

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No. 1939 of 2023

Date Order with signature of Judge

For hearing of bail application

28.9.2023

Mr. Aftab Ahmed Khuhro advocate for the applicant/accused
Ms. Khadim Hussain Addl. P.G.

Through this bail application under Section 497 Cr.P.C., the applicant has sought admission to post-arrest bail in F.I.R No. 813/2023, registered under Section 6/9(C) CNS Act at P.S SSHIA Karachi.

2. The charge against the applicant is that on 07.07.2023 Complainant Assistant Sub-Inspector Abbas Ali of PS SSHIA, Karachi arrested the applicant and recovered Charas weighing 1100 grams. After observing the required formalities at the spot the recovered narcotics and the applicant were brought to P.S SSHIA Karachi where the subject FIR was lodged under Section 6/9(C) CNS Act 1997 on the same day. The prosecution obtained the chemical report of the alleged recovered Narcotics with a positive result. The earlier bail plea of the applicant has been declined by the Sessions Judge Malir Karachi vide order dated 11.08.2023 in Bail Application No. 3410/2023.

3. Learned counsel for the applicant/accused argued that the applicant/accused is innocent and has falsely been implicated in this case. Learned counsel emphasized that according to the prosecution story, no independent witness has been cited by the complainant though he received spy information. Per learned counsel, the prosecution miserably failed to provide any private witness for the search and recovery of alleged charas as the area is very thickly populated which is a clear violation of Section 103 Cr. P.C., therefore creates serious doubts, hence the case needs further inquiry. He argued that both the mashirs are subordinate to the complainant, however, the prosecution succeeded in obtaining a positive Chemical Examiner report, which creates doubt in the prosecution story, however, the applicant cannot be saddled with the charas allegedly recovered from the applicant. He next argued that before the alleged recovery of narcotics from the applicant, the father of the applicant moved an application to the learned justice of the peace under section 22-A and B Cr.PC on 19.06.2023 about the arrest of the applicant by police, and the learned Court vide order dated 05.07.2023 directed the SHO concerned not to harass the applicant and to provide protection to him. The learned Court further passed the order on 08.07.2023 on the habeas corpus petition

No. 216 of 2023 and disposed of the application on the premise that on 07.07.2023 the applicant was arrested in FIR No. 813 of 2023 for the offense punishable under Section 9 (i) 3 of CNS Act, therefore, the false implication of the applicant/accused cannot be ruled out at this stage. He lastly prayed for allowing the bail application.

4. On the other hand learned APG argued that the applicant/accused was arrested the applicant and recovered Charas weighing 1100 grams from his possession. He further added that the embargo contained in Section 51 of the Control of Narcotics 'Substance Act 1997 does apply to the case of the present applicant, which is not in derogation of Section 103 Cr. P.C. The learned Prosecutor has submitted that the Chemical Examiner report is positive and supports the case of prosecution. He further submitted that as per 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. The learned APG pointed out that the recovery of a huge quantity of charas cannot be foisted upon the applicant. He further submitted that the applicant and his family are involved in many cases of like nature such a report was submitted by the SHO to the District & Sessions Judge Malir Karachi in the aforesaid Criminal Petition, hence, the applicant/accused is not entitled to a grant of bail. However, at this stage learned counsel for the applicant has submitted that the family of the applicant has already been acquitted in the aforesaid cases and relied upon the FIRs and judgments passed by the learned courts.

5. Considering the submissions of learned counsel for parties, going through the recovery memo, alleged statement/interrogation report of the applicant, and the report of the chemical examiner dated 01.08.2023, as well as the orders passed by the learned justice of the peace, prima facie, suggest that the following aspect of the case:-

- i) *The applicant was arrested on 07.07.2023 along with Charas weighing about 1100 grams, the Investigating Officer referred the entire charas for Chemical Examination on 10.10.2023 and the Chemical Examiner vide letter dated 01.08.2023 opined that the sample was identified to contain charas. PWs have supported the case of the prosecution CRO of the applicant has been obtained whereby it is reported that one FIR No. 451 of 2021 under Section 6/9 C was registered against the applicant at PS Gadap City, Karachi.*
- ii) *The father of the applicant moved Criminal Miscellaneous Application No. 1651 of 2023 to the Court of Justice of Peace Malir Karachi whereby the learned*

Court vide order dated 05.07.2023 directed the police to protect the father of the applicant and the learned Sessions Judge Malir Karachi also passed an order dated 08.07.2023 whereby the applicant was shown to have been in detention with PS Gadap City Karachi however before the recovery of the detainee i.e applicant, he was shown involved in the subject crime, and the application became infructuous and disposed of.

6. The charas (cannabis) allegedly recovered from the applicant was 1100 grams, as his case is on the borderline as the 100 grams quantity marginally exceeded the maximum limit of one kilogram (1,000 grams) which is required to be considered a case under Section 9 (b) of Act 1997 as it exceeds only 100 grams. Section 9(b), CNSA, which speaks as under:--

"9(b) imprisonment which may extend to seven years and shall also be liable to fine, if the quantity of the narcotic drug, psychotropic substance or controlled substance exceeds one hundred grams but does not exceed one kilogram."

