

**ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI**

Criminal Bail Application No.1727 of 2023

Date	Order with signature of Judge
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For hearing of bail application

25.8.2023

Mr. Muhammad Akbar Khan advocate for the applicants
Mr. Khalid Nawaz Khan Marwat advocate for the complainant alongwith complainant.
Mr. Talib Ali Memon, Assistant PG alongwith ASI/IO Sheheryar Ahmed, PS Kalakot Karachi

Through this bail application under Section 498 Cr.P.C., the applicants have sought admission to post-arrest bail in F.I.R No. 185/2023, registered under Section 147,149,324,452,427 PPC at Police Station Kalakot, Karachi South. The earlier bail plea of the applicant has been declined by the learned X-Additional Sessions Judge (South) Karachi vide order dated 31.07.2023 in Cr. Bail Application No. 2529/2023.

2. The accusation against the applicants is that they in connivance with their accomplices attacked the house and office of the complainant as well as made firing and caused damage to their vehicles, and walls such report of the incident was made to the Kalakot police, District South Karachi on 16.07.2023 and FIR No.185/2023 under Section 147, 149, 324, 452, 427 PPC was registered against the applicants and others.

3. It is inter alia contended by the learned counsel for the applicants that the allegations against the applicants are of ineffective firing; and, no injury was attributed to them, during the alleged occurrence, as such case against them requires further inquiry. Learned counsel has further submitted that no recovery of the alleged crime weapon has been made from the applicants. Learned counsel next argued that the final report under Section 168 Cr. P.C. has been prepared and is to be submitted before the concerned Magistrate under Section 173 Cr. P.C. As such the applicants cannot be kept in judicial custody for an indefinite period in the case of alleged ineffective firing, which is yet to be proved. Learned counsel asserted that ingredients of Section 324 PPC are missing and not attractive as no attempt was made to kill the complainant and/or any of the witnesses as such mere ineffective firing could not bring the case within the ambit of Section 324 PPC. He next argued that the role of the applicants as regards murderous assault on the complainant party requires

a thorough probe. He pointed out that the recovery of the alleged two empties from the spot belonged to the complaint party who made firing from their weapon and police in connivance with them managed the story and allegedly recovered two empties from the spot just to book the applicants in the aforesaid crime; and, in absence of concrete proof, coupled with missing of crime weapon, the recovery of mere empties, are of no significance under the law; and, in such circumstances, the applicants are entitled to grant of post-arrest bail. Learned counsel also argued that so far as the question of common intention with co-accused is concerned that needs to be looked into by the trial Court when the evidence of the parties is recorded, as the intention is always a subjective state of mind and was/is difficult to be determined at the bail stage and in absence of such material evidence no conclusive findings could be given at the bail stage, however, he insisted that the applicants cannot be left at the mercy of complainant and police, including the order passed by the learned trial Court declining the bail to the applicants based on presumption and assumptions which needs to be set at naught by this Court. Learned counsel emphasized that bail could not be withheld as a punishment for a mere accusation of a non-bailable offense. He submitted that the applicants have moved the application for reinvestigation of the case which is pending adjudication which factum itself requires further inquiry. Per learned counsel, the question of whether the applicants were present on the spot and participated in the alleged occurrence requires evidence and also calls for further inquiry. Learned counsel also submitted that it is the object of the criminal law to ensure the availability of the accused to face the trial and not to punish him prematurely for an offense allegedly pending final determination by a competent Court of law. In support of his contentions, he relied upon the cases of Muhammad vs The State (1998 SCMR 454), Rehan vs. The State (2009 SCMR 181), Ghulam Murtaza vs The State (2001 P.Cr.L.J 1691), Illahi Bux vs. The State (2003 MLD 1044) Mehrab vs. The State (2004 MLD 631), Daterdino vs. The State (2005 P.Cr.L.J 572), Nabi Bux alias Nabu vs The State (2005 YLR 1531), Abdul Haq vs. The State (1988 P. Cr. L.J 1452), Wazir vs. The State (1993 P. Cr. L.J 1007), Ghulam Hussain vs. Abdul Karim and others (1987 P.Cr.L.J. 271), Tasaver vs. The State (2006 P. Cr. L.J 629), Qalib Abbas vs. The State (2000 P.Cr.L.J 464), Umar Usman vs. The State (2006 P. Cr. L.J 1506), Anwar Saifullah Khan vs. The State and 3 others (2001 SCMR 1040), Muhammad Hussain and 3 others vs. The State (1987 P. Cr. L.J 324), Muhammad Aslam and 4 others vs. The State (1985 P. Cr. L.J 2449), Attaullah Khan vs. The State (1987 P. Cr. L.J 846), Rahmatullah vs. The State (1987 P. Cr. L.J 1409), Muhammad Nadeem Anwar and another vs. National Accountability Bureau (PLD

