were inquired from them and the person occupying the driving seat identified himself as Muhammad Shakeel Son of Muhammad Ayoub, whereas the one sitting next to him identified himself as Lutufullah son of Mawaz Khan. However, they tried to deceive and mislead the police personnel and refrained from coming out clean but after being persistently questioned they conceded that narcotics were hidden beneath the front seat. Thereafter, the vehicle was searched and as per discloser of the accused three packets wrapped with yellow solution tape containing charas were recovered from beneath the front seat. The weight of each packet was measured to be 1 K.G amounting to a total of 3 Kg for three packets. The same was taken into custody and was sealed at the spot under mushirnama, and from all the packets 10/10 gram charas was taken out and sealed in a brown envelope for the purpose of chemical analysis. Police also recovered other material from the custody of accused. Accused and recovered properties were brought to the police station. Thereafter, the police lodged FIR under section 6 read with section 9-C of Control of Narcotic Substance Act, 1997 against Applicant and others.

3. I have noticed that the applicant filed Cr. Bail Application No. 845/2017 before this Court, which was dismissed vide order dated 21.07.2017, thereafter he filed another bail application No.378/2018,

which was too dismissed as not pressed vide order dated 02.04.2018. Now this is afresh bail application moved by the Applicant, impugning the order dated 18.08.2018 passed by the learned Judge, Special Court-II (CNS) Karachi.

4. Mr. Muhammad Ijaz Tanoli, learned counsel for the Applicant has contended that the Applicant moved first bail application before this Court and the same was disposed of vide order dated 21.07.2017 with directions to the learned trial Court to record evidence of the material witnesses within a period of three months and the same directives were not complied with. He further contended that the Applicant moved second bail application before this Court, which was not pressed, however, certain direction was issued to the learned trial Court to examine the material witnesses but the said direction were not complied with. The learned counsel for the Applicant has drawn my attention to the decision rendered by Hon'ble Supreme Court of Pakistan in the case of ***Imtiaz Ahmed v. the State (2017 SCMR 1194)*** and argued that the right of speedy trial is a fundamental right of the Applicant/accused and any unreasonable delay in conclusion of the trial before the Special Court would amount denial of justice. He next added that delay in conclusion of trial is a ground for grant of bail as the Applicant is behind the bar for almost 20 months while conclusion of the trial is not insight because the prosecution witnesses are not turning up inspite of the directions given by learned trial Court. In support of his contention, he relied upon the case of ***Riaz-ur-Rehman v. The State (2017 P.Cr.L.J 1661)*** and ***Shaukat Ali v the State and others (2017 P.Cr.L.J 1020)***, At this stage learned counsel for the Applicant attempted to argue the case on merits in spite of knowing the fact that Applicant's earlier bail application was dismissed on merits, however he insisted that this matter may be decided on merits. On merits he

contended that the recovery of 3 K.G. of Charas is foisted upon the applicant in a pre-plan conspiracy; that witnesses of the alleged recovery has not been cited from the locality, therefore, alleged recovery is doubtful; that there is violation of section 103 Cr.P.C; that co-accused Muhammad Shakeel has been granted bail vide order dated 13.05.2017 while bail was declined to the applicant by the learned trial court therefore rule of consistency is applicable in the case of applicant; that as per chemical report and ratio of its weight, the applicant cannot be accounted for the whole Narcotic Substance but for the material sent to the chemical examiner i.e. 30 grams, which does not fall with the prohibitory clause 497(1) Cr.P.C therefore, the applicant is entitled for the concession of bail; that the applicant belongs to very poor family and he has been involved by the complainant only for not fulfilling the illegal demand of the complainant; Per learned counsel Applicant has no previous criminal record and entire case requires further enquiry into the guilt of Applicant. He lastly prays for grant of bail to the Applicant on merits as well as on statutory delay.

5. During the course of the arguments the learned counsel has drawn my attention to the Order dated 18.8.2018 passed by learned Judge Special Court-II, CNS Karachi, whereby the Bail Application moved by the Applicant in Special Case No.246 of 2017 was declined.

