

**ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI**

Special Criminal Bail Application No.38 of 2023
(Mustafa SikanderV/sThe State)

Date	Order with signature of Judge
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For hearing of bail application

14.7.2023

Mr. Zia-ul-Haq Makhdoom, advocate for the applicant.
Mr. Khalid Rajpar, Special Prosecutor Custom Intelligence along with
Zubair Ranjha (Preventive Officer) Investigating Officer and Ms. Abeer
Jawaid, Deputy Director on behalf of Directorate of Investigation &
Intelligence.
Mr. Muhammad Ahmed, DAG.

ORDER

Through this bail application, the applicant Mustafa Sikander son of Muhammad Sikander seeks post-arrest bail in Crime No. M-3706/DCI/Seiz/2023, registered under Sections 2(s) & 16 of the Customs Act. 1969 punishable under clauses (8) & (89) of Sub-Section (1) and Sub-Section (2) of Section 156, of P.S Directorate General, Intelligence & Investigation-Custom, Karachi. Applicant earlier filed Bail Application bearing No.72/2023, which was dismissed by the learned Special Judge (Customs, Taxation & Anti-Smuggling), Karachi vide order dated 10.06.2023.

2. Prosecution case as narrated in the FIR is that the Directorate of Intelligence & Investigation-Customs, Regional Office Karachi recovered 5,000 Boostin Plus (2g) Injections, 85 Boostin (2g) Injections and 20 Mastijet Fort Injections total of 5,105 pcs of injection from the possession of accused Muhammad Ali. On a query, he disclosed that the present applicant was/is his partner who handed over the aforesaid foreign original Boostin Injections to him. He further disclosed that the applicant manages the whole racket of smuggling the Boostin injections from different countries to Pakistan. Consequently, upon such statement of co-accused Muhammad Ali, the applicant was arrested by the Investigating Officer, and on the pointation of the applicant, further recovery of banned items was effected from other accused involved in the aforesaid crime. Finally, the case was registered against all accused under Sections 2(s) & 16 of the Customs Act. 1969 punishable under clauses (8) & (89) of Sub-Section (1) and Sub-Section (2) of Section 156, of P.S Directorate General,

Intelligence & Investigation-Custom, Karachi. The applicant's first bail plea has been rejected by the trial court vide order dated 10.06.2023.

3. It is, inter-alia, contended by the learned counsel for the applicant that the entire case of the prosecution depends upon the statement of the co-accused, which is inadmissible in evidence under Article 38 of the Qanoon-e-Shahadat Order 1984 and no reliance can be placed on such type of statement of co-accused; he further submitted that aforesaid statement was made by him in Police custody and it was not a judicial confession. He next argued that at the bail stage also, the prima facie involvement of the co-accused cannot be determined merely based on the statement of the co-accused without any other independent incriminating material corroborating the statement. Therefore, the trial court has to examine whether there is any other tangible incriminating material available on record that corroborates the statement of the co-accused, by connecting the applicant with the commission of the alleged offences. He added that there is no evidence with the prosecution which could suggest that the applicant provided the seized boost in injections to co-accused Muhammad Ali; that there is no evidence against the applicant that he is instrumental to the alleged recovered banned items; that there is no evidence that applicant has any nexus with the main accused who allegedly admitted his guilt through the statement before the trial Court which was unfortunately acted upon vide order dated 02.06.2023. The learned counsel for the applicant contends that the seized injections were not notified or banned items under the customs law; therefore, the provision of Section 2(s) of the Customs Act, 1969 is not applicable. He further submitted that seized injections are not banned items under the law as the Supreme Court has banned only the sale of these injections vide its order dated 06.01.2018, therefore, the applicant cannot be saddled with criminal liability based on the statement of co-accused as such the case of the applicant falls within the ambit of Section 497(2) Cr.P.C. He further argued that the alleged offenses carry a maximum punishment of six years, therefore, bail could be granted as there are alternative punishment has been provided in the aforesaid sections purportedly applied against the applicant and the lesser punishment is to be looked into at the bail stage. In support of his contentions, learned counsel for the applicant has relied upon the case of Mst. Kareema v. The State [2012 YLR 2921], Muhammad Bashir Guraya v. Raja Muhammad Irshad [2005 YLR 1220], Afzal Chauhan v. The State [2003 P.Cr.L.J. 142], Muhammad Aqeel alias Tapla v. The State [2014 MLD 316], Abdul Qadir Motiwala v. The State [2000 P. Cr.L.J.], Shahabul Hassan v. The State [PLD 1991 SC 898], Abdul Majid Afridi v. The State [2022 SCMR 676], Muhammad Sarfaraz

