Form No: HCJD/C-121.

ORDER SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

JUDICIAL DEPARTMENT.

Criminal Misc. No. 988-B of 2022

Waqar Khan

Versus

The State

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	19.09.2022.	Mr. Muhammad Saleem Khan Baloch, Advocate for the petitioner in the instant petition. Barrister Salman Safdar, Amicus Curiae. Ms. Khadija Ali and Mr. Jamil Fayyaz Rajpoot, State Counsels. Mr. Iftikhar Ali, S.I with record. Mr. Akhtar Iqbal, S.I.

BABAR SATTAR, J.- The petitioner is seeking post arrest bail in relation to charges brought pursuant to FIR No. 440, dated 29.03.2022, registered under Section 9(c) of the Control of Narcotic Substances Act, 1997 **("CNSA")**, at Police Station Sabzi Mandi, Islamabad.

2. Learned counsel for the petitioner submitted that the allegation as reflected in the FIR was that the petitioner was carrying narcotics weighing 1800 grams. His submissions included the following. The petitioner had been behind bars for a period of five months and he was a first time offender who was not required for investigation any longer. All of the witnesses in the matter were police officials and no private person had been included as a witness to the occurrence. The power of arrest had been exercised by an ASI, which was in breach of the provisions of Section 21 of

CNSA. In ***Hamid Khan alias Wajid Khan Vs. The State (Criminal Misc. No. 1279-B/2021)*** this Court had granted bail on the basis that the petitioner had not been arrested in compliance with requirements of law as stated in Section 21 of CNSA, and as such arrest curtailed the petitioner's right to liberty and dignity, the petitioner was entitled to bail in view of Articles 4, 9, 10-A and 14 of the Constitution. He relied on ***Muhammad Shafique Vs. State (2016 PCr.LJ 1315)*** for the proposition that where a sample was sent for forensic analysis after a period of seventy-two hours, in breach of the requirement under rule 4(2) of the Control of Narcotic Substances (Government Analysts) Rules, 2001 **("CNS Rules")**, it became a case of further inquiry and the petitioner was entitled to bail.

3. Learned State Counsel submitted that the petitioner was a habitual offender and had twenty three cases registered against him and he had already been convicted for an offence under Section 9(b) of CNSA in which he had been released on probation. She contended that in view of Section 51 of CNSA the application of sections 496 and 497 of Cr.P.C. was excluded where an accused was charged with an offence under Section 9(c) of CNSA. She submitted that it was held by the august Supreme Court in ***Anti-Narcotics Force through its Regional Director/Force Commander, A.N.F. Rawalpindi Vs. Qasim Ali (2019 SCMR 1928)*** that bail was not to be granted to an accused charged with an offence under Section 9(c) of CNSA in view of the prescription under Section 51 of CNSA that excluded

consideration of grounds for bail provided under sections 496 and 497 of Cr.P.C. She submitted that the apex Court had observed that a reference to Section 497(2) of Cr.P.C. by the learned High Court in granting bail to an accused charged with an offence under Section 9(c) of CNSA was uncalled for. She further submitted that the august Supreme Court held in ***Liaquat Ali Vs. State*** ***(2022 SCMR 1097***) and ***Faisal Shahzad Vs. State*** ***(2022 SCMR 905)*** that provisions of CNS Rules were directory and not mandatory, and such Rules did not control the substantive provisions of CNSA. Consequently, a delay in sending samples beyond a period of seventy-two hours, created no entitlement for bail to an accused charged with an offence under Section 9(c) of CNSA. She further submitted that it had been held by the august Supreme Court in ***Zafar Ali Vs. The State*** ***(2008 SCMR 1254)*** that the provisions of Sections 20 to 22 of CNSA were directory and that non-compliance with such provisions was not a ground for holding that a trial or conviction of an offender under Section 9(c) was bad in the eyes of law.

4. The august Supreme Court in ***Gul Manan Vs. The State*** ***(2021 SCMR 1804)*** held that the matter called for further inquiry and fell within the ambit of Section 497(2) of Cr.P.C. while granting bail to an accused charged with an offence under Section 9(c) of CNSA. Likewise, in ***Faizan Ali Vs. State*** ***(2019 SCMR 1649)*** it was held by the august Supreme Court that as safe custody of contraband was not established, prosecution’s case became one of doubt and the

conviction was set-aside. In ***Muhammad Ullah Vs. State (2009 SCMR 954)*** where contraband was recovered from secret cavities of a vehicle it was held by the august Supreme Court that the case would be deemed to be that of further inquiry, (i.e. the ground mentioned in Section 497(2) of Cr.P.C.), and bail was granted. The learned Sindh High Court in ***Wajid alias Waji Vs. State (2016 PCr.LJ 831)*** and the learned Balochistan High Court in ***Abdul Ghafoor Vs. State (2020 PCr.LJ 1512)*** granted bail to accused charged with offences under Section 9(c) while referring Section 497(2) of Cr.P.C. In ***Faisal Munir Vs. State (2013 PCr.LJ 1525)*** the learned Peshawar High Court granted bail to an accused charged with an offence under Section 9(c) of Cr.P.C., where an ASI had arrested the accused and affected recovery and had carried out the investigation in breach of Sections 21 and 22 of CNSA.

