

Order Sheet
IN THE HIGH COURT OF SINDH, KARACHI
Cr. Bail Application No. 516 of 2021

Applicant: Rashid Kashmiri son of Meer Akbar,
through Mr. Hashmat Khalid, Advocate.

Respondent: The State, through Syed Meeral Shah,
Additional Prosecutor General Sindh.

Date of hearing: 29.04.2021

Date of order: 29.04.2021

Arshad Hussain Khan, J:- The applicant/accused through above bail application has sought post-arrest bail in the case registered under F.I.R. No.122 of 2021 at PS New Karachi, for an offence under Section 23(i)A Sindh Arms Act, 2013.

2. Briefly stated the facts of F.I.R. No. 122 of 2021 are that complainant SIP Saleem Siddiqui lodged the FIR stating therein that with reference to crime No. 121 of 2021 registered under section 23(i)A Sindh Arms Act 2013, the applicant/accused Rashid Kashmiri son of Meer Akbar was arrested and from his possession police recovered one rifle 223 magazine along with 22 rounds for which he could not produce license.

3. Learned counsel for the applicant/accused has argued that the applicant/accused is innocent and has falsely been implicated in the case with malafide intentions and ulterior motives. He has further contended that one Usama son of Muhammad Fareed, being relative of accused, was arrested by the police and after taking bribe the police released him on 15.02.2021 and when Usama reached at home he disclosed to his mother that accused Liaquat being his uncle (*Mamo*) along with others are also in the custody of police at PS North Karachi Industrial Area (N.KIA) and police also demanding bribe for their release. Consequently, on 17.02.2021 Mst. Zubaida, the sister of accused, sent an application to the Hon'ble Chief Justice of this Court and other forums as well as law enforcing agencies in respect of illegal detention of the applicant/accused including others by the police. It is also contended that the alleged arrest of the applicant/accused has been shown as 18.02.2021 whereas he was in custody of the police prior to the said date. He has further argued that the recovery has been foisted upon the applicant/accused; the applicant is a poor person and failed to

fulfill the demand of the police as such he has been implicated in false cases. Since he is behind the bars and there is no likelihood that the case of the applicant will be decided in near future. It is further argued that the alleged offence comes under the provision of sub-section 1(1) of section 8 of the Sindh Arms Act 2013 and the punishment for such category is for the terms which may extend to seven years and with fine, as mentioned in sub-section 2 of section 23 of the Sindh Arms Act, 2013. It is further contended that the Pakistan Arms Ordinance 1965 is parallel to the present act and under the Constitution of Pakistan when there are two existing law for one offence, at the bail stage, the lowest punishment is considered. He has argued that neither in the FIR, nor in the Memo of arrest and recovery and nor in the challan it has been mentioned that the recovered rifle was sent for FSL and as such no FSL report of ballistic expert is available on the record to ascertain finger print on it, which makes the case of accused for further inquiry. He has lastly prayed that the applicant/accused is also entitled for concession of bail in the above crimes.

4. Learned Addl.P.G. for the State while opposing the bail application prayed for dismissal of the same.

5. I have considered the arguments advanced by learned counsel for the applicant/accused and learned Addl. Prosecutor General as well as perused the material available on the record.

6. From perusal of the FIR, it appears that the present applicant has been arrested in another crime bearing No. 121/2021 registered under Section 23(i)A Sindh Arms Act, 2013 and subsequently from his possession rifle 223 along with 22 rounds were recovered and as such present FIR bearing No. 122 of 2021 was registered.

7. A perusal of the Sindh Arms Act, 2013, shows that the legislatures, within their wisdom, have parted the 'weapons' into four categories i.e. 'ammunition' , 'arms', 'firearms' and 'prohibited arms' and the Act itself provides the legal meaning of each category, legal limitations for possessing/carrying and punishment for contravention thereof.

Bare reading of the meaning of the "arms", "firearms" and "ammunition" would show that they relate to different category of weapons and have been defined there. The meaning of "arms" specifically includes rifles, pistols, revolvers, grenades, swords, bayonets and other lethal weapons while no such weapon has been included in the meaning of the 'firearms ". The word riot-pistol, used in the meaning of 'firearms" needs not be confused with that of pistols because riot-pistol (or less -lethal launcher) is a type of firearm that is used to fire 'non-lethal' ammunition for purpose of suppressing riots. It is pertinent to mention that deliberate use of the words "arms", "firearms and ammunition" leave nothing to doubt the intention of the Legislatures that they mean to categorize weapons.

The above position also stands crystal clear from reading of Chapter-V of the Act, which deals with the offences and penalties. Therefore, it will be advantageous to reproduce the relevant penal sections.

