ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No. 1553 of 2023

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

**28.8.2023**

Mr. Muhammad Hanif Khan advocate for the applicant
Mr. Abrar Ali Khichi, Additional PG for the State.

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Through this bail application under Section 497 Cr.P.C., the applicant namely Tariq has sought admission to post-arrest bail in F.I.R No. 266/2023, registered under Section 6/9-2(4) of CNS Act at P.S Ittehad Town, Karachi. The earlier bail plea of the applicant was declined by the learned Additional Sessions Judge VIII (West) Karachi vide order dated 19.06.2023 in Cr. Bail Application No. 2767/2023 on the premise that recovery of Ice weighing 110 grams has been effected from the applicant and the alleged offense is also against the society, especially affecting the young generation/children of the society.

2. Brief facts of the case as per FIR are that on 09.6.2023, the complainant namely Sub-Inspector Aijaz Memon of P.S Ittehad Town Karachi apprehended the applicant/accused with the help of police officials and recovered crystal from the applicant. The recovered crystal was weighed through a digital scale and found 110 grams and the same was sent to the Chemical Examination on the same day. The recovered narcotic was taken into custody and after preparation of memo of arrest and recovery formally arrested the applicant/ accused and lodged the FIR under Section 6/9-2(4) of CNS Act on the same day.

3. Learned counsel for the applicant / accused has contended that the applicant/accused is quite innocent and did not commit the alleged offense mentioned in the FIR; that there are no reasonable grounds to believe that the accused/applicant would have committed the alleged offense; that the alleged 110-gram crystal had been dispatched for chemical analysis, and as per the new amendment in the Narcotics Act 1997, the alleged offense does not provide sentence for death, life imprisonment or more than ten years imprisonment, as such does not cover by the prohibitory clause of Section 497(1) Cr. P.C. and the basic rule is bail not jail while refusal is

the exception in such like cases. It is further contended by learned counsel for the applicant/accused that from the bare reading of FIR, it is obvious that the prosecution's case is a novel story, as according to the prosecution the complainant saw the applicant in suspicious condition and arrested him; that the contents of FIR are silent and do not carry any detail about the possession and alleged purchaser of the alleged crystal from the accused/applicant, hence under the circumstances of the case Section 6 of the CNS Act, 1997 is not attracted or applicable; that the FIR is further silent on the point that how and by which means the complainant got the quantity of the alleged recovered crystal, which shows that the alleged quantity shown by the complainant is presumptive and imaginary, which further creates doubts. It is next contended that nothing incriminating has been recovered from the possession of the accused/applicant and the alleged recovery is false and foisted upon him; that there is no private witness to the alleged recovery even though the place of the alleged incident is a thickly populated area, but even though no any independent witness has been associated to the alleged recovery which creates serious doubts in veracity of the prosecution case and the benefit of doubt is to be given and extended to the accused as per rule of law. He added that in the FIR or the recovery memo, the gross weight of the narcotics is 110 grams thus liability is to be seen at the bail stage in terms of law laid down by the Supreme Court, and in this eventuality, it becomes a case between sub-sections (b) of section 9, C.N.S. Act, 1997 as amended up to date. Thus the benefit of the doubt in this aspect shall go to the accused, because of the principle of law laid down by the Supreme Court in various judgments. He next submitted that since this normal sentence provided for recovery of 110 grams of crystal, is not covered by the prohibitory clause of section 497(1), Cr.P.C., therefore, the applicant is entitled to the concession of bail. In support of his contention, he relied upon the case of *Asmatullah v. Government of Khyber Pakhtunkhwa* (**PLD 2020 Pishwar 35**). He lastly contended that under the circumstances, the case against the accused/applicant is a fit one for further inquiry under Section 497(2) Cr.P.C. for bail.

4. Learned Addl. P.G. has opposed this bail application because a good quantity of ICE has been recovered from the applicant. He argued that the offense with which the applicant is charged is an offense against society at large and is heinous. Since the instant case involves huge 110 grams of ICE and this is not an ordinary drug like other narcotics and it is for this reason that the statute itself has provided a note of caution under section 51 of the C.N.S Act of 1997 before enlarging an accused on bail in the ordinary course; that no enmity or ill-will has been pointed out against

the police officials by the defense counsel. He further added that prosecution witnesses have supported the prosecution case and prima facie there has been nothing on record to establish any mala fide or serious enmity against such police officials. In the absence of substantial proof, the plea of enmity legally cannot be entertained at the bail stage because such like plea is readily available but to make it substantial shall require proof, which could not be considered at the bail stage. About the contention of the learned counsel for the applicant that no private person of the locality was associated as a witness or *mashir* though recovery was effected from a public place. She added that because of section 25 of the Control of Narcotic Substances Act, 1997 the applicability of section 103, Cr.P.C. has been excluded in the cases of recovery of narcotics; that defects or irregularities, if any, could well be agitated but during the trial and not at bail-stage; that plea of the applicant that ICE was foisted upon him cannot be entertained at such stage as this fact could only be ascertained after the recording of evidence. He argued that any plea that requires deeper examination and comments of nature, likely to prejudice to plea/case of either defense or prosecution, must always be avoided at this stage because the criterion for tentative assessment and evaluation of evidence are completely different from each other. Thus, a tentative assessment of material available on record, prima facie does not lead to a conclusion that there are no reasonable grounds to believe it as a case of further inquiry. He also submitted that the applicant is also involved in similar cases as well as other cases registered under Section 392 PPC, 23(1)(a) of the Sindh Arms Act 2013 and under Section 6/9(b) CNS Act, therefore, he prayed for dismissal of the instant bail application.