5. In view of the inconsistent case law brought to our attention, we framed the questions that arose for our consideration as follows:

(i) Does Section 51 of CNSA exclude the grounds for grant of bail as provided under Section 497 of Cr.P.C? If the answer to the aforementioned mentioned question is in the affirmative, can bail be granted on constitutional grounds for breach of Articles 4, 9, 10-A and 14 of the Constitution? And in such case what would be the test to be applied for grant of bail.

(ii) Does a Special Court constituted under Section 46 of CNSA have jurisdiction to grant

bail to an accused charged with an offence under Section 9(c) of CNSA? And if factors mentioned in Section 497 of Cr.P.C are excluded by virtue of Section 51 of CNSA, can the Special Court take into account constitutional grounds that are taken into account by a High Court for purpose of grant of bail where a statutory right of bail is otherwise not available in view of the law laid down by the august Supreme Court in ***Khan Asfandyar Wali Vs. Federation of Pakistan (PLD 2001 SC 607)*** and more recently in ***Muhammad Iqbal Khan Noori Vs. National Accountability Bureau, etc***. ***(PLD 2021 SC 916)****?*

(iii) Does the arrest of an accused by a person not vested with authority pursuant to Sections 21 and 22 of CNSA constitute a ground for grant of bail in view of Articles 4, 9, 10-A and 14 of the Constitution on the basis that the accused has been arrested in a manner that is not backed by law even after the judgment of august Supreme Court in ***Zafar Vs. The State (2008 SCMR 1254)*** wherein it has been held that a trial or conviction would not stand vitiated in view of the fact that there is a breach of provisions of Sections 20, 21 and 22 of CNSA? Would benefit of doubt in such case be due to the accused at bail stage, even if it is not a ground vitiating trial?

(iv) Does the breach of the direction in Rule 4(2) of CNS Rules and delay in sending the sample for forensic analysis create doubt regarding the safe custody of contraband of a nature the benefit of which is to be afforded to an accused at bail stage?

6. Mr. Salman Safdar, ASC was invited to appear as Amicus Curiae and he submitted that CNSA like other special laws was promulgated for swifter dispensation of justice and it imposed stricter conditions for grant of bail to the accused pending trial. He submitted that it was held in ***Ameer Zeb vs. State*** ***(PLD 2012 SC 380)*** that harder the sentence, stricter the burden of proof. But unfortunately the purpose of the law has not been achieved by the manner in which provisions of CNSA have been given effect with stereo typical complaints, secret informers, and seizure, arrest and recovery being affected exclusively by police officials in breach of provisions of sections 20, 21 and 22 of CNSA. He submitted that where information was received leading to the search and seizure operation being carried out by law and enforcement agencies, there was no reason for failure to ensure that video testimony was available to back the charges. He submitted that in view of the manner in which provisions of CNSA were given effect too much uncontrolled discretion was vested in police authorities, which was why complaints of narcotics substances being planted on innocent citizens was not unheard-of. On the question of bail he submitted that the principles in relation to the law on bail was well settled: bail could not be withheld as punishment; seriousness of the offence that a person is charged with was no ground for denial of bail; provisions of law were not to be stretched in favour of the prosecution's case; the presumption that a person was innocent until proven guilty was to be given effect. He submitted that the bar under Section 51(1) of CNSA, if it were deemed to be a complete

bar against grant of bail, would be unconstitutional as it would amount to pre-trial punishment in breach of the rights guaranteed to citizens under Articles 9 and 10-A of the Constitution. He submitted that the death penalty was rarely awarded in Section 9(c) cases and in other cases where death penalty was more frequently granted, such as murder and terrorism-related cases, the accused were entitled to bail if they met the required test under the law. He submitted that in ***Raja Shamshad Hussain vs. Gulraiz Akhtar (PLD 2007 SC 564)*** the august Supreme Court suspended the death sentence and granted bail pending adjudication of the appeal. In relation to Section 51 of CNSA he submitted that the intent of the legislature behind such provision was not unambiguous. Unlike Section 21D of the Anti-Terrorism Act, 1997, or Section 9(b) of the National Accountability Ordinance, 1999, Section 51 did not rule out the possibility of bail in an offence related to Section 9(c) of CNSA as it did not exclude the application of Section 498 of Cr.P.C under which pre-arrest bail could be granted. Likewise, it also did not exclude the application of Section 426 of Cr.P.C or Section 561-A of Cr.P.C. He submitted that in ***Gul Zaman vs. State (1999 SCMR 1271)*** the august Supreme Court held that the High Court could press into service Section 561-A of Cr.P.C in a case of hardship if delay in trial was of a nature which was repulsive and unconscionable. He submitted that the law laid down in ***Gul Zaman*** was never overruled and was still good law. He submitted that while ***Gul Zaman*** created the possibility of granting bail in Section 9(c) cases, notwithstanding the bar

