

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No. 680 of 2023

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

For hearing of bail application

19.09.2023

Mr. Saadi Sardar advocate for the applicants alongwith applicants.
Mr. Talib Ali Memon Assistant PG.
Mr. Javed Panhwar advocate for the complainant alongwith complainant
Zulfiqar Ali.

The applicants Muhammad Amin Chapal, Muhammad Rauf Chapal, and S. M Asif Qadri seek the indulgence of this Court against an order dated 27.03.2023 of District & Sessions Judge (South) Karachi whereby the trial Court while dismissing the bail application of the applicants has denied them the pre-arrest bail in FIR No. 88/2023 registered for the offense under Section 342/506-B/34 PPC, of P.S Clifton Karachi, however the investigation officer added the sections 406 and 34 PPC in the charge-sheet No. 88/2023 dated 22.03.2023.

2. Briefly stated, the allegation against the applicants is that the complainant had booked a residential flat in the project known as Chapal Builders at UAE Dubai against which he paid US\$ 75,000/- in installments through Bank Al-Falah but the applicants did not complete the said project in time thereafter complainant severally demanded his amount and flat with the applicants/accused being the owner of Chapal Builders but they delayed from one pretext to another so also issued threats of dire consequences including the threats of murder.

3. At the very outset I asked the learned counsel for the applicants what could be the malafide of the complainant to book the applicants in the subject crime.

4. Learned counsel for the applicants contends that the applicants are innocent and has falsely been implicated in the case; that there is a delay of almost 4 months in the lodgment of the FIR, which has not been explained by the prosecution; that not only there is an inordinate delay in lodging the FIR but the subsequent events highlighted above wherein the claim of the parties is also under adjudication before this Court in Civil Suit No. 1519 of 2022 (re- Muhammad Amin v Zulfiqar Ali Malkani & another, the veracity of the allegation qua criminal breach of trust, prima facie, has become doubtful and, therefore, the element of malice and malafide on the part of complainant cannot be ruled out which makes the case of the applicants to be one wherein exercise of extra ordinary discretion of pre-arrest bail would be just to meet the ends of justice, particularly, when the circumstances warrant further inquiry and the fact that the

alleged offence does not fall within the ambit of prohibitory clause of section 497 Cr.P.C wherein grant of bail is a rule and refusal is an exception. Further contends that the applicants have no nexus with the crime alleged against them. Further averred that nothing has been recovered from the applicants during the investigation the investigation, hence they are entitled to the concession of pre-arrest bail on the aforesaid grounds. He emphasized that if for arguments, the contents of the complaint are admitted to be true, even then it is a matter of civil dispute, which is purely civil and needs to be trashed out in trial after the recording of evidence; that the offenses applied by the prosecution are not attracted and even are bailable. In support of his contention, he relied upon the cases of Fahad Hussain v The State 2023 SCMR 364, Shahzada Qaiser Arfat v The State PLD 2021 SC 708, and Rizwan Hanif v The State 2010 YLR 888. Lastly, he prays for a grant of bail to the applicants.

5. Mr. Talib Ali Memon, Assistant PG assisted by the learned counsel for the complainant has opposed the bail plea of the applicants and submitted that the names of applicants/accused have appeared in the F.I.R registered for the offense under section 506-B/342/34 PPC; that the accused persons induced the brother of the complainant to book the flat at UAE in the project known as “Chapal The presidency” and obtained US \$ 75,000 and so also cheated the other persons in the name of the said project, though the said project was not completed which was required to be completed in the year 2013. He argued that during the investigation. The investigation officer collected such an agreement of booking in the said project by the complainant so the complainant also produced a bank statement showing the amount was transferred to the account of “Chapal The presidency” from the account of the complainant's brother namely Jahangir Khan. He further submitted that the applicant has not denied the allegation that the complainant had booked a flat in project in UAE known as “Chapel The presidency” nor denied that they were/are owners of the said project; that the accused persons have also cheated other general public in the named booking of flats, therefore, the offense is against the society. He next submitted that the accused are not able to demonstrate any malafides in lodging the FIR nor is their 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. He further argued that the applicants committed a breach of trust, thus the offense charged against the applicants stood satisfied, however the same entails severe punishment, and therefore they are not entitled to the concession of pre-arrest bail until the civil dispute, pending

between the parties, is decided by the competent Court of law as discussed supra. He added that the applicants have been declared guilty by the police during the investigation process; therefore, they are not entitled to the concession of pre-arrest bail in the said crime. In support of his contention, he relied upon the case of Abdul Aziz Memon v The State **2020 SCMR 313**, an unreported order in Cr. Bail Application No. 1586 of 2023, 1575 of 2023, and 1583 of 2023 passed by this Court and Mukhtiar Ahmed V The State **2016 YLR 40** He prayed for the dismissal of the bail application.

