ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.1574 of 2023

Date	Order with signature of Judge

For hearing of bail application

10.8.2023

Mr. Jahangir Shaikh advocate for the applicant
Mr. Muntazir Mehdi, Additional PG alongwith SI Siraj Ahmed of PS Mubina Town Karachi

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Through this criminal bail application, the applicant seeks post-arrest bail in F.I.R No.286/2023, registered under Section 8-A(1) of the Sindh Prohibition of Preparation, Manufacturing, Storage, Sale and Use of Gutka and Manpuri Act, 2019 (the Act of 2019) at PS Mubina Town Karachi. The earlier bail plea of the applicant has been declined by the learned IV-Additional District & Session Judge, Karachi East vide order dated 11.7.2023.

2. Brief facts of the prosecution case as per FIR are that on the day of the incident, the complainant was busy in patrolling in police mobile for prevention of crime, while during patrolling he got information from a spy informer that at Street of Taal near Naddi Quaid-e-Azam Colony, Karachi two brothers (1) Muhammad Ashraf @ Qadir and (2) Muhammad Asghar were selling injurious *Gutka Mawa*. By knowing the information of the informant reliable at about 2140 hours complainant reached the address on the pointation of the spy informer, where they saw two persons, one of them fled away towards *Naddi* while one person was apprehended, who disclosed his name as Muhammad Ashraf @ Qadir S/o Bheera and disclosed the name of his absconder partner as Muhammad Asghar S/o Bheera. His search was conducted by making other subordinates as witnesses in the absence of any private one and from personal search 128 packets of injurious *Gutka Mawa* were recovered from the bag he possessed and disclosed that they used to sell *Gutka Mawa* for their livelihood. The said act of the accused persons falls within the case under Section 8(i) of the SGMA. Hence the FIR.

3. Learned counsel for the applicant/accused has mainly contended that the applicant/accused is innocent and has been falsely implicated in this case with malafide intention of the complainant; that nothing has been recovered from the possession of the present applicant/accused and the alleged recovery has been foisted upon them by the police with malafide

intention and due to non-fulfilling the illegal demand of gratification; that no such alleged incident has ever taken place. The prosecution cooked up a false and bogus story and falsely involved the applicant/accused in this false case; that the place of incident is a thickly populated area, but the prosecution has failed to produce any private witnesses hence the case of the applicant/accused needs further inquiry which is the clear violation of Section 103 Cr.P.C.; that the contents of the FIR are false, baseless and do not constitute any ground for making out any case against the applicant/accused, hence the applicant is entitled to bail.

4. Learned Additional PG strongly opposes the bail plea of the applicant on the ground that the offense is against society and the applicant/accused is not entitled to the concession of bail.

5. I have heard learned counsel for the applicant and the learned APG and have also examined the material available on record and the relevant provisions of the Act of 2019. Section 8(1) of the Act of 2019, under which the applicant has been booked, provides that whoever contravenes the provisions of Sections 3, 4, 5, 6, and 7 of the Act of 2019 shall be punishable with imprisonment that may extend to three years, but shall not be less than one year, and shall also be liable to fine which shall not be less than Rs.200,000/-. Sections 3, 4, and 5 of the Act of 2019 provide that the mixture or substance defined in clauses (vi) and (viii) of Section 2 of the Act of 2019 shall not be produced, prepared, manufactured, offered for sale, distributed, delivered, imported, exported, transported and dispatched by any person. Section 6 of the Act of 2019 prohibits the ownership and operation of premises or machinery for the manufacture of *manpuri*, *gutka*, or their derivatives; and, Section 7 of the Act of 2019 prohibits the acquisition and possession of the asset derived from *manpuri*, *gutka*, and their derivatives. To invoke the provisions of Sections 3, 4, and/or 5 ibid, the mixture or substance must fall within the following definitions of "derivative" and "gutka and manpuri", mentioned in clauses (vi) and (viii), respectively, of Section 2 of the Act of 2019:

