

IN THE HIGH COURT OF SINDH, CIRCUIT COURT,
HYDERABAD

Criminal Bail Application No.S- 234 of 2023

Date of hearing: 12.06.2023

Date of order: 12.06.2023

The applicant : Ghulam Sarwar through Mr. Safdar Ali Charran,
Advocate.

The State : through Mr. Siraj Ahmed Bijarani, A.P.G.

Complainant Abdul Aziz present in person.

ORDER

MUHAMMAD SALEEM JESSAR, J: Through this bail application, applicant Ghulam Sarwar seeks his admission on post arrest bail in Crime No.05 of 2022, registered at P.S Phulji Station for offence u/s 337-U, 337-A(i), 336, 506, 504, 114, 147 & 148 PPC.

2. The case has been challaned by the police which is now pending for trial before the Court of Additional Sessions Judge-III, Dadu vide Sessions Case No.262 of 2022 [Re-The State v. Ghulam Sarwar & others].

3. The applicant filed two successive bail applications before the trial Court which were declined even he filed Criminal Bail Application No.S-522 of 2022 before this Court which too was disposed of vide order dated 01.12.2022 thereby trial Court was directed to expedite the trial and conclude it within two (02) months time. Hence instant bail application has been maintained.

4. In compliance of the directions contained under previous diary, the trial Court has submitted progress report in respect of

Sessions Case No.262 of 2022 which reveals that the charge against accused has been framed whereas the complainant appeared before it on 22.05.2023 alongwith his application alleging therein the harassment at the hands of accused. On 03.06.2023 it was fixed before the trial Court for evidence; however, due to their non-appearance the trial Court has issued BWs against all the P.Ws. The report is taken on record.

5. Learned counsel for the applicant submits that applicant was arrested by the police on 11.02.2022 and no recovery was affected from his possession. Next submits that role attributed to him is that he allegedly instigated to co-accused besides caused Danda (heavy wooden stick) blow to complainant which resulted in break of his tooth; however, co-accused Mashooque and Riaz had also joined in causing injuries to him. He next submits that co-accused Riaz has been granted bail whereas applicant is in custody right from the date of his arrest and no progress has been made in his trial. Further submits that if the contents of FIR presumed to be true even then the punishment provided by the law for Section 337-U does not carry the punishment of imprisonment except Diyat which is yet to be determined by the trial Court after recording evidence of the prosecution witnesses. As far as Section 336 PPC is concerned, he submits it is not applicable to the case of applicant as tooth is not an organ, hence prays for grant of bail. In support of his contentions, he places reliance on the cases reported as Faqir Muhammad and 3 others v. The State (2021 YLR 503), Anwar Ali v. The State (2018 P.Cr.L.J Note 21) and Abdul Razzaq v. 1st Additional Sessions Judge and another (2015 YLR 2595).

6. On the other hand learned A.P.G appearing for the State opposes the application on the ground that applicant has been nominated in FIR with specific role of causing Danda blow to complainant. He however, could not controvert the fact that Section 337-U PPC carries punishment of Diyat only and no punishment for imprisonment has been provided by the law.

7. Complainant Abdul Aziz present in person; however, his counsel as intimated by Mr. Shabeer Hussain Memon, Advocate, is

not feeling well therefore, seeks date. Complainant present opposes the bail application on the ground that he (the applicant) is the person who caused Danda blow to him.

8. Arguments heard. Record perused.

9. Per FIR the incident is said to have taken place on 15.01.2022 whereas report thereof was lodged on 10.02.2022 i.e. after the delay of about 26 days though the distance between Police Station and place of occurrence is about 3/4 kilometers. No plausible explanation has been furnished by the prosecution for such an inordinate delay. Though the applicant has been nominated in FIR with specific role of allegedly causing Danda blow to complainant which resulted in breaking of his one tooth; however, the punishment provided by the law for such an offence as defined u/s 337-U PPC, is only Diyat and no punishment for imprisonment has been provided.

10. It is admitted position of the record that after registration of the case and thorough investigation the police have disposed of the FIR under cancel 'C' class and such report in terms of Section 173 Cr.P.C was filed but the Magistrate concerned did not concur his opinion with police report and directed the I.O to reinvestigate the case. After conducting reinvestigation the I.O had applied Section 336 PPC only to strengthen the rope of prosecution's case. To constitute an offence for itlaf-i-udw or itlaf-i-salahiyyat-i-udw there must be a permanent disfigurement of an organ but in instant case allegedly a front tooth of the complainant has been broken / removed which does not fall under the definition of an organ. Reliance can be placed upon the case of Zahoor Ahmad and another v. The State (2005 YLR 1664), therefore, causing itlaf of a tooth does not amount to impair or removal of an organ of the body which may entail the punishment for itlaf-i-salahiyyat-i-udw as defined u/s 334 and 336 PPC but it would fall u/s 337-U PPC which provides the punishment for payment of Arsh and it shall be one twentieth of Diyat and does not provide any punishment for imprisonment. However, if itlaf is of a milk tooth, the accused shall be liable to Daman and may also be punished with imprisonment of

either description for a term which may extend to one year only which is bailable. In instant case there is no such case which may warrant punishment in terms of itlaf of a milk tooth. Hence the offence does not fall within the prohibitory clause of Section 497 Cr.P.C.

11. Admittedly no punishment for imprisonment has been provided by the Statute, as defined u/s 337-U PPC but the applicant, who has been in custody right from the date of his arrest without progress in his trial. Since no punishment for imprisonment has been provided by the Statute and as far as imposition of Diyat is concerned, it is yet to be determined by trial Court after recording evidence. Hence, keeping an individual under custody for such an indefinite period will serve no legal or technical purpose, rather it will prejudice the case of applicant.

12. It is settled law that every accused would be presumed to be blue eyed boy of the law until and unless he may be found guilty of alleged charge and law cannot be stretched upon in favour of the prosecution particularly at bail stage. Per progress report submitted by the trial Court prosecution itself is at fault in causing delay in conclusion of the trial therefore, the applicant cannot be burdened for such delay caused by the prosecution itself. It is also settled law that expeditious trial is the right of every accused and one cannot be kept behind the bars for an indefinite period without progress in his trial.

13. Moreover, co-accused Riaz has been bailed out by the trial Court whereas Mashooque is still at large and has not been arrested by the police. During investigation the I.O had disposed off FIR under cancel 'C' class thereby has dented the case of prosecution. Such flaw in investigation created a doubt and benefit of the same must be extended in favour of accused even at bail stage.

14. The upshot of above discussion is that applicant has made out a good prima facie case for his release on bail within meaning of sub-section 2 to Section 497 Cr.P.C. Consequently instant bail application is hereby allowed. The applicant shall be released on bail subject to his furnishing solvent surety in the sum of Rs.100,000/-

(Rupees One Lac) and P.R Bond in the like amount to the satisfaction of the learned trial Court.

15. Needless to mention that the observations made hereinabove are tentative in nature and shall not prejudice the case of either party at trial.

JUDGE

Tufail