

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.1810 of 2023

(Razika vs The State)

Criminal Bail Application No. 1811 of 2023

(Niaz Khan vs The State)

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

08.09.2023

Mr. Waqas Ali Chaudhary advocate for the applicants.
Mr. Zahoor Shah, APG.

The Applicant Niaz Khan, in Bail Application No.1811 of 2023 claims to be of tender age i.e. 12 years as per his Birth Registration Certificate issued by Union Council Kathore No.3 District Malir Karachi, had been arrested, along with his mother namely Raziqa, the applicant in Bail Application No.1810 of 2023, by SIU Police West Karachi in connection with the F.I.R No.135/2023, registered for offenses under Section 9 (i) 6-B & 9 (i) 6-C of Control of Narcotic Substance Act, 1997, and from the possession of applicants Niaz Khan and Razika, alleged 511 and 509 grams of heroin were recovered. The earlier bail plea of the applicants has been declined by the Additional Sessions Judge I Model Criminal Trial Court Karachi vide orders dated 12.7.2023 and 07.08.2023 in Criminal Bail Application Nos. 3245 and 3246/2023. Applicants now seek their admission on post-arrest bail in the aforesaid crime, on the ground of tender age and lady accused in terms of section Section 497(1) of the Code of Criminal Procedure 1898 and Section 6(5) of the Juvenile Justice System Act, 2018.

2. It is inter-alia contended by the learned counsel for the applicants that the alleged narcotics are foisted upon him by police. Learned counsel emphasized that the complainant has made no efforts to associate any private witness from public, though the complainant received spy information of the alleged incident to happen, besides that the complainant was also accompanied by lady searcher and were on patrolling duty, which creates serious doubt in the prosecution story; that the place of incident is a thickly populated area, but no private witness has been cited by the police at the time of alleged recovery, which is in clear violation of Section 103 Cr.P.C., He insisted that it is case under sub-clauses (b) of section 9 CNSA and punishment is always to be awarded for the offense

in commensuration with the quantum of recovery of contraband, therefore, the quantum of punishment has to be ascertained by the Trial Court as such, the applicants are entitled for bail; that both the mashirs are subordinate of the complainant, therefore, the false implication of applicants/accused cannot be ruled out; that applicants/accused are confined in jail since their arrest and are no more required for further investigation. The learned counsel has also pleaded that on the evening of 19.06.2023, a phone call was received by the father of the applicant Niaz Khan and husband of the applicant Raziqa from an unknown person for demand of illegal gratification of the amount of Rs. 200,000/- on failure to meet with such demand the applicants were initially arrested by Pak Rangers and then handed over their custody to the police, who were proved to be sharp enough to implicate the applicants in the false FIR. He has further contended that he remained in police custody and after that, he was remanded to judicial custody. Per learned counsel, the applicant Niaz Khan was adjudged by the trial Court to be a juvenile and applied for post-arrest bail on merits, as well as, on the ground of tender age, but the trial Court dismissed his bail application as well as his mother's bail application in violation of principles laid down by the Supreme Court in bail matters. The learned counsel has also pressed very hard on the ground of the tender age of the applicant Niaz Khan and contended that the applicant, a juvenile aged about 12 years as per his birth certificate duly verified by the learned trial court, is to be released on bail, as of right, under Section 6(5) of the Juvenile Justice System Act, 2018, as he has been detained for a continuous period exceeding three months without the trial. Learned counsel emphasized that the applicant Niaz was/is a minor and the applicant Razika is a lady accused and is entitled to be released on bail under the first proviso to Section 497(1) of the Code of Criminal Procedure 1898. Learned counsel, pointed out that joint recovery has been shown in the Mushirnama, which is not permissible under the law, therefore, prayed for allowing instant bail applications.

3. Learned APG, on the other hand, has supported the impugned bail declining orders passed by the learned trial court and maintained that Section 6(5) of the Act does not apply to a case involving a "heinous offense". The embargo contained in Section 51 of the Control of Narcotics 'Substance Act 1997 does apply to the present applicants, which is not in derogation of Section 103 Cr. P.C. Learned APG has submitted that the applicants are involved in the narcotic case as such they are not entitled to the concession of post-arrest bail either under Section 6(5) of the Act or Section 497(1) of the Code of Criminal Procedure 1898. The learned APG submitted that a huge quantity of heroin i.e. 509 and 511 grams were

recovered from their possession respectively and the chemical examiner report is positive and supports the case of prosecution; and, because of the recent amendment in the law, through Act No.XX of 2022 in the Control of Narcotics Substance Act 1997, a punishment of 14 years is mentioned which falls within the prohibitory clause of Section 497 Cr. PC. He prayed for the dismissal of the bail applications.

4. I have heard learned counsel for the parties and perused the material available on record.

5. To appreciate the aforesaid propositions so put forward by the parties, it is the undeniable legal position that under the first proviso to Section 497(1) Cr. P.C., grant of bail is a rule and refusal an exception, as held in *Tahira Batool v. State* (PLD 2022 SC 764), so far as the lady accused is concerned. It is now well-settled that in a case where the accused is either a minor under the age of sixteen years, or woman, or a sick or infirm person, even in a non-bailable offense of prohibitory clause, in the same manner as bail is granted or refused in offenses of non-prohibitory clause of Section 497(1) Cr. P.C. In *Tahira Batool's case*, the Supreme Court granted bail to the accused lady for an offense punishable under Section 395 PPC, under the 1st Proviso to Section 497(1) Cr. P.C., however, in the present case the applicants have been jointly charged with an offense under Section 9 (i) 6-B & 9 (i) 6-C of the Control of Narcotic Substance Act, 1997, in the given circumstances whether the maximum punishment of 14 years or alternative would be awarded or not is also a point of discussion.