Ansari v. The State [PLD 2021 SC 738], Nouman Khan alias Roman v. The State [2020 SCMR 666], Master Ghulam Muhammad v. The State [2010 MLD 877], Ali Shan v. Directorate of Intelligence and Investigation Karachi [2017 P.Cr.L.J. Note 189], Tariq Bashir v. The State [PLD 1995 SC 34], Shehroze v. The State [2006 YLR 3167], Ismail Ejaz v. The State [2023 PCr.L.J. 114], Asghar Ali Rajput v. The State [2020 MLD 1473], Muhammad Akram v. The State [2020 P. Cr.L.J. 31] and Arshad Mahmood v. The State [1985 P.Cr.L.J. 2048]. He prayed for allowing the instant bail application.

4. On the other hand, learned Special Prosecutor Custom Intelligence has opposed the grant of bail to the applicant on the premise that he in connivance with the main accused smuggled the banned items which have been restricted by the Supreme Court. Per learned counsel, the main accused by the Customs Authority and on the pointation of the applicant recovery has been made as such the collusion and connivance of both the accused cannot be ruled out. He further submitted that the applicant is the partner of the main accused and all accused are jointly and severally responsible for the smuggling of the banned item. It is further contended that there is sufficient evidence available against the applicant to connect him with the aforesaid crime. He next argued that the Supreme Court vide order dated 06.01.2018 placed an embargo upon RBST Injection in as much as no import manufacturing and sale of the said injection was/is permissible. Learned counsel heavily relied upon the order dated 06.01.2018 passed by the Supreme Court and argued that any person selling RBST Injections, on the passing of the order of the Supreme Court, shall be considered to be violating the order of the Supreme Court and shall be dealt with under the law. He next submitted that the offense alleged against the applicant is based on two points (1) evidence of co-accused Muhammad Ali, on whose pointation the applicant has been arrested, and on his pointation the banned items comprised 5000 foreign origin injections plus (2g) Injections, 85 boostin (2g) Injection and 20 Mastijet Fort Injections total 5105 Pcs of injections have been recovered under proper seizure memo by completing all codal formalities as provided under the Customs Act, 1969 including search warrant issued by the learned IX-Judicial Magistrate Karachi Central. Besides all these items need to be confronted to the applicant at the trial and the offense of active connivance and assistance falls within the ambit of Section 2(s) and 16 of the Customs Act, 1969 punishable under clauses (8) and (89) of subsection (1) and subsection (2) of section 156. He added that the aforesaid injections were imported illicitly in violation of the order of the Supreme Court and the material collected during the investigation prima-facie

connects the applicant with the crime hence he does not deserve a concession of post-arrest bail. He lastly prayed that the bail application of the applicant is liable to be dismissed in terms of the ratio of the order passed by the Supreme Court.

5. I have heard the learned counsel for the parties and perused the material available on record and case law cited at the bar.