under Section 51, a contradictory view was taken by the august Supreme Court in ***The State vs. Javed Khan (2010 SCMR 1989)*** wherein bail granted to an accused was cancelled by the august Supreme Court in view of Section 51(1) of CNSA. Likewise in ***Anti-Narcotics Force through its Regional Director/ Force Commander, A.N.F. Rawalpindi Vs. Qasim Ali (2019 SCMR 1928),*** while remanding the matter for re-consideration of bail back to the High Court, a three-member bench of the august Supreme Court observed that Section 51 of CNSA ousted the application of provision of Section 497 of Cr.P.C, and thus any reference to subsection (2) of section 497 of Cr.P.C while admitting the respondent to bail was uncalled for. He submitted that there were conflicting judgments of the august Supreme Court on the issue of application of Section 51 of CNSA. On the one hand there were judgments in which bail was denied by relying on Section 51 of CNSA. But on the other hand there were judgments wherein the accused were admitted to bail on the ground that they succeeded in making out the case for further inquiry, which was the test for grant of bail under Section 497(2) of Cr.P.C. He opined that the test for grant of bail on the basis of further inquiry had stood the test of time as reflected in the jurisprudence produced by the august Supreme Court, and was inconsonance with the rights guaranteed by the Constitution under Articles 4, 9 and 10-A of the Constitution. He also opined that in cases involving hardship based on delay or sickness, the accused had a constitutional right to be admitted to bail notwithstanding Section 51, as had been

held in ***Khan Asfandyar Wali*** that provisions of statutory law could not trump provisions of the Constitution or the authority of the High Court to uphold fundamental rights, including the right to grant bail in an appropriate case in exercise of its authority under Article 199 of the Constitution. He submitted that in relation to Question No. 2 framed by the Court (in Para 5 above) the authority to grant of bail was vested in the Special Court constituted under Section 46 of the CNSA. In relation to Question No.3 he submitted that Sections 21 and 22 of CNSA had been declared to be directory and not mandatory by the august Supreme Court in ***Fida Jan vs. The State (2001 SCMR 36)*** and on the basis of breach of the requirements stipulated in such provisions bail ought not be granted, as the effect of such breach was to be considered after recording of evidence but not at the time of forming a tentative view on the basis of the material before the Court at bail stage. In relation to Question No.4 he submitted that according to the law laid down in ***Tariq Mehmood vs. State (PLD 2009 SC 39)***, ***Faisal Shahzad vs. The State (2022 SCMR 905)*** **and** ***Liaqat Ali vs. State (2022 SCMR 1097)*** Rule 4(2) of CNSA Rules was directory and not mandatory and on basis of delay in sending sample to the Forensic Science Laboratory **("FSL")** for evaluation, beyond the stipulated period of seventy-two hours, an accused could not claim the right to be granted bail.

7. Section 51 of CNSA states the following:

> ***No bail to be granted in respect of certain offences****: (1). Notwithstanding anything contained in sections 496 and 497 of the Criminal Procedure Code, 1898 (V of 1898), bail shall not be granted to an accused person charged with an offence under this Act or under any other law relating to narcotics where the offence is punishable with death.*
>
> *(2). In the case of other offences punishable under this Act, bail shall not be normally granted unless the Court is of the opinion that it is a fit case for the grant of bail and the security of a substantial amount.*

Two things that stand out from a bare reading of Section 51 of CNSA: (i) the application of Sections 496 and 497 of Cr.P.C is only excluded in relation to grant of bail to an accused charged with an offence punishable with death; and (ii) grant of bail in all other offences under the CNSA is subject to procuring security of a substantial amount.

8. Section 47 of the CNSA states that provisions of Cr.P.C apply to trials and appeals under CNSA except as otherwise provided within CNSA. Thus, the exclusion is Section 51 is a carve-out and an exception to the application of Cr.P.C in view of Section 47 of the CNSA. What has, however, not been excluded (as also submitted by the learned Amicus Curiae and noted by the august Supreme Court in *Gul Zaman,* is the authority of the High Court under Sections 426, 498 and 561-A of Cr.P.C. In comparison Section 21D of the Anti-Terrorism Act, 1997 **("ATA"),** for example, excludes the application of Sections 439, 491, 496, 497, 498, 498-A and 561-A of Cr.P.C in considering grant of

bail to an accused under provisions of the ATA. Likewise Section 9(b) of the National Accountability Ordinance, 1999 **("NAO")** provides that no Court is vested with jurisdiction to grant bail to a person accused of an offence under the NAO notwithstanding provisions in Sections 426, 497, 498, 491 and 561-A of Cr.P.C. Section 51 of CNSA is not happily worded, to put it subtly, and does not reflect the legislative intent behind such provision in an unequivocal manner, which has resulted in some confusion in terms of its application as evident from the case law.

