

**IN THE PESHAWAR HIGH COURT,**  
**PESHAWAR,**  
**[Judicial Department].**

**Cr.Misc.BA No.1540-P/2020**

Ismail son of Muhammad Khitab,  
 r/o Afghanistan, presently Ghafoor Abad Dir Colony Peshawar.  
 (Confined in Central Prison Peshawar).

Petitioner (s)

**VERSUS**

The State

Respondent (s)

For Petitioner :-	<u>Malik Nasrum Minallah, Advocate.</u>
For State :-	<u>Mr. Arshad Ahmad AAG.</u>
Date of hearing:	<b><u>29.06.2020</u></b>

**ORDER**

**ROOH-UL-AMIN KHAN, J:-** Petitioner Ismail son of Muhammad Khitab, seeks post arrest bail in case FIR No.483 dated 03.05.2020, registered under section 9 (d) Khyber Pakhtunkhwa Control of Narcotic Substances Act, 2019 (*to be referred hereinafter as the Act of 2019*) and section 14 Foreigners Act, at Police Station Agha Mir Jani Shah, Peshawar.

**2.** According to First Information Report (FIR), on receipt of spy information regarding presence of the petitioner in possession of narcotics on a thoroughfare leading to Dir Colony, on 03.05.2020 Syed Sajid Ali Shah ASI along with other police officials, reached the spot and in the midnight at 00.05 hours, apprehended the petitioner

along with plastic bag, containing 15 sachets of heroin, total weighing 75 grams and an amount of Rs.1800/- in cash, being the alleged sale proceed of narcotics. Allegedly, on the pointation of the petitioner, the ASI also recovered 06 packets heroin from ceiling of his baithak, each weighing 1000 grams. He separated 05 grams from each packet and one gram from 75 grams as samples for chemical analysis by the FSL, hence, this case.

3. Arguments of learned counsel for the parties heard and record perused.

4. Main thrust of the arguments of learned counsel for the petitioner was that the alleged search, seizure and arrest of the petitioner without warrant, has been made by an ASI, whereas, according to section 28 of the Act of 2019, search, seizure and arrest without warrant can only be made by an “**Authorized Officer**” and under section 2(e) (ii) of the Act of 2019, “**Authorized Officer**” means a Police Officer/official not below the rank of Sub-Inspector duly authorized by the Regional Police Officer, therefore, the entire proceedings are nullity in the eye of law and the petitioner is entitled to be released on bail on this score alone. In support of his arguments, he placed reliance on the judgment of Division Bench of this Court dated 27.12.2019, rendered in WP No.6372-P/2019 followed by Judgments dated 27.03.2020, 30.03.2020 and 20.04.2020,

passed by single Bench in Cr.Misc.BAs Nos.341-P, 580-P and 468-P of 2020.

5. I have gone through the judgments (supra) wherein, in the former cases, inter alia, the concession of bail has been granted to the accused on the ground of proceedings, not initiated by the “**Authorized Officer**”, whereas, in the the latter case, the accused has been granted bail on the sole ground of non-compliance of the provisions of section 28 of the Act of 2019, without touching merits of the case. With utmost respect, I differ with the view taken in the judgments (supra) for the following reasons:

6. The Control of Narcotic Substances Act, 1997 (Act XXV of 1997) (*to be referred hereinafter as the Act of 1997*), was enacted and promulgated in the year 1997, and made applicable throughout the Pakistan. The Government of Khyber Pakhtunkhwa in the year 2019, enacted and promulgated the Khyber Pakhtunkhwa Control of Narcotics Substances Act 2019 (Act No.XXXI of 2019), vide notification dated 4<sup>th</sup> September, 2019, extendable to the whole of the Province of the Khyber Pakhtunkhwa, and under section 59 thereof, the Act of 1997 was repealed but only to the extent of cultivation, possession, selling, purchasing, delivery and transportation etc within the Province to the extent of the Khyber Pakhtunkhwa. For the

sake of convenience and ready reference section 59 of the Act of 2019, is reproduced below:-

**“59. Repeal and Savings:- (1)** The Control of Narcotics Substances Act, 1997 (Act No.XXV of 1997), to the extent of cultivation, possession, selling, purchasing delivery and transportation etc within the Province, to the extent of the Khyber Pakhtunkhwa is hereby repealed.”

7. The thread bare reading of section 59 of the Act of 2019 depicts that though the Act of 1997 has been repealed but only to the extent of cultivation, possession, selling, purchasing, delivery and transportation etc, within the province of the Khyber Pakhtunkhwa, however, it does not speaks specifically about repealing of rest of the provisions of the Act of 1997.

