

**ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI**

Criminal Bail Application No. 1749 of 2023

Date	Order with signature of Judge
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For hearing of bail application

**18.9.2023**

Mr. Hashmat Khalid advocate for the applicant  
Mr. Muntazir Mehdi, Addl. P.G

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Through this bail application under Section 497 Cr.P.C., the applicant has sought admission to post-arrest bail in F.I.R No. 2403/2022, registered under Section 397/34 PPC, lodged at Police Station KIA, Karachi. The earlier bail plea of the applicant has been declined by the learned IIIrd Additional Session Judge (East) Karachi vide order dated 10.05.2023 in Criminal Bail Application No. 2348/2023.

2. The charge against the applicant is that on 12.12.2022, he robbed the complainant and was arrested with the help of the police and from his possession one pistol with 30 bore and Rs.4000/- were recovered. Such report of the incident was lodged at P.S KIA on the same day.

3. It is, inter alia, contended that the applicant is innocent and has falsely been implicated in this case; he next contended that the accused is in custody as UTP for the last one and half year without trial and even charge could not be framed within the aforesaid period. Per learned counsel fair and expeditious trial was/is the fundamental right of the accused which could not be denied. Learned counsel added that hardship suffered by the accused on account of delay was/is quite obvious and the same could not be overlooked. He next argued that the alleged offence against the applicant does not fall within the prohibitory clause under Section 497 Cr. P.C, therefore the matter requires further inquiry; He has further contended that the bail should not be refused as a punishment. He has next contended that the applicant is neither desperate dangerous nor a hardened criminal and has not previously been convicted and the case of the applicant is of merits and requires further inquiry. He lastly prayed for allowing the bail application.

4. Learned Addl. PG has opposed the application on the premise that the applicant attempted to commit robbery. The offense is against The society and there is a strong likelihood; that he will commit the same offense if released 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 the dismissal of the bail application.

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

6. Tentative assessment of the record transpires that the applicant/accused was arrested by police with the help of complainant from somewhere else not from the place of incident and one pistol was allegedly recovered from him, including Rs.4000/- and got involved in the subject F.I.R upon the statement of the complainant, yet upon the arrest of the present applicant/accused there appears no test-identification parade as holding of such test is a check against false implication and it is a good piece of the evidence against the genuine culprit in terms of the ratio of the judgment of the Supreme Court in the case of *Farman Ali v. The State* **1997 SCMR 971**. Per learned APG, the applicant was riding motorcycle and co-accused robbed the complainant, who allegedly fled away from police. The question arises as to whether the applicant was vicariously liable for the action of co-accused, who allegedly robbed the complainant and how recovery was made from present applicant as suggested by the prosecution, nonetheless, truth or otherwise of charges leveled against the applicant/ accused could only be determined at the conclusion of trial after taking into consideration the evidence adduced by both the parties on oath. During arguments, I have been informed that trial Court has not taken pains to start the case and failed to frame the charge, it is almost one and half year and what could be the reason for which the trial Court to answer.

7. The record shows that the applicant/accused is neither previous convicted nor a hardened criminal and has been in continuous custody since his arrest and 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. Besides the prosecution has only applied offence under Section 397, P.P.C. being carrying punishment with imprisonment for not less than seven (07) years does not fall within the prohibitory clause of section 497 Cr.P.C., while offence under Section 392, P.P.C. has not been applied and this Court while hearing a bail application is not to keep in view the maximum sentence provided by the statute for the charged offence but the one which is likely to be entailed; however, in such like cases, the accused can make out his arguable case for post arrest bail.

8. 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. It may be observed that the offence alleged against the applicant/accused falls outside the prohibitory clause of Section 497, Cr.P.C. in such like case grant of bail is a rule and refusal is an exception. Reliance could be placed on the case of Mohammed Tanveer v. the state **PLD 2017 Supreme Court 733**.

9. On the question of delay in trial of the under trial prisoner (UTP), the Supreme Court in the case of Shakeel Shah Vs. The State **2022 SCMR 1** has deliberated on the scope of the right of an accused to bail on the statutory ground of delay in conclusion of the trial under the third proviso to section 497(1), Cr.P.C and held that the prosecution must show, on the basis of the record, that there was/is a concerted effort on the part of the accused or his counsel to delay the conclusion of the trial by seeking adjournments without sufficient cause on crucial hearings and/or by making frivolous miscellaneous applications and further held that this statutory right to be released on bail is, however, subject to two exceptions: one is embodied in the third proviso itself and the second is provided in the fourth proviso. As per these exceptions, the right to be released on bail on the ground of delay in conclusion of the trial is not available to an accused if:

*(i) the delay in conclusion of the trial is occasioned by an act or omission of the accused or by any other person acting on his behalf, or*

*(ii) the accused is a convicted offender for an offence punishable with death or imprisonment for life or is in the opinion of the court a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.*

10. The Supreme Court has emphasized on the point that the statutory right to be released on bail flows from the constitutional right to liberty and fair trial under Articles 9 and 10A of the Constitution. Hence, the provisions of the third and fourth provisos to Section 497(1) Cr.P.C must be examined through the constitutional lens and fashioned in a manner that is progressive and expansive of the rights of an accused, who is still under trial and has the presumption of innocence in his favour.

