ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No.1795 of 2023

Date	Order with signature of Judge

For hearing of bail application

20.9.2023

Mr. Kashif Ali advocate for the applicant
Syed Meeral Shah, Additional PG alongwith SI Nazar Awan of PS Shah Lateef

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Through this criminal bail application, the applicant Ahmed seeks post-arrest bail in F.I.R No.623/2023, 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 Shah Latif Karachi. The earlier bail plea of the applicant has been declined by the Ist Assistant Sessions Judge, (Malir) Karachi vide order dated 13.7.2023 in Cr. Bail application No. 2841/2023 on the premise that the material is available on record to connect the applicant with the commission of the alleged offense and the grounds agitated by the applicant have already been discarded by the Court vide order dated 02.06.2023.

2. The charge against the applicant is that on 29.05.2023 he was found possessing and selling the injurious *Gutka Mawa*. Knowing the information the complainant Muhammad Iqbal Mangi (SIP) raided the place of the incident, apprehended the applicant, and recovered 7 bags containing 90 shoppers of injurious *Gutka Mawa* and 25 Mainpuri and other articles. The applicant and the recovered material were brought to the police station where FIR No. 623/2023 under Section 8(i) of the SGMA was registered on the same day.

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 him 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 case. He has further contended that the applicant is minor/juvenile as admitted by the investigating officer in the charge-sheet, he even could not think about the commission of the alleged offense 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, 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.

6. 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.

7. 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."*

8. 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.

9. 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.

10. 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.

11. The guilt or innocence of the applicant on the issue of his involvement in the aforesaid crime 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.

12. 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.

13. 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 a 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 are 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).**

14. The applicant claims to be a juvenile, the Supreme Court in the case of *Khawar Kayani Vs. The State* (**PLD 2022 SC 551**) has interpreted Section 6(5) of the Juvenile Justice System Act, 2018. The question of whether the case of the applicant, being a child as disclosed by the investigating officer in the charge-sheet, 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."

15. Prima facie the trial court ought to have considered the case of the applicant in terms of the principles laid down by the Supreme Court in the cases of *Khawar Kayani Vs. The State* (**PLD 2022 SC 551**).

16. In principle 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**).

17. 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.

18. It is a settled principle of law that the benefit of the doubt can be even extended at the bail stage. Reliance is placed on *Muhammad Ejaz v. The State* (**2022 SCMR 1271**), *Muhammad Arshad v. The State* (**2022 SCMR 1555**), and *Fahad Hussain v. The State* (**2023 SCMR 364**).

19. Because of the above factual and legal position as set forth by the Supreme Court in the cases of *Khawar Kayani Vs. The State* (**PLD 2022 SC 551**). The applicant is found entitled to the relief of bail under the first proviso to Section 497(1) Cr.PC, including the reasons recorded hereinabove and this bail application is accepted, subject to his furnishing solvent surety in the sum of Rs.50,000/- and PR Bond in the like amount to the satisfaction of the trial Court, However, the learned trial Court is directed to proceed with and conclude the trial expeditiously.

20. Needless to mention any observations made in the above order are tentative 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 creates 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.

21. This criminal bail application stands disposed of.

JUDGE