

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

Criminal Bail Application No.2258 of 2022

Date	Order with signature of Judge
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1. For order on office objection at 'A'
2. For hearing of bail application

13.7.2023

Mr. Mamoon A.K. Shirwany, advocate for the applicant
Syed Shafqat Ali Shah Masoomi, advocate for the complainant
Ms. Amna Ansari, Additional PG

Through this bail applicant Shaikh Ghulam Murtaza son of Shaikh Abdul Rahim seeks pre-arrest bail in FIR No.807/2022, registered with Police Station Ferozabad Karachi under Sections 324/109/34 PPC. His earlier pre-arrest bail plea was declined by the trial Court vide order dated 29.10.2022 on the premise that there appears to be a nexus between the applicant and happening of the alleged incident. The applicant being aggrieved by and dissatisfied with the order dated 29.10.2022 passed by the learned trial Court approached this Court on 21.11.2022 and this Court vide order dated 21.11.2022 admitted the applicant to interim pre-arrest bail subject to furnishing solvent surety in the sum of Rs.25,000/- and PR bond in the like amount to the satisfaction of the Nazir of this Court and now the matter is fixed for confirmation of the bail or otherwise.

2. It is, inter alia, contended that the applicant is innocent and he has been falsely implicated in the alleged crime by the complainant in connivance with the police with mala fide intentions and ulterior motives. Learned counsel submitted that there is a dispute between the parties over the property, therefore, the false implication of the applicant cannot be ruled out. He next argued that the applicant and complainant are brothers inter se and are now at daggers drawn on the dispute of the property i.e. House No.95-A, SMCHS Karachi which is occupied jointly by both the complainant and applicant and residing with their families as well as are practicing advocates. He next argued that civil litigation between the parties is pending before the competent Court of law and to pressurize the applicant to bow before the complainant he has been booked in the alleged crime of Section 324 PPC though he has not played any role in the alleged firing upon the complainant on the alleged date, time and place of incident. The police is attempting hard to arrest the applicant to humiliate and disgrace him with mala fide intention at the behest of the complainant. He has submitted that the co-accused have already been granted bail as

such principle of consistency is applicable in the present case as such applicant's bail already granted by this Court is liable to be confirmed. He further submitted that no specific role was assigned to the present applicant as such Section 324 PPC is not applicable so far as Section 109/34 PPC is concerned it is yet to be determined by the trial Court whether the applicant has instigated the co-accused to commit the crime or otherwise which requires a deeper appreciation of evidence. He next submitted that object of a trial is to make an accused to face the trial and not to allow his incarceration in jail as the accused has to prove his innocence before the trial Court. He submitted that the offense with which the applicant is charged is of mere presence at the alleged place of incident and nothing has been brought on record that applicant had overacted and indulged in the alleged firing upon the complainant and caused any injury, hence the propriety of law demands that applicant may also be granted bail and in case the applicant fails to secure the bail, he being an advocate will be humiliated and disgraced in the public at large at the hands of police, therefore, the interim bail granted to the applicant may be confirmed.

3. Syed Shafqat Ali Shah Masoomi, learned counsel for the complainant has vehemently opposed the pre-arrest bail to the applicant on the ground that the applicant was amongst the assailants who made the fatal indiscriminate firing upon the complainant who sustained bullet injuries on his body, however, was saved, therefore, the applicant is not entitled to the extraordinary relief under Section 498 Cr.P.C. He next submitted that the occurrence had taken place during the daylight and the FIR was promptly lodged and the applicant has participated in the crime by directing the main accused to cause firearm injury to the complainant who is also an advocate and injured, therefore, the applicant is not entitled to be released on bail in the attempt to murder case. He next submitted that ocular testimony and medical evidence strongly support the case of the complainant and it is not a fit case for bail and the plea taken by the applicant needs deeper appreciation, therefore, extraordinary relief cannot be granted to the applicant. He further submitted that the applicant has been attributed a specific motive to commit the crime allowing his son to fire upon the complainant over the property dispute. He submitted that the incident took place in the presence of the applicant who failed and neglected to rescue his brother who was at the mercy of his son Umar who started spraying bullets on the vital parts of the body of the complainant just to get the subject property vacated which is apathy on the part of all accused. He lastly submitted that the applicant after obtaining bail from this Court has misused the concession of bail and issued threats of dire consequences. In support of his contentions, he relied upon the cases of

Mamaras v. State [PLD 2009 SC 385], Waseem Ullah v. State [2004 SCMR 860], Muhammad v. Fazal Ali Shah [1968 P. Cr.L.J.], Safdar v. Dildar [1990 SCMR 1123], Waqas Ahmed v. State [2005 SCMR 1496], Muhammad Bashir v. State [2000 SCMR 78], Muhammad Azam v. State [1990 SCMR 1319] and Muhammad Afzal v. State [2012 SCMR 707].

4. 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 extraordinary relief in terms of Section 498 Cr.P.C. can be given to the applicant.

5. I have heard the learned counsel for the parties and perused the material available on record and case law cited at the bar.

6. This Court is conscious of the fact that the concept of pre-arrest bail is an extraordinary relief, which is limited to rare cases based upon trumped-up charges rather it has to be extended sparingly. However, in the present case, the tentative assessment of the record reflects the following aspect of the case:-

- i) That there is a dispute between the parties over the property, therefore, the false implication of the applicant cannot be ruled out.
- ii) That the applicant and complainant are brothers inter se and are now at daggers drawn on the dispute of the property i.e. House No.95-A, SMCHS Karachi which is occupied jointly by both the complainant and applicant and residing with their families as well as practicing advocates.
- iii) Civil litigation between the parties is pending before the competent Court of law.
- iv) That applicant has not played an active role in the alleged firing upon the injured on the alleged date, time, and place of incident.
- v) That the police is attempting hard to arrest the applicant with mala fide intention at the behest of the complainant.
- vi) That the co-accused have already been granted bail as such principle of consistency is applicable in the present case.
- vii) That no specific role was assigned to the present applicant as such Section 324 PPC needs to be seen by the trial court whether applicable or otherwise. As far as Section 109/34 PPC is concerned it is yet to be determined by the trial

Court whether the applicant has instigated the co-accused to commit the crime or otherwise.