2008 S.C 645), Muhammad Aslam and another vs. The State (1987 P. Cr. L.J 1451) and Rabnawaz vs The State (1990 SCMR 1085)

4. Learned counsel appearing on behalf of the complainant has vehemently opposed the contention raised by the learned counsel for the applicants and referred to the grounds agitated by the applicants and rebutted the same on the premise that the adverse allegations leveled are false and fabricated and needs to be discarded. It is argued that all the accused persons in furtherance of their common intention attacked the complainant party made indiscriminate firing and caused damage to the property of the complainant, hence, they are jointly liable for the offense committed by them. It is further argued that parties are known to each other before occurrence, hence, there is no chance of misidentification, However, frankly conceded that there is no injury caused to either complainant or any of the PWs. Learned counsel further argued that tangible and sufficient evidence is available on record, showing the presence of applicants/accused, so that such an incident took place. He next submitted that the complainant as well as PWs in their statements have specifically nominated them in the commission of the offense; that ocular account is supported by the crime empties recovered from the spot, hence they do not deserve bail. Per learned counsel the bail plea of the applicants has rightly been declined by the trial Court vide order dated 31.07.2023 on the premise that the applicants were nominated in the FIR with specific roles. He further argued that there is no delay in lodging of the FIR as such the applicants are prima-facie involved in the firing upon the complainant and his brother as they have admitted their presence at the place of incident, however, they were saved from such murderous assault, therefore, the offense under Section 324 PPC is fully attracted in this case. He also relied upon the pictures of the place of incident. He prayed for the dismissal of the bail application.

5. Learned Additional PG has endorsed the point of view of the learned counsel representing the complainant and prayed for the dismissal of the bail application on the ground that no mala fide has been attributed to the complainant and police and in the absence of these two grounds no relief in terms of Section 497 Cr.P.C. can be given to the applicants.

6. I have heard the arguments advanced by the learned counsel for the parties and have gone through the material placed before me.

7. Tentative assessment at this stage by this Court is as under:-

- a. *The alleged incident took place on 16.7.2023 and was reported to the police on the same date.*

- b. *The place of incident was inspected on 16.7.2023 and police recovered two empties of 30 bore and one empty of 9 MM and marks of bullets were found on the main gate and walls of the house of the complainant.*
- c. *The statement of the complainant was recorded on 17.07.2023 with the narration that he was available at one marriage ceremony where he was informed by his brother that applicant Muhammad Ayub, Yousuf, Sajjad Khan, and others came there with firearms and started abusing and attacking him and caused damage to the vehicle and fled away due to intervention of neighbors. However, they again came to his office and started firing but they were saved. They also caused damage to the office and again fled away by seeing the police.*
- d. *FSL report of one 09 mm bore crime empty and one 30 bore crime empty was obtained on 25.07.2023.*
- e. *Police arrested the applicants Yousuf Khan and Sajjad Khan on 17.07.2023, however, no recovery was made from them.*

8. The allegation against the applicants is that they along with their accomplices launched a murderous assault upon the complainant party by making fire shots but luckily they remained safe and the bullets while ripping through the windscreen of the vehicle hit the main door. The aforesaid incident was witnessed by the PWs who reported the matter to the complainant who lodged the F.I.R against the applicants and others. Prima facie the alleged occurrence has taken place in broad daylight whereas the parties were known to each other before the alleged incident and this could be the reason they are named in the F.I.R.; hence, there is no question of the identity of the applicants by the prosecution witnesses.

