

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No.1595 of 2023

Date	Order with signature of Judge
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For hearing of bail application

12.9.2023

Mt. Azhar Ali Shaikh advocate for the applicants alongwith applicants.
Mr. Zahoor Shah, Additional PG alongwith Aijaz Alam complainant.

Through this bail application under Section 498 Cr.P.C., the applicants Khadim Magsi and Mst. Jameela have sought admission to pre-arrest bail in F.I.R No.294/2023, registered under Section 380/457/454/34 PPC at Police Station Steel Town. The earlier bail plea of the applicants has been declined by the learned Additional Sessions Judge VI (Malir) Karachi vide order dated 09.06.2023 in Cr. Bail Application No. 2300/2023. The applicants being aggrieved by and dissatisfied with the aforesaid order approached this Court by filing bail application No. 1260 of 2023 which was dismissed for non-prosecution vide order dated 07.07.2023, however, they succeeded in filing instant bail application and obtained interim pre-arrest bail vide order dated 21.07.2023. in such circumstances of the case I am of the tentative view that since in the earlier bail application, no decision has been made on merit, therefore, I intend to decide the present lis keeping in view the dicta laid down by the Supreme Court on the proposition that pre-arrest bail should be decided on merits.

2. The accusation against the applicants is that on 18.03.2023 they committed theft in the house of the complainant and took away 3 bangles weighing 3 tolas, one earring weighing one tola, one chain weighing one tola, and two earrings weighing four aana and another valuable articles; such report of the incident was lodged on 23.05.2023 with Police Station Steel Town under Section 380/457/454/34 PPC.

3. Learned counsel for the applicants has contended that the applicants are innocent and have falsely been implicated in this case with malafide intentions and ulterior motives. He has further argued that the alleged incident took place on 18.03.2023 while the FIR was lodged on 23.05.2023 after an unexplained delay of more than two months and 5 days, which makes the prosecution story doubtful and benefit of the doubt always goes in favor of the applicant at this stage. He has further argued that the complainant himself is not an eyewitness of the alleged incident

and the complainant based on doubt lodged the instant FIR against the applicant; that there was no witness who might have seen the applicants while entering the house of the complainant. He has further contended that merely their names are transpiring in FIR nothing incriminating has been shown to have been recovered by the police from their possession and the alleged offenses do not fall within the prohibitory clause of Section 497(1) Cr.P.C.

4. Learned Assistant P.G, Sindh assisted by the complainant opposes the bail application on the ground that applicants are nominated in FIR; besides, recovery is yet to be effected from their possession. He; however, admits that the case has been challaned which is now pending for trial before the trial Court.

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

6. The main offense, with which applicants stand charged for Section 380 PPC, carries a maximum punishment of up to 07 years; hence, does not exceed the limits of the prohibitory clause of Section 497 Cr.P.C. Admittedly, the offense is unseen and the FIR is delayed for about 2 months and 5 days for which no plausible explanation has been furnished by the prosecution for such an inordinate delay. The delay in criminal cases, particularly when it is unexplained, is always presumed to be fatal for the prosecution. Besides the prosecution has not collected sufficient material to connect the applicants with the alleged crime as the malafide of the complainant cannot be ruled out however this aspect is to be seen by the learned trial Court after the recording of the evidence, therefore, in such like situation, bail can be claimed and its refusal will be an exception. The sections applied in the FIR are being tried by the concerned court after recording evidence of the parties if the prosecution succeeds in proving its charge against them even then punishment of more than 3 years cannot be visualized if tried by the Magistrate.

7. Keeping in view the aforesaid factors, I am also cognizant of the fact that the grant of pre-arrest bail is an extraordinary remedy in criminal jurisdiction; it is the diversion of the usual course of law, arrest in cognizable cases; protection to the innocent being hounded on trump-up charges through abuse of process of law, therefore, the accused seeking judicial protection is required to reasonably demonstrate that intended arrest is calculated to humiliate him with taints of mala fide; it is not a substitute for post-arrest bail in every run of the mill in the criminal case as it seriously hampers the course of the investigation. Although the

provision of Section 498 Cr. P.C. is neither ancillary nor subsidiary to Section 497 Cr. P.C. is an independent Section, however, a bare reading of the language of sub-Section (2) of Section 497 Cr. P.C. provides considerations for the grant of bail under Section 497(2) Cr. P.C. practically merged Sections 497/498 Cr.P.C. into one aspect qua concept of pre-arrest bail persuading it to act conjointly in all fairness. The practice of granting extraordinary relief has passed through the transitory period with divergent interpretations of its scope since its inception, however, the law is not static rather it is growing day by day.

8. 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 Sections 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 mala fide 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 the Sessions Judge which was recalled by the learned High Court while exercising suo-moto revisional jurisdiction, however, the order of learned Sessions Judge was restored by the Supreme Court while elaborating the principle in the above said terms. In the present case prima facie the prosecution has not collected sufficient incriminating material to connect the applicants with the alleged crime.

9. In the circumstances and because 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 applicants falls within the ambit of Section 498 Cr.P.C. Consequently, the instant bail application is hereby allowed; interim bail granted earlier to the applicants on 21.07.2023 is hereby confirmed on same terms and conditions.

10. Before parting with this order; however, it is clarified that the reasoning given in this order is tentative and will have no effect whatsoever in any manner upon the merits of the case.

11. Applicants present before the Court are directed to continue their appearance before the trial Court without negligence and in case they may misuse the concession or may temper with the prosecution's evidence then

the trial Court is competent to take legal action against them as well to their surety in terms of Section 514 Cr. PC. Trial Court is also hereby directed to make necessary arrangements for securing the attendance of the prosecution witnesses and conclude the trial within the shortest possible time under intimation to this Court through MIT-II

JUDGE

Shahzad/*