

IN THE HIGH COURT OF SINDH, KARACHI

Before:

Mr. Justice Mohammed Karim Khan Agha, J.

Criminal Bail Application number, name of the Applicant and his counsel.

Criminal Bail Application No.1752 of 2017
Syed Fayyaz Hussain Gilani V. The State.
Through Mr. Asif Ali Pirzada, Advocate.

Mr. Habib Ahmed, Special Prosecutor, ANF.

On Court Notice:

Dr. Shahid Ahmed, Consultant Cardiologist, NICVD
Dr. Nausheen Ahmed, Pulmonologist, JPMC
Dr. Ghulam Mohammed, Senior Medical Officer Central
Prison Karachi

Date of hearing: 29.01.2018 and 12.02.2018

Date of order: 15-02-2018.

ORDER.

Mohammed Karim Khan Agha, J: This is a bail application filed on behalf of the applicant/accused, on medical grounds, who is facing trial in crime No.27 of 2015 under section 6/9-C Control of Narcotics Substances Act 1997 (CNSA) registered at PS ANF Clifton, Karachi

2. The allegations as contained in the instant FIR are that Inspector Khalid Rashid lodged FIR on 18.08.2015, at about 09:00 hours stating therein that on 19.08.2015, he was present at ANF Clifton Karachi and received information through DD Operation-I that Provincial Drug Smuggler Agha Jan son of unknown, after concealing narcotic substance in a

bus bearing No.TKU-042 would smuggle it through his agent Mohammad Saleem son of Sadiq Khan, resident of Quetta and Barkat Ali son of Haq Nawaz Jan resident of Sher Shah Karachi, and **it would be cleared from the checking points from Hub Chowki, Karachi by Fayyaz Hussain Gilnai a Sindh Police Official** and in case of immediate action the arrest of the accused and recovery of the Narcotics substance is possible. Therefore under the instruction of Superior Officer the Complainant Inspector Khalid Rashid constituted the raiding party comprising of Inspector Muzammil Ahmed, Sub Inspector Arif Lodhi, SI Attaullah Khan Jadoon, ASI Javed Aslam, HC Nasir Khan and others. ANF staff in 4 cabin vehicles left PS according to the report No.09 at about 2100 hours alongwith spy informer under the supervision of Deputy Director Operation and reached in front of Super Waziristan Hotel, Main Hub River Road, Raees Goth, Karachi at about 2200 hours and started checking of the vehicles coming from Baluchistan and at about 2300 hours a bus bearing registration No.TKU-042 in dilapidated condition was seen coming towards Karachi, which was stopped and found a person sitting on the driving seat and a person sitting on the front passenger seat as well as on rear seat, who were apprehended and at that time some vehicles were stopped and persons were asked to act as mashirs, but due to fear of Narcotic smugglers they refused, therefore, ASI Javed Aslam and ASI Ali Sher were nominated as witnesses and the apprehended person sitting on the driving seat disclosed his

name as (i) Mohammad Naeem son of Sadiq Khan, r/o Quetta and the person sitting behind the driving seat disclosed his name (ii) Barkat Ali son of Haq Nawaz, r/o Sheikh Abdul Nabi Road, Jacobabad **whereas the person who was sitting on the front passenger seat disclosed his name as Syed Fayyaz Hussain Gilani son of Riaz Hussain r/o North Karachi A-192, Sector 1-A4, he further disclosed that he is SIP of Sindh Police who also confessed about the clearance of the bus from Hub Chowki to Sher Shah** and after some prevarication all the 3 persons pointed all the narcotics substance in huge quantity under the floor of the loading portion of the bus and all 3 accused led the pointed place where the narcotics substance concealed and when such portion, comprising of wood, was opened through the instruments and checked and found silver foil packets of Charas and on counting 2758 foil packets of different colour with different trademarks of **Charas weighing 2758 Kgs and 55 foil packets of maroon colour of Opium weighing 55 Kgs recovered**, samples were taken out from recovered Charas and the Opium were sealed for purpose of chemical analysis. From the personal search of the accused Mohammad Naeem a colour copy of CNIC, Rs.500, one Nokia Mobile phone alongwith two Sims, **from personal search of Fayyaz Hussain from right side of his pocket a copy of CNIC in his name, service card of Sindh Police and Rs.1000 recovered.** From the search of accused Barkat Ali original CNIC and Rs.200/- recovered. Memo of arrest and

recovery prepared on the spot and obtained signature of witnesses on it and signature on the case property and so also on sample parcels, which were drawn from the narcotic substance. Hence this FIR.