9. The other aspect of the matter is that in view of the law laid down by the august Supreme Court in ***Khan Asfandyar Wali*** and ***Muhammad Iqbal Khan Noori***, the question of grant of bail is always to be considered by the High Court in view of the fundamental rights and guarantees promised by the Constitution and not merely on the basis of provisions of a statute under which the citizen is charged with an offense. A question before the Court therefore is what would be the test for grant of bail on constitutional grounds even if it is deemed that the grant of bail on the basis of grounds provided under the Cr.P.C is ousted altogether in terms of Section 51 of CNSA.

10. The third related matter is that since the promulgation of the Control of Narcotics Substances (Amendment) Act, 2022 **("CNSA Amendment Act")**, Section 9 of the CNSA stands amended and it is only in the instance of an accused carrying heroin or morphine in a quantity of 6000 grams or more, or cocaine in a quantity of

5000 grams or more, that death penalty is attracted. Consequently, since the promulgation of CNSA Amendment Act, the bar under Section 51 is only attracted in relation to an accused being charged with possession of the aforementioned contraband in the prescribed quantities. And the provisions of Section 497 of Cr.P.C for consideration of grant of bail would apply in relation to an accused charged with any other offence under CNSA.

11. Let us start with a discussion regarding the relevant law laid down by the august Supreme Court. In ***Gul Zaman*** the accused was charged with an offence under Section 9(c) of CNSA. By a majority verdict of two to one, the august Supreme Court held that where there was insufficient material available to connect the accused with the commission of the offence, the accused could not be kept behind bars on suspicion alone and allowed grant of bail notwithstanding Section 51 of CNSA. While discussing the scope of Section 51 of CNSA, the august Supreme Court observed that Section 51 did not oust the application of Section 498 or Section 426 of Cr.P.C. during the pendency of his appeal. And while a person accused of an offence under Section 9(c) could be granted pre-arrest bail under Section 498 of Cr.P.C, he could not be otherwise granted bail after being arrested due to the ouster of Sections 496 and 497 Cr.P.C in section 51 of CNSA. The august Supreme Court also held that where the application of Section 426 of Cr.P.C was excluded by a special law the High Court ought not employ its authority under Section 561-A of Cr.P.C as an

alternative or additional jurisdiction in view of the fact that the person in question had already been convicted after trial. But it held that Section 561-A of Cr.P.C could be employed to grant bail pending trial where the delay in concluding the trial was "of the nature which may be repulsive and unconscionable". It further observed that in cases where an accused developed an ailment which could possibly causes death if kept in detention, the High Court could "invoke section 561-A, Cr.P.C. and may release him on bail, as such an order will be within the ambit of the expression 'or otherwise to secure the ends of justice', used in above section 561-A, Cr.P.C."

12. In a nutshell, the august Supreme Court held in ***Gul Zaman*** that notwithstanding Section 51 an individual accused of an offence under Section 9(c) of CNSA was entitled to bail if the prosecution failed to establish that sufficient material was available on record providing a court reasonable grounds to believe that the accused was guilty of the offence that he had been charged with. The test applied in ***Gul Zaman*** was therefore akin to the test mentioned in Section 497(1) of Cr.P.C.

13. In ***Ameer Zeb*** the Apex Court reiterated the law laid down in ***Tariq Bashir vs. The State (PLD 1995 SC 34)***, that "there is no concept of punishment before judgment in the criminal law of the land." It reiterated the ratio in ***Amir vs. State (PLD 1972 SC 277)*** wherein it was held that for purposes of bail provisions of law were not to be stretched in favour of the prosecution and the benefit of

doubt if any ought to go to the accused and also reiterated the principles of interpretation of statutes laid down by august Supreme Court in ***State vs. Qaim Ali Shah*** ***(1992 SCMR 2092)***, wherein such principles were articulated as follows:

> *(i) That a statute which transgresses on the rights of a subject whether as regards his person or property, should be so construed, if possible, which may preserve such rights;*
> *(ii) That if two views of a provision of a penal statute are possible, one which favours an accused person be preferred over the other;*
> *(iii) That the jurisdiction of the superior Courts cannot be abolished or ousted unless this is done by express, clear and unambiguous words or clear intendment.*

14. In ***Qasim Ali*** a three-member bench of the august Court did not discuss the scope of Section 51 of CNSA at any length and simply held that, "section 51 of Control of Narcotic Substances Act, 1997 clearly ousts application of the provisions of Section 497 of Cr.P.C. to the cases under the Control of Narcotic Substances Act, 1997 and, thus, any reference to subsection (2) of Section 497 of Cr.P.C. by the High Court while admitting the respondent to bail was uncalled for." Likewise in ***Javed Khan*** the two-member bench of the august Supreme Court cancelled the bail granted to a person accused of an offence under Section 9(c) while reproducing Section 51(1) of CNSA. In these cases the ratio in ***Gul Zaman*** was not considered and the august Supreme Court did not hold that the law laid down in ***Gul Zaman*** was being overruled.

15. In ***The State vs. Mubeen Khan*** ***(2000 SCMR 299)*** a three-member bench of the august Supreme Court recalled bail granted by the learned Sindh High Court where the accused was charged with an offence under Section 9(c) of CNSA, by relying on Section 51(1) of CNSA and holding that third proviso to Section 497(1) of Cr.P.C could not be pressed into service to grant bail to an accused charged with an offence under Section 9(c). Here the Apex Court also reiterated the law laid down in ***Qaim Ali Shah***.