- viii) That the offense with which the applicant is charged is of mere presence at the alleged place of incident and nothing has been brought on record that the applicant had overacted and indulged in the alleged firing upon the complainant and caused any injury to Pws, therefore, his culpability in the alleged crime certainly requires to attract the phrase malafide on the part of prosecution as it would be decided by the learned trial court after the recording of evidence during the trial, entitling him for the relief sought for.
- ix) That the alleged action of the complainant and police prima-facie is based on ulterior motives, therefore the role of the applicant to be allegedly present at the scene of the incident as a silent spectator requires to be thrashed out by the trial Court.
- x) Prima-facie, sufficient material has not been collected to connect the applicant with the alleged commission of the crime, to disentitle him from the extraordinary relief in the matter when the case against him is based on malafide and ulterior motives.

7. No doubt, the applicant is nominated in FIR; however, it is delayed for about 10 days, for which no plausible explanation has been furnished by the prosecution for such an inordinate delay merely saying that the injured was hospitalized was/is not justifiable. The delay in criminal cases, particularly when it is unexplained, always presumes to be fatal for the prosecution. Besides, the delay of 10 days in lodging the FIR is also one of the grounds for bail and this is the reason the applicant has attributed malafide on the part of the police and the complainant. It appears that the complainant being the son of the injured witness was not in a position to lodge a report in time, any of his family members or well-wisher could come forward to lodge the report, however, it was not done. The applicant's presence at the place of incident as portrayed by the complainant is that he ought to have desisted his son not to fire upon the father of the complainant. This is a prima-facie motive on the part of the complainant to make the applicant/accused in the FIR, which prima facie could be treated as an ulterior motive as discussed supra. Further Section 324 PPC could be attracted when the applicant ought to have attempted to fire upon the father of the complainant,

however, that piece of evidence is missing in the present case. However, the aforesaid aspect needs to be seen by the trial court for the reason that 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 offence:** The intention to kill is needed to be proved clearly beyond reasonable doubt. To prove this, the prosecution can make use of the 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 offence:** 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.**

9. Though the offense under section 324 PPC entails punishment upto 10 years and attracts the stringency of the prohibitory clause of section 497 Cr.P.C. however, the concession of pre-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. 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.

10. About the plea of the learned counsel for the complainant that the rule of consistency does not apply between pre-arrest and 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 and as such the accused persons in such case were admitted to pre-arrest bail.

11. 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 pre-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 whereas Section 498 Cr.P.C deals with two situations:-

- i) *The fixation of the amount or bond according to the circumstances;*
- ii) *Conferment of powers to grant bail to a person who is not in custody;*

12. Although the provision of Section 498 Cr.P.C is neither ancillary nor subsidiary to Section 497 Cr.P.C but is an independent Section, however, bare reading of language of sub-section (2) of Section 497 Cr.P.C provide considerations for grant of bail under Section 497(2) Cr.P.C it practically merged Section 497/498 Cr.P.C. into one aspect qua concept of pre-arrest bail persuading it to act conjointly in all fairness. The practice for grant of extraordinary relief has passed through the transitory period with divergent interpretations qua its scope since its inception, however, the law is not static rather it is growing day by day. The Supreme Court while handing down a salutary judgment titled "Meeran Bux vs. The State and another" (PLD 1989 Supreme Court 347) enunciated the concept of pre-arrest bail which was more innovative, liberal, crafted in consonance with the intent of the legislature, hence, it has conceptually widened its scope in its entirety, elaborating its concept in the spirit of section 497/498 Cr.P.C. It was reiterated in another judgment of the Supreme Court titled "Syed Muhammad Firdaus and Others v. The State (2005 SCMR 784). The Supreme Court virtually introduced a broadened mechanism of interpretation to adjudge the element of malafide or malice at the touchstone of the merits of the case. In the said case, mentioned above, the accused who has ascribed the injury to the deceased on the leg (simple) was granted pre-arrest bail by Sessions Judge which was recalled by the learned High Court while exercising suo-motu revisional jurisdiction, however, the order of learned Sessions Judge was restored by the Supreme Court while elaborating the principle in the above said terms.

13. Keeping in view the facts and circumstances narrated above and the judgments pronounced by the Supreme Court on the subject issue, it has made it abundantly clear that while granting pre-arrest bail, Court can consider the merits of the case in addition to the element of malafides/ulterior motives which has to be adjudged in the light of law

laid down by the Supreme Court in the case law stated supra. As a consequence, 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 ground 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.

14. The accumulative effect of the whole discussion and while seeking guidance from the above-referred case law, this Court is of the considered opinion that the applicant has made out a case for grant of extraordinary relief of pre-arrest bail, hence is squarely entitled to the same. The case law cited by the learned counsel for the complainant is of no help to him for the reasons discussed in the preceding paragraphs.

15. These are the reasons for my short order dated 13.07.2023 whereby I have allowed the bail application and confirmed the interim bail granted to the applicant vide order dated 21.11.2022, subject to his furnishing further solvent surety in the sum of Rs.100,000/- (Rupees one hundred thousand only) and PR bond in the like amount to the satisfaction of the Nazir of this Court.

16. The observation recorded hereinabove is tentative which shall not prejudice the case of either party at the trial.

JUDGE

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