

Order Sheet.

HIGH COURT OF SINDH, KARACHI.

CR. B. A.NO.194 OF 2010.

Muhammad Shoaib. . . .Versus. . . . The State.

Date

Order with signature of Judge

Date of hearing: 15.03.2010.

Date of order:

Mr. Muhammad Ali Waris, Advocate for the applicant/ accused.

Mr. Shahzado Saleem, A.P.G.

**O R D E R.**

**AQEEL AHMED ABBASI, J.**- Being aggrieved and dissatisfied with the order dated 18.01.2010, passed by the learned IInd Additional Sessions Judge Karachi East, in Sessions Case No.1754 of 2009, culminating from F.I.R. No.321 of 2009, registered under sections 380, 457, 427 P.P.C. at police station Ferozabad Karachi East, the applicant has filed instant bail application before this Court.

2. Brief facts for the purpose of instant bail application are that, complainant Syed Kalim Ahmed, Manager at Habib Bank Limited Malir Branch, lodged the aforesaid F.I.R. stating therein that on 27.11.2009 at about 7.15 a.m. security guard of the Bank namely Sajid informed him through phone that he as per routine turned off the lights and saw that smoke is coming from Bank as there was fire in the Bank, on which he immediately reached the Bank and saw that lock of the staff gate was broken. Thereafter, he went inside the bank and saw that ATM machine was cut from gas cylinder and Rs.27,09,500/- which were inside ATM Machine were missing. Moreover 02 12-bore repeater guns alongwith 10 cartridges of bank's security company were also missing from inside the bank. Thereafter, the complainant informed the police through 15 Emergency and lodged the F.I.R.

3. During the investigation, accused Sajid ali Khan and accused/applicant Shoaib were arrested. As per prosecution version they confessed the offence and police recovered Rs.26,11,000/- and two repeater guns on their pointation. Thereafter, case was challaned in the concerned Court. While submitting Challan sections 381/409 P.P.C. were also introduced by the prosecution.

4. It is, inter alia, contended by Mr. Muhammad Ali Waris, learned counsel for the applicant that the applicant has been falsely involved in the instant crime merely on the statement recorded under section

161 Cr.P.C. of co-accused Sajjid Hussain, being the security guard of the bank. According to learned counsel for the applicant neither the name of the applicant is mentioned in the F.I.R. nor there is any eye witness of the incident. It is further argued that the applicant is a very senior officer of the bank and was functioning as Operation Manager who is very well acquainted with the pin-code of the ATM machine, hence there could have been no possibility of committing any theft or robbery as alleged by the prosecution. It is further argued that on the face of it the robbery was committed by using gas cylinder and burners to melt the machine, which were found from the place of incident, moreover, the recovery was also made from inside the bank at the pointation of co-accused Sajid, whereas, the prosecution has foisted the alleged recovery upon the present applicant on purported statement of the applicant recorded under section 161 Cr.P.C., which was obtained during remand by severely beating him and after having seriously injured both the legs of the applicant, which matter was also reported and has duly been affirmed by the Medical Officer District Jail Malir vide its report No.14 dated 15.1.2010 recorded in register No.44. Said report is available at page-55 as annexure-A. It is further argued that the statement of the co-accused recorded under remand before the police office, cannot be used as evidence against the present applicant and the same is liable to be rejected and ignored otherwise. The learned counsel for the applicant further argued that no recovery has been effected from the person of the applicant nor any incriminating evidence against the applicant has been brought on the record by the prosecution. According to learned counsel all the charges against the applicant as mentioned in the F.I.R. do not fall within the prohibitory clause of section 497 Cr.P.C., whereas the offence which has been introduced subsequently under section 409 P.P.C. is an afterthought and none of the ingredients of aforesaid section under the circumstances are attracted in this case. Learned counsel further states that it is the case of no evidence and there is no possibility of conviction of the applicant on the basis of allegations and the evidence available with the prosecution, therefore, the applicant is entitled to the concession of bail. In support of his contention the learned counsel for the applicant has placed reliance on the following reported judgments:

