

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No.2319 of 2023

Date	Order with signature of Judge
For hearing of bail application	

20.12.2023

Mr. Abdul Razzaq Solangi advocate for the applicant
Mr. Talib Ali Memon, Assistant PG alongwith IO/ASI Amir Nawaz PS
Sukhan Karachi
Mr. Faiz Durrani advocate for the complainant

Through this Criminal Bail Application, applicant Syed Jamshed Hussain seeks post-arrest bail in FIR No. 343/2023, registered under Sections 406,408 read with section 381 PPC at PS Sukkhan Karachi, his earlier bail plea has been declined vide order dated 28.9.2023 passed by learned Sessions Judge Karachi Malir in Criminal Bail Application No. 4237 of 2023.

2. The accusation against the applicant is that he misappropriated 15 tons of coal from the Lucky Commodator Pvt Ltd. Company, out of which 6 tons of coal was recovered and the rest of the same is yet to be recovered. The applicant was arrested in the subject FIR on 08.08.2023, though the alleged offense took place on 04.08.2023.

3. Learned counsel for the applicant/accused mainly argued that the applicant/accused is innocent and has falsely been implicated in this case with mala fide intention and ulterior motives. He further argued that the alleged incident had taken place on 04.08.2023 but the complainant lodged an FIR on 08.08.2023, after a delay of 04 days and such delay has not been explained by the complainant. He further argued that the applicant/accused is not nominated in the FIR but has been arrested based on the further statement of the complainant at the belated stage as such the prosecution story cannot be relied upon. He further argued that there is no eyewitness of the incident and even no person has been cited to disclose how such coal was stolen by the present accused or misappropriated, hence the ingredients of Section 406 PPC are missing in the present case. He further argued that nothing has been recovered from the possession of the applicant/accused and so far the question of invoices is concerned, the said weight belongs to the company and the company maintains the same so the chances of manipulation cannot be ruled out. He further argued that the applicant/accused was arrested by the police and confined to put pressure upon him to record his confessional statement, but the applicant was neither produced before the learned Judicial Magistrate nor any statement under Section 164 Cr. P.C. was recorded. He further argued that no identification of recovered coal was conducted by the complainant. He

further argued that the facts are that the company tried to make the applicant/accused a witness against some other accused persons with whom the company had financial disputes but on his refusal, implicated him in this case. In support of his arguments learned counsel relied upon the cases of *Mst. Asiya Vs The State and another* reported in **2023 SCMR 383**, *Shameem Bibi Vs The State and others*, reported in **2022 SCMR 2077** and *Akhtar Ail Ghow Ada Vs the State* reported in **2015 MLD 1661**. He lastly prayed for allowing the bail application.

4. The learned APG assisted by the learned counsel for the complainant vehemently opposed the grant of bail and submitted that the learned trial court had rightly dismissed the bail application filed on behalf of the accused. He further argued that no ground is taken in addition to filing an instant bail application and it is 100% the same as filed before the learned trial court and decided on merits. He further submitted that there were two bail applications filed by the applicant/accused before the learned Judicial Magistrate and both were heard and dismissed on merits. He further submitted that the applicant/accused was the Supervisor of the warehouse and managed all the affairs of the company, but he fraudulently committed cheating and misappropriation of coal entrusted. He further submitted that the present applicant/accused has already confessed the commission of the offense in collusion with other accused persons before the owners of the company as well as I.O. and such video is available on record. He further submitted that one witness namely Irfan in his statement u/s 161 Cr. P.C. has clearly implicated the applicant/accused in the commission of the offence. He further submitted that the challan has been submitted and if the applicant/accused is released on bail there is a likelihood of tampering with the prosecution evidence. He further submitted that I.O. has collected the CDR report of the phone of the applicant/accused and established contact of the applicant with other accused for the commission of the offense. He further submitted that I.O. recovered 06 tons of coal worth of rupees six lacs, which is sufficient to connect the applicant/accused in the commission of the offense. He lastly prayed that the applicant/accused is not entitled to the concession of bail, therefore, the bail application may be dismissed. In support of his arguments, he relied on the cases of *Muhammad Akram v The State* **2014 P. Cr. L.J 653**, *Qurban v The State* **1987 MLD 2248**, *Shahid Pervaiz v The State* **2012 MLD 537**, *Arif v The State* **2009 P Cr. L.J**, *Adnan v The State* **2019 YLR Note 47**, *Muhammad Akram v The State* **2003 P.Cr. L.J 1925**, *Sajid Ali v The State* **2009 P Cr. L.J 130**, *Umar Hayat v The State* **2012 YLR 1296**, *Swab Gul v The State* **2004, MLD 1535** and *Ayaz Ahmed v The State* **2002 P. Cr. L.J 965**.

5. I have heard learned counsel for the applicant/accused, learned advocate for the complainant, learned APG for the State, and also gone through the record available before me.

6. From the perusal of the contents of the FIR, it appears that complainant Tariq Hussain lodged an FIR on 08.08.2023 stating therein that on checking of computer record, it transpired that 15 tons of coal was missing. The complainant inquired from his employee Abdullah who disclosed that he used to manipulate the weight while hooking, such report was lodged with Police Station Sukkhan on 08.08.2023.

7. It is vehemently urged by the complainant that the applicant/accused had confessed his guilt and such video was/ is available with the prosecution; that the record further shows that 15 tons of coal were misappropriated from the company of the complainant out of which six tons of coal were recovered worth of rupees hundreds of thousands; that during the investigation, the Investigating Officer obtained the CDR of a mobile phone of the present applicant/accused, which shows that applicant/accused Jamshed was continuously in contact with other accused, which established their contact for the commission of an offense.

