

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No.2393 of 2023

Date	Order with signature of Judge
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For hearing of bail application

10.11.2023

Mr. Mir Muhammad Jamali advocate for the applicant
Mr. Siraj Ali Khan, Additional PG
Mr. Hussain Bux Baloch advocate for the complainant alongwith
complainant Imam Bux

Through this Criminal Bail Application under Section 497 Cr.P.C., applicant Essa son of Ibraheem Thaheem has approached this Court for post-arrest bail in crime No. 07 of 2023 registered for offenses under Section 302, 114, 337-H(ii), 506-(2) and 35 PPC of Jati Police Station. His earlier bail plea has been declined by the trial Court vide order 03.10.2023 in Criminal Bail Application No. 534 of 2023 on the premise that he instigated to co-accused Haji Yaqoob, who made fatal firing upon the complainant, consequently, two persons lost their lives.

2. Learned counsel for the applicant has submitted that this Court vide orders dated 17.07.2023 and 10.10.2023 passed in Cr. Bail Application Nos. 1965 of 2023 and 1121 of 2023, have granted pre-arrest bail to the co-accused; and, the case of the applicant is akin, as such rule of consistency is fully applicable in the present case. He has further submitted that the applicant has no role in the FIR, however, he has been saddled with the role of instigation. He further submitted the applicant was not aware of the happening of the alleged incident and behind his back the proceeding under Section 87 & 88 Cr. PC was initiated by the learned Magistrate. He prayed for allowing the instant bail application.

3. Learned APG assisted by learned counsel for the complainant has opposed the bail application of the applicant on the ground that the name of the applicant is much available in the FIR with the specific role of instigation and aerial firing. He next submitted that the delay in FIR has been explained with reasons; that the applicant is involved in the murder of two persons; therefore, he is not entitled to the concession of relief. Learned Counsel for the Complainant has contended that the applicant accompanied by his accomplices, each lethally armed fired upon the deceased Allah Dino Thahim and Ismail Thahim which hit them on their body. The said allegation is prima facie supported by the medical evidence. The offense alleged against him falls within the prohibitory clause of section 497(1) Code of Criminal Procedure. In these circumstances he is not entitled to the concession of post-arrest bail;

the applicant shared his common intention with the co-accused to kill the two innocent persons; and the principle of vicarious liability is fully attracted to the applicant. He next contends that there is no universal rule of law that a person who has not caused any injuries to the deceased cannot be burdened with common intention under section 34 of the Pakistan Penal Code or common object; that the participation of the applicant in the assault in question prima facie shows his involvement in the occurrence; that the motive of murder of deceased is apparent from the fact that the applicant had come along with co-accused to the place of incident to fight and commit murder of deceased persons; that the entire act was preplanned, and that in such circumstances, bail should be refused; that existence of a common intention amongst the participants in a crime is the essential element for application of section 34 PPC which is fully attracted in the present case. It is further contended that the reason for the delay in lodging of FIR has been fully explained; that the present applicant has facilitated/instigated the co-accused to get murder of deceased persons. He lastly submitted that this is a case of double murder of two innocent persons, therefore, prayed for the dismissal of the bail application.

4. I have heard learned Counsel for the parties and have minutely perused the material available on record.

5. The allegations against the applicant as contained in the FIR are that he participated in the alleged incident of murder of deceased Allah Dino and Ismail took place on 19.2.2023 in connivance with his accomplices. His bail plea was rejected by the trial Court vide order dated 03.10.2023 on the premise that he instigated the co-accused and remained an absconder.

6. The tentative assessment of the record reflects that the incident took place on 19.2.2023 and reported the incident to the police after two days i.e. on 21.2.2023. Further, the allegation that the whole occurrence was committed by the applicant/accused at his instigation needs to be looked into by the trial Court, for the reason that there are three ingredients essential to dub any person as conspirator i.e. (i) instigation, (ii) engagement with co-accused, and (iii) intentional aid qua the act or omission to attract the aforesaid crime. All three ingredients prima facie are lacking in this case, however, the said factum is yet to be thrashed out by the trial Court.

7. About the plea of the learned counsel for the complainant that the rule of consistency does not apply in post-arrest bail, I rely upon the case of *Kazim Ali and others versus The State and others*, (2021 SCMR 2086). In the said case, the Supreme Court dispelled such a view and held that

where the role ascribed to a large number of accused was general, which cannot be distinguished from each other, and technical ground that consideration for pre-arrest and post-arrest bail are on different footing would be only limited up to the arrest of the accused persons because soon after their arrest they would become entitled to the concession of post-arrest bail on the plea of consistency.

8. The grounds agitated by the learned counsel for the complainant cannot be assessed at the bail stage without recording the evidence in the matter as such the applicant has made out a case of post-arrest bail in the aforesaid crime at this stage. 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.

9. On the aforesaid reasons the bail application of the applicant Essa is accepted in the aforesaid crime subject to his furnishing solvent surety in the sum of Rs.200,000/- [Rupees two hundred thousand only] and PR bond in the like amount to the satisfaction of the trial Court.

JUDGE