6. I have heard the learned counsel for the parties and have perused the material available on record with their assistance.

7. Prima facie, the applicants have to show malafide and ulterior motives on the part of the complainant and Police to claim bail before arrest under Section 498 CR.PC, irrespective of the factum whether the offense is of a simple or serious nature. In principle, the term malafide means in bad faith. A malafide action is performed with dishonest intent; a person purposely attempts to cheat or deceive you.

8. The Supreme Court has held in the recent judgment that mala fide, ulterior motives, or false implication are essential for pre-arrest bail. Pre-arrest bail can be granted where the arrest of the accused is imminent with ulterior motive, mala fides, or due to his false implication apparent on the face of the record, not just this but in addition thereto, the accused must also show that his/her arrest was being sought for ulterior motives, particularly on the part of the police to cause irreparable humiliation to him/her and to disgrace and dishonor him/her in the crime. Additionally, such accused should further establish that he/she had not done or suffered any act, which would disentitle him/her to a discretionary relief in equity e.g. he had no past criminal record or that he had not been a fugitive at law. On the aforesaid proposition, I am guided by the decision of the Supreme Court in the case of Maqbool Ahmad Mahessar v. National Accountability Bureau (NAB) **(2021 SCMR 1166)**.

09. The Supreme Court in the case of Kamran Ataullah v. The State **(2021 SCMR 449)** has held that an accused in a criminal case cannot be granted anticipatory bail to subvert or undermine investigative procedure/process that essentially includes arrest to bring the statutory exercise to its logical end for effective and meaningful prosecution of the offense through the collection of evidence consequent upon arrest.

10. The tentative assessment of the record reveals that the applicants in connivance with each other induced the complainant and his brother to book the Flat in the project known as “Chapal the Residency” in UAE Dubai against which

he paid US\$ 75.000 in installments to the applicants through Bank Al-Falah, however, they failed to complete the project and abandoned the same and left UAE without returning the amount deposited by the complainant with them and committed criminal breach of trust and criminal intimidation by keeping the complainant under illegal confinement to pressurize him to back out from his claim of subject residential flat and amount.

11. In the present case, the prosecution has applied different sections of PPC, firstly Section 342 PPC provides punishment for wrongful confinement of a person to the extent of one year, and this is a bailable offense. As far as Section 506 PPC is concerned the same provides the punishment for criminal intimidation to the extent of two years, however, if the death threat is issued to any person, the punishment may extend to seven years and then it becomes a non-bailable offense. The punishment for criminal breach of trust under Section 406 PPC is seven years and is a non-bailable offense.

12. So far as ‘criminal intimidation’ is concerned, the same has been defined in Section 503 PPC in the following words:-

“503. Criminal Intimidation: Whoever threatens another with any injury to his person, reputation, or property, or to the person or reputation of anyone in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.”

13. A bare perusal of the afore-quoted provision of law makes it clear that whenever an overt act is materialized and ended into an overt act, the provision of Section 506(ii) PPC would not be applicable and the only provision that will remain in the field is the overt act, which is committed in consequence of criminal intimidation. On the aforesaid proposition, I am guided by the decision of the Supreme Court in the case of Rana Muhammad Imran Nasarullah Vs. The State **2022 SCMR 1946**.

14. In the present case, the provision of Sections 342 PPC has been alleged against the applicants, which is bailable. As far as Section 406 PPC is concerned, the same was added at a belated stage in the charge sheet and the application of the same would be resolved by the Trial Court after recording of the evidence. It is now established that while granting pre-arrest bail, the merits of the case can be touched upon by the Court. Reliance is placed on the case of Miran Bux Vs. The State (PLD 1989 SC 347) and Sajid Hussain @ Joji Vs. The State (PLD 2021 SC 898).

15. In view of above tentative assessment, it is observed that not only there is an inordinate delay in lodging the FIR but the subsequent events highlighted above wherein the claim of the complainant is also under adjudication, based on

documentary evidence; and, the veracity of the allegation qua criminal breach of trust, prima facie, has become debatable point and, therefore, at this stage, the element of malice and malafide on the part of complainant cannot be ruled out as his prima-facie intent is to recover his booking amount from the applicants which is not the function of this Court, however, it is for the parties to take resort of civil proceedings, these all factums make the case of the applicants to be one wherein exercise of extra ordinary discretion of pre-arrest bail would be just to meet the ends of justice, particularly, when the circumstances warrant further inquiry and the fact that the alleged offences do not fall within the ambit of prohibitory clause of section 497 Cr.P.C wherein grant of bail is a rule and refusal is an exception. Reliance is placed on the cases of Muhammad Ramzan alias Jani Vs. The State and others (2020 SCMR 717).