3. Learned counsel for the applicant / accused submitted that that he was only applying for bail on medical grounds and that the medical reports which he had filed entitled him to bail on medical grounds based on the law of medical bail. In this respect he placed reliance on **Ch. Zulfiqar Ali V State** (PLD SC 2001 546) and **Imtiaz Ahmed V State** (2017 SCMR 1194).

4. On the other hand, learned Special Prosecutor ANF opposed the grant of bail to the applicant stating that it was unclear from the reports whether the applicant could be treated in jail and whether the ailment of the applicant was life threatening. Furthermore, he contended that the earlier bail application on merits had been dismissed by the High Court, that this was a heinous crime concerning the recovery of Charas weighing 2758 Kgs and 55 foil packets of maroon colour of Opium weighing 55 Kgs recovered and that the applicant was a police officer who was supposed to prevent crime rather than indulge in it and that his application for medical bail had been dismissed by the trial court vide order dated 09-11-2017. He did however state that as a middle ground he had no objection to the applicant remaining in hospital where he currently was being treated, National

Institute of Cardiovascular Diseases (NICVD) until the outcome of the trial.

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

6. At the outset I am of the view that the merits of the case, delay in the case, seriousness of the offense are not particularly relevant in an application concerning medical bail as the grant of bail on medical grounds is bail which is of a separate and distinct nature to that determined on merits, statutory grounds and/or hardship. This is because the right to life of the individual as enshrined by Article 9 of the Constitution and the fact that a person is innocent until proved guilty far out weigh the heinousness of the offense. Every accused who is innocent until proven guilty has the right to proper medical treatment to safe guard his life even if he is facing the most heinousness of crimes and it is the duty of the court's to ensure that the life of the accused is preserved whilst he is incarceration if he is suffering from serious life and potentially threatening ailments.

7. In this respect in the case of **Imtiaz Ahmed V State** (2017 SCMR 1194) the Hon'ble Supreme Court has recently held as under at P.1200 Para 19

"19. The co-accused, namely, Irfan Ali (since dead) was seriously sick, he applied to the Court for providing specialization treatment in some government hospital, however, the Presiding Judge of the Court did pay proper attention to it and left the fate of the said accused at the mercy of the jail authorities and the Prosecution. The

Jailor reported to the Court that permission of the Home Department, Punjab had been sought and on getting the same, he would be taken to the hospital for treatment and management through specialized medical experts. It was in this background that in not getting timely specialized treatment in some government hospital, his disease aggravated to unmanageable extent thus, he was shifted to the hospital in serious emergency, however, after staying 2/3 days in the hospital, his life could not be saved by then and he died there. This is uncondonable default on the part of the Presiding Judge, who had surrendered his judicial authority to the Jailor to regulate the custody of the under-trial prisoner and to take care of his health. **It must be borne in mind that custody of under-trial prisoners, including health care and other facilities has to be regulated strictly by the Judges, before whom the trials are pending. The jail authorities can only deal with the custody of those prisoners who are sentenced to imprisonment. Thus, we are of the view that the Presiding Judge of the Special Court was fully oblivious of his judicial authorities to enforce the writ of the Court, keeping in view the urgent and sensitive nature of the matter. Even in a case of hardened, desperate and dangerous criminals, they are entitled to similar treatment, however, to ensure that they may not abscond from the custody, the Court may direct that while staying in the government hospital for treatment sufficient number of security guards should be provided, however, on that ground alone urgent treatment from specialist doctors whenever is seriously needed, cannot be denied to them, being a fundamental right of every citizen, as the provision of the Constitution has not drawn any distinction between an under-trial prisoner or citizens at large.**" (bold added)

8. The law on bail on medical grounds was enunciated as long ago as 1995 by the Hon'ble Supreme Court in the case of **Mohammed Yousafullah Khan V State** (PLD 1995 SC 58) which in my view still remains good law, even after the later cases of **Muhammed Saeed Mehdi V State** (2002 SCMR 282) and **Peer Mukaram Ul Haq V NAB** (2006 SCMR P.1225), where it was held at P.65 as under:

