JUDGMENT SHEET

PESHAWAR HIGH COURT, PESHAWAR

[JUDICIAL DEPARTMENT]

Cr. Misc (BA) No. 941-P/2022.

Date of hearing 11.04.2022

Petitioner (s) (by) Qaiser Baig Advocate

The State (by) Ms. Hina Rukh Advocate

JUDGMENT

MUSARRAT HILALI, J. :- Sher Wali seeks his post arrest bail in case FIR No. 1618, dated 10.11.2021, under sections 9 (d) CNSA, registered at police station, Badhber, District Peshawar. Earlier, for the same relief, he had approached the lower forum, but his petition was rejected by learned Judge, Special Court, Peshawar, vide order dated 02.12.2021.

2. As per prosecution story, on 10.11.2021 Yousaf Shah SI along with other police contingent was on patrol duty, when received information as to smuggling of charas from Dara Adam Khel to Peshawar, therefore, in the backdrop, he arranged '*nakabandi*' at Zangli Check Post, when at 1500 hours, a motorcar bearing registration No. IDB-3339 arrived which was stopped for the purpose of checking. The driver disclosed his name as Sher Wali (petitioner) and from his personal possession, nothing incriminating was recovered, however, during cursory interrogation, on his pointation, 20 packets of charas, total weighing 20690 grams, were recovered from the secret cavities

made in the CNG tank of the motorcar, accordingly, the above referred case FIR was registered against him.

3. Having heard learned counsel for the petitioner and learned AAG appearing on behalf of the State at length; it appears from the record that, no doubt, the petitioner was driving the motorcar at the relevant time but the narcotics were recovered from the secret cavities made in CNG tank of the motorcar. It has now been well settled that while granting or refusing bail to an accused person, the Court is not required to see and consider the evidence/ material collected in favour of the persecution only, but also has to give proper attention to the plea taken by the accused as in the instant case, where during investigation of the case, the petitioner in his statement recorded under section 161 Cr.P.C gave details of the event as to how by taking advantage of his ignorance, the vehicle in which the chars was kept in the secret cavities, was handed over to him by co-accused Sajid. According to his statement, the charas and the motorcar were owned by co-accused Sajid and Abdur Rahim and he was not in conscious knowledge of the same, accordingly, in the light of statement of the petitioner, co-accused Sajid and Abdur Rahim were also arrayed as accused in the case. Besides other material so far collected by the investigating officer, the CDR data available on record also

supported the version of the accused-petitioner. This Court in the case titled **Shah Zaib vs. the State (2014 P.Cr. L J 494**, has held that, though, statement recorded under section 161 Cr.P.C by an accused person is not admissible in evidence as per provision of Article 38 of the Qanoon-e-Shahadat Order, 1984, but once a statement recorded by police themselves, bringing on record prima facie detachment of an accused of commission of the offence in question, then the same at least may be considered for the purpose of bail. Reliance is also placed on the case titled **Raza and another vs the State and two others (PLD 2020 S.C 523).**

4. In the above context, learned AAG appearing on behalf of State after going through the file also confirms that nothing was recovered from personal possession of the petitioner and that he did not make an attempt to run away from the spot, when the police signaled the vehicle to stop, however, he submitted that the petitioner was driving the vehicle, therefore, it can be safely presumed that he was having conscious knowledge of the narcotics concealed in that vehicle. It has now been well settled that a criminal case is to be decided on the basis of evidence collected by the prosecution and suspicion, howsoever, grave or strong could never be a proper substitute for the standard of proof required in a criminal case, i.e., beyond reasonable doubt.

Rel: **(PLD 2019 S C 592).** For constitution of an offence, mens rea and the element of conscious knowledge coupled with conscious participation on the part of the accused are the sine qua non and the august Supreme Court in the case titled **"Manzoor and 4 others v. The State" [PLD 1972 SC 81]** has held that bail is not to be withheld as a punishment. It has further been held that there is no legal or moral compulsion to keep people in jail merely on the allegation that they have committed offences punishable with death or transportation, unless reasonable grounds appear to exist to disclose their complicity as the ultimate conviction and incarceration of a guilty person can repair the wrong caused by a mistaken relief of interim bail granted to him, but no satisfactory reparation can be offered to an innocent man for his unjustified incarceration at any stage of the case albeit his acquittal in the long run. Therefore, in view of the above discussion and while driving guidance from the case law, referred to above, the question as to whether the petitioner was having conscious knowledge of narcotics concealed in the secret cavities of the vehicle requires serious consideration, which shall be determined by the learned trial Court after recording evidence. In the circumstances, case against the petitioner calls for further inquiry falling within the ambit of section 497(2) Code of Criminal Procedure.

5. Likewise, the petitioner was arrested in the case on 10.11.2021 and remained in jail for five months, yet challan has not been put in court, as such, there is no prospect of the commencement of trial in the near future let alone its conclusion and this factor also tilt the scales of justice in favour of bail rather than Jail, particularly, when there is nothing on record to show that the petitioner was either previous convict or involved in the like nature cases.

6. Accordingly, for the reasons discussed above, the instant petition is allowed, resultantly, the petitioner is directed to be released on bail subject to furnishing bail bonds in the sum of rupees two lac with two sureties each in the like amount to the satisfaction of learned trial court, who shall ensure that the sureties are local, reliable and men of means.

Before parting with this judgment it is pertinent to mention that the above observations, mentioned herein above, are tentative in nature which shall not influence the trial court during trial.

Above are the reasons of short order of even date.

Announced
11.04.2022
M.Zafral P.S

JUDGE