16. It has become transparent that the matter in hand, ex-facie, seems to be Civil, as it is evident from the contents of the F.I.R that there was a civil transaction between the parties and both the parties agreed to sale and purchase some property in lieu of certain amount which was purportedly received by the applicants and other persons and civil suit No. 1519 of 0220 is stated to be pending before this Court, however; the complainant averred in his complaint that applicants issued threats of dire consequences to him thus the incident was reported to the police. This issue primarily has to be decided by the learned trial Court as well as about the application of section 406 of P.P.C., according to the facts and circumstances of the case after recording evidence. The offence of criminal breach of trust as defined under S.405, P.P.C, punishable under Section 406, P.P.C. was to be committed if the property (money) was given on trust and the same property was not returned. If a person gave money to others for investment in the business and an equivalent amount of money along with profit was to be returned by the latter then prima-facie, such business transaction was not to attract the provision of Sections 405 & 406 of P.P.C. Primarily such transactions was not of entrustment of property, but simply one of the investments of the property. The record further reflects that no date, time, or place of criminal intimidation by applicants was given in F.I.R. No relevant details of criminal intimidation were brought on record of the investigation. It is a well-settled law that no one could be prosecuted based on vague and unspecified allegations.

17. Prima facie, the complainant had tried to convert a civil and business dispute in a criminal case to extract concession of civil matter; and the learned trial Court has to evaluate the same judiciously, independently. On the issue of breach of trust, it has already been clarified by the Supreme Court in the cases of Shahid Imran v The State and others 2011 SCMR 1614 and Rafiq Haji Usman v Chairman, NAB and another 2015 SCMR 1575 that the offenses are attracted only in a case of entrustment of property and not in a case of investment or

payment of money. In the case in hand, it is the prosecution's case that the complainant agreed with the applicants about the sale and purchase of the subject residential flat.

18. The intent behind the grant of bail is to safeguard the innocent person from the highhandedness of police/ complainant if any; and, very strong and exceptional grounds would be required to curtail the liberty of the accused charged, before completion of the trial, which otherwise is a precious right guaranteed under the Constitution of the country.

19. Besides the above In the case of *Tariq Bashir V. The State* (PLD 1995 SC 34) the Supreme Court has taken notice of stock of prevailing circumstances where under-trial prisoners are sent to judicial lock-up without releasing them on bail in non-bailable offenses punishable with imprisonment of less than 10 years and held that "grant of bail in such offenses is a rule and refusal shall be an exception, for which cogent and convincing reasons should be recorded." While elaborating exceptions, albeit it was mentioned that if there is a danger of the offense being repeated, if, the accused is released on bail, then the grant of bail may be refused but it is further elaborated that such opinion of the Court shall not be founded on mere apprehension and self-assumed factors but the same must be supported by cogent reasons and material available on record and not to be based on Surmises and artificial or weak premise. Even otherwise to ensure that the accused may not repeat the same offense, if, released on bail, sufficient surety bonds shall be obtained through reliable sureties besides the legal position that repetition of the same offense would disentitle the accused to stay at large as bail granting order may be recalled in that event, therefore, such ground should not be an absolute bar in the way of grant of bail. It may be noted that there is a sky-high difference between jail life and free life. If the accused person is ultimately acquitted in such cases then, no kind of compensation would be sufficient enough to repair the wrong caused to him due to his incarceration. It is a settled principle of law that once the Legislature has conferred discretion on the Court to exercise jurisdiction in a particular category of offenses without placing any prohibition on such discretion.

20. Once this Court has held in categorical terms that grant of bail in offenses not falling within the prohibitory limb of section 497 Cr.P.C. shall be a rule and refusal shall be an exception then, the subordinate Courts should follow this principle in its letter and spirit because principles of law enunciated by this Court under Article 203 of the Constitution of Islamic Republic of Pakistan, 1973 is binding on all subordinate Courts. My view is supported by the decision rendered by the Supreme Court in the case of *The State v. Syed Qaim Ali Shah* (1992

SCMR 2192) and the famous case of *Khan Asfandyar Wali and others v. Federation of Pakistan (PLD 2001 SC 607)*.

21. I expect the Courts below to adhere to these binding principles in the future and not to act mechanically in the matter of granting or refusal of bail because the liberty of citizens is involved in such matters; therefore, the same should not be decided in a vacuum and without proper judicial approach.

22. In view of the facts and circumstances narrated above, I am of the considered view that the learned trial Court has erred in appreciation of law on the subject while rejecting the pre-arrest bail of the applicants, hence, the same is set at naught, as a consequent I am of the considered view that the case of the applicants is based on the term malafide and fully covered under section 498 Cr.PC, entitling for the confirmation of pre-arrest bail earlier granted to the applicants vide order dated 28.03.2023 subject to furnishing their additional security in the Sum of Rs. 500,000/- (Five lac) each and P.R Bond in the like amount to the satisfaction of the Nazir of this Court.

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

JUDGE

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