

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.702 of 2023

Ghulam Murtaza
applicant through:

Khawaja Naveed Ahmed, advocate

The State,
through:

Mr. Muhammad Iqbal Awan, APG

Naqash Mehmood Khan,
complainant through:

Mr. Allah Ditta Shakir, advocate

**Date of hearing:
& order :**

08.08.2023

ORDER

Adnan-ul-Karim Memon, J. – Applicant Ghulam Murtaza seeks bail before arrest in F.I.R No.558/2022, registered under Sections 420, 407, 34 PPC at PS Steel Town, Karachi. His earlier bail plea has been declined by the trial Court vide order dated 21.03.2023 on the premise that the allegation of misappropriation and cheating is leveled against first driver Farhan son of Muhammad Yaseen, second driver Muhammad Mateen son of Muhammad Tariq and cleaner Abdul Jabbar, wherein, there was allegation of misappropriation of 400 bags of Soona DAP Fertilizer. As per police papers said accused Farhan was arrested by the police, during investigation he disclosed that present applicant Ghulam Murtaza and co-accused Abdul Jabbar had also acted in league with each other to commit misappropriation of such 400 bags of Soona DAP fertilizer.

2. Learned counsel for the accused argued that the incident had taken place on 24.08.2022 but FIR was registered on 03.09 2022, with an unexplained delay of 10 days. He next argued that the present accused was not nominated in FIR, but was implicated by co-accused Farhan due to malafide intentions as the present accused Ghulam Murtaza had differences with said Farhan and there was litigation pending between them and hence he has falsely implicated him in present case. Learned counsel further argued that there was no evidentiary value of the implication of the present accused by the main accused, as no recovery was effected from the present accused. Learned counsel further contended that there is no direct evidence against the applicant to connect him with the commission of the alleged offense and the alleged offenses do not fall within the prohibitory clause hence the bail is a rule and refusal is the exception. Learned counsel lastly argued that if the accused is arrested he will be humiliated by the police and nothing more.

3. On the other hand, learned counsel for the complainant contended that though the present accused is not nominated in the FIR the first driver Farhan of trailer PLA-

700, who was entrusted to move 400 bags of Soona DAP to Haroonabbad Warehouse, being the prime accused of misappropriation of 400 bags of Soona DAP Fertilizer, had disclosed the name of present accused being accomplice during the investigation. Learned counsel further went on to argue that if at this stage, the present accused is granted pre-arrest bail, no recovery could be made due to him being enlarged on bail and the prosecution investigation would suffer badly. He next argued that the present accused is implicated in the commission of the offense in league with him by co-accused Farhan and admittedly the misappropriation of 400 bags of Soona DAP Fertilizer was not an easy task to have been accomplished by one or two persons; rather, there may be a group of persons involved in the commission of such offense. At this stage when recovery of misappropriated property is still to be made, the enlargement of the present applicant on pre-arrest bail would be nothing but to hamper the investigation of the case. As for as malice on the part of the complainant is concerned, suffice it to say that investigation has to be carried out and the involvement of the applicant is to be investigated by the Investigating Officer, therefore, no extraordinary circumstances are available to enlarge the applicant on pre-arrest bail. He lastly prayed for the dismissal of the instant bail application.

4. I have heard the learned counsel for the parties and perused the record with their assistance.

5. From the record, it transpires that the name of the applicant/accused has been included in the challan upon the statement of co-accused recorded under section 161 Cr.P.C. The Supreme Court in the case *The State through Director Anti-Narcotic Force, Karachi v. Syed Abdul Qayum* [2001 SCMR 14], while dilating upon the evidentiary value of the 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 statement of co-accused recorded by police during investigation is inadmissible in the evidence and cannot be relied upon. A similar view has been reiterated by the Supreme Court in the case of *Raja Muhammad Younas v. The State* [2013 SCMR 669].

6. It would not be out of place to mention here that evidence of an accomplice is ordinarily regarded suspicious, therefore, the extent and level of corroboration has to be assessed keeping in view the peculiar facts and surrounding circumstances of the case. 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 and to avail such relief of Extra-ordinary, it is obligatory to establish that the prosecution has been launched, which is based upon malafides, ulterior motives and if it is materialized, it would certainly cause irreparable loss to his reputation.

7. The Supreme Court in the recent judgment has held that such practice to grant ad-interim bail is an extension of such a remedy to act as a shield to protect innocent persons facing the highhandedness of individuals or authority against frivolous litigation. The rationale to grant ad-interim bail is synonymous with passing a prohibitory injunction; however, the concept of ad-interim bail is more precious as compared to the prohibitory injunction. In the former, the liberty of the person is involved whereas in the latter, only propriety rights are in question. The status of the accused becomes “custodia legis” during the period when ad-interim bail is granted till its final adjudication subject to furnishing of sureties to the satisfaction of the Court.

8. The provision of Sec.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;*

9. No doubt, the applicant is nominated in FIR; however, it is delayed for about 10 days, for which no reasonable explanation has been furnished by the prosecution for such an inordinate delay. The delay in criminal cases, particularly when it is unexplained, always presumes to be fatal for the prosecution. In the circumstances and in view of the dicta laid down by the Supreme Court of Pakistan in the case of Tanveer v. The State and another (PLD 2017 SC 733), the case against the applicant needs to be looked into by the trial court on the allegations leveled against him by the prosecution as the entire case of the applicant is based on malafide and ulterior motives on the part of prosecution; besides the alleged offenses do not exceed the limits of the prohibitory clause of Section 497(1) Cr.P.C.

10. I have noticed that out of the three alleged offenses, one offense i.e., under Section 420 is bailable. As far as the offense under Section 407 PPC is concerned, it is noticeable that prima-facie, there is no direct role attributed to the applicant in the FIR about his dishonesty to take away the alleged material. The prosecution has merely said that the applicant being the driver in connivance with the co-accused committed breach of trust, prima-facie these allegations required authenticated proof to be produced before the trial court by the complainant to substantiate the aforesaid narration with documentary evidence, however, the aforesaid assertion could be determined by the trial Court after recording the evidence of the parties, as at the bail stage this Court cannot say for and against the parties on the aforesaid points.

11. The accumulative effect of the whole discussion is that this Court is of the tentative opinion that the applicant has made out a case for the grant of extraordinary relief of pre-arrest bail, hence is squarely entitled to the same.

12. 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.

13. 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 malafide intention and ulterior motive of the complainant and police as such is entitled to confirmation of bail granted to the applicant/accused vide order dated 30.3.2023 on the same terms and conditions.

14. Needless to mention here that any observation made in this order is tentative and shall not affect the determination of the facts at the trial or influence the trial Court in reaching its decision on the merits of the case. The trial Court is directed to expedite the trial and conclude the same within one month positively and a compliance report shall be submitted to this Court. It is, however, made clear that in the event that, during proceedings, the applicant/accused misuses the bail, then the trial Court would be competent to cancel the bail of the applicant/accused without making any reference to this Court.

JUDGE