

ORDER SHEET
IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Cr. Bail Application No. S-422 of 2024

Applicant: Shaman alias Shamoo alias Shamshad son of Ali Muhammad Phulpoto through Mr. Ali Gohar Shar advocate.

Respondent: The State through Mr. Shafi Muhammad Mahar, Deputy Prosecutor General.

Date of hearing: 29-07-2024

Date of Order : 29-07-2024

ORDER

ADNAN-UL-KARIM MEMON, J: Applicant Shaman alias Shamoo alias Shamshad is seeking post-arrest bail F.I.R No.166 of 2024 under section 9 (C) of Control of Narcotic Substance 1997.

2. His earlier bail plea has been discarded by the trial Court vide order dated 7.6.2024 on the premise that a huge quantity viz (1700) grams of charas has been recovered from the possession of the applicant. There is no *ill will* or enmity alleged against the police for foisting a huge quantity of narcotic substance upon the applicant.

3. It is inter-alia contended that the applicant is innocent and has falsely been implicated in this case with mala-fide intention and ulterior motives; that the place of the incident has been a populated area where private persons were available but the complainant has not associated private witnesses for witnessing arrest and recovery proceedings despite of prior spy information; that no specific role has been assigned by the prosecution. He next contended that the all the witnesses are police officials and there is no apprehension to temper with the evidence of PW. He argued that before the alleged incident the sister of the applicant raised her voice of concern that police had taken away his brother for unknown reasons and later booked him in the present case. He further argued that police referred the case property to Chemical analysis after three days after

the alleged recovery. He lastly prayed for allowing the bail application.

4. Learned Deputy Prosecutor General has submitted that as per Amendment Bill, 2022 of CNS Act, 1997 passed by the National Assembly of Pakistan on 6th September 2022, the offense with which the applicant is charged, falls within the prohibitory clause; therefore, the applicant/accused does not deserve any leniency. He next argued offenses punishable under the C.N.S Act of 1997 are by its nature heinous and considered to be offenses against the society at large 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; he added that applicant is habitual offender and involved in 12 cases registered at police station B-Section Khairpur of District Khairpur.

5. I have heard learned counsel for the parties and have perused the record with their assistance and case law cited at the bar.

6. The accusation against the applicant is that he was arrested with the alleged recovery of charas, weighing about 1700 grams, from the shopper bag. In such like cases, the Supreme Court of Pakistan granted bail based on the borderline, and in this respect, reliance is placed in the case of *Saeed Ahmed v. The state etc* **PLJ 2018 SC 812** wherein 1350 grams of substance recovered marginally exceeds 1 K.G. and benefit of bail was extended to the accused in the case of *Naimatullah and another v. The State* **2017 MLD 1097**, wherein it was held that in cases where recovery of narcotic substance does not exceed the limit between 900 to 1500 grams the case being of borderline between clauses (b) and (c) of CNS Act, 1997.

7. Perusal of the record reveals that 1700 grams of charas was recovered from the applicant on 6.5.2024 and the sample separated from it for chemical analysis was sent to the chemical analyzer on 9.5.2024 after the delay of 03 days, for which no plausible explanation has been advanced. However, the investigating officer

was duty-bound to transmit the sample parcel within 72 hours of its separation. In this regard, guidance is sought from "Muhammad Shafiq V. the State" (2016 P.Cr.L.J. 1315), in which it has held that "lapse on the part of the police in sending the contraband substance for chemical analysis within the stipulated period has made the case of the accused that of further inquiry. Mere involvement in other cases of like nature without a conviction does not disentitle the applicant from the concession of bail if the case otherwise calls for further inquiry. Reliance is placed upon "(Arsalan Masih and others v. The State and others" (2019 SCMR 1152). Primarily, section 36 of CNSA provides that a sample of the narcotic drug has to be submitted to the Government Analyst for the test and analysis, while Rule 4 of the Control of Narcotics Substances (Government Analyst) Rules, 2001 ("Rules") provides that reasonable quantity of samples from the narcotic drug shall be drawn and dispatched to the testing laboratory. According to the Ameer Zeb case, which is a decision of a five-member larger Bench of the Supreme Court and thus has a binding effect, a representative sample is to be collected from every packet/cake/slab of the alleged narcotic drug and sent for analysis to the Chemical Examiner.