8. Perusal of both the enactments would reveal that section 21 of the Act of 1997, is analogous to a great extent with section 28 of the Act of 2019, as both speak about the power of entry, search, seizure and arrest of accused without warrant. For the sake of convenience and ready reference, section 21 of the Act of 1997 is reproduced below:-

**21. Power of entry, search, seizure and arrest without warrant. – (1)** Where an officer, not below the rank of Sub-Inspector of Police or equivalent authorized in this behalf by the Federal Government or the Provincial Government, who from his personal knowledge or from information given to him by any person is of opinion that any narcotic drug, psychotropic substance or controlled

substance in respect of which an offence punishable under this Act has been committed is kept or concealed in any building, place, premises or conveyance, and a warrant for arrest or search cannot be obtained against such, person without affording him an opportunity for the concealment of evidence or facility for his escape; such officer may:-

( a) enter into any such building, place, premises or conveyance;

( b) break open any door and remove any other. obstacle to such entry in case of resistance;

(c) seize such narcotic drugs, psychotropic substances and controlled substances and other materials used in the manufacture thereof and any other article which he has reason to believe to be liable to confiscation-n under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of an offence punishable under this Act; and

d) detain, search and, if he thinks proper, arrest any person whom he has reason to believe to have committed an offence punishable. under this Act.

(2) Before or immediately after taking any action under sub-section (1), the officer referred to in that sub-section shall record the grounds and basis of his information and proposed action and forthwith send a copy thereof•, to his immediate superior officer.

**(Bold and underline supplied emphasis).**

I deem it appropriate to reproduce section 28 of the Act of 2019, for facility reference and comparison with section 21 of the Act of 1997, which read as under:-

**28. Power of entry, search, seizure and arrest without warrant.---**(1) Where an **authorized officer**, who from his personal knowledge or from information given to him by any person, is of the opinion that any narcotic substance is kept or concealed in any building, place, premises, dwelling house or conveyance and warrant for the search or

arrest cannot be obtained from the Special Court against such person without affording him an opportunity for the concealment of evidence or facility for his escape, such officer may-

- (a) enter into any such building, place, premises, dwelling house subject to the proviso of sub-section (1) of Section 27 of this Act;
- (b) break open any door and remove any other obstacle to such entry in case of resistance;
- (c) seize such narcotic substances, methamphetamine and other materials used in the manufacturing thereof and any other article or documents which he has reason to believe to be liable for confiscation or may furnish evidence of the 4 commission of an offence punishable under this Act; and
- (d) search and, if he thinks proper, arrest any person whom he has reason to believe to have committed an offence punishable under this Act.

(2) Before or immediately after taking any action under sub-section (1), the authorized officer, mentioned in sub-section (1), shall record the grounds and basis of his information and take immediate necessary action and forthwith send a copy of the same to the Director or as the case may be to the Regional Police Officer”.

The word “**Authorized Officer**” has been defined under section 2(e) of the Act of 2019, which means:-

- (i) An Officer of the Directorate General, not below the rank of Sub-Inspector, authorized by the Director; or
- (ii) A Police Officer/official not below the rank of Sub-Inspector, authorized by the Regional Police Officer.

9. Section 21 of the Act of 1997 (*almost ditto copy of section 28 of the Act of 2019*), has remained the point of discussion before the august Supreme Court of Pakistan in

different cases. Useful reference can be made to case titled, **“Muhammad Younas and others vs Mst. Perveen alias Mano and others” (2007 SCMR 393)**, wherein the august Supreme Court was pleased to hold that arrest of accused in possession of narcotics by a Police Officer below the rank of Sub-Inspector would not vitiate the prosecution case, rather the competent Court would proceed to determine the guilt or innocence of the accused on the basis of evidence, irrespective of the manner in which he is brought before the court. The relevant portion of the judgment (supra) is reproduced below:-

“The other argument of the learned counsel for the respondent No.1 as to the violation of the provision of section 21 and 22 of the Act needs to be dealt with. **Ordinarily, only an officer of the rank of Sub-Inspector or equivalent or above may exercise the powers of arrest and seizure of narcotics. But this is not an absolute rule. There may be cases of extreme urgency requiring prompt action, where an accused is caught with narcotics in his possession by a Police Officer of a lower rank. Can it be said that such Police Officer should just let him go with the narcotics? The answer would certainly be in the emphatic “No”.** The guilt or innocence of an accused does not depend on the question of competence or otherwise of a Police Officer to investigate the offence. A trial of an accused is not vitiated mere on the ground that the case has been investigated by an officer who is not authorized to do so unless a contrary intention appears from the language of a statute. The competent Court would proceed to determine the guilt or innocence of an accused on the basis of the evidence produced before it irrespective of the manner in

which he is brought before it. A somewhat similar view was taken in the cases of “Mr. Abdul Latif Vs GM Paracha and others” (1981 SCMR 1101), “State through Advocate General Sindh Vs Bashir and others” (PLD 1997 SC 408), “The Crown vs Mehar Ali” (PLD 1956 FC 106), “ M.S.K Ibrat Vs the Commander in chief, Royal Pakistan Navy and others” (PLD 1956 SC 264), “Ahmad Khan Vs Rasul Shah and others” (PLD 1975 SC 66 at page 81, 88 and 151-152), “Muhammad and others Vs the State” (1984 SCMR 954) and “the State vs Sohail Ahmed and 04 others” (PLD 1990 FSC 29). We may however observe that in a proper case, a Police Officer, if guilty of deliberate usurpation of power and violation of a statute may render himself liable to disciplinary or penal action or both in accordance with law. The purpose of enacting protective provisions of sections 21 and 22 of the Act seems to be that normally the cases of narcotics being of serious nature should be handled by more responsible Police Officer. **(emphasis supplied).**