16. However, in ***Imtiaz Ahmed vs. The State*** ***(2017 SCMR 1194)***, the two-member bench of the august Supreme Court admitted an accused to bail, who was charged with an offence under Section 9(c) of CNSA. While granting bail the Apex Court held that notwithstanding Section 51(1) of CNSA guidance could be sought from the provisions of Section 497 of Cr.P.C and that a citizen had the right to liberty guaranteed by Article 9 of the Constitution, which an accused could not be denied. The following was held in relevant part:

> *6. There is a long chain of authorities where the superior courts have always jealously guarded and protected the liberty of citizens in the matter of grant of bail and in all such cases assistance, aid and guidance has always been taken from the provision of section 497, Cr.P.C. being considered the mother provision of law, regulating the grant or refusal of bail to an accused person in cases triable under the special law, as the said provision of law has successfully undergone the test of all times, since its inception/incorporation in the Code.*
>
> *7. The liberty of a citizen has been elevated to the high pedestal by the provisions of Articles 7 and 9 of the*

> *Constitution of 1973, which inter alia provides that no citizen shall be deprived of his life and/or liberty, save in accordance with law, nor any accused person shall be detained without 'lawful authority of the competent court.*

In ***Imtiaz Ahmed*** the august Supreme Court also relied the law laid down in ***Khan Asfandyar Wali*** and while reiterating the ratio in ***Khan Asfandyar Wali*** held that :

> *…the superior Courts' powers cannot be curtailed or taken away with regard to protecting the liberty of citizens even in crimes of heinous nature and that the superior Courts despite of no mechanism provided for grant of bail to accused person, facing charges under the said law can grant bail in fit cases under section 497, Cr.P.C. which has been re-activated by the superior Courts of the country along with all beneficial provisos with regard to statutory delay or sickness of the nature which could not be treated in jail or the same is likely to endanger the prisoner's life.*

17. In ***Sakina Bibi vs. The State (2008 SCMR 1111)*** bail was granted to an accused charged with an offence under Section 9(c) of CNSA, after a two-member bench of the Apex Court found that the prosecution had failed to prove that the accused had conscious and exclusive possession of contraband in question. It called the accused's case one of further inquiry, referring to the test under Section 497(2) of Cr.P.C.

18. Likewise, in ***Muhammad Ullah Vs. State (2009 SCMR 954)*** a three-member bench of the august Supreme Court found that as the contraband was recovered from a secret cavity in the vehicle, the question of knowledge of the

accused of such contraband was a factual question to be resolved after trial and the accused was admitted to bail on the basis that his case was that of further inquiry. Here once again the august Supreme Court alluded to the test under Section 497(2) of Cr.P.C.

19. In ***Gul Manan*** a three-member bench of the august Supreme Court held that the question of whether or not the accused, who was not the driver of the vehicle, had conscious knowledge of narcotics concealed in the vehicle was a question to be determined during trial and held that the case of the accused called for further inquiry falling within the ambit of Section 497(2) of Cr.P.C. The august Supreme Court here explicitly referred to Section 497(2) of Cr.P.C. even though in ***Qasim Ali*** it had held that Section 497(2) of Cr.P.C ought not to be referred while considering grant of bail to an accused under Section 9(c) in view of Section 51 of CNSA. But in ***Muhammad Noman Munir vs. The State (2020 SCMR 1257)*** bail was denied to an accused charged with an offence under Section 9(c) of Cr.P.C while referring to Section 51 of CNSA. Likewise, in ***Bilal Khan vs The State*** **(2021 SCMR 460)** the august Supreme Court denied bail to an accused charged with an offence under Section 9(c) of CNSA in view of by Section 51 of CNSA.

20. While considering whether delay in the conclusion of a trial undermines the right of fair trial and due process guaranteed under Article 10-A of the Constitution, the

august Supreme in ***Chairman NAB vs. Nasar Ullah*** ***(PLD 2022 SC 497)*** held the following:

> *"Delay" in the conclusion of a criminal trial is antithetic to the very concept of a "fair trial" and "due process" guaranteed by Article 10A of the Constitution. The right to a fair trial is a cardinal requirement of the rule of law. If an accused cannot be tried fairly for an offence, he should not be tried for it at all. Conclusion of trial within a reasonable time is an essential component of the right to a fair trial. The prolonged pre-trial detention of the accused also defies the presumption of innocence, another essential element of the right to a fair trial, for an accused is presumed innocent until he is proven guilty by proof beyond reasonable doubt. Even before the addition of Article 10A in the Constitution, the right to a fair trial and due process was well-entrenched in our jurisprudence and considered to be a part of the right of access to justice enshrined in the constitutional right to be dealt with in accordance with law guaranteed by Article 4 and the fundamental right to life and liberty guaranteed by Article 9 of the Constitution.*

21. Re-affirming the law laid down in ***Nasar Ullah,*** the august Supreme Court in ***Syed Raza Hussain Bukhari vs. The State*** ***(Crl. Petition No. 636/2022)*** held while considering the scope of Section 5(2) of the Prevention of Corruption Act, 1947, that "if a High Court while hearing a bail petition is of the view that the facts and circumstances of the case offend and impair the fundamental rights of the accused, it can grant bail in exercise of its constitutional jurisdiction without being limited by the legislation that regulates the grant of bail in the offence …. In order to assess the reasonable time for the conclusion of the trial, the High Court may be guided by, and structure its discretion on

the basis of the statutory timeframe provided in the third proviso to Section 497(1) Cr.P.C."

