

ORDER SHEET

IN THE HIGH COURT OF SINDH, KARACHI
Cr. B.A. No. 1267 of 2023

Date	Order with signature of Judge
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1. For order on MA No. 6983/2023
2. For hearing of bail application.

04.07.2023

Mr. Jamroz Khan, Advocate for the applicant.
Ms. Rubina Qadir, DPG.

1. Exemption granted subject to all just exceptions.
2. Applicant Habib ur Rehman @ Mama son of Hassan Shah is seeking bail after arrest in FIR No. 29/2023 lodged under Section 9(1), 3(c) CNS Act at P.S. S.I.U, Karachi.

The allegation against the applicant/accused is that he was found in possession of contraband of 1600 grams of charas which act of the applicant/accused of punishable under the CNS Act hence he was arrested.

Learned counsel for the applicant/accused premised his case on the argument that the sample of from the alleged recovery was not sent to the Chemical Examiner for its examination which is mandatory under the CNS Act and it is settled principle that procedural requirements are to be fulfilled by the Investigating Agency and failure thereof would create a doubt which favours the applicant/accused at bail stage, therefore, applicant/accused be enlarged on bail.

On the other hand learned DPG argued that applicant/ accused was arrested on the spot having in possession of contraband item,

therefore, he be punished according to law. While concluding her submissions, she prayed for cancellation of bail plea of the applicant/accused.

I have heard the submissions of learned counsel for the applicant as well as learned APG and scanned the available material. There is no cavil with the proposition that the matter in hand pertains to the special law made by the Legislature for the purpose i.e. CNSA and the special law has always got an overriding effect over the general law. In the instant matter the accused is behind the bars since last 5/6 months without any progress in the trial. After perusal of the record, it reveals that Investigation Agency has terribly failed to adhere to the strict compliance of the provisions of CNSA Rules, which is definitely a major dent, particularly, sending of contraband for analysis after more than 3 days. In this regard rule 4 of CNSA Rules is reproduced:-

4. Despatch of sample for test or analysts.---(1) Reasonable quantity of samples from the narcotic drugs, psychotropic substances or the controlled substances seized, shall be drawn on the spot of recovery and despatched to the officer-incharge of nearest Federal Narcotic Testing Laboratory, depending upon the availability for test facilities, either by insured post or through special messenger duly authorized for the purpose.

(2) Samples may be despatched for analysis under the cover of a Test Memorandum specified in Form-I at the earliest, but not later than seventy-two hours of the seizure. The envelope should be sealed and marked "Secret drug sample/ test memorandum"

After brooding over Rule 4 of CNSA Rules, 2001 in a scrupulous manner it becomes crystal clear that the recovered contraband needs to be sent to the nearest narcotic testing laboratory by the Investigating Agency within 3 days from recovery of the same whereas

in the case in hand this mandatory requirement has not been complied with by the Investigating Agency. It is also a settled principle of law that bail is not a license of acquittal or exoneration but simply a change of custody and in case of bail the place of custody is only substituted and the court after satisfying itself the custody, changes the custody from police and give it to the hands of sureties. It is a beaten track whereupon certain principles regarding acceptance and refusal of bail, that too structuring or governing the matter have stood laid down by the superior courts. Be that as it may, in my estimation, the applicant/accused has successfully made out his case under section 497(2) of Cr.P.C. for further inquiry, particularly, when the mandatory provisions of the special law have not been adhered to by the Investigating Agency, therefore, presumption of recovered contraband at present goes against the prosecution for the purpose of bail. Furthermore, heinousness of offences is per se no ground for rejection of bail. There are plethora of judgments of the Hon'ble Supreme Court on the subject that after tentative assessment of the record as a general principle of criminal justice, if any dent is appearing in the case of prosecution, same is always to be resolved in favour of accused and burden of proving the allegation levelled against the petitioner is solely on the shoulders of the prosecution. Although matter in hand pertains to the offences falling under the ambit of special law i.e. CNSA and Rules wherein arrow of presumption of illicit recovered articles as per section 29 CNSA to some extent has been fixed against the accuse but it needs to be taken into consideration only when the investigation agency has stricto sensu given adherence to the codal modalities and mandatory provisions of special law which in our estimation so far is lacking in the case in hand, gross lapses and loopholes are oozing from

the available record on part of the investigation agency. Therefore, the applicant/accused has made out the case for grant of bail. Though any sole fact itself is not sufficient to shatter the prosecution's case but all the above noted discrepancies found in the case of the prosecution bring the case of the applicant/accused within the ambit of further inquiry as per contemplation of section 497(2), Cr.P.C. It is worthwhile to mention that mere levelling of an offence is not sufficient to keep the accused behind the bars. The basic rule of law is bail and not jail, as laid down by the Apex Court of Pakistan in PLD 1995 SC 334. The Honorable Apex Court of Pakistan in the case of Muhammad Sarfraz Ansari v. State and others reported as PLD 2021 SC 738 (vertical precedent) held that that at bail stage the court cannot make deeper examination and appreciation of the evidence collected during investigation or to conduct anything in the nature of a preliminary trial to determine the accused's guilt or innocence. Likewise the learned Peshawar High Court in the case of Hayatullah v. Lal Badshah reported as PLD 2009 Peshawar 28 (Horizontal precedent) held that deeper appreciation of evidence and drawing conclusions therefrom is not warranted.

As a result therefore, this bail application is allowed. Applicant Habib ur Rehman @ Mama is granted bail subject to furnishing solvent surety in the sum of Rs.50,000/- (rupees fifty thousand) with P.R bond in the like amount to the satisfaction of Nazir of learned trial Court.

JUDGE