5. I have heard learned counsel for the applicant, learned Addl. P.G. and have perused the record of the case with their assistance and case law cited at the bar.

6. According to FIR, the complainant Sub-Inspector Aijaz Memon arrested the applicant and recovered 110 grams of crystal from his possession and sealed the same on the spot. In such circumstances, whether the prosecution would be able to bring home the guilt of the accused, are the fatal questions to be answered by the prosecution during the trial, however, at the moment makes the case of the applicant arguable for bail to ascertain whether the recovered contraband is Methamphetamine (Ice), however, this question needs to be taken care of by the trial court in its true perspective; the second question is whether this court can only consider the quantity of substance sent for Chemical Examination for considering the case of the applicant for bail, in such a

scenario, I seek guidance from the decision of the Supreme Court in the case of *Para Din and others Vs the State* (**2016 SCMR 806**). The Supreme Court has already set at naught the aforesaid point, and need no further deliberation on my part.

7. In narcotic cases the Supreme Court's earlier view in the case of *Ameer Zeb v. The State* (**PLD 2012 SC 380**), is clear that if any narcotic substance is allegedly recovered, a separate sample is to be taken from every separate packet, wrapper, or container, and every separate cake, slab or another form for chemical analysis and if that is not done, then only that quantity of the narcotic substance is to be considered against the accused person from which a sample was taken and tested with a positive result.

8. Keeping in view the aforesaid principle in bail matters, in the present case it appears that the Chemical Examiner received only 110 grams of narcotic substance thus it would be sufficient to say that in light of the judgment (supra), at the moment, prima-facie, only the quantity shall be taken into consideration against the applicant as per the chemical report on 06.07.2023, while dealing with his plea of bail, which surely is still to be thrashed out by the trial Court. However, since the recovery of 110 grams of narcotic substance, the weight of which seems to be covered by Section 9(b), C.N.S. Act, 1997, which does not fall within the ambit of prohibitory clause of Section 497(1), Cr.P.C., besides amendment brought in the CNS Act, 1997 vide Act No. XX of 2022, punishment for contravention of Sections 6, 7, and 8 provides that if the quantity of psychotropic substances is more than 100 grams and up to 500 grams, the imprisonment may extend to five years, therefore, the applicant who being in jail since his arrest is entitled to the concession of bail keeping in view the quantum of punishment as well as dicta laid down by the Supreme Court as discussed supra. On the subject issue, the decisions of the Supreme Court and High Courts are clear in terms, thus no further deliberation is required on my part.

9. As the quantity of the alleged recovery of 110 grams of narcotic substance marginally does not exceed the limit where the punishment is life imprisonment or death as set by the newly amended law. Under such circumstances whether the maximum punishment would be awarded or not, the same would be determined at the trial Court. Even it is by now well-settled that where two quantum of sentences are provided in the statute, for bail, the lesser shall be considered, without dilating upon the other points involved in the matter or agitated by the parties for and against, therefore, in the instant case, the question of quantum of sentence is required to be considered for bail; and the same

would fall within the purview of further inquiry as provided under Section 497(2) Cr.P.C.

10. I have noticed that the cases of *Ateebur Rehman v. The State* (**2016 SCMR 1424**), which involved the recovery of 1014 grams of heroin, and *Aya Khan and another v. The State* (**2020 SCMR 350**), which involved the recovery of 1100 grams of heroin, and bail was granted by the Supreme Court in both cases. So far as pendency of criminal cases are concerned, in my tentative view, this Court has to decide the present *lis* and not the cases pending against the applicant, therefore, this plea of the learned APG is of no use at this stage, as the same cases, if any, shall be decided on their own merits.

11. For what has been discussed above, this application is accepted and the applicant is admitted to bail. He shall be released on bail provided he furnishes bail bonds in the sum of Rs.100,000/- (rupees one lac only) with two reliable and resourceful sureties each in the like amount to the satisfaction of the learned trial Court. However, the learned trial Court shall endeavor to examine the complainant positively within one month and if the charge has not been framed the same shall be framed before the next date of hearing, and a compliance report shall be submitted through MIT-II of this Court. The MIT-II shall ensure compliance with the order within time.

12. The observation recorded hereinabove is tentative and shall not prejudice the case of either party at trial.

JUDGE

Shazad