ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No. 1498 of 2023

Date	Order with signature of Judge

For hearing of bail application

11.8.2023

Mr. Liaquat Ali Awan advocate for the applicant
Mr. Talib Ali Memon, APG

Through this bail application under Section 497 Cr.P.C., the applicant has sought admission to post-arrest bail in F.I.R No.22/2023, registered under Section 393/397/34 PPC, lodged at Police Station Iqbal Market Karachi. The earlier bail plea of the applicant has been declined by the learned III-Additional District and Session Judge (West) vide order dated 26.06.2023 in Criminal Bail Application No.861/2023.

2. The accusation against the applicant is that he along with his accomplices attempted to commit robbery with the complainant and during such robbery co-accused was injured by the firing of his accomplices and arrested on the spot, who disclosed his name as Yaseen and also named the applicant involved the crime, such report of incident was lodged at P.S Iqbal Market on 28.01.2023, subsequently the applicant was arrested on the statement of co-accused.

3. It is, inter alia, contended that the applicant is innocent and has falsely been implicated in this case; he next contended that the name of the applicant has been given to the co-accused, which is in clear violation under Article 37, 38 and 43 of the Qanun-e-Shahadat Order, 1984. Learned counsel further submits that the prosecution has failed to put the present applicant before any Judicial Magistrate for identification parade. As such his case falls within the ambit of Section 497 Cr.P.C; that no specific role has been assigned to the applicant nor any recovery has been made from him during investigation; that the offenses under Section 393, 397 PPC do not fall within the prohibition contained in Section 497(1) Cr. P.C. He prayed for allowing the bail application.

4. Learned APG has opposed the application on the premise that applicant attempted to commit robbery and one of the co-accused was arrested at the spot who named the applicant in the crime as his accomplices; the offense is against the society and there is strong likely hood; that he will commit the same offense if release on bail. While

denying the allegation of malice on the part of the police, learned APG submits that there was no reason for the police to implicate the applicant without any justification. He prayed for dismissal of the bail application.

5. I have heard learned counsel for the parties and perused material available on record.

6. Perusal of record reveals that applicant was not arrested on the spot and no recovery was effected from him when he was arrested in the aforesaid crime at the statement of co-accused. The Supreme Court in the case of *The State through Director Anti-Narcotic Force, Karachi v. Syed Abdul Qayum* [**2001 SCMR 14**], while dilating upon the evidentiary value of statement of co-accused made before the police in light of mandates of Article 38 of the Qanun-e-Shahadat Order, 1984, inter alia, held that statements of co-accused recorded by police during investigation are inadmissible in the evidence and cannot be relied upon. Similar view has been reiterated by the Supreme Court in the case of *Raja Muhammad Younas v. The State* [**2013 SCMR 669**], wherein it has been held as under:

> *"2. ……..After hearing the counsel for the parties and going through the record, we have noted that the only material implicating the petitioner is the statement of co-accused Amjad Mahmood, Constable. Under Article 38 of Qanun-e-Shahadat Order, 1984, admission of an accused before police cannot be used as evidence against the co-accused……"*

7. It would not be out of place to mention here that evidence of an accomplice is ordinarily regarded suspicious, therefore, extent and level of corroboration has to be assessed keeping in view the peculiar facts and surrounding circumstances of the case.

8. In the present case, no test-identification parade has been held in so far as the applicant/accused is concerned. It is well-settled that in cases where the names of culprits are not mentioned, holding of test-identification parade becomes mandatory. Reliance in this regard can be placed on the case of *Farman Ali v. The State* [**1997 SCMR 971**], wherein the Supreme Court of Pakistan, inter alia, has held that: -

> *"7. Holding of identification test becomes necessary in cases, where names of the culprits are not given in the F.I.R. Holding of such test is a check against false implication and it is a good piece of evidence against the genuine culprits….."*