22. Article 4(1) of the Constitution states that, "to enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen", and Article 4(2)(a) states that, "no action detrimental to the life, liberty, body, reputation or property of any person shall be taken except in accordance with law". The guarantee of Article 4 is to be read together with Article 9, which provides that "no person shall be deprived of life or liberty save in accordance with law". When it comes to the right of an accused to be granted bail the consideration includes the right of the individual to liberty on the one hand and the public interest in effective prosecution of offences on the other. The law on bail is a means to strike a balance between public interest rooted in enforcement of the law and prosecution of offenders and the individual citizen's right to liberty and fair trial. These competing rights are to be balanced. It was held by the august Supreme Court in ***East and West Steamship Co. vs. Pakistan (PLD 1958 SC 41)*** that, "it is necessary that the Court should have a clear appreciation of the public need which is to be met and where the statute prescribes a restraint upon the individual, the Court should consider whether it is a reasonable restraint, in the sense of not bearing excessively on the subject and at the same time being the minimum that is required to preserve the public interest." The same principle was reiterated by the august Supreme Court in ***Pakistan Muslim League vs.***

Federation of Pakistan ***(PLD 2007 SC 642)*** when it held that, "no infringement or curtailment in any fundamental right can be made unless it is in the public interest and in accordance with valid law. No doubt that reasonable restriction can be imposed but it does not mean arbitrary exercise of power or unfettered or unbridled powers which surely would be outside the scope of reasonable restriction…".

23. The jurisprudence that is evolved in relation to curtailment of fundamental rights is that the restraint upon the enjoyment of a fundamental right when required to be imposed in pursuit of a legitimate state purpose (such as enforcement of laws and swift prosecution of the accused), must be least restrictive of the fundamental right of the citizens and tailored narrowly to achieve the state purpose in question. And such restraint must be put in place only for a reasonable period necessary to attain the object of such restraint. It is in this context that the right of a citizen not to be placed in detention indefinitely pending trial is to be considered and in order to narrowly tailor the restrain on his liberty a statutory right to be released on bail is provided under Section 497 of Cr.P.C. It is for the same reason that the right of a citizen to be released on bail where there exists inordinate delay in conclusion of the trial for reasons not attributable to the accused in question, has been recognized as a constitutional right of the accused under Article 10-A of the Constitution by the august Supreme Court in ***Syed Raza Hussain Bukhari***. It was also held by

the august Supreme Court in ***Shahzada Qaiser Arfat alias Qaiser vs. State*** ***(PLD 2021 SC 708)*** that even in relation to grant of pre-arrest bail the High Court and the Court of Sessions must consider the question of grant of bail "in the constitutional context of liberty, dignity, due process and fair trial."

24. Before we express our opinion on the questions framed earlier in this opinion, let us also consider the law laid down in relation to the test for further inquiry and the grant of benefit of doubt at bail stage. In ***Muhammad Ijaz vs. The State*** ***(2022 SCMR 1271)*** a three-member bench of august Supreme Court while relying on the law laid down in ***Samiullah vs. Laiqzada*** ***(2020 SCMR 1115)*** and ***Muhammad Faisal vs. The State*** ***(2020 SCMR 971)*** reiterated that "benefit of doubt if established can be extended even at bail stage." The same was held in ***Ihtisham Ali Cheema vs. The State*** ***(2022 SCMR 624).*** The principle was again reiterated by a three-member bench of the august Supreme Court in ***Muhammad Arshad vs. The State*** ***(2022 SCMR 1555)*** and it was held that "it is now established beyond any doubt that benefit of doubt can be extended even at preliminary state i.e. bail and suspension of sentence."

25. The link between extension of benefit of doubt and how it relates to case of further inquiry was explained in ***Jahanzeb vs. The State*** ***(2021 SCMR 63)*** where a three- member bench of Apex Court held that, "if there exists any possibility to have a second view of the material

available on the record then the case advanced against whom allegation is leveled is entitled for the relief in the spirit of Section 497(2) of Cr.P.C." Likewise, in ***Resham Khan vs The State*** ***(2021 SCMR 2011)*** it was held that "the insight and astuteness of further inquiry is a question which must have some nexus with the result of the case for which a tentative assessment of the material on record is to be considered for reaching just conclusion. The case of further inquiry pre-supposes the tentative assessment which may create doubt with respect to the involvement of accused in the crime."

26. Let us now revert to the questions framed in Para 5 above and synthesize the jurisprudence produced by the august Supreme Court to address those questions.

