

Order Sheet

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No. 1400 of 2021

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

13.09.2021 :

Syed Samiullah Shah, advocate for the applicant.
Ms. Amna Ansari, Addl. P.G. a/w SIP Riaz Ahmed of P.S. Aram Bagh.

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NADEEM AKHTAR, J. – Through this bail application under Section 497 Cr.P.C., the applicant / accused Usman son of Ahrar seeks admission to post-arrest bail in Crime No.378/2021 registered against him on 31.05.2021 at P.S. Arambagh Karachi under Section 23(1)(a) of the Sindh Arms Act, 2013 (**‘the Act of 2013’**). The applicant / accused had filed Criminal Bail Application No.2205/2021, which was dismissed by the learned 1st Additional Sessions Judge (Model Criminal Trial Court) Karachi South vide order dated 23.06.2021.

2. The case of the prosecution, as set up in the subject FIR, is that the complainant S.I. Muhammad Nadeem Haider Solangi of P.S. Arambagh Karachi, along with police constables Sohrab and Ghulam Muhammad, was patrolling the area in police mobile No.SP-1174 within the jurisdiction of the aforesaid police station ; when they reached Arambagh Park near Furniture Market which is about one kilometer from the above police station, they saw two suspicious persons on a motorcycle at around 1850 hours ; the said two persons were stopped by them who disclosed their names as Usman son of Ahrar (present applicant) and Faisal son of Shahabuddin ; the said two persons were thoroughly searched in the presence of the above named two police constables as no other person was willing to act as *mashir* / witness ; upon their personal search, an unnumbered T.T. pistol with loaded magazine and three live bullets was recovered from the front belt of the trouser of Usman and 140 grams of charas wrapped in a white plastic bag (*theli*) was also recovered from the right pocket of his trouser ; from Faisal, an unnumbered T.T. pistol with loaded magazine and three bullets was recovered which was hidden in the rear belt of his trouser, and 110 grams of charas wrapped in a white plastic bag (*theli*) was recovered from the front pocket of his shirt ; both the above persons could not produce the license of the pistols recovered from them ; and, the pistols and charas recovered from them were seized and sealed on the spot and they were arrested.

3. This bail application has been filed only by the present applicant / accused Usman ; and, a separate FIR bearing No.380/2021 was registered against him under Sections 6 and 9(b) of The Control of Narcotic Substances Act, 1997, for carrying charas, which is not the subject matter of the instant bail application.

4. It is contended by learned counsel for the applicant that there is apparent malafide on the part of the police as the applicant has been falsely and maliciously implicated in the subject crime with ulterior motive due to enmity ; the complainant party was trying to snatch the money which was being carried by the applicant in his wallet and upon his resistance, he was implicated in the subject crime ; despite the fact that the place of arrest of the applicant was a densely populated area, no independent witness was associated by the complainant party nor did they disclose the names of such independent persons who allegedly did not cooperate with them ; due to this reason the case set up by the prosecution has become doubtful and cannot be believed ; the applicant was not carrying the pistol allegedly recovered by the complainant party nor does it belong to him ; the alleged recovery has been foisted upon him ; the matter requires further inquiry ; the applicant has no previous criminal record ; and, there is no apprehension that the evidence will be tampered with or that the witnesses will be influenced by the applicant, or he will abscond if he is released on bail.

5. On the other hand, learned APG contends that the FIR clearly shows that the pistol was recovered from the applicant and it was immediately seized and sealed on the spot ; the role of the applicant in relation to the commission of the subject offence is specific and clear in the FIR ; and, there was no delay in lodging the FIR. The allegations of malafide and ulterior motive on the part of the complainant party / police officials, was specifically denied by learned APG. It was not disputed by her that the applicant does not have any previous criminal record.

6. I have heard learned counsel for the applicant / accused and learned Assistant Prosecutor General Sindh for the State, and have also gone through the record. In Ayaz Ali V/S The State, **PLD 2014 Sindh 282**, after examining and comparing Sections 23(1)(a) and 24 of the Act of 2013, it was held by a learned single Judge of this Court that Sub-Section 1(a) of Section 23 of the Act of 2013 deals with situations where one acquires, possesses, carries or controls any firearm or ammunition in contravention of Section 3 of the Act of 2013 (i.e. 'license for acquisition and possession of firearms and ammunition') ; and

whereas, Section 24 of the Act of 2013 provides punishment for possessing arms or ammunition, licensed or unlicensed, with the aim to use the same for any unlawful purpose. It was further held that since maximum punishment up to 14 years is provided in Section 23(1)(a) and Section 24 ibid provides punishment up to 10 years, maximum punishment in the case of recovery of a pistol, which falls within the definition of “arms” in terms of Section 2 of the Act of 2013, will be 10 years under Section 24 ibid. It was further held in the above case that the question of quantum of punishment had to be determined by the trial Court as to whether the accused would be liable to maximum punishment or not, and in case of his conviction, whether his case would fall under the prohibitory clause or not. It was also held in the cited case that as all the witnesses were admittedly police officials and the accused was no more required for further investigation, the case was that of further inquiry and accordingly bail was granted.