In case titled, “**The State vs Abdali Shah**”, (2009 SCMR **291**), it has been held by the Hon’ble Supreme Court that:-

**“Even the provisions of sections 20 to 22 of CNSA being directory, non-compliance thereof would not be a ground for holding the trial/conviction bad in the eyes of law. On this ground the conviction of the appellant cannot be set aside.** Reference in this behalf can be made to the case of Fida Jan v the State 2001 SCMR 36; State through AG Sindh v Hemjoo 2003 SCMR 881, Karl Johan Joseph v the State PLD 2004 SC 394 and Muhammad Younas v Mst. Perveen alias Mano and others 2007 SCMR 393, wherein it is observed that where provisions of CNSA are directory in nature, non-compliance of the same is not fatal”. **(emphasis supplied).**



Similarly, while dilating upon the provision of section 21 of the Act of 1997, the Hon'ble Supreme Court in case titled, **“The State Vs Abdali Shah” (2009 SCMR 291)**, made the following observations:-

“It would be seen that a huge quantity of 52 Kgs of chars was allegedly recovered from the Taxi beside which the respondent was standing while closing its dickey. It is not possible that the police would foist such a huge quantity of charas upon him. **It appears that the learned High Court has relied heavily upon the technical aspect of the seizure and arrest which in our opinion are misconceived as in the fist place no raid was carried out by the police personnel but the respondent apprehended during normal patrol duty. As such the provisions of section 21 are not applicable. Even otherwise, it cannot be expected that upon apprehension of the accused the police party would go in search of the officer who is entitled to arrest the accused being an ASI. At the most, this was an irregularity which was curable under section 537 Cr.P.C. as held by this Court in case of Muhammad Hanif (supra).** (emphasis supplied).

**10.** In light of the law laid down by the Hon'ble Supreme Court in the judgments (supra), I feel no hesitation to hold that mere non-compliance of the provisions of section 28 of the Act of 2019 (*para materia to section 21 of the Act of 1997*), would not vitiate the proceedings, and such non-compliance cannot be made **a sole ground** for release of the accused on bail, particularly, in cases of extreme urgency requiring prompt action.

**11.** In the case in hand, the occurrence has taken place at 00.05 hours i.e. mid night. There was no time for the complainant ASI to comply with the provisions of section 28 of the Act of 2019. The petitioner has been arrested red handed and huge quantity of narcotics has been shown recovered from his possession and on his pointation. Statement of witnesses to the recovery proceedings recorded under section 161 Cr.P.C., who on the face of record has no ill will or enmity with the petitioner, support the version of the Seizing Officer. On tentative assessment of the material on record, petitioner is prima facie connected with the commission of offence which is not only against the State but also against the society at large, hence, he is not entitled to the concession of bail. Resultantly, this petition stands dismissed.

**12.** Before parting with the order, it is necessary to mention here that controversy with regard to power of entry, search, seizure and arrest without warrant, by an officer below the rank of Sub-Inspector has already been resolved by the august Supreme Court of Pakistan in the judgments (supra). Probably the cases (supra) had not been brought into the notice of Hon'ble Benches of this Court while deciding cases relied upon by learned counsel for the petitioner, mentioned in Paragraph No.4 of this judgment. In such a situation, it has been remained the practice to

refer the case to Hon'ble the Chief Justice of this Court for constitution of a Larger Bench, but keeping in view the mandatory provisions of Article 189 of the Constitution of Islamic Republic of Pakistan, 1973, which says that any decision of the Supreme Court shall, to the extent that it decides question of law or is based upon or enunciates a principle of law, be binding on all other Courts in Pakistan, I feel no need to sent the case to Hon'ble the Chief Justice for constitution of the larger Bench, because even if the larger Bench is constituted, the law already laid down by the Hon'ble Supreme Court, shall prevail.

**13. The Additional Registrar (Judicial) of this Court shall send copy of this judgment to the worthy Sessions Judges of the entire Districts, who shall further circulate the same among the Courts dealing with the cases of narcotics.**

**Announced:**  
**29.06.2020**  
*M.Siraj Afridi PS*

**JUDGE**

**SB of Hon'ble Mr. Justice Rooh ul Amin Khan.**