> *"(vi) "derivative" means any mixture under any name viz. panparag, gutka, or such other mixture which is prepared or obtained by any series of operations from the ingredients as given in clause (viii)." (Emphasis added) "(viii) "gutka" and "manpuri" means – (a) any mixture which contains any of the forms of chalia (betel nut), catechu, tobacco, lime and other materials as its ingredients which is injurious to health and not fit for human consumption within the meaning of section 5 of the Sindh Pure Food Ordinance, 1960, and is also in contravention to the provisions of rule 11 of the Sindh Pure Food Rules, 1965 ; (Emphasis added) (b) any substance prepared for human consumption and is posing a serious threat to the health of people and includes such substances as the Government may, by notification in the official Gazette, declare to be such substances."*

6. Perusal of the above-mentioned provisions of the Act of 2019 shows that to invoke the provisions of Sections 3, 4, and/or 5 ibid, it is necessary for the prosecution to show that there was a “mixture” or “substance”, as defined in clauses (vi) and (viii) of Section 2 of the Act of 2019, and the accused was involved in the production, preparation, manufacture, sale, distribution, delivery, import, export, transportation and/or dispatch thereof. Prima facie, it appears that there was no mixture as all the items allegedly recovered from the applicant were found packed separately. It may be noted that if all or any of the said items viz. *chalia*, *choona*, *katthah*, salt, and bottles of water meant for batteries, are possessed, transported, sold, etc., independently or individually, the provisions of Sections 3, 4 and/or 5 the Act of 2019 shall not be attracted. The word “mixture” used in Sections 2(vi), 2(viii)(a), and 3 of the Act of 2019 is significant which clearly shows that unless a mixture of the ingredients prescribed by the Act of 2019 is made, the aforesaid provisions will not be attracted. In the absence of a mixture, the substance shall not fall within the definitions of “derivative”, “gutka” or “manpuri” contained in clauses (vi) and (viii) of Section 2 of the Act of 2019.

7. The question of whether or not the above-mentioned items allegedly recovered from the applicant/accused were to be used as the raw material for preparing the mixture of any of the derivatives or substances defined in the Act of 2019, requires further inquiry in my opinion. It will be for the learned trial Court to decide whether possession, transportation, sale, etc. of such items/raw material is an offense under the Act of 2019 or not. 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. The offense alleged against the applicant does not fall within the prohibitory clause of Section 497 Cr.P.C. Because of the above, the principle that grant of bail in such an offense is a rule and refusal an exception, authoritatively and consistently enunciated by the Supreme Court, is attracted in the instant case. Besides alleged recovery was affected from the populated area and the complainant has advance information regarding the presence of the applicant at the pointed place but no private person was associated as a witness or *mashir* either from the place of incident or from the place of information. All the witnesses are police officials; therefore, there is no apprehension of tempering the evidence. The investigation of the case is completed and the challan has been filed before the Court having jurisdiction, therefore, the custody of the applicant is not required for further investigation.

8. Punishment provided in Section 8 of the said act is up to 03 years but shall not be less than 01 year and a fine of rupees two lacs. It is settled by now that while deciding the question of bail lesser sentence is to be considered. While considering the lesser sentence of the alleged offense for which the applicant is charged, the same provided maximum punishment of up to 03 years which even does not fall within the prohibitory clause of Section 497 Cr. P.C and grant of bail in these cases is right while refusal is an exception as has been held by the Supreme Court in cases of *Tarique Bashir v. State* **(PLD 1995 SC 34),** *Zafar Iqbal v. Muhammad Anwar* **(2009 SCMR 1488),** *Muhammad Tanveer v. State* **(PLD 2017 SC 733)** and *Shaikh Abdul Raheem v. The State* **(2021 SCMR 822).**

9. From the tentative assessment of the record the applicant has made out his case for further inquiry. Resultantly, this application is allowed and the applicant is granted post-arrest bail subject to furnishing his solvent surety in the sum of Rs.100,000/- (One hundred thousand only) and PR bond in the like amount to the satisfaction of the trial Court.

10. Needless to mention that any observations made in the above order are tentative in nature and shall not influence the trial Court in any manner if the matter proceeds, however, if the applicant/accused misuses the concession of bail or create hindrance in smooth proceedings of trial, the trial Court is at liberty to cancel his bail in terms of Section 497(5) Cr.P.C.

11. This criminal bail application stands disposed of.

JUDGE

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