6. According to the case of the prosecution, 509/ 511 grams of heroin were recovered from the applicants, not only because the quantity of 9/11 grams exceeds the upper limit of 500 grams to bring the case within the prohibition contained in section 497(1) Cr. P.C. The Supreme Court in such circumstances granted post-arrest bail to the lady accused, keeping in view the (II) Proviso of Section 497 Cr. P.C. in the case of *Mst. Kaimat Bibi v. The State* (2022 SCMR 609). The Supreme Court also in the case 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. In the present case, the guilt or innocence of the applicants is yet to be determined by the trial Court. The prosecution has not placed any material to establish that the applicants are previous convicts or involved in the same and similar offenses in the past.

7. Apart from the above, it revealed from the record that the aforesaid narcotics were recovered from the applicants respectively through common Mashirnama, which was prepared in this case, therefore, on this ground also case of the applicants also requires further probe. It is a well-settled principle of law that mere heinousness of offense is no ground to reject the bail plea. The basic concept of bail is that no innocent person's liberty is to be curtailed until and unless proven otherwise. The essential prerequisite for the grant of bail by subsection (2) of section 497, Cr.P.C. is that the court must be satisfied based on the material placed on record that there are reasonable grounds to believe that the accused is not guilty of an offense punishable with death or imprisonment for life. The condition of this clause is that sufficient grounds exist for further inquiry into the guilt of the accused which would mean that question should be such that it has nexus with the result of the case and can show or tend to show that the accused was not guilty of the offense with which he is charged. Grant or rejection of bail is a discretionary relief but such discretion should be exercised fairly and judicially. The word discretion when applied to court means sound discretion judiciously guided by law and to lessen the hardship of the people. It is the well-settled and basic principle of law that the bail is not to be refused as punishment.

8. So far as the question of juvenile of Applicant Niaz Khan is concerned, the Supreme Court in the case of *Khawar Kayani Vs. The State (PLD 2022 SC 551)* has settled this proposition once and for all about Section 6(5) of the Act 2018, therefore no further deliberation is required on the part of this court. Besides it is yet to be seen by the trial court in terms of the remand report dated 21.6.2023, whether the case of the applicant, being a child of 12 years, falls within the exception contained in section 83 P.P.C., for ease of reference, is hereby reproduced infra:-

“Act of a child above [ten] and under [fourteen] of immature understanding.- Nothing is an offence which is done by a child above [ten] years of age and under [fourteen], who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.”

9. In the present case, the applicants were arrested on 19.06.2023 and they had been detained for a continuous period exceeding three months since their detention and their trial has not yet been commenced when they applied for the relief of bail before the trial Court. The trial Court declined the relief of bail to the applicants on the analogy that the offense was heinous. The approach of the trial Court, in the present case, to decline the benefit of Section 6(5) of the Act,2018, if applicable, subject to the final

say of the trial court, and (II) Proviso of Section 497 Cr. P.C. to the applicants, merely by observing that the offense is “heinous” is not legally correct and against the principles laid down by the Supreme Court in the case of Khawar Kayani Vs. The State (PLD 2022 SC 551). and Tahira Batool v. State (PLD 2022 SC 764). A fourteen Member Bench of the Supreme Court in the case of Justice Khurshid Anwar Bhinder v. Federation of Pakistan (PLD 2010 SC 483), has concluded that where the Supreme Court deliberately and to settle the law, pronounces upon a question of law, such pronouncement is the law declared by the Supreme Court within the meaning of Article 189 and is binding on all the Courts of Pakistan. It cannot be treated as mere obiter dictum. Even the obiter dictum of the Supreme Court, due to the high place which the Court holds in the hierarchy in the country enjoys a highly respected position as if it contains a definite expression of the Court’s view on a legal principle, or the meaning of law.

10. Moreover, it has been held time and again by the Supreme Court that bail does not mean acquittal of the accused but only change of custody from police to the sureties, who on furnishing bonds take responsibility to produce the accused whenever and wherever required to be produced. On the aforesaid proposition, I am fortified with the decision of the Supreme Court on the case of Haji Muhammad Nazir v. The State (2008 SCMR 807).

11. Because of the above factual and legal position, as set forth by the Supreme Court, prima-facie, the applicant’s case falls within the ratio of the decisions rendered by the Supreme Court in the aforesaid cases including the cases of Ateebur Rehman v. The State (2016 SCMR 1424), Aya Khan and another v. The State (2020 SCMR 350), Mst. Ghazala v. The State (2023 SCMR 887) and Sahib Ullah Versus State through A.G. Khyber Pakhtunkhwa (2022 SCMR 1806).

12. The applicants Niaz Khan and Raziqa are admitted to post-arrest bail in F.I.R No.135/2023, registered for offenses under Section 9 (i) 6-B & 9 (i) 6-C of Control of Narcotic Substance Act, 1997, subject to their furnishing surety in the sum of Rs.100, 000/- each with P.R Bond in the like amount to the satisfaction of the trial Court.

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

JUDGE