6. Tentative assessment of record reflects the following aspect of the case:-

- i) Prosecution has alleged that information was passed through Director General I&I to Director I&I Karachi that a huge quantity of banned items comprising of foreign origin “Boostin Injections”, were being carried by a person in a box at a dark spot near Regent Plaza Hotel, Shahrah-e-Faisal, Karachi, for its delivery to an unknown person for illegal disposal in the city. According to the aforesaid information, Additional Director formed a team led by the Deputy Director, who approached the spot where, a huge quantity of “Boostin Injections” were found properly wrapped with plastic sheets, whereas, one person namely Muhammad Ali was found looking after the same at the spot. On a query from the said person namely Muhammad Ali in the presence of witnesses about the aforesaid placed foreign origin Boostin Injections, to which, the said person claimed the ownership of the said foreign origin Boostin Injections, and disclosed that his partner namely Mustafa Sikandar Son of Muhammad Sikandar handed over the aforesaid foreign origin Boostin Injections to him. He informed that Mustafa organizes the whole system of smuggling the injections from different countries to Pakistan. Muhammad Ali informed that he supplies the injections to vets and other persons. Muhammad Ali could not answer satisfactorily and failed to produce any relevant legal documents in support of lawful import/possession.
- ii) Prima-facie 5,105 pieces of banned injection valued at Rs.14,804,500/- were recovered from the accused under proper Seizer Memo, though “Boostin Injections” were banned by the Supreme Court to be sold and/or used under any circumstances, vide order dated 6.1.2018 passed in Civil Petition No.2374–L of 2016.
- iii) F.I.R was promptly lodged on 13.5.2023 and challan was submitted in the Special Court.
- iv) Accused Muhammad Ali and Heman Das were arrested and admitted their guilt before the trial Court vide statement dated 2.6.2023 and conviction was awarded to him by the trial court vide judgments dated 2.6.2023 and 13.6.2023.
- v) The co-accused soon after his arrest immediately pointed to the place which led to the recovery of a further quantity of Boostin Injections, from co-accused thus there appears to be a prima facie, case against him to disentitle him from the concession of post arrest bail.
- vi) Any deeper appreciation of the evidence at this stage is not warranted as the same might affect the case of prosecution or the applicant. However, on tentative assessment of the material on record, it appears that there is sufficient material available with the prosecution to connect the applicant with the alleged crime.

- vii) In view of the gravity of allegations made against the applicant and the fact that the applicant in connivance with other co-accused persons has violated the order passed by the Supreme Court by allowing the import, manufacturing, and sale of the Boostin Injections, thus prima-facie connects the applicant, the act attributed to the applicant is sufficient to form the tentative view that no case for bail at this stage is made out.

7. I have been informed that Boostin is a brand name for Recombinant Bovine Somatotropin (RBST), a genetically engineered hormone that is used to increase milk production in dairy cows. When injected into cows, RBST increases the amount of milk they produce by about 15-20%. There are several potentially harmful effects of giving boostin injections to milk-giving cattle. It impacts the quality of milk which increases the risk of reproductive problems, such as infertility and abortions as well as increased risk of antibiotic resistance. The injections have been banned due to the side effects it has on animals [injected with the hormone] and humans too.

8. The Supreme Court took cognizance of the matter and passed elaborative order dated 6.1.2018 in Civil Petition No.2374–L of 2016 and imposed a complete ban on the sale or purchase of such RBST injection. An excerpt of the order dated 06.01.2018 is reproduced as under:-

*“3. **RBST Injection:** After having heard Mr. Salman Akram Raja, learned ASC and the learned counsel representing the companies, namely, Ghazi Brothers, Elilily and ICI, for the reasons to be recorded, we place a ban upon RBST Injection with immediate effect. Inasmuch as, no import, manufacturing and sale of the said injection shall be permissible on the passing of this order. The Nazir of High Court of Sindh, Karachi is directed to immediately takeover the stocks of RBST injections of the above named companies into his possession, though the stocks may be kept within the premises of those companies but sealed, so that the fate of these injections may be dealt with and determined later. This order is regardless of the stay orders granted by the learned High Court of Sindh in Suit No.2200/2015 titled “Irfan Ghazi v. Federation of Pakistan”, Suit No.2297/2015 titled “Irfan Ghazi v. Federation of Pakistan” and Suit No.2333/2015 titled “Elilily & ICI v. Federation of Pakistan”. Mr. Faisal Hussain Naqvi, learned ASC representing Ghazi Brothers wants to place on record further documents. Let the needful be done within one week. It may be mentioned that any person selling RBST Injections, on the passing of this order, shall be considered to be violating the order and shall be dealt with in accordance with law.”*