9. The questions which require judicial scrutiny by this Court on the subject point are as follows:

- (i) *Sharing common intention.*
- (ii) *Role ascribed.*
- (iii) *Recovery of two crime empties.*

10. It seems that the punishment for the offense under section 324, P.P.C. is the imprisonment for either description for a term which may extend to ten years, and shall also be liable to fine, and, if hurt is caused to any person by such act, the offender shall, in addition to the imprisonment and fine, be liable to the punishment provided for the hurt caused. In principle, the essentials to prove an offense under Section 324 PPC are:

- i) Nature of the Act: The act attempted should be of such a nature that if not prevented or intercepted, it would lead to the death of the victim.
- ii) Intention or knowledge of committing the offense: The intention to kill is needed to be proved clearly beyond a reasonable doubt. To prove this, the prosecution can make use of circumstances like an attack by dangerous weapons on vital body parts of the victim, however, the

intention to kill cannot be measured simply by the seriousness of the injury caused to the victim.

iii) Performance or execution of offense: The intention and the knowledge resulting in the attempt to murder by the accused is also needed to be proved for conviction under the section.

iv) The act by the offender would cause death in its ordinary course.

11. In the instant case, there is admittedly ineffective firing and none of the PWS has/have sustained any injury, which is the main ingredient of section 324, P.P.C.; though the offense under section 324 PPC entails punishment up to 10 years and attracts the stringency of the prohibitory clause of section 497 Cr.P.C. however, the concession of post-arrest bail can be extended to an accused if the reasonable grounds to connect him with the commission of a crime are found lacking from the record, in the case in hand prima-facie the ingredients of section 324 PPC, are lacking in this case, however, the said factum is yet to be thrashed out by the trial Court. Moreover, it has not been explained as to which of the accused fired upon the complainant party, and even from the perusal of the FSL report it is clear that the two empties secured from the place of incident and without matching with crime weapon which has not been secured create doubt in the prosecution story.

12. Perusal of the record placed before this court, it is an admitted fact that the allegation against the applicants is that they resorted to indiscriminate firing without causing any injury to anyone; however, the alleged bullet hit the windscreen of the vehicle parked inside the house of the complainant and one bullet also hit the main gate. It is nobody's case that the prosecution witnesses escaped from the firing of the applicants due to some hurdle or safety measure. The occurrence has taken place in the open and if there had been any intent on the part of the applicant, there was nothing that could restrain them from committing the occurrence on a broader spectrum. During the investigation though recovery of two empties of pistol 30 bore were recovered from the spot but as no weapon was affected by the applicants during the investigation, therefore, mere recovery of empties would be a question to be resolved by the trial court after the recording of prosecution evidence.

13. Section 427 is bailable, whereas, Section 452 PPC carries a maximum punishment of 07 years and is yet to be established by the prosecution after recording evidence of its witnesses before the trial Court. As in that view of the matter the bail plea of the applicants ought to have

been considered by the trial court in terms of section 497, Cr.P.C., for the reason that an offense punishable with ten (10) years imprisonment or more only falls within prohibitory clause of this Section. In principle, the provision of Section 497(2) Cr.P.C confers powers upon the Court to grant bail during the investigation, inquiry, or trial subject to an opinion formed by the Court that material placed before it is not sufficient to establish guilt and it still requires further inquiry into his guilt. The contention of the learned counsel that the case of the applicants squarely falls within the ambit of section 497(2), Cr.P.C. is concerned, the said provision reveals the intent of the legislature disclosing pre-condition to establishing the word "guilt" against whom an accusation is leveled has to be established based on reasonable ground, however, if there exists any possibility to have a second view of the material available on the record then the case advanced against whom the allegation is leveled is entitled for the relief in the spirit of section 497(2), Cr.P.C. On the aforesaid principle, I am supported by the view of the Supreme Court in the case of in case of Muhammad Tanveer vs. the State (PLD 2017 S.C. 733).