Question No.1.

Does Section 51 of CNSA exclude the grounds for grant of bail as provided under Section 497 of Cr.P.C? If the answer to the aforementioned mentioned question is in the affirmative, can bail be granted on constitutional grounds for breach of Articles 4, 9, 10-A and 14 of the Constitution? And in such case what would be the test to be applied for grant of bail.

(i) The entitlement of an accused to be granted bail must always be considered in the constitutional context of liberty, dignity, due process and fair trial. Detaining a citizen pending trial is a fetter on his right to liberty guaranteed under Article 9 of the Constitution. Such fetter must be applied in a manner that is least restrictive of the right to liberty

and essential to serve the public interest embedded in the fair trial of the accused and linked to the larger interest of administration of justice and rule of law.

(ii) Statutory provisions can never trump the constitutional rights and entitlements of citizens or the constitutional authority of Courts to uphold such fundamental rights. Any statutory restrictions on grant of bail are therefore to be read and considered in view of the fundamental rights guaranteed by the Constitution. The fetter on the right of an accused to be granted bail must therefore be interpreted in view of Articles 4, 9, 10-A, 14 and 25 of the Constitution.

(iii) The right of a citizen to be considered for grant of bail cannot be abolished altogether by a statutory provision, as such provision would be in breach of Article 9 of the Constitution. Where a special law places a fetter on grant of bail to an accused, such as Section 51(1) of CNSA, the High Court or the Special Court must consider the entitlement to bail in view of Articles 9 and 10-A read together with Article 4 of the Constitution.

(iv) The presumption of innocence that attaches to an accused, who has not yet been proven guilty through a fair trial, is a salutary principle of justice. Bail cannot be withheld as a punishment prior to

conviction no matter how serious the offence that the accused has been charged with. And statutory provisions in special laws cannot be stretched in favour the prosecution's case to detain an accused indefinitely or in breach of his fundamental rights pending trial.

(v). The Constitutional test is that the liberty of an accused, who is to be deemed innocent until proven guilty through a fair trial, can be curtailed once the prosecution establishes to the satisfaction of the Court that there is sufficient material available to enable the Court to form a reasonable belief that the accused is guilty of the offence that he is charged with. This test for purposes of upholding the right of a citizen under Article 9 of the Constitution is not materially different from the test prescribed under Section 497(1) and 497(2) of Cr.P.C. The test under section 497(2) of Cr.P.C is the flipside of the test under Section 497(1) of Cr.P.C, as in the event that the material available before the court creates doubt regarding the guilt of the accused in relation to the offence for which he has been charged, the benefit of such doubt is to be given to the accused. And the Court would, in the presence of such doubt, not be able to form a reasonable belief that the accused is guilty of the offence that he has been charged with. The test for grant of bail under Article 9 of the Constitution read

together with Article 4 is therefore not fundamentally different from the test applicable under Section 497(1) and 497(2) of the Cr.P.C and the Courts while considering the entitlement of an accused to bail under Article 9 of the Constitution can draw guidance from the jurisprudence produced in relation to under Sections 497(1) and 497(2) of Cr.P.C. as held in ***Syed Raza Hussain Bukhari***.

(vi) The delay in conclusion of a criminal trial falls foul of the right of an accused to fair trial and due process guaranteed by Article 10-A of the Constitution as held in **Nasar Ullah**. If there is inordinate delay in conclusion of the trial, which is not attributable to the accused and is attributable to the state, the accused would have an independent constitutional ground to be considered for grant of bail under Article 10-A of the Constitution. The only distinction between the constitutional right to grant of bail in face of inordinate delay and the statutory right to grant of bail under the proviso to 497(1) of Cr.P.C is that the grant of the former is a discretionary remedy to be exercised in view of the overall facts and circumstances of the case. However, once it is established that the delay in conclusion of the trial is inordinate, the continuing denial of the right of the accused to liberty guaranteed under Article 9 of the Constitution

cannot be countenanced and bail ought to be granted.

(vii) Grant of bail in hardship cases involving frailty in health and sickness of an accused is also a constitutional right for consideration for grant of bail under Article 9 of the Constitution. The right to life of a citizen cannot be fettered or jeopardized to serve public interest in administration of justice where the health of accused is such that his continuing detention in penitentiary could result in a threat to his life. Such accused would have a right to be considered for grant of bail under Article 9 of the Constitution.