1. **MUHAMMAD RAFIQUE v STATE (1997 S C M R 412).**
2. **MUHAMMAD ASHRAF v. STATE (1998 S C M R 279).**
3. **FAQIR ULLAH v. KHALIL-UZ-ZAMAN (1999 SCMR 2203)**
4. **NOOR-UL-HASSAN v. STATE (N L R 1984 Criminal 477).**
5. **ASGHAR ALI V. STATE (PLJ 1994 Cr.C. (SAC) 248.**
6. **ALI AKBAR v. ESA KHAN and another (2003 Y L R 1284)**
7. **ZAREEN KHAN v. STATE (2004 P Cr. L J 597)**
8. **MUHAMMAD SALEEM v. STATE (2008 M L D 1521)**
9. **SABIR HUSSAIN v. STATE (1999 P Cr. L J 958).**

5. Conversely, the learned A.P.G. supports the impugned order and opposes the grant of bail to the applicant on the ground that the recovery has been effected on the pointation of the applicant and applicant has confessed commission of the crime. It is further argued that section 409 P.P.C. falls within the prohibitory clause of action 407 Cr.P.C., therefore, the applicant is not entitled to the concession of bail. In support of his contention, the learned A.P.G. has placed reliance on **NOORUDDIN v. STATE (1999 P Cr. L J 148)**, **AZIZULLAH v. STATE (1999 P Cr. L J 154)**, **SARWAR v. THE STATE (2000 P Cr. L J 1894)** and **ZULFIQAR AHMED v. STATE (2007 P Cr. L J 183).**

6. I have heard the learned counsel, perused the record and examined the case law referred and relied upon by both the learned counsel.

7. Prima facie, it appears that there is no eye witness of the alleged incident; the F.I.R. has been lodged at the instance of the bank manager who appears to have received a telephonic call about the alleged incident, which had already been taken place at the night time when the bank was closed. It is also pertinent to note that there is no confessional statement of the present applicant before the concerned Magistrate, whereas the prosecution appears to have based its entire case on the alleged confessional statement, which was in fact recorded under section 161 Cr.P.C. by the police during investigation after having obtained the remand of the applicant. As per record it further appears that the applicant was seriously maltreated by the police during remand which fact has also duly been

verified by the Medical Officer of the jail. As regard the statement of one of the co-accused under section 161 Cr.P.C., implicating the present applicant in the instant alleged crime, same cannot be considered as a conclusive and independent evidence in the absence of any incriminating evidence to convict the applicant in the alleged crime.

8. In view of the above facts and on the basis of tentative assessment of the evidence available on record I am of the view that the prosecution case cannot be considered as free from doubt and it is a case of further inquiry into the matter. There is no private and independent witness of the recovery. Therefore, the applicant is entitled to the grant of bail more particularly when the offences mentioned in the F.I.R. at the first place do not fall within the prohibitory clause of section 497 Cr.P.C. further the attraction of section 409 P.P.C. appears to be doubtful under the facts and circumstances of this case. I am fortified in my view by the judgment of Apex Court reported as **MIR HAZAR MALIK v. STATE (1999 S C M R 1377)**, wherein it has been held by the Honourable Supreme Court that extra judicial statement of co-accused could not be relied upon alone for the purpose of conviction and the matter requires further inquiry. In another case reported as **MUHAMMAD ASHRAF v. THE STATE (2000 P Cr. L J 2080)**, it has been held that while considering the bail, Courts are not supposed to keep in view the maximum sentence provided by the relevant law the one likely to be entailed by the facts and circumstances of the case. The case law referred and relied upon by the learned counsel for the applicant hereinabove, appears to be attracted in the instant case, whereas the case law referred and relied upon by the learned A.P.G. hereinabove, appears to be distinguishable and are not applicable in the circumstances of this case.

9. Under these circumstances, applicant is granted bail in the sum of Rs.500,000/- (Five Lac) with P.R Bond in the like amount to the satisfaction of the trial Court. However, if

during the trial, the applicant misuse the concession of bail the learned trial Court shall be at liberty to initiate proceedings to cancel the bail of the applicant as per law.

10. Needless to mention that the observations made hereinabove are tentative in nature and the trial Court shall not be influenced by any such observation and shall decide the case strictly on merits and on the basis of evidence available on record.

Application disposed of.

JUDGE

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