

Form No: HCJD/C-121
ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Crl.Misc. No. 17244-B/2024

Salman Hamid Versus The State and another

S.No. of order/ Proceeding	Date of order/ Proceeding	Order with signature of Judge and that of parties or counsel, where necessary.
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<u>02.05.2024</u>	Mr. Burhan Moazzam Malik, Advocate for the petitioner. Mr. Hammad Akbar Wallana, Special Prosecutor for ANF with Zahid Ali Channa, Inspector.
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Through this petition, Salman Hamid, petitioner supplicates post-arrest bail in case FIR No. 30/2024 dated 28.02.2024 for offences under sections 9(1)6(e) and 15 of CNSA, 1997 (Amended Act, 2022) registered at Police Station RD ANF, Lahore.

2. Pith and marrow facts of the case are that on 28.02.2024 petitioner’s co-accused namely Adeel Ahmad was apprehended by the ANF officials and recovered 5 Kilograms heroin concealed in secrete cavity of his car Toyota Altis bearing Registration No. ALW-227 as well as a drone with its remote control and battery. It was further alleged that above mentioned co-accused disclosed upon query that he use drone for the supply of narcotics. On 29.02.02024 during the investigation Adeel Ahmad co-accused also made disclosure that he purchased drone from Lucky Electronics Hall Road, Lahore owned by Salman

Hamid petitioner. Moreover, he has also placed a white colour drone at the above mentioned shop for the purpose of repair which he can get recover on pointation. The above mentioned drone, as well as, four other drones were recovered from the possession of petitioner from his shop established in the name and style of Lucky Electronics Hall Road, Lahore by the investigating officer on 29.02.2024. It was further alleged that the petitioner facilitated his co-accused. Hence, this case.

3. It is *inter alia* contended by learned counsel for the petitioner that the petitioner is not nominated in the FIR in any capacity, he has been involved in this case in the light of disclosure made by Adeel Ahmad, co-accused recorded before the police; that he purchased drone from Lucky Electronics Hall Road, Lahore owned by the petitioner; that except this, there is no *iota* of evidence against the petitioner which can connect him with the commission of crime; that statement of co-accused cannot be used against the petitioner, even otherwise, he has not stated in his confessional/ in-culpatory statement dated 29.02.2024 before the investigating officer that the petitioner was in league with him qua the commission of crime. Further submitted that business of drone is not prohibited in Pakistan and there is no evidence against the petitioner that he is involved in the trafficking of

narcotics allegedly recovered from his co-accused Adeel Ahmad.

4. Contrarily, Learned Special Prosecutor for ANF has vociferously argued that the petitioner is fully involved in this case because he sold drone to Adeel Ahmad co-accused who was using the same for the supply of narcotics, in this way, offence under section 15 of CNSA, 1997 (amended Act, 2022) is fully applicable to his extent. Lastly submitted that this petition has no force and the same may kindly be dismissed.

5. I have heard learned counsel for the petitioner as well as learned Special Prosecutor for ANF meticulously and perused the record minutely with their able assistance.

6. After hearing learned counsel for the parties and going through the record it has straightaway been noticed by this Court that no recovery of narcotics was effected from the possession of petitioner. The narration of the FIR discloses that recovery of the narcotics was effected from petitioner's co-accused namely Adeel Ahmed. The petitioner has been involved in this case only on the statement of supra mentioned co-accused, which is inadmissible in evidence and cannot be relied upon. Moreover, according to Article 38 of the Qanun-e-Shahdat Order, 1984 confession of accused before police could not be used against him. Section 38 of the Order *ibid* is

hereby mentioned below for the purpose of facilitation:-

“Confession to police officer not to be proved

No confession made to a police officer shall be proved as against a person accused of an offence”

After visiting the archive of judicial verdicts, I have found a case law reported as “Raja Muhammad Younas v. The State” (2013 SCMR 669) wherein the Hon’ble Supreme Court of Pakistan held as under:-

“After hearing the counsel for the parties and going through the record, we have noted that the only material implicating the petitioner is the statement of co-accused Amjad Mahmood, Constable. Under Article 38 of Qanun-e-Shahadat Order, 1984, admission of an accused before police cannot be used as evidence against the co-accused.”