“From the above discussed position it is clear to us that the bail on medical ground can be granted under section 497, Cr.P.C. if the Court reaches the conclusion **on the basis of medical report** that the ailment with which the accused is suffering is such that it cannot be properly treated while in custody in Jail. The fact that the appellant is not suffering from any particular type of injury (as observed by the learned Judge that there was no fracture of bone in that case), would not be a ground either to refuse or grant the bail on medical ground. **The correct criteria for grant of bail to an accused in a non-bailable case, on medical ground, in our view, would be that the sickness or ailment with which the accused is suffering is such that it cannot be properly treated within the premises of jail and that some specialized treatment is needed and his continued detention in Jail is likely to affect his capacity or is hazardous to his life**”. (bold added)

9. Thus, the test would therefore appear, in non bailable cases such as the instant case, to have the following limbs as set out below all of which in turn the court would need to be satisfied of, **based on the medical reports**, before the Court before bail on medical grounds can be granted under the first proviso to S.497 (1) Cr.PC based on the particular facts and circumstances of each case

- (a) the sickness or ailment with which the accused is suffering is such that it cannot be properly treated within the premises of jail **and**
- (b) that some specialized treatment is needed **and**
- (c) his continued detention in Jail is likely to affect his capacity **or** is hazardous to his life.

Whether the medical reports before us meet the legal requirements of medical bail?

10. In determining this issue we need to examine the medical reports before us with the relevant law based on the facts and the circumstances of this particular case.

11. Earlier the bail of the applicant was dismissed by the trial court on medical as well as other grounds largely on account of the fact that no medical board had been constituted to determine the nature and seriousness of the applicants ailment which in fact is related to his heart and the medical field of cardiology. Since the applicant has now produced medical reports compiled by a medical board constituted by the court the findings of the earlier order declining bail on medical grounds are distinguishable from the present case.

The minutes of the first medical board dated 09-12-2017 are reproduced as under:

No.F.2-12-K/2017-GENL/5784/JPMC
GOVERNMENT OF SINDH
JINNAH POSTGRADUATE MEDICAL CENTRE
KARACHI-75510.

Dated the 9.12.2017

The Assistant Registrar Criminal BR.,
Honorable High Court of Sindh
Karachi

Subject: Minutes of Medical Board of Syed Fayyaz Hussain Gillani, Ref:- Honourable High Court of Sindh at Karachi CR/BAIL/APPLN/NO/1752/2017, dated 23rd November, 2017.

A meeting of the Medical Board of Syed Fayyaz Hussain Gillani was held on 7th December, 2017 at 12:15 pm in the Committee Room No.1 Administration Block JPMC Karachi. The following consult attended the meeting:

Prof. Qurban Hussain Shaikh, HOD MICU W-23
Chairman

Dr. Shahid Ahmed, Cardiologist, NICVD Member

Dr. Nausheen Ahmed, Pulmonologist, W-12 Member

Patient Syed Fayyaz Hussain Gillani examined and reviewed the available medical record by the Medical Board.

Syed Fayyaz Hussain Gillani known case of HTN, Diabetes Mellitus and Ex-smoker. His PCI was done on 6th February, 2017 at NICVD, Karachi. **Since then he has been visiting NICVD multiple times for shortness of breath.**

According to patient he is on following medicines.

- Insulin 50 B.D, Tab: Lipiget, Tab: Lowplat plus, Tab: Merol, Tab: Cardace, Tab: Spiromide
- Cap: Risek

- **On examination:**

- Pulse 75/m, BP 140/85 mm Hg, SO 99%, PEFR 1701/m, Chest Auscultation normal. **He is in New York Heart Association functional class-II patient. He is complaining of Exertional dyspnea.**(bold added)

- **Advice:**

- Continue above mentioned medicines and Salt restriction.

- **Investigation advice:**

- 1. Fresh echocardiogram 2. EGG 3. Thallium scan for viability and ischemic 4. HbA1c
- 5. Lipid Profile 6. FBS, CBC 7. Spirometry 8. C X R PA View

- After all these above investigations mentioned Medical Board will review and reassess the patient to decide whether the prison life is detrimental to the accused.

- Next meeting of Medical Board will be held after receiving investigations.

- Dr. Yahya Khan Tunio
- Deputy Director

Copy forwarded for information and necessary action to the Superintendent Central Prison Karachi is hereby requested that to send accused Syed Fayyaz Gillani at JPMC and NICVD Karachi for investigations / labs as advised by the Medical Board mentioned above as soon as possible alongwith previous medical record.

