

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No. 1519 of 2023

 DATE ORDER WITH SIGNATURE(S) OF JUDGE(S)

For hearing of bail application

05.09.2023

Mr. M.S. Bukhari advocate for the applicant alongwith applicant.
 Ms. Rubina Qadir Assitstant PG.
 Complainant present in person.

The applicant seeks indulgence of this Court against an order dated 11.07.2023 of Additional Sessions Judge V (Malir) Karachi whereby the trial court while dismissing the bail application of the applicant has denied to him the post arrest bail in FIR No. 531/2022 registered for the offense under Section 420/406/504/506-B/34 PPC, PPC of P.S Steel Town Karachi.

2. Briefly stated, the allegation against the applicant is that he cheated the complainant and failed to give him the due share of commission/brokerage, amounting to rupees three crores and fifty lacs, and consequently issued threats of dire consequences. Such a report of the incident was given to P.S Steel Town Karachi, who lodged FIR No. 531/2022 for the offenses under Section 420/406/504/506-B/34 PPC.

3. Learned counsel for the applicant contends that the applicant is innocent and has falsely been implicated in the case; that there is a delay of 9 months in the lodgment of the FIR, which has not been explained by the prosecution; that there is no agreement between the parties in respect of the alleged business transaction based on commission/brokerage basis; that the F.I.R culminated into C-Class report and matter is pure of civil nature; that the alleged offense does not fall within the prohibitory clause, hence it requires further probe. Lastly, he prays for a grant of bail to the applicant.

4. Ms. Rubina Qadir, Assistant PG assisted by the complainant has opposed the bail plea of the applicant and submitted that the accused is not able to demonstrate any malafides in lodging the FIR nor is his arrest being sought with ulterior motives, which remains the primary test for the grant of pre-arrest bail. Learned Assistant PG submitted that the grant of pre-arrest bail is an extraordinary relief that may be granted in extraordinary situations, to protect the innocent person against victimization through abuse of law for ulterior motives; and that pre-arrest bail is not to be granted as a substitute or an alternative to post-arrest bail. Complainant who is present has relied upon the statement dated

10.08.2023 and submitted that the agreement reached between the parties established that the applicant has to pay the commission to the complainant, therefore she prayed for the dismissal of the bail application.

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

6. Perusal of the F.I.R. reflects that there is a delay of about 9 months in lodging the F.I.R., and the explanation so furnished for such delay does not appear to be satisfactory. Though the complainant remained silent for the aforesaid period and did not report the matter to the police, which prima facie shows something fishy on his part. 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. Moreover, the investigating officer disposed of the case under C-Class vide report under section 173 CR.PC and the alleged offenses do not fall within the prohibitory clause of Section 497 Cr.P.C. Furthermore, the applicant has already joined the trial and attends the trial Court regularly.

7. 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.

8. 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.

9. 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.

10. 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.

11. 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 notion of a trust is that there is a person trustee or trustee, in whom confidence is reposed by another who commits property to him; this again supposes that the confidence is freely given. A person, who obtains property by trick from another, bears no resemblance to a trustee and cannot be regarded as a trustee 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. Conversion signifies the depriving of the owner of the use and possession of his property. When the cheat afterward sells or consumes or otherwise uses the fruit of his cheating, he is not committing an act of conversion, for the conversion is already done, but he is furnishing evidence of the fraud he practiced to get hold of the property. 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.

12. 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.

13. 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.

14. 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 420 and 406 PPC are attracted in the present scenario or otherwise.

15. In the result, this application is allowed. Ad-interim pre-arrest bail already granted to the applicant is hereby confirmed subject to his furnishing further security/cash amount in the sum of Rs.500,000/- (Rupees five hundred thousand) with one surety in the like amount to the satisfaction of the Nazir of this 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 and it is for the trial Court to see whether offenses under Section 420/406/504/506-B/34 PPC are made out or otherwise.

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.

18. This criminal bail application stands disposed of.

JUDGE

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