8. The question is whether the applicant can be saddled with possession and transporting the narcotics in terms of Section 6/9 C of CNS Act 2022, prima facie this question needs to be taken care of by the trial Court as the Supreme Court in the case of Zahid Sarfaraz Gill v The State 2024 SCMR 934 has held that the police and members of the Anti Narcoic Force failed to record or photograph at the time of search of the accused when search, seizure or arrest is made, as the law permits the use of modern device or techniques, however in the present case the police has failed to apply the test so directed by the Supreme Court, therefore, in all cases about Narcotics, this modern device is required to be used in future cases without fail in terms of the ratio of the decision of the Supreme Court in the case of Zahid Sarfaraz Gill. No doubt, the offense of trafficking the narcotic is

a heinous one and affects society at large but it is a settled principle of law that every case is to be decided on its facts and circumstances. Again, in the case of Deputy Director ANF Karachi vs Syed Abdul Qayum, reported in **2001 SCMR 14**, which was later, the Supreme Court ruled that despite the provisions contained in Section 51 of the Control of Narcotic Substances Act, 1997, the Sessions Court and High Court have the power to grant bail. For the sake of convenience and ready reference, the relevant part of the judgment is given below:-

“Moreover, this Court in the case of Gul Zaman V the State reported in 1999 SCMR 1271, has elaborately dealt with the application of sections 496, 497, and 498 Cr.P.C. in view of the bar contained in section 51 of the Act and it has been unanimously held that despite the provisions contained in section 51 of the Act, the Sessions Court and High Court have the power to grant bail.”

9. Since the judgment rendered by the Supreme Court directed to record or take photographs at the time of search of the accused when search, seizure, or arrest is made as the law permits the use of modern devices or techniques but the police failed and neglected to adhere the dicta laid down by the Supreme Court, which is a constitutional command under Article 199 of the Constitution, therefore, appreciating whether the applicant was arrested with charas from his trousers requires deeper appreciation.

10. In view of the above, the arguments of the learned Prosecutor that the bar contained in Section 51 (1) of CNSA is applicable is without any substance in the light of the ratio of the judgment rendered by the Supreme Court in the case of Zahid Sarfarz Gill supra as the prosecution failed to comply the law laid down by the Supreme Court, which was decided on 22.11.2023 whereas the subject FIR was registered on 6.5.2024, which shows that either prosecution is ignorant the law laid down by the Supreme Court or deliberately avoiding to adhere the principle of law, besides the trial Court has completely ignored the judgment of the Supreme Court, which apathy, therefore, the benefit should go to the accused at the bail stage without touching the merits of the case.

11. 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.

12. 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).

13. For what has been discussed above in the preceding paragraphs, this bail application is accepted and the applicant Shaman alias Shamoo alias Shamshad is admitted to bail in FIR No. 166 of 2024 under section 9 (C) of Control of Narcotic Substance 1997 of PS B-Section Khairpur. He shall be released on bail provided he furnishes bail bonds in the sum of Rs.200,000/- (Rupees two lac only) with two reliable and resourceful sureties each in the like amount as well as PR Bond to the satisfaction of the learned trial Court. However, the learned trial Court shall endeavor to examine the Investigating officer positively within one month and if the charge has not been framed the same shall be framed on the date so fixed by the trial Court, and a compliance report shall be submitted through the Additional Registrar of this Court. He shall ensure compliance with the order within time.

14. Needless to mention here that the observations made herein above are tentative, which shall not be influenced by such observations while deciding the case on merits.

JUDGE