“Section 23(1) ---Whoever --

(a) acquires, possesses, carries or control any firearm or ammunition in infringement of section 3, shall be punishable with imprisonment for a term which may extend to fourteen years and with fine;”

“Section 24. Punishment for possessing arms with intent to use for unlawful purposes---Whoever possesses arms or ammunition licensed or unlicensed with the aim to use them for any unlawful purpose or to facilitate any other person to use them for any unlawful purpose shall, whether such unlawful purpose has been materialized or not, the license holder, the user and the person who has no license, be punishable with imprisonment for a term which may extent to ten years and with fine.”

[Emphasis supplied]

This Court in the case of *Ayaz Ali v. The State* [PLD 2014 Sindh 282], while dilating upon the issue in detail, inter alai, has observed as under:-

"9. The joint reading of section 23(1)(a) and section 24 of the Act would show that the subsection (1)(a) of section 23 of the Act deals with situation where one acquires, possession carries or control any firearm or ammunition in contravention of section 3 (i.e. 'license, for acquisition and possession of fire-arms and ammunition) while the section 24 of the Act punishment for possessing arms or ammunition licensed or unlicensed with the aim to use them for any unlawful purpose. It is germane to append there that plain reading of sections 23 and 24, elucidate that section 23(1)(a) provides maximum punishment up to 14 years, whereas section 24 provides up to ten

years, thus, apparently instant case, wherein recovery is pistol, which falls within the definition of "arms" as provided in the section 2, which carries maximum sentence ten years as provided in section 24 of the Sindh Arms Act, 2013.

10. As the quantum of punishment has to be determined by the trial court. In such like cases whether accused would be liable to the maximum punishment provided for the offence and also as to whether the punishment in case of proof of the guilt after trial in the circumstances would fall under the prohibitory clause are the questions requiring further probe, as the maximum punishment provided under section 24 of the S.A.A., 2013, is ten years, discretion is left upon the trial Court by the Legislature to decide the fate of the case according to the circumstances of the case commensuration with the nature of case. The record is also silent as to whether the applicant is a habitual or previous convict, hence all these facts make the case against him as that of further inquiry."

8. In view of the above referred dictum of this Court in the of case *Ayaz Ali* (supra), the offence involving recovery of unlicensed weapon namely; rifle carries maximum sentence up to 10 years as the same falls within the definition of 'arms' as per Section 2 (C) of SAA, 2013.

As regards the contention of learned Additional P.G that the alleged offence falls within the prohibitory clause of Section 497, Cr.P.C., it may be observed that the Court while hearing bail not to keep in view the maximum sentence provided by the Statute but the one which is likely to be entailed in the facts and circumstances of the case. The Honourable Supreme Court of Pakistan in case of *Jamal-ud-Din alias Zubair Khan v. The State* [2012 SCMR 573] inter alia, has held that:-

"4. without entering into the merits of the case, as the quantum of sentence has to be commensurate with the quantum of substance recovered, we doubt the petitioner can be awarded maximum sentence provided by the Statute. Needless to say that the Court while hearing, a petition for bail is not to keep in view the maximum sentence provided by the Statute but the one which is likely to be entailed in the facts and circumstances of the case. The fact that petitioner has been in jail for three months yet commencement of his trial let alone its conclusion is not in sight, would also tilt the scales of justice in favour of bail rather than jail."

9. In instant case perusal of the FIR reveals that there is no mention regarding preparation of *mashirnama* of arrest and recovery. Even the names of *mashirs* have not been mentioned in the FIR nor is it mentioned that the property recovered from possession of the accused was sealed at the spot. There is no F.S.L. report of ballistic expert on the record. The record further shows that the applicant/accused is not previous convict nor a hardened criminal. Moreover, the

applicant/accused has been in continuous custody since his arrest and is no more required for any investigation nor the prosecution has claimed any exceptional circumstance, which could justify keeping him behind the bars for an indefinite period pending determination of his guilt. There appears no likelihood of tampering in the prosecution case. Moreover, it is settled principle of law that bail cannot be withheld as punishment. It is also well settled that truth or otherwise of the charges could only be determined at the conclusion of trial after taking into consideration the evidence adduced by both the parties. Reliance can be placed on the case of Muhammad Nadeem Anwar and another v. National Accountability [2008 SC 645].

10. In view of the peculiar facts and circumstances of the case, I am of the opinion that prima facie, the applicant/accused has succeeded to bring his case within the purview of further inquiry and as such is entitled to bail and for this reason, he was admitted to bail subject to his furnishing solvent surety in the sum of Rs.1,00,000/- and P.R. Bond in the like amount to the satisfaction of the trial court, by my short order dated 29.4.2021.

11. Needless to mention here that any observation made in this order is tentative in nature and shall not affect the determination of the facts at the trial or influence the trial court in reaching its decision on the merits of the case. It is, however, made clear that in the event if, during proceedings, the applicant/accused misuses the bail, then the trial court would be competent to cancel the bail of the applicant/accused without making any reference to this Court.

Above are the reasons of my short order dated 29.04.2021.

Judge