Similarly, in case titled as “Muhammad Sarfraz Ansari vs. The State and others” (PLD 2021 SC 738) apex court of Pakistan has observed as infra:-

“3. We have heard the learned counsel for the parties and have gone through the record of the case. We have noticed that the petitioner is not nominated in FIR; he has rather been implicated in the case by the co-accused Waqar Aslam, the prima facie beneficiary of the alleged fraud, in his confessional statement during investigation, which has been relied upon by the learned counsel for the State to oppose the prayer of the petitioner for bail. No doubt, as per Article 43 of the Qanun-e-Shahadat Order, 1984 when more persons than one are being jointly tried for the same offence and a confession made by one of such persons admitting that the offence was committed by them jointly, is proved, the court may take into consideration the confessional statement of that co-accused as

circumstantial evidence against the other co-accused(s). However, this Court has, in several cases, held that conviction of a co-accused cannot be recorded solely on the basis of confessional statement of one accused unless there is also some other independent evidence corroborating such confessional statement. The principle ingrained in Article 43 of the Qanun-e-Shahadat is applied at the bail stage and the confessional statement of an accused can lead the court to form a tentative view about prima facie involvement of his co-accused in the commission of the alleged offence; but as in the trial, at the bail stage also, the prima facie involvement of the co-accused cannot be determined merely on the basis of confessional statement of other accused without any other independent incriminating material corroborating the confessional statement.”

Moreover, in a recent pronouncement “Akhtar vs. Khwas Khan and another” (2024 SCMR 476) Supreme Court of Pakistan while deciding with such like case has observed as under:-

“So far as the alleged confession of the petitioner before police during investigation is concerned, the niceties of Article 38 of the Qanun-e-Shahadat Order, 1984 are quite lucid that no confession made to a police officer shall be proved as against a person accused of any offence, while Article 39 emphasizes that, subject to Article 40, no confession made by any person whilst he is in the custody of a police officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person. Seemingly, a confession made before the police is not made admissible by dint of the aforesaid provisions of the Qanun-e-Shahadat Order, 1984 in order to preserve and safeguard the philosophy of safe administration of criminal justice and is

also based on public policy. In the aforesaid backdrop, we are sanguine that the case of petitioner requires further inquiry to prove his guilt which can only be thrashed out after recording of evidence in the Trial Court.

7. The petitioner was arrested on 29.02.2024, one day after registration of FIR by the ANF officials but the fact remains that the contraband (5-KGs heroin) was not consciously/actively in possession of the petitioner. Under Section 6 of the Control of Narcotic Substances Act, 1997 possession of narcotic drugs is an offence, which is punishable under Section 9 of the said Act. Section 6 reads as under:-

“6. Prohibition of possession of narcotic drug etc.---No one shall produce, manufacture, extract, prepare, possess, offer for sale, purchase, distribute, deliver on any terms whatsoever, transport, dispatch, any narcotic drug, psychotropic substance or controlled substance except for medical scientific or industrial purposes in the manner and subject to such conditions as may be specified by or under this Act or any other law for the time being in force.”

General Rule is that there is presumption that *mens rea*, an evil intention or a knowledge of wrongfulness of the act is an essential ingredient in every offence. In other words, the prosecution is duty bound to prove that the accused was knowingly in control of something in the circumstances, which showed that he was assenting to being in control of it.

There is no evidence except the oral assertion of the prosecution that he facilitated in supply of heroin.

8. I have further noted that there is no evidence on file against the petitioner that he had any nexus with recovered heroin. So far as sale and recovery of drones from the petitioner is concerned, the learned Special Prosecutor for ANF has failed to prove that sale of drone is prohibited in Pakistan and the petitioner was not legally competent to do the business of same. It is abundantly clear from the record that the petitioner has been made accused in this case merely on the basis of sale of drone to main accused which was allegedly being used by him for the supply of narcotics to his customers. If the petitioner can be made accused on the above said ground then dealer of Toyota Car should have also been accused of this case because Toyota Altis Car has allegedly been used for the transportation of heroin and the same has also been taken into possession by the investigating officer at the time of recovery of heroin and arrest of accused.