7. The Statute has enshrined the figure up to one kilogram. The quantity of narcotic drug psychotropic substance exceeds the limits specified in the aforesaid amended Section 9(b), the sentence of death or imprisonment for life or extend to 14 years, etc. has been provided under section 9(c), CNSA, which speaks as under:--

"9(c) death or imprisonment for life, or imprisonment for a term which may extend to fourteen years and shall also be liable to fine which may be up to one million rupees, if the quantity; of narcotic drug psychotropic substance or controlled substance exceeds the limits specified in clause (b).

Provided that if quantity exceeds ten kilograms the punishment shall not be less than imprisonment for life."

8. As the matter in hand pertains to bail and under section 51, CNSA some conditions have been postulated to refuse bail in respect of certain offenses; therefore, to facilitate the matter, I would like to reproduce the aforesaid section as under:-

"51. No bail is to be granted in respect of certain offenses.---(1) Notwithstanding anything contained in sections 496 and 497 of the Criminal Procedure Code, 1898 (V of 1898), bail shall not be granted to an accused person charged with an offense under this Act or under any other law relating to narcotics where the offense is punishable with death.

(2) In the case of other offenses punishable under this Act, bail shall not be normally granted unless the Court is of the opinion that it is a fit case for the grant of bail and against the security of a substantial amount."

9. From the language employed in a statute 'it can be gathered whether it is mandatory or directory in its nature. A reading of the aforesaid section reveals that no bail could be granted in respect of offences committed under CNSA and provisions of sections 496 and 497 have expressly been excluded. However, an elbow room was left at the discretion of the Court under subsection (2) of section 51, CNSA where a statute has laid down that bail should not normally be granted unless the Court thought that it was a fit case for grant of bail. The words "fit case for grant of bail" used in the statute would depend on facts of an individual case and are required rather than more favorable circumstances appearing on record in favor of the accused to get entitlement to the concession of bail.

10. The applicant has been behind bars since his arrest. No private or independent person was associated with mashir in this case and all the witnesses of the prosecution are admittedly police officials, and as such the prosecution will be responsible for procuring their attendance at the trial. Thus, there is no question or probability that the evidence will be tampered with or that the prosecution witnesses will be influenced by the applicant if he is enlarged on bail. The Supreme Court in the case of Muhammad Sarfraz Ansari V/S state and others **PLD 2021 SC 738** held that at the bail stage, the court cannot make a deeper examination and appreciation of the evidence collected during investigation or conduct anything like a preliminary trial to determine the accused's guilt or innocence.

11. Prima facie the application was moved by the father of the applicant about the illegal detention of the applicant as PS Gadap where a raid was conducted at PS but the police shifted the applicant to another place and said petition was disposed of. Prima facie this assertion needs probe in the matter which is the function of the trial Court and it is the well-settled law that the benefit of the doubt if any should go in favor of the accused even at the bail stage in terms of the ratio of the judgment passed by the Supreme Court in the case of Ihtisham Ali Cheema vs. The State (2022 SCMR 624). As a general principle of criminal justice, if any doubt appears in the case of the prosecution, the same is always to be resolved in favor of the accused, and the burden of proving the allegation

leveled against the applicant is solely on the shoulders of the prosecution, however, in narcotic cases this principle is not in favor of accused. Furthermore, the heinousness of the offense is per se no ground for rejection of bail.

12. Moreover, a tentative perusal of the police record, it is to be seen whether the applicant is prima facie, involved, in spreading narcotics in society whether his case is hit by prohibition contained in section 51, CNSA, and whether there is doubt that applicant could be awarded maximum sentence provided by the newly amended statute and whether it is a borderline case between subsections (b) and (c) in terms of the ratio of the decisions of the Supreme Court in the cases of *Saeed Ahmed v. State* (PLJ 2018 SC 812), *Aya Khan v. The State* (2020 SCMR 350) and *Ateebur Rehman v. The State* (2016 SCMR 1424), which involved recovery of 1014 grams of heroin and *Aya Khan case*, which involved recovery of 1100 grams of heroin, and bail was granted by the Supreme Court in both cases. Prima facie all aspects of the case including the petition filed by the father of the applicant should be taken care of by the trial Court.

13. Because of the above, it is yet to be seen by the learned trial Court to what extent, the applicant could be saddled with the aforesaid provisions of law, which is possible only after recording the evidence. The applicant is not required for further investigation. Finding it a case between two provisions of law and which provision is to be invoked, it is for the trial court to take care of, thus this is a case of further inquiry within the ambit of Section 51(2) of the CNS Act. So far as the contention of the learned Additional PG that the family of the applicant is involved in the narcotics business, suffice it to say that the mere pendency of criminal cases against the family and/or applicant is no ground to refuse bail as the bail application is to be decided on its merit rather than depending upon the cases registered against them at various places, as this Court has to decide the lis at hand and not in other cases.

14. In view of the above facts and circumstances, this bail application is allowed subject to furnishing solvent surety by the applicant in the sum of Rs.100,000/- (Rupees one hundred thousand only) and P.R. bond in the like amount to the satisfaction of the trial Court.

15. Needless to mention the observations recorded in the instant bail application are based on tentative assessment, which ought not to prejudice the proceedings before the learned trial court.

JUDGE