12. As noted this medical board needed to carry out further investigations before giving its findings which lead to a second medical board dated 22-12-2017 which had received the results of its investigations which is reproduced as under:

Minutes of Medical Board of accused Syed Fayyaz Hussain Gillani.

Ref:- Honourable High Court of Sindh at Karachi CR/BAIL/APPLN/NO/1752/2017, dated 12-12-2017

The Second meeting of the Medical Board of accused Syed Fayyaz Hussain Gillani was held on 22nd December, 2017 at 11:00 am in the Committee Room No.1 Administration Block JPMC Karachi. The following consultants attended the meeting:

Prof. Qurban Hussain Shaikh, HOD MICU W-23
Chairman

Dr. Shahid Ahmed, Cardiologist, NICVD Member

Dr. Nausheen Ahmed, Pulmonologist, W-12 Member

Patient Syed Fayyaz Hussain Gillani and fresh investigations examined and reviewed by the Medical Board.

He is known case of HTN, Diabetes Mellitus and Ex-smoker. His PCI was done on 6th February, 2017 at NICVD, Karachi. Since then he has been visiting NICVD multiple times for shortness of breath and chest pain.

In view of current investigations and recent Echocardiography that shows severe left ventricular dysfunction with dilated heart. This patient can at any time have life threatening arrhythmia (Cardiac arrest) needing emergency treatment, if facilities to address the above mentioned condition is not available in jail then confinement might be detrimental to his health / life. (bold added)

Sd/-

1. Prof. Qurban Hussain Shaikh 2. Dr. Shahid Ahmed 3. Dr. Nausheen Ahmed
Chairman Member Member

Sd/-

Sd/-

13. After examining the medical reports I found that certain aspects of the same needed to be clarified. In particular (a) whether treatment was available for the ailment as found in

the second medical board's report in the jail hospital for which the medical officer Karachi central prison was called on 12-02-2018 to give his opinion (b) in terms of emergency treatment mentioned in the 2nd medical report what was the potential range of this based on the medical reports and the applicants medical history e.g. angieapathy, stents, ballooning, or open heart surgery (c) what was meant by the word "might" be detriment to his health. In this respect the members of the 2nd Medical board were called on 12-02-2018.

14. The medical officer of central prison categorically stated that based on the petitioners cardiac condition if it was to relapse the jail hospital had no such facilities to treat the same and the patient/inmate would have to be sent to an outside hospital. The jail prison did not even have such a basic piece of equipment such as a defibrillator. In his report dated 10-02-2018 he also stated as under:

"Above named accused H/O known diabetic and known hypertensive. He C/O chest pain radiating to left arm and shortness of breathing. **For the above complaints he was sent to Civil Hospital Karachi in emergency on dated 13.01.2017 where he was admitted in cardiology department and discharged on 18.01.2017. On dated 25.01.2017 he was sent to NICVD where he was admitted, during admission angioplasty was done due to 2 vessel disease and discharged on 18.02.2017. On dated 15.06.2017 he was sent to NICVD where he was admitted and discharged on 28.08.2017 with advise medicines. On dated 11.10.2017 he was sent NICVD where he was discharged on 14.10.2017. On 07.12.2017 medical board was constituted at JPMC by the orders of Honourable High Court of Sindh who advised fresh investigation. The second meeting of the medical board was held on 22.12.2017 in which medical board gives opinion that investigations shows severe left ventricular dysfunction with dilated heart and also mention that this patient can at any time have**

life threatening arrhythmia (Cardiac arrest) needing emergency treatment, if facilities to address the above mentioned condition is not available in jail then confinement might be detrimental to his health / life. (bold added)

15. Of the three member medical board constituted on the directions of this court Prof. Qurban Hussain Shaikh HOD MICU W-23 was absent due to professional engagements in Islamabad so could not attend the court. However I did not consider his absence to be of great significance since the other 2 board members were present being Dr. Shahid Ahmed, Cardiologist (who was probably the most important member of the board for my purposes as his speciality was cardiology which concerned the applicant's medical issues) and Mrs Nausheen Ahmed pulmonologist.