Question No.2

Does a Special Court constituted under Section 46 of CNSA have jurisdiction to grant bail to an accused charged with an offence under Section 9(c) of CNSA? And if factors mentioned in Section 497 of Cr.P.C are excluded by virtue of Section 51 of CNSA, can the Special Court take into account constitutional grounds that are taken into account by a High Court for purpose of grant of bail where a statutory right of bail is otherwise not available in view of the law laid down by the august Supreme Court in ***Khan Asfandyar Wali Vs. Federation of Pakistan*** ***(PLD 2001 SC 607)*** *and more recently in* ***Muhammad Iqbal Khan Noori Vs. National Accountability Bureau, etc****.* ***(PLD 2021 SC 916)****?*

27. The obligation to uphold the fundamental rights of citizens is not a responsibility that singularly vests in the High Court alone. All Courts are endowed with the responsibility to uphold fundamental rights of citizens. There is nothing in law

that prevents a Special Court constituted under Section 46 of the CNSA to consider grant of a bail to an accused charged with an offence under Section 9(c) of the CNSA on constitutional grounds mentioned above in relation to question No.1 where the exclusion of provisions of Sections 496 and 497 of Cr.P.C are otherwise applicable by virtue of Section 51 of CNSA. Even as a matter of legal policy, it would make no sense for the Special Court to consider statutory grounds alone and leave the consideration of constitutional grounds for grant of bail to the High Court as a court of first instance.

Question No.3

Does the arrest of an accused by a person not vested with authority pursuant to Sections 21 and 22 of CNSA constitute a ground for grant of bail in view of Articles 4, 9, 10-A and 14 of the Constitution on the basis that the accused has been arrested in a manner that is not backed by law even after the judgment of august Supreme Court in ***Zafar Vs. The State (2008 SCMR 1254)*** *wherein it has been held that a trial or conviction would not stand vitiated in view of the fact that there is a breach of provisions of Sections 20, 21 and 22 of CNSA? Would benefit of doubt in such case be due to the accused at bail stage, even if it is not a ground vitiating trial?*

28. In view of law laid down by the august Supreme Court in ***Fida Jan vs. The State (2001 SCMR 36)***, ***The State vs. Hamju (2003 SCMR 881)***, ***M. Hanif vs. The State (2003 SCMR 1237)***, ***Arshad Mehmood vs. The State (PLD 2008 SC 376)***, ***Zafar Ali*** **and** ***Syed Zafar Ali Shah vs. The State (2022 SCMR 1450)***, it is now settled that the requirements of Sections 20 to 22 of CNSA are

directory in nature. And while a breach of such provisions may produce penal consequences for the state authorities administering provisions of CNSA, such breach does not create an independent right for an accused to be admitted to bail. It is further settled that the effect of breach of provisions of Sections 20 to 22 of CNSA can be considered after recording of evidence in a trial but such breach cannot be taken into account during a tentative assessment of the material placed before the court at bail stage. In this view of the matter the contrary view taken by this Court in ***Hamid Khan alias Wajid Khan Vs. The State*** ***(Criminal Misc. No. 1279-B/2021)*** is not good law.

Question No.4.

Does the breach of the direction in Rule 4(2) of CNS Rules and delay in sending the sample for forensic analysis create doubt regarding the safe custody of contraband of a nature the benefit of which is to be afforded to an accused at bail stage?

29. In view of the law laid down by the august Supreme Court in ***Tariq Mehmood*** and ***Faisal Shahzad***, Rule 4(2) of CNS Rules have been held not to be mandatory, but of a directory in nature. In relation to compliance with such rule, including sending samples of suspected contraband to the FSL within a period of seventy-two hours, the test applicable is that of substantial compliance. Non-compliance with the said rule is a question to be considered at the trial stage and not at the bail stage. Such fact can be taken into account by the learned trial Court if it comes to the conclusion that non-compliance with the rule 4(2) of the CNS Rules otherwise

establishes lack of safe custody of the contraband creating a doubt the benefit of which ought to be given to the accused. The judgment of this Court in ***Muhammad Shafique Vs. State*** **(2016 PC.LJ 1315)** shall not be treated as law for the proposition that bail is to be granted on the sole basis that a sample of contraband was not sent to the FSL within a period of seventy-two hours from its seizure.

30. It has been already clarified in Para 10 above that in view of the amendments introduced in CNSA through CNSA Amendment Act, the bar within Section 51(1) of CNSA ousting application of Section 496 and Section 497 of Cr.P.C is only applicable in relation to possession of heroin and morphine where the quantum of such contraband is 6000 grams or more and in relation to cocaine where the quantum of such contraband is 5000 grams or more. In relation to all other offenses under CNSA, the considerations for grant of bail under provision of Cr.P.C. would be attracted in adjudication the entitlement of an accused to grant of bail.

31. In the present case, the quantum of narcotics attributed to the accused is 1800 grams of charas, which attracts a punishment of 14 years and falls within the prohibitory clause of Section 497(1) of Cr.P.C. In view of Section 9 of CNSA as amended by the CNSA Amendment Act, the material placed before this Court is sufficient to enable us to form a reasonable belief that the accused is connected with the offence that he has been charged with. The petitioner is, therefore, not entitled to the grant of bail on any constitutional or statutory ground. Consequently, the

petition is ***dismissed*** with a direction to the learned trial Court to conclude the trial within a period of six months from the date of receipt of this order.

(MOHSIN AKHTAR KAYANI)
JUDGE

(TARIQ MEHMOOD JAHANGIRI)
JUDGE

(BABAR SATTAR)
JUDGE

Announced in the open the court on **24.10.2022.**

JUDGE

JUDGE

JUDGE

Approved for reporting.

Shakeel Afzal/-