14. In the instant case, as no overt act is ascribed to the applicants except the allegation of ineffective firing not supported by any recovery of weapon and as such the recovery of crime empties from the place of occurrence whether has any legal sanctity or otherwise which could be determined by the trial court after recording evidence, therefore, the facts and circumstances narrated above bring the case of the applicants of further inquiry falling within the ambit of section 497(2), Cr.P.C. entitling them for the concession of bail. Keeping in view the aforesaid analogy, the applicants have made out a case of post-arrest bail in the aforesaid crime at this stage. On the aforesaid proposition, I am guided by the decision of the Supreme Court in the case of Jahanzaib Vs. The State (2021 SCMR 63).

15. The facts and circumstances narrated above and the judgment pronounced by the Supreme Court on the subject issue, the Courts of law are under a bounded duty to entertain a broader interpretation of the "law of bail" while interpreting material placed before it more liberally to arrive at a conclusion which is badly required due to the apparent downfall in the standard of investigation. Otherwise, the liberty of a person is a precious right that has been guaranteed under the Constitution of the Islamic Republic of Pakistan, 1973. To abridge or curtail liberty merely on the grounds of being involved in a criminal case without adjudging it on merits would certainly encroach upon the right against free life. This right

should not be infringed, rather it has to be protected by the act of the Court otherwise it may frustrate the concept of safe administration of criminal justice.

16. Once the Supreme Court has held in categorical terms that grant of bail in offenses not falling within the prohibitory limb of Section 497 Cr.P.C. shall be a rule and refusal shall be an exception then, the subordinate Courts should follow this principle in its letter and spirit because principles of law enunciated by the Supreme Court under Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973 has binding effect on all subordinate Courts. On the aforesaid proposition, I seek guidance from the decisions rendered by the Supreme Court in the cases of *The State v. Syed Qaim Ali Shah* (1992 SCMR 2192), *Tariq Bashir v. The State* (PLD 1995 SC 34), and *Khan Asfandyar Wali and others v. Federation of Pakistan* (PLD 2001 SC 607).

17. I expect the Courts below to adhere to these binding principles in the future and not to act mechanically in the matter of granting or refusal of bail because the liberty of a citizen is involved in such matters; therefore, the same should not be decided in a vacuum and without proper judicial approach.

18. The applicants have been behind bars since their arrest and concession of bail could not be withheld by way of premature punishment. The reliance is also placed upon the case of *Abid Ali alias Ali vs. The State* (2011 SCMR 161) and *Husnain Mustafa Vs. The State and Another* (2019 SCMR 1914). There are also various pronouncements in support of this principle. As a consequence, the applicants have made a case for a grant of relief of post-arrest bail and, hence are entitled to the same. Reliance is placed upon the case of *Husnain Mustafa Vs. The State and Another* (2019 SCMR 1914).

19. In view of the facts and circumstances narrated above, I am of the tentative view that the learned Court below has erred in appreciation of the law on the subject while rejecting the bail of the applicants in the subject FIR, hence, the same is set at naught.

20. The grounds agitated by the learned counsel for the complainant cannot be assessed at the bail stage without recording the evidence.

21. For the reasons discussed supra, the instant bail application is accepted. The applicants are admitted to post-arrest bail in F.I.R No. 185/2023, registered under Section 147,149,324,452,427 PPC at Police Station Kalakot, Karachi South subject to their furnishing solvent surety in

the sum of Rs.100,000/- (Rupees One hundred thousand only) each and PR Bond in the like amount to the satisfaction of the trial Court. However, the learned trial Court would be at liberty to cancel their bail application, if the applicants misuse the concession of bail.

22. The observation recorded hereinabove is tentative and shall not prejudice either party in the trial.

JUDGE

Shahzad/*