9. It is pertinent to mention here that investigating officer recorded first confessional statement of Adeel Ahmad co-accused on 28.02.2024 in line with the story of crime report. In that statement he (co-accused) has not stated that he purchased drone from petitioner but on the following day, i.e. 29.02.2024 his second confessional statement was recorded during the course of investigation wherein he simply stated that

recovered drone was purchased from Lucky Electronic Hall Road, Lahore owned by the petitioner. In his second confessional statement Adeel Ahmad, co-accused has not stated that Salman Hamid, petitioner was in the knowledge that he (co-accused) purchased drone from his shop for the purpose of supply of narcotics or the petitioner was in connived with him in the illegal business of narcotics.

It would not be out of place to mention here that Article 18 of the Constitution of Islamic Republic of Pakistan, 1973 fully safeguards the lawful business of the citizens, which for convenience is reproduced infra:-

Article 18. Subject to such qualifications, if any, as may be prescribed by law, every citizen shall have the right to enter upon any lawful profession or occupation, and to conduct any lawful trade or business : Provided that nothing in this Article shall prevent-

(a) the regulation of any trade or profession by a licensing system; or

(b) the regulation of trade, commerce or industry in the interest of free competition therein; or

(c) the carrying on, by the Federal Government or a Provincial Government, or by a corporation controlled by any such Government, of any trade, business, Freedom of assembly. Freedom of association. Freedom of trade, business or profession industry or service, to the exclusion, complete or partial, of other persons.

It has been ordained in Article 4 of the Constitution of Islamic Republic of Pakistan, 1973 that every citizen of Pakistan shall be treated in accordance with law. Article 4 is hereby mentioned below:

Article 4. (1) To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan.

(2) In particular-

(a) no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law;

(b) no person shall be prevented from or be hindered in doing that which is not prohibited by law; and

(c) no person shall be compelled to do that which the law does not require him to do.

More-so, life and liberty of a person is protected in the light of Article 9 of the Constitution of Islamic Republic of Pakistan, 1973 which is described below for the purpose of facilitation:-

Article 9. No person shall be deprived of life or liberty save in accordance with law.

In the light of above said circumstances, it is held that investigating officer of this case has travelled beyond his jurisdiction. He illegally arrested the petitioner and thereafter taken into possession drones from his shop without lawful authority. If this practice be allowed to continue, then not a single citizen of Pakistan can run any lawful business.

10. Another crippling feature of this case which cannot be lost sight of is that it is nowhere mentioned in the prosecution's case that the petitioner has some direct relation with the narcotic drugs or as otherwise dealt with. It is worth mentioning here that the evidence of an accomplice is ordinarily regarded as suspicion; therefore, extent and level of corroboration has to be assessed keeping in view the peculiar facts and surrounding circumstances of the case. The question whether the petitioner had the conscious knowledge that sold out drone to be used for the supply of narcotics to its customers by the co-accused Adeel Ahmad, shall be determined by the trial court after recording of evidence and at this stage applicability of section 15 of Control of Narcotics Substances Act, 1997 against the petitioner is doubtful in nature because no such evidence is available in this respect. Reliance is placed upon the following case law titled as "Atif ur Rehman vs. The State and another" (2021 SCMR 324) and "Gul Manan vs. The State" (2021 SCMR 1804).

11. It is settled law that once accused succeeds to establish that his case calls for further inquiry and probe, then rigors contained in section 51 of the CNSA, 1997 would not be attracted. A reference in this respect may be made to the case laws reported as "Dad Khan vs. The State" (2020 SCMR 2062) and "Noman alias Noma vs. The State" (2020 P.Cr.L.J. Note 40). The petitioner is behind the bars since

29.02.2024. The investigation of the case is complete and the petitioner is no more required by the police for the purpose of further investigation. The petitioner is still awaiting his trial, the conclusion of which is not in sight in near future, therefore, his further detention in jail would serve no useful purpose for the prosecution. Accordingly, this petition is **allowed** and the petitioner is admitted to post arrest bail on furnishing bail bond in the sum of Rs.5,00,000/- with one surety in the like amount to the satisfaction of the learned trial Court.

12. Needless to mention here that the observations made hereinabove are only tentative in their nature and are strictly confined to the extent of grant of instant bail.

(Muhammad Tariq Nadeem)
Judge

Approved for reporting

JUDGE

Announced, prepared, dictated on 02.05.2024
and signed on 10.05.2024

Khurram