6. Conversely, the learned Special Prosecutor has contended that the direction given by this Court to the learned trial Court twice in the matter does not entitle the Applicant for the concession of bail. In support of his contention, he relied upon the case of **Nisar Ahmed v. the State (PLD 2016 SC 11)** and argued that non-compliance of the direction of this Court cannot be considered as a valid ground to grant bail to the Applicant. He next contended that this is a case of inordinate delay and the Applicant cannot claim bail on the ground of statutory

delay, which is not available to him at this stage. In support of his contention, he relied upon the case of ***the State through Deputy Director Anti-Narcotics Force Karachi v. Mobin Khan (2000 SCMR 299)*** and argued that the offence in which the applicant is involved carrying life imprisonment and death sentence, therefore, the grant of bail to the Applicant on the ground of inordinate delay is still not available with the Applicant. He attempted to justify his assertion by saying that three KG Chars was recovered from his exclusive possession thus the applicant is not entitled for concession of bail. He next argued that the learned trial Court has started recording the evidence of the Investigating Officer and the matter is in progress, therefore, the direction may be given to the learned trial Court to examine remaining material witnesses. At this stage, the learned counsel for the Applicant has conceded the factual position and informed this Court that when the instant bail application was filed before this Court, on the very day, the Investigating Officer was examined by the learned trial Court, this factual position is also endorsed by learned Special Prosecutor for ANF.

7. I have considered submissions of the parties and perused the material available on record, case law cited at the bar as well as impugned order passed by the learned trial Court in the aforesaid matter.

8. The learned trial Court in order to elaborate the direction given to it by this court vide orders dated 21.07.2017 and 02.04.2018 made an abortive attempt as follows:-

“7. It further appears that two bail applications were dismissed on merits and the Hon’ble High Court of Sindh pleased to dismiss the bail application with the direction to examine material witnesses within 3 months which unfortunately has not be complied with due to the circumstances as enumerated as above. Now charge has been framed against accused Lutufullah and the matter was fixed for evidence on 18.08.2018.

8. Furthermore this Court has heavy jurisdiction of three districts of Karachi included the cases of customs, excise and ANF and on daily basis 10 to 15 new cases are instituted and due to quantum of work disposal of cases absolutely takes a lot of time. I am fortified with the case law cited as 2000 SCMR 299, in this case law the Hon’ble Supreme Court of Pakistan pleased

to observe that the first bail application of the accused persons was dismissed by the Hon'ble Division Bench of Hon'ble High Court of Sindh and later on, the statutory delay the bail application was moved which was allowed and the same order was impugned before the Hon'ble Supreme Court of Pakistan and the Hon'ble Supreme Court of Pakistan inclined to hold that in view of sub-section (1) of section 51 of the CNS Act, 1997 read with clauses (b) and (c) of section 9 and 3rd proviso of Section 497 Cr.P.C cannot be pressed into service in case in which quantity of narcotic drug, psychotropic substance and controlled drug exceed one Kg and which may entail, inter alia, death sentence and the order of the Hon'ble High Court of Sindh was set aside and the bail was cancelled. The delay is not a ground for bail when the bail of the accused have been dismissed on merits. In another reported case PLD 2016 SC 266 the Hon'ble Supreme Court of Pakistan observed that non-compliance of direction is not a ground for bail."

9. Be that as it may, I am not persuaded to agree with the aforesaid reasoning of the learned trial court for the reason that **this Court directed the learned trial court to record evidence of the material witnesses within a period of three months.** The learned trial Court instead of compliance of the Orders of this Court, prima-facie has ignored the same. **Emphasis Added**

10. This Court while invoking its Supervisory Jurisdiction under Article 203 of the Constitution of the Islamic Republic of Pakistan, 1973 does not endorse the impugned action of the learned trial court which is in violation of strict command of Article 203 of the Constitution.

11. In such circumstances of the case, I am of the view that the direction given by this Court in bail matters may not be taken lightly in future. Now it is well settled law that: **To have a speedy trial, is the fundamental right of accused being universally acknowledged. Under the Criminal Procedure Code, smooth methodology and scheme for speedy trial, is provided whether it is held by the Sessions Court or Magistrate, in recognition of the said right of an accused person. This principle shall apply more vigorously to the trials before Special Courts, constituted under the CNS Act, or any other special law so that unnecessary delay, much less shocking one in its conclusion is avoided in all circumstances. Any unreasonable or shocking delay in the conclusion of the trial, before Special Courts, would amount to denial of justice, or to say, denial of fundamental**

rights, to the accused, of speedy trial. (Emphasis Added). I am fortified with the decision rendered by the Hon'ble Supreme Court of Pakistan in the case of **Imtiaz Ahmed vs. The State (2017 SCMR 1194).**

