

ORDER SHEET
IN THE HIGH COURT OF SINDH CIRCUIT COURT
MIRPURKHAS
B.A No.S-172 of 2024

(Muhammad Yousif Vs. The State)

DATE	ORDER WITH SIGNATURE OF JUDGE
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Date of hearing & Order 13.08.2024

Mr. Shoukat, Advocate for the applicant

Mr. Shahzado Saleem, A.P.G Sindh

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ORDER

Adnan-ul-Karim Memon, J. The Applicant Muhammad Yousif seeks his release on post-arrest bail in F.I.R No.131 of 2024 for the offense under section 9 (i) 3-C of the CNS Act at Police Station Sanghar. His earlier bail plea was declined by the trial court vide order dated 22.07.2024 on the premise that the applicant had been arrested on the spot and 2240 grams of charas had been recovered from his possession.

2. It is inter-alia contended that the applicant is innocent and has falsely been implicated in this case, he next contended that the place of the incident is a thickly populated area but no independent private person is cited as mashir, which is a clear violation of Section 103 Cr. P.C. makes the case highly doubtful. He has further argued that if the recovered narcotic weighed along with the black polythene bag, if weighed might have come to certain grounds that require further probe; and, the Chemical report is at variance, so far as the net weight and gross weight are concerned, in that eventuality the case of the applicant falls within the ambit of Section 9 (b) of the CNS amended Act 2022 and falls within the ambit of Section 497(2) Cr.P.C. He has further argued that the degree of punishment under Section 9 (C) of the CNS Act, increases with the quantity of narcotics recovered, that the proviso to Section 9 (c) entails that only when the quantity of narcotic exceeds 10 KG, then the punishment could be enhanced. He lastly prayed for allowing the bail application.

3. Learned Additional Prosecutor General opposed the grant of bail to the applicant on the premise that the applicant/accused had been arrested on the spot and 2240 grams of charas had been recovered from his possession by the police party headed by the complainant SIP Muhammad Iqbal of P.S Sanghar. He added that the quantity of alleged charas falls under section 9(i)(3) (c) of the CNC (amended) Act and the punishment of such offense is extended up to 14 years, which falls within the prohibitory clause of section 497 Cr.P.C. he argued that sentences not only falls within prohibitory clause of section 497 Cr. P.C but also attracts the bar contained in section 51(1) of the Ibid Act. As per the prosecutor, the material available on record is sufficient to connect the applicant/accused with the commission of the offense. He further argued that the

applicant/accused has not made out the case for further inquiry and his application may kindly be dismissed.

4. Before dealing with the merits of the respective contentions, it would be appropriate to refer to the guidelines given by the Supreme Court, while considering the application for grant of bail. The guidelines are that while deciding a bail application this Court has to consider the facts of the case narrated in the FIR, statements recorded under Section 161 Cr.P.C., other incriminating material against the accused, nature, and gravity of charge and pleas raised by the accused. In this regard, I am fortified by the decision of the Supreme Court rendered in the case of *Shahzad Ahmed Vs. The State* [2010 SCMR 1221]. Keeping in view the above principle, the learned counsel for the parties has been heard and the record has been perused.

5. The accusation against the applicant is that on 30.05.2024, he was arrested by Police and recovered 2240 grams of charas, such F.I.R. was lodged at Police Station Sanghar. The alleged narcotics were dispatched to the Chemical Examiner on the next day; such chemical report dated 20.6.2024 is positive. Even, though I have perused the aforementioned test report, however, there appears a remarkable difference between the gross weight i.e. 2240, and the net weight of Charas which weighs 2236 grams, which is at variance and this discrepancy requires to be taken care of by the trial court after recording the statement of the police officials.

6. In such circumstances, the question is whether the applicant can be saddled with possession and transporting the narcotics in terms of 9(i)(3) (c) of the CNS (amended) Act because the applicant has been shown to have been arrested and police allegedly found black shopper bag containing purported four big and one small dark brown pieces charas; whereas the applicant claims that he was arrested from his house. Besides the defense has also leveled allegations against the prosecution witnesses of their malice in the matter. 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 *Ayaz Khan and another v. The State* (2020 SCMR 350), which involved the recovery of 1100 grams of heroin, granted bail 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 applicant is a previous convict, merely being involved in the same and similar offenses in the past cannot be ground to refuse bail as this case can be decided on merit, therefore, the record cannot be cited as precedent to refuse bail on this point. In such cases, the false implication can be judged by the trial court as the prosecution had sufficient time to comply with the directions of the Supreme Court in the case of *Zahid Sarfaraz Gill v The State* 2024 SCMR 934 where it has been held that the police and members of the Anti Narcotic 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*.

7. 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.”

8. 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 189 of the Constitution, therefore, appreciating whether the applicant was arrested with charas from his possession requires deeper appreciation. 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. 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**).

9. Additionally, 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.

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 in the year 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.

11. For what has been discussed above in the preceding paragraphs and the facts and circumstances of the instant case make it a case of further inquiry Accordingly, the applicant Muhammad Yousif is granted post-arrest bail, in the case arising out of F.I.R No.131 of 2024 for the offense under section 9 (i) 3-C of the CNS Act at Police Station Sanghar, subject to his furnishing bail bond in the sum of Rs. 100000/- (One Hundred Thousand Rupees) with one more surety in the like amount to the satisfaction of the Trial Court.

12. The observation recorded hereinabove is tentative and shall not prejudice the case of either party at trial. However, the learned trial Court shall endeavor to examine the complainant positively within one month. If the charge has not been framed, the same shall be framed before the date so fixed by the trial Court, and a compliance report shall be submitted through the Additional Registrar of this Court. The Additional Registrar shall ensure compliance with the order within time.

JUDGE

“Ali Sher”