16. When asked about his medical report Dr. Shahid Ahmed confirmed the same and clarified that the applicant had a history of severe cardiac problems and his health condition was such that he may have a cardiac arrest at any time which would almost certainly require heart surgery and his confinement in jail bearing in mind his past medical history, current medical condition and lack of emergency medical aid for cardiac problem e.g. the lack of even a defibrillator at the prison hospital **would** be detrimental to his health and hazardous to his life and may even result in his death unless prompt medical treatment was provided which was not available in the jail premises and as such he should be moved to hospital with the required facilities such as NICVD where

any surgery which he required could be carried out. Mrs Nausheen Ahmed pulmonologist who was also a member of the Board had no reason to disagree with such assessment but frankly mentioned that cardiology was not her speciality.

17. Learned Special prosecutor ANF has neither challenged the composition of the medical boards nor their findings however he has come up with the submission that the applicant may remain in hospital until the completion of his trial.

18. In all fairness this seems to be a good half way house where the health of the applicant could be closely monitored and looked after and at the same time he could attend the trial and would be less likely to abscond if placed under guard. If any surgery was required, according to Dr. Shahid Ahmed, Consultant Cardiologist, NICVD, this could be carried out at NICVD where the applicant had been treated in the past for his heart ailment and as such if he had a cardiac arrest he could be immediately treated without loss of time. This option would also seem to be in the best interests of the applicant bearing in mind his cardiac problem.

19. In the case of **Muhammed Aslam Bajwa V State** (PLD 2004 SC 780) the Hon'ble Supreme court held as under at P.784 at Para 9:

"In view of the report of Medical Board, the condition of petitioner is stable. Special Medical Board with consensus had only recommended the hospitalization of petitioner for his treatment, which according to the learned counsel for the petitioner, is available to him till

this time and he is hospitalized. Grant of bail under first proviso to section 497(1), Cr.P.C. is discretionary in nature. Every ailment does not attract invocation of discretion contained in the proviso. There must exist strong reasons to believe that despite the availability of modern medical technology, life saving drugs, advance medical treatment and care, accused still requires treatment which is not generally available.

20. As such in exercise of my discretion the application for bail on medical grounds is dismissed however the superintendent of Central Prison Karachi is directed to immediately move the applicant from the prison to NICVD where he shall remain under guard until the completion of his trial. The trial court is directed to complete the trial within 3 months of receipt of this order. A copy of this order shall be sent to the Superintendent Central prison Karachi, Administrator NICVD and the concerned trial court for information and compliance

21. Before parting with this order I would like to observe that the jail hospital of central jail Karachi appears to be woefully ill equipped to look after the health and well being of so many incarcerated prisoners.

22. With regard to the staff and equipment available at the jail hospital at central prison Karachi in his written statement dated 10.02.2018 senior medical officer stated the following concerning medical facilities available at the hospital:

It is further stated that no specialist doctor posted in central prison Karachi. Only six doctors of General Cadre and eleven dispensers are posted in central prison Karachi and they perform their duties round the clock routine wise. Facility of ECG machine and oxygen is available in

functioning condition, our doctors and paramedical staff can operate them. Specialist doctors visit the prison once a week."

23. It is probably true that in most societies (even those which are more developed than ours) little care is taken towards the well being of incarcerated prisoners in terms of quality of food, over crowding, sanitation, health care etc since such persons are generally regarded as the pariahs of society and are considered by most of the public as completely undeserving of any sympathy let alone the basic living conditions which would not justify expenditure from the public taxes.

24. Be that as it may Article 9 of the Constitution provides for the security of person and Article 14 makes the dignity of man inviolable. As such I hereby direct the Secretary Health Government of Sindh to meet with the senior medical officers of each jail in Sindh and ensure that all equipment already available is working and that it has trained operators **and** to add any further medical equipment which is reasonably required so at least emergency patients such as cardiac can be stabilized before being sent to outside hospitals for specialized treatment, that there is sufficient availability of required medicines including vaccinations against hepatitis and other such diseases, that there are adequate beds available in the prison hospital, that there are an adequate number of doctors and dispensers **including at least one cardiac specialist available at all times** so that the

prisoners can be properly cared for. A five star hotel is not expected but it is the duty of the state to ensure that at a minimum prisoners have the basic medical facilities available to them whether they are rich or poor inmates as under the Constitution every body is entitled to equal treatment before the law.

25. A copy of this order shall be sent to the Secretary Health Government of Sindh for information and compliance who shall submit its report on paragraph 24 of this order through MIT II within two months of the date of this order and the matter shall be put up in court on 23-04-2018 when a responsible officer of the Health Department Government of Sindh shall be in attendance along with the Additional Advocate General.