

THE HIGH COURT OF SINDH KARACHI

**Cr. Bail Application No. 558 of 2020**

For hearing of Bail Applications.

Applicant/ Accused : Muhammad Yousuf son of Jan  
Muhammad through M/s.  
Muhammad Sahib Khan and Habib-  
ur-Rehman Marwat, Advocates .

The State : Through Mr. Abdullah Rajput  
Deputy Prosecutor General, Sindh.

Date of hearing : 19-05-2020

Date of order : 19-05-2020

**ORDER**

**Adnan Iqbal Chaudhry J.** - The Applicant seeks bail in FIR No.90/2019 registered at P.S. SIU West, Karachi, under sections 6 and 9(c) of the Control of Narcotic Substances Act, 1997 (the CNS Act).

2. Per the FIR, on 15-07-2019 at 19:00 hours, the Complainant ASI posted at P.S. SIU West alongwith other police officials was on patrol in a police mobile near Yar Muhammad Goth, within the territorial limits of P.S. Mouchko, Karachi (West), when he saw two suspicious persons on the road side; that one of them fled while throwing away a packet while the Applicant, Muhammad Yousuf was apprehended; that the Applicant was carrying a shopping bag from which was recovered heroin wrapped in plastic and then again wrapped in a cloth; that the heroin was weighed on the spot and found to be 1010 grams and then sealed; hence the case against the Applicant under section 9(c) of the CNS Act. As regards the packet abandoned by the co-accused, that was found to contain 130 grams of ICE and he was booked under section 9(b) of the CNS Act. The entire quantity recovered from the Applicant was sent for chemical examination. The chemical report states that the substance was in powder form and tested positive for heroin.

3. Heard the learned counsel and perused the record.

4. It is the Applicant's case that the narcotic has been foisted on him; that in fact he was picked up by the police on the night of 13-07-2019 from his house in Lyari, which fact is demonstrated by the written complaints made by the Applicant's mother to the police before the instant FIR. Learned counsel for the Applicant submitted that had the Applicant been apprehended as alleged in the FIR, then section 27(1) of the CNS Act required the Complainant ASI to forward the Applicant to the officer-in-charge of the nearest police station, but instead the Complainant ASI took the Applicant to P.S. SIU which, per the FIR, was 28/29 kilometers away. Learned counsel also drew attention to the mention of a digital scale present in the police mobile and submitted that it was unbelievable that an ASI not being an investigator would be carrying a weighing scale which in any case is not part of the investigation kit.

5. The argument that section 27(1) of the CNS Act required the Complainant ASI to forward the Applicant to the officer-in-charge of the 'nearest police station', though attractive on first blush, does not consider whether such direction/requirement is only in cases where the arresting officer is acting on the special authority envisaged under section 21 of the CNS Act. Nonetheless, since such argument was made to support the ground of 'foisting', I am not inclined to express an opinion on the said question of law at the bail stage lest any observation prejudices the trial. The argument that it was unlikely that a weighing scale was available in the police mobile is also only conjecture at this stage when apparently the police mobile belonged to the SIU. However, the fact that lends some support to the averment of 'foisting' is that one complaint said to have been made by the Applicant's mother alleging that her son had been picked up by the police unlawfully on 13-07-2019, appears to have been received by P.S. Chakiwara on 14-07-2019 ie., one day prior to the instant FIR.

6. The learned DPG relied on *State v. Javed Khan* (2010 SCMR 1989) to submit that since the offence was under section 9(c) of the CNS Act, which prescribed death as a possible punishment, bail was prohibited by sub-section (1) of section 51 of the CNS Act. However, the case of *State v. Javed Khan* is only for the proposition that since section 51(1) of the CNS Act was special law, due weight is to be given to it as against the general principles of section 497 Cr.P.C. The effect of section 51(1) of the CNS Act had been dealt with by the Supreme Court in *Gul Zaman v. The State* (1999 SCMR 1271) where it was held that notwithstanding the bar contained in section 51(1), an accused being tried for an offence punishable with death could be admitted to bail, and that "Though the Court may decline bail to an under trial accused if upon tentative assessment of the material produced before it by the investigating agency it finds a prima facie case against him, but where no such material is available it would be unjust to refuse bail to him." In holding so, the Honourable Supreme Court appears to have read down section 51(1) of the CNS Act on the touchstone of basic human rights and Article 2-A of the Constitution of Pakistan.

7. In *Khuda Bakhsh v. The State* (2015 SCMR 735) it has been held by the Supreme Court that that the degree of punishment under section 9(c) of the CNS Act increases with the quantity of the narcotic recovered, and that the proviso to section 9(c) entails that only when the quantity of the narcotic exceeds 10 kilograms could the greater punishment of life imprisonment or death be awarded. In the instant case, the quantity allegedly recovered is 1010 grams. In view of the case of *Khuda Bakhsh*, the offence would not attract punishment of death and then the bar contained in section 51(1) of the CNS Act is also not attracted.

8. The more compelling argument advanced by learned counsel for the Applicant was that the FIR did not mention whether the weight of heroin mentioned therein of 1010 grams was taken with or without its shopper and two wrappings of plastic and cloth, and thus it was a borderline case between sections 9(b) and 9(c) of the CNS Act.

Though the report of the chemical examiner states the gross weight as 1025 grams and the net weight as 1010 grams, it is not clear whether 1010 grams was net of all 4 layers enclosing the heroin powder viz the sealing material, the shopper, the cloth wrapper and then the plastic wrapper. In other words, this is nonetheless a borderline case between sections 9(b) and 9(c) of the CNS Act, a fact which can only be determined at the trial.

9. In view of the foregoing, this is a fit case for the grant bail under section 51(2) of the CNS Act. Thus, the Applicant, Muhammad Yousuf is admitted to bail in FIR No.90/2019 registered at P.S. SIU West, Karachi, subject to furnishing solvent surety in the sum of Rs.400,000/- [Rupees Four Hundred Thousand Only] along with P.R. Bond in like amount to the satisfaction of the trial Court.

Needless to state that the observations herein are tentative and nothing herein shall be construed to prejudice the case of either party at trial.

**JUDGE**

SHABAN/PA\*