7. In two unreported cases before this Court viz. Criminal Bail Application No.566/2014 (Muhammad Ismail V/S The State) and Criminal Bail Application No.1010/2014 (Muhammad Shafique V/S The State) decided on 09.07.2014 and 11.07.2014, respectively, it was held by me that the terms “arms” and “firearms” have been separately and distinctly defined in Clauses (c) and (d), respectively, of Section 2 of the Act of 2013 ; amongst many other articles designed as weapons of offence or defence, “pistols” are included in the definition of “arms” in Clause (c) ibid and not in the definition of “firearms” defined in Clause (d) ibid ; the punishment and penalty for acquiring, possessing, carrying or controlling any “firearm” or ammunition in infringement of Section 3 of the Act of 2013, is provided in Section 23(1)(a) ibid, which is imprisonment for a term which may extend to 14 years and with fine ; and, whereas, the punishment for possessing “arms” or ammunition, licensed or unlicensed, with the aim to use them for any unlawful purpose etc., is provided in Section 24 ibid, which is imprisonment for a term which may extend to 10 years and with a fine. It was held in the aforementioned cases that the above clearly shows the intention of the legislature that not only are the offences in relation to “arms” and those relating to “firearms” to be dealt with separately as provided for in the Act of 2013 ; but since punishments having different terms in respect of “arms” and “firearms” have been specified separately in the Act of 2013, punishment under Section 23(1)(a) ibid cannot be awarded for an offence committed under Section 24 ibid, and vice versa. Post-arrest bail in both the aforementioned cases was granted by this Court.

8. Adverting to the facts of the present case, the prosecution has alleged that a pistol was recovered from the applicant, but he was booked under Section 23(1)(a) of the Act of 2013, which is applicable to “firearm or ammunition” and not to “arms”. As observed above, “pistols” are included in the definition of “arms” in Clause (c) *ibid* and not in the definition of “firearms” defined in Clause (d) *ibid*. Thus, it will be for the trial Court to decide as to whether the provisions of Section 23(1)(a) *ibid* will apply to the applicant’s case or not.

9. According to the prosecution’s own case, the applicant was intercepted by the complainant party at a densely populated and commercial public place in daylight during business hours at 1850 hours, and as such the said place could not be deemed to be deserted at the time of alleged crime. Despite this position, not a single private and independent person was associated by them to act as a witness and the FIR does not specifically state as to how many persons were asked by them to act as witness and the names of such persons have also not been disclosed. The police has alleged to have recovered an unnumbered T.T. pistol with loaded magazine and three live bullets from the applicant. It is not the case of the prosecution that when the police spotted the applicant and stopped him for questioning, he tried to run away or offered any resistance. On the contrary, it is an admitted position that the applicant, without any resistance, allowed the police to question him, search him and arrest him. The applicant is behind the bars since the date of his arrest i.e. 31.05.2021 and in the meantime the investigation has been completed and the challan has been submitted before the trial Court, therefore, he will not be required for any further investigation. No private or independent person was associated as *mashir* in this case and all the witnesses of the prosecution are admittedly police officials, and as such the prosecution will be responsible to procure their attendance at the trial. Thus, there is no question or probability that the evidence will be tampered with or that the prosecution witnesses will be influenced by the applicant if he is enlarged on bail.

10. The present applicant has been granted post-arrest bail by this Court vide order dated 13.09.2021 in Criminal Bail Application No.1401/2021 in respect of FIR bearing No.380/2021 registered against him under Sections 6 and 9(b) of The Control of Narcotic Substances Act, 1997. The *mashirnama*, witnesses and evidence in the subject FIR and the above mentioned FIR are the same. The guilt or innocence of the applicant is yet to be established as it would depend on the strength and quality of the evidence that will be produced

by the prosecution and the defense before the trial Court who shall then have to decide whether the offence alleged against the applicant falls within the ambit of Section 23(1)(a) ibid or not. In view of the above, this case requires further inquiry in my humble opinion. It is well-settled that in the circumstances discussed above, concession of bail should be exercised in favour of the accused as a rule.

11. It is clarified that the observations made herein are tentative in nature which shall not prejudice the case of either party nor shall they influence the learned trial Court in any manner in deciding the case strictly on merits in accordance with law.

12. In view of the above, the applicant Usman son of Ahrar is admitted to bail subject to his furnishing solvent surety in the sum of Rs.50,000.00 (Rupees fifty thousand only) and a P.R. bond for the same amount to the satisfaction of the learned trial Court. The instant bail application stands disposed of in the above terms.

J U D G E