ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.1721 of 2023

Date	Order with signature of Judge

1. For order on office objection at 'A'
2. For hearing of bail application

10.8.2023

Mr. Piyas Ali Soomro advocate for the applicant
Mr. Muntazir Mehdi, Additional PG alongwith SIP Manzoor Abbasi, PS Site Superhighway Karachi

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Through this bail application under Section 497 Cr.P.C., the applicant has sought admission to post-arrest bail in F.I.R No.611/2023, 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). The earlier bail plea of the applicant has been declined by the learned II-Assistant Sessions Judge Malir Karachi vide order 26.6.2023 in Criminal Bail Application No.2854/2023.

2. The case of the prosecution, as set up in the subject FIR, is that during the patrolling of the area by the police party on the date and at the time and place mentioned in the FIR apprehended the applicant and recovered from his possession 12 sacks of betel nuts weighed about 120 KG, one Tap in which wheat betel nuts were lying weighed 80 KG, three drums of Tabaco and other betel nuts weighed 100 KG and his act falls under Section 8(i) A of the *Gutka Mawa* Act. such report of the incident was incorporated under section 154 C.r.PC. Upon registration of the FIR, the applicant / accused had filed Criminal Bail Application but the same was dismissed.

3. It is contended by learned counsel for the applicant that there is malafide on the part of the police as the applicant has been falsely implicated in the subject crime with an ulterior motive; there is no independent witness of the alleged crime; the matter requires further inquiry; the applicant has no previous criminal record; there is no apprehension that the evidence will be tampered with or that the witnesses of the prosecution will be influenced by the applicant, or he will abscond if he is released on bail; the applicant is behind the bars since the date of his arrest; and, no substantial progress has been made in the trial before the learned trial Court. Learned counsel submitted that bail cannot be

withheld as punishment and if any doubt raising from the case of the prosecution the benefit of the same will go to the accused even on bail stage; that section 8 of the Gudika and Main Puri Act, 2019 is punishable up to three years hence the offense does not fall within the prohibitory clause of section 497 Cr. P.C., hence the applicant is entitled to the grant of bail.

4. While denying the allegation of malice on the part of the police, learned APG submits that there was no reason for the police to implicate the applicant without any justification. He further submits that the presence of the accused at the scene of the alleged crime and recovery of the above-mentioned substance from the place of incident in his presence was sufficient to implicate him in the subject crime. It is urged by him that the applicant is not entitled to the concession of bail because of the huge quantity of the substance recovered in his presence. He, however, concedes that the offense alleged against the applicant does not fall within the prohibitory clause of Section 497 Cr.P.C.

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.200,000.00. 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 in order to invoke the provisions of Sections 3, 4, and/or 5 ibid, the prosecution must 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 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).**

09. 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: 100000/= (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 and shall not influence the trial Court in any manner if the matter proceeds.

JUDGE

Zahid/*