12. Reverting to the merits of the case, it is well settled law that once bail application of the Applicant is dismissed on merits, he can only apply for post arrest bail before this Court on fresh ground, if any, available to him under the law. I am fortified with the decision rendered by the Hon'ble Supreme Court of Pakistan in the case of **Muhammad Aslam v. the State & others (PLD 2015 SC 41).** An excerpt of the order dated 21.7.2017 passed by this Court is reproduced as under:-

“7. Tentative assessment of record reflects that applicant is arrested red-handed with possession of 3 K.G of Charas (Narcotics Substances). The recovery of Charas was duly witnessed by the police officials who are as good witness as any other person and who had no ostensible reason to falsely implicate the Applicant in a case of present nature. Chemical Examination Report supports the prosecution case. Reverting to the arguments of non- performance of provisions of section 103 Cr.P.C. Section 25 of Control of Narcotic Substances Act, 1997 excludes applicability of section 103 Cr.P.C. thus, ratio of judgment in the case of Ghulam Murtaza (Supra) relied upon, is not relevant at bail stage. Case of the Applicant is hit by prohibition contained in Section 51 of the Control of Narcotic Substances Act, 1997. Therefore no case of further enquiry is made out. Reliance is safely made in the case of Socha Gul vs. The State (2015 SCMR 1077). Rule of consistency is not applicable in the present case as Applicant has failed to produce any material to suggest that he is falsely implicated in the alleged crime, merely saying that Applicant has been implicated by Anti-Narcotic Force due to non-fulfilling of their illegal demands is not sufficient to discard the prosecution story as false, which is even otherwise a factual controversy and, at bail stage only tentative assessment of the record is to be made. Besides that the offence falls under section 9 (c) of Control of Narcotic Substance Act, 1997 which is punishable with life imprisonment.

8. The case law cited by the learned counsel for the Applicant is distinguishable from the facts and circumstances of the case in hand.

9. In view of the above facts and circumstances the Applicant has not made out a case for grant of bail at this stage therefore, the instant bail application is dismissed.

10. The findings mentioned above are tentative in nature which shall not prejudice the case of either party at the trial stage. However, the learned Trial Court is directed to record evidence of the material witnesses within a period of three months where after the Applicant will be at liberty to move fresh bail application before the learned Trial Court on fresh ground, if any.”

13. That the instant bail application has been filed by the Applicant on the strength of third Proviso to Section 497 Cr.P.C alone without any other fresh ground. Prima-facie this is not a case of statutory delay as the offence under Section 9 (c) is punishable with life imprisonment and death sentence. And, third proviso of sub-section (1) of Section 497 provides statutory period of two years, whereas the Applicant has not crossed the period prescribed in the aforesaid proviso, therefore, Applicant's assertion is totally misconceived.

14. The case laws that is, **Riaz-ur-Rehman vs. The State (2017 P.Cr.L.J 1661)** and **Shaukat Ali vs. The State and others (2017 P.Cr.L.J 1020)** cited by the learned counsel for the Applicant are quite distinguishable from the facts and circumstances of the instant bail application.

15. In view of the above facts and circumstances, the Applicant has failed to make out a case for grant of post arrest bail. Therefore, the instant bail application is dismissed.

16. The findings of this Court on the grounds of bail are tentative in nature which shall not prejudice the case of either party in the trial proceedings.

17. From the forgoing, the learned Trial Court is directed to record evidence of the remaining witnesses within a period of two months, where after the Applicant will be at liberty to move fresh Bail Application before the learned Trial Court on fresh ground if any and the learned trial Court shall decide the same on merit, keeping in view the judgment rendered by the Hon'ble Supreme Court of Pakistan in the case of **Imtiaz Ahmed Vs. The State, through Special Prosecutor ANF, (2017 SCMR 1194)**, and observation made by this Court in the preceding paragraph.

18. These are the reasons of my short order dated 25.10.2018, whereby I have dismissed the captioned bail application.

19. Before parting with this order, I expect from the learned trial Court that the direction of this Court, particularly in the bail matters shall be adhered to in future and valid reasons are to be assigned, if the trial is not concluded within the stipulated time. Let a copy of this order be sent to all Special Courts (CNS) at Karachi, through learned Registrar of this Court, for information and compliance. In the meanwhile MIT-II of this Court is directed to call monthly reports from all Special Courts (CNS) at Karachi, on the strength of third Proviso to Section 497 Cr.P.C, more particularly, in view the dicta laid down by the Hon'ble Supreme Court of Pakistan in the case of Imtiaz Ahmed Vs. The State, through Special Prosecutor ANF, (2017 SCMR 1194).

JUDGE

Karachi
Dated: 29/10/2018

S.Soomro/PA