8. Perusal of the F.I.R. reflects that there is a delay of about 4 days in lodging the F.I.R., and the explanation so furnished for such delay does not appear to be satisfactory. The complainant remained silent for the aforesaid period and did not report the matter to the police even though he failed to disclose the name of the applicant in the aforesaid FIR, which prima facie shows something fishy either on the part of the complainant or the police. The delay in lodging F.I.R. falls within the ambit of deliberation and afterthought, therefore, it is always considered to be fatal for the prosecution case in bail matters.

9. Coming to the issue of misappropriation and breach of trust on the part of the applicant suffice it to say that the concept of trust envisages that one person (the settlor) while relying upon another person (the trustee) and reposing special confidence in him commits property to him. There is a fiduciary relationship between the two in law. Section 405 PPC defines criminal breach of trust as follows:

405. Criminal breach of trust.— Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property, in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits criminal breach of trust.

10. The essential ingredients of criminal breach of trust under section 405 PPC are:

- (i) the accused must be entrusted with property or dominion over it;**
- (ii) he must have dishonestly misappropriated the property or converted it to his use or disposes it of in violation of any trust or willfully suffers any other person to do so.**

11. The offense of criminal breach of trust resembles the offense of embezzlement under the law. The punishment for ordinary cases is provided in section 406 PPC but there are aggravated forms of the offense also which are dealt with under Sections 407 to 409 PPC. The first condition mentions three important terms: entrustment, dominion, and property. "Entrustment" means handing over possession of something for some purpose without conferring the right of ownership while "dominion" refers to "the right of control or possession over something, such as dominion over the truck". The term "property" has been used without any qualification so it must be understood in the wider sense. There is no reason to restrict its meaning to movable property. Further, the word "property" must be read in conjunction with "entrustment" and "dominion". A trust contemplated by section 405 PPC would arise only when the property belongs to someone other than the accused.

12. According to the second condition, the accused must be shown to have mens rea. Section 24 PPC defines "dishonestly" as the doing of an act to cause wrongful gain to one person or wrongful loss to another person. Thus, in the context of section 405 PPC, the property must be lost to the owner or he must be wrongfully kept out of it. Dishonest misappropriation may sometimes be inferred from the circumstances if there is no direct evidence. This second condition is satisfied by any one of four positive acts, namely, misappropriation, conversion, use, or disposal of property. The offense of criminal breach of trust as defined in section 405 PPC is distinct from the offense of cheating under section 420 PPC. In principle, property obtained by cheating is not capable of being fraudulently converted under section 405. The essence of the offense under section 405 is the dishonest conversion of the property entrusted, but the act of cheating itself involves a conversion. Therefore, cheating is a complete offense by itself. The offense under Section 420 PPC is complete as soon as delivery is obtained by cheating, and without further acts of misappropriation, there can be no breach of trust.

13. The law recognizes a distinction between the investment of money and the entrustment thereof. In the former, the sum paid or invested is to be utilized for a particular purpose while in the latter case, it is to be retained and preserved for return to the giver and is not meant to be

utilized for any other purpose. Primarily, breach of trust when associated with dishonesty triggers criminal liability. Thus, even temporary misappropriation may attract Section 405 PPC. On the other hand, negligence which results in loss of the entrusted property may make a person liable for damages under the civil law but would not expose him to criminal prosecution. Criminal prosecution is possible only if it is shown that the person was entrusted dominion over a particular asset. The element of entrustment contemplated by section 405 PPC is conspicuously missing in the instant case. There is essentially a dispute between both parties over commission/brokerage which requires evidence. Hence, in view of what has been discussed above, in my tentative opinion, the trial Court has to see whether Sections 406,408 PPC are attracted in the present scenario or otherwise.

14. The record does not show that any implicating material evidence has been recovered from the applicant/accused. From the record, it transpires that the name of the applicant/accused was not mentioned in the FIR, however, his name has been included in the challan that too upon the further statement of the complainant recorded under section 162 Cr.P.C., which statement needs to be corroborated by concrete evidence, which factum shall be seen by the Trial Court whether the applicant has any role in the commission of alleged offense based on his purported confession before the police and or complainant, as the applicant has not been assigned the material to commit criminal breach of trust in terms of law laid down by the Supreme Court from time to time on the issue of criminal breach of trust, even otherwise the offense does not fall within the ambit of prohibitory clause of Section 497(1) Cr. P.C. Prima facie in absence of incriminating material, the case of the applicant falls within the ambit of further inquiry,

15. In view of the above facts and circumstances of the case, as a result, this bail application is allowed. The applicant Syed Jamshed Hussain is admitted to post-arrest bail in FIR No. 343 of 2023 under Sections 381, 406, 408 PPC of PS Sukhan, subject to his furnishing surety amount in the sum of Rs.500,000/- (Rupees five hundred thousand) with one surety in the like amount to the satisfaction of the Trial Court.

16. Needless to say the observations made in this order are tentative and shall not influence the trial Court while concluding the case. The learned trial Court is to expeditiously proceed with the trial under the law and examine the complainant within one month and if the charge is not framed, the same shall be framed positively on the next date of hearing.

17. However it is made clear that in case of abuse or misuse of the concession of bail by the applicant, including causing a delay in the conclusion of the trial, the prosecution may approach the competent Court for cancellation of bail under Section 497(5), Cr.P.C. and the trial Court itself can do so under law.

JUDGE