9. The principles governing the bail are clear in its terms. Section 497(1) Cr. P.C provides that an accused shall not be released on bail if there appear reasonable grounds for believing that he has been guilty of an offense punishable with death or imprisonment for life or imprisonment

for ten years. This part of Section 497(1) Cr.P.C which prohibits the grant of bail in certain offenses is popularly known as the prohibitory clause of Section 497(1) CrPC. The exceptions for refusing bail in offenses that do not fall within the prohibitory clause of Section 497(1) CrPC are, therefore, also applicable to the accused who pray for bail under the first proviso to Section 497(1) Cr.P.C in an offense falling within the prohibitory clause. The exceptions provided in the aforesaid section are well-settled by several judgments of the Supreme Court. There is a likelihood of the accused i.e. (a) absconding to escape trial; (b) tampering with the prosecution evidence or influencing the prosecution witnesses to obstruct the course of justice; or (c) repeating the offense keeping in view his previous criminal record, nature of the offense or the desperate manner in which he has prima facie acted in the commission of the offense.

10. I am cognizant of the fact that the persons involved in the commission of white-color offenses are usually professional and there is a likelihood that they would repeat the offence if enlarged on bail. In this case, the accused were well aware of the fact that the Supreme Court has imposed a complete ban on the sale of RBST injection, however, the accused managed to bring the ban items to the country, and fortunately, they were apprehended red handed with sufficient quantity of banned items.

11. I have examined the record of the case carefully and do find sufficient material that would attract the above exceptions to decline the request of the applicant to enlarge him on post-arrest bail at this stage for the reason that all the P.Ws have supported the version of the complainant as such sufficient material in the shape of recovery of banned items is available on the record against the applicant to connect him with the alleged offenses, besides further recovery of boostin injections has been made on the pointation of the applicant which also shows his prima facie connection in the aforesaid crime. Primarily at the bail stage only tentative assessment is to be made and nothing has been brought on record to show any ill-will or *malafide* on the part of the complainant to book the applicant in the aforesaid crime, on the statement of co-accused. And upon his arrest, he provided credible information to the Investigating officer, which led to the recovery of a sufficient quantity of RBST injection

12. Adverting to the contentions of the applicant that the statement of co-accused is not admissible in evidence, suffice it to say that it is well-settled law that when more persons than one are being jointly tried for the same offense and a confession made by one of such persons admitting that the offense was committed by them jointly, is proved, the Court may take

into consideration the confessional statement of that co-accused as circumstantial evidence against the other co-accused. The aforesaid principle is applied at the bail stage and the statement of the co-accused can lead the Court to form a tentative view about prima facie involvement of his co-accused in the commission of the alleged offence. The case law relied upon by learned counsel for the applicant is of no help to the case of the applicant for the simple reason that the Supreme Court has imposed a ban upon the selling of the boostin injections, therefore, this Court cannot take a contrary view under the circumstances of the case at hand.

13. In view of the above, learned counsel for the applicant failed to make out a good case for the grant of post-arrest bail in light of sub-section (2) of Section 497 Cr.P.C. In such circumstances, the instant Criminal bail Application stands dismissed.

14. The learned trial Court is directed to expedite the trial and examine the material witnesses within one month, at least the complainant must be examined in the intervening period. In case of non-compliance strong reasons shall be furnished, thereafter the applicant would be at liberty to repeat the bail, and the tentative observation recorded hereinabove will not come in his way so far as fresh bail application is concerned.

JUDGE