

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No. 2186 of 2021

Date	Order with signature of Judge
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For hearing of bail application :

25.01.2022 :

Hafiz Sharifullah, advocate for the applicants / accused.

Mr. Zafar Ahmed Khan, Addl. P.G.

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NADEEM AKHTAR, J. – Through this bail application under Section 497 Cr.P.C., the applicants / accused Abdul Bari, Naimatullah and Shahjahan seek admission to post-arrest bail in Crime No.609/2021 registered against them on 26.10.2021 at P.S. Gulshan-e-Maymar, Karachi West, under Sections 6 and 9(c) of The Control of Narcotic Substances Act, 1997 (**‘the Act of 1997’**). The applicants / accused had filed Criminal Bail Application No.5655/2021, which was dismissed by the learned Additional Sessions Judge-I Karachi West (Model Criminal Trial Court) vide order dated 09.11.2021.

2. The case of the prosecution, as set up in the subject FIR, is that during the patrolling of the area by the police party on the date and at the time and place mentioned in the FIR, 2,260 grams of charas was recovered by the police from vehicle No.BSA-737. According to the FIR, the applicants disclosed to the police party that applicant No.1 Abdul Bari was the driver, applicant No.2 Naimatullah was the second driver and applicant No.3 Shahjahan was the conductor of the said vehicle. The recovered charas was seized and sealed on the spot and was sent for chemical examination.

3. It is contended by learned counsel for the applicants that there is malafide on the part of the police as the applicants have been falsely implicated in the subject crime with an ulterior motive ; the alleged recovery has been foisted upon the applicants ; there is no independent witness of the alleged crime due to which the case set up by the prosecution has become doubtful ; the vehicle in question was a passenger bus with thirty two passengers which fact has not been disclosed in the FIR nor have their names been mentioned therein ; the recovered charas could have been left in the vehicle by any of the said passengers ; the matter requires further inquiry ; the applicants have no previous criminal record ; and, there is no apprehension that the evidence will be tampered with or that the witnesses of the prosecution will be influenced by the applicants, or they will abscond if they are released on bail.

4. On the other hand, learned Addl. P.G. contends that the FIR clearly shows that a substantial quantity of charas was recovered from the bus which was in the possession and control of the applicants ; the role of the applicants in relation to the commission of the subject offence is specific and clear in the FIR ; there was no delay in lodging the FIR or in sending the narcotic substance recovered from the bus for chemical examination ; and, the report submitted by the Chemical Examiner supports the case of the prosecution. The allegation of malafide and ulterior motive on the part of the police officials has been specifically denied by the learned Addl. P.G. It is further contended by him that the offence committed by the applicant falls within the ambit of Clause (c) of Section 9 of the Act of 1997, and accordingly it falls within the prohibitory clause of Section 497 Cr.P.C. He submits that the concession of bail cannot be granted to any of the applicants in view of the law laid down by the Hon'ble Supreme Court in Kashif Amir V/S The State, **PLD 2010 S.C. 1052**,

5. I have heard learned counsel for the applicant and learned Addl. P.G. and have carefully examined the material available on record including the test report submitted by the Chemical Examiner after examining the charas allegedly recovered from the subject vehicle. I have noticed that the subject FIR was registered against one Abdul Hadi and applicants 2 and 3, and the report of the Chemical Examiner also reflects their names ; whereas, the charge sheet was submitted against applicant No.1 Abdul Bari and applicants 2 and 3, and the present bail application has also been filed by them. In order to explain the discrepancy in the name of applicant No.1, it was contended by learned counsel for the applicants as well as learned Addl. P.G. that his actual and correct name is Abdul Bari which was inadvertently mentioned as Abdul Hadi in the FIR, however, the mistake was corrected at the time of submission of the charge sheet. Learned counsel for the applicants states that this bail application should be decided on merits as it is not his case that applicant No.1 is entitled to the concession of bail due to the above mentioned discrepancy.

6. According to the test report submitted by the Chemical Examiner, the gross weight and net weight of charas allegedly recovered from the vehicle was 2,260 grams and 2,250 grams, respectively. The charas (cannabis) falls within category (i) specified in Clause (s) of Section 2 of the Act of 1997 substituted through The Control of Narcotics Substance (Sindh Amendment) Act, 2021, and the net weight thereof, being more than double the maximum limit of one kilogram (1,000 grams) prescribed in Clause (b) of Section 9 *ibid*, falls under

Clause (c) of Section 9. Therefore, this is not a borderline case between the said Clauses (b) and (c). The punishment of the offence falling under clause (c) is death or imprisonment for life or imprisonment for a term which may extend to fourteen years. Thus, the prohibition contained in Section 51 of the Act of 1997 shall apply to this case, and it also falls within the prohibitory clause of Section 497 Cr.P.C. Therefore, the applicants are not entitled to the concession of bail and there appears to be no exception to this rule in the facts and circumstances of the instant case.

7. The above view is fortified by Muhammad Noman Munir V/S The State and another, **2020 SCMR 1257**, wherein 1,380 grams of cannabis and 07 grams of heroin were recovered from the accused. In the said authority, the concession of bail was declined by the Hon'ble Supreme Court by holding that the prohibition embodied in Section 51 of the Act of 1997 was applicable thereto. It was also held that the non-association of a witness from the public and his non-cooperation was a usual conduct symptomatic of social apathy towards civic responsibility ; and, even otherwise the members of the contingent being functionaries of the State are second to none in their status, and their acts statutorily presumed, *prima facie*, were *intra vires*.

8. It has been argued on behalf of the applicants that they have been falsely implicated in the subject crime and the alleged recovery has been foisted upon them. However, it is not their case that applicants 1, 2 and 3 were not the driver, second driver and conductor, respectively, of the vehicle in question. In Kashif Amir (supra), the Hon'ble Supreme Court was pleased to hold that it is well-settled principle that a person who is on driving seat of the vehicle shall be held responsible for transportation of the narcotics having knowledge of the same ; no condition or qualification has been made in Section 9(b) of the Act of 1997 that the possession should be an exclusive one and it can be joint one with two or more persons ; when a person is driving the vehicle, he is in-charge of the same and it would be under his control and possession ; and, whatever articles lying in the vehicle would be under his control and possession. In Nadir Khan and another V/S The State, **1988 SCMR 1899**, it was held by the Hon'ble Supreme Court that knowledge and awareness would be attributed to the in-charge of the vehicle.

9. It is a matter of record that the charge sheet has been submitted in this case before the trial Court. The guilt or innocence of the applicants is yet to be established as it would depend on the strength and quality of the evidence

produced / to be produced by the prosecution and the defense before the trial Court. Therefore, it is clarified that the observations made herein are tentative in nature which shall not prejudice the case of either party nor shall influence the learned trial Court in any manner in deciding the case strictly on merits in accordance with law.

10. In view of the above, the instant bail application is dismissed with direction to the learned trial Court to conclude the trial of the subject case within two (02) months strictly in accordance with law. Let this order be communicated to the learned trial Court for compliance.

J U D G E