9. It is well-settled law that the process of identification parade has to be carried out having regard to the exigencies of each case in a fair and non-collusive manner and such exercise is not an unchangeable ritual, inconsequential non-performance whereof, may result into failure of prosecution case, which otherwise is structured upon clean and probable evidence. Reliance is placed on the case of *Tasar Mehmood v. The State* (**2020 SCMR 1013**). Even otherwise, it is settled law that holding

of identification parade is merely a corroborative piece of evidence. If a witness identifies the accused in Court and his statement inspires confidence; he remains consistent on all material particulars and there is nothing in evidence to suggest that he is deposing falsely, then even the non-holding of identification parade would not be fatal for the prosecution case. Reliance is placed on *Ghazanfar Ali v. The State* (**2012 SCMR 215**) and *Muhammad Ali v. The State* (**2022 SCMR 2024**). However, in the present case, the name of the applicant has been given by the co-accused in such circumstances of the case it was incumbent upon the complainant to identify the co-accused in the identification parade in terms of Article 22 of the Qanun-e-Shahadat Order, 1984. For the reason that trial has not yet began to occasion for the complainant to see the accused as it was the duty of the investigating officer to arrange the identification parade through the concerned Magistrate soon after the arrest of the accused to give opportunity to the complainant to identify the accused or otherwise, as during investigation, prosecution could not collect any material to show that applicant has any nexus with the alleged offence except his simple arrest.

10. In FIR Sections 393 and 397 PPC have been applied. Section 391 PPC provides that when five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity". The punishment under Section 395 is that whoever commits dacoity shall be punished with imprisonment for life, or with rigorous imprisonment for a term which shall not be less than four years nor more than ten years and shall also be liable to fine. Section 393 PPC pertains to attempt to commit robbery which is punishable with R.I for a term which shall be extended upto 07 years whereas Section 397 PPC provides the punishment for attempt to commit robbery or dacoity when armed with deadly weapons for which accused shall be punished not less than 07 years. In other words, so far as the co-accused is concerned, the prosecution is required to prove in order for Section 393 P.P.C. to apply is their intention to commit dacoity. The same was the view of the Supreme Court in the case of *Muhammad Ali v. The State* (**2022 SCMR 2024**).

11. Keeping in view the punishments provided in above Sections, while deciding the bail application lesser sentence out of alternate sentence may be taken into consideration for determining whether the case falls under prohibitory clause of Section 497(1) Cr.P.C, I am of the considered view that case of the applicant requires further enquiry as there are no reasonable grounds to believe that he has committed an offence punishable with death, imprisonment for life or 10 years as the prosecution

could not collect any material against the applicant to show that he has committed an offence which falls within the prohibitory clause of Section 497(1) Cr.P.C.

12. The prima facie evidence so brought on record by the prosecution against the applicant is only the statement of co-accused and even after his arrest he has not been put to identification parade to be identified by the complainant whether he was the accused, who came to robe him as discussed supra. In such circumstances the trial Court has to determine the guilt of the applicant whether he was vicariously liable for the act of co-accused or he was also in league with them this could only be possible after recording the evidence.

13. The record shows that the applicant/accused is not previous convict. Moreover, the applicant/accused has been in continuous custody since his arrest and he is no more required for any investigation nor the prosecution has claimed any exceptional circumstance, which could justify keeping him behind the bars for an indefinite period pending determination of his guilt. It is well-settled that while examining the question of bail, Court has to consider the minimum aspect of the sentence provided for the alleged offence.

14. From the tentative assessment of the evidence in the hand of prosecution, it appears that there is hearsay evidence against the present applicant/accused, while it is yet to be determined if he is involved or not, which is possible only after recording the evidence by the trial Court.

15. In view of the peculiar facts and circumstances of the case, I am of the tentative opinion that prima facie, the applicant/accused has succeeded to bring his case within the purview of further inquiry and as such is entitled to bail. Resultantly, this bail application is allowed and the applicant is granted post-arrest bail subject to furnishing his solvent surety in the sum of Rs:100,000/- (One hundred thousand only) and PR bond in the like amount to the satisfaction of the trial Court.

16. Before parting with this order, it is observed that the observations made in this order are tentative in nature and the same would have no bearing on the outcome of the trial of the case. It is made clear that in case, the applicant/accused during proceedings before the trial Court, misuses the concession of bail, then the trial Court would be competent to cancel the bail of the applicant/accused without making any reference to this Court.

JUDGE

Zahid/*