11. To understand the said proviso and the related fourth proviso to section 497(1) Cr.P.C., same is reproduced hereunder for ready reference and convenience:

*“497. When bail may be taken in cases of non-bailable offence.*

*(1) When any person accused of non-bailable offence is arrested or detained without warrant by an officer-in-charge of a police station, or appears or is brought before a Court, he may be released on bail, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an*

*offence punishable with death or [imprisonment for life or imprisonment for ten years]*

*Provided that the Court may direct that any person under the age of sixteen years [or any woman] or any sick or infirm person accused of such an offence be released on bail*

*Provided further that a person accused of an offence as aforesaid shall not be released on bail unless the prosecution has been given notice to show cause why he should not be so released.*

*Provided further that the Court shall, except where it is of the opinion that the delay in the trial of the accused has been occasioned by an act or omission of the accused or any other person acting on his behalf, direct that any person shall be released on bail—*

*(a) Who, being accused of any offence not punishable with death, has been detained for such offence for a continuous period exceeding one year or in case of a woman exceeding six months and whose trial for such offence has not concluded; or*

*(b) Who, being accused of an offence punishable with death, has been detained for such offence for a continuous period exceeding two years and in case of woman exceeding one year and whose trial for such offence has not concluded:*

*Provided further that the provisions of the foregoing proviso shall not apply to a previously convicted offender for an offence punishable with death or imprisonment for life or to a person who, in the opinion of the court, is a hardened, desperate or dangerous criminal or is accused of an act of terrorism punishable with death or imprisonment for life.”*

12. In the present case, the applicant is charged with offences punishable under Sections 397 and 34 PPC, which are not punishable with death; his bail plea is, therefore, covered by part (a) of the third proviso to section 497(1) Cr.P.C.

13. In the similar circumstances the Supreme Court has held that the above provision envisages that in an offence not punishable with death, the trial of the accused is to be concluded within a period of one year from the date of detention of the accused, and in case the trial is not so concluded, the law mandates the release of the accused on bail. The accused, thus, has a statutory right to be released on bail if his trial for such offence is not concluded within a period of one year from the date of his detention. The period of one year for the conclusion of the trial begins from the date of the arrest/detention of the accused and it is of little importance as to when the charge is framed and the trial commenced. The purpose and objective of the provision is to ensure that the trial of an accused is conducted expeditiously and the pre-conviction detention of an accused does not extend beyond the period of one year, in cases involving offences not punishable with death. In such cases, if the trial of an accused is not concluded within a year of his detention, the statutory right to be released on bail ripens in his favour.

14. Continuing on the subject question, it is further held that the second exception to the right of the accused to be released on bail on the ground of delay in conclusion of the trial is provided in the fourth proviso. According to which the provisions of the third proviso do not apply to the accused who is:

- (i) *a convicted offender for an offence punishable with death or imprisonment for life; or*
- (ii) *a hardened, desperate or dangerous criminal, in the opinion of the Court; or*
- (iii) *an accused of an act of terrorism punishable with death or imprisonment for life.*

15. Further that condition (i) and (iii) are self-explanatory and must be borne out from the record. Under condition (i), the accused must have been earlier convicted by a Court of law for an offence punishable with death or imprisonment for life. Under condition (iii), the accused must be accused of an act of terrorism punishable with death or imprisonment for life. It is condition (ii) which requires the Court to apply its judicious mind to the facts and circumstances of the case and make an opinion as to whether or not the accused is a hardened, desperate or dangerous criminal. The words hardened, desperate or dangerous have been couched in between conditions (i) and (iii) and therefore signify the same sense of gravity and seriousness as to the nature of the offence and character of the accused.

16. Now it is well settled that in the absence of any such material as discussed supra, bail cannot be denied to an accused on the statutory ground of delay in conclusion of the trial as held by the Supreme Court in the cases of *Moundar v. State* **PLD 1990 SC 934** *Shabbir V. State* **2012 SCMR 354** and *Imtiaz Ahmed vs. The State* **2017 SCMR 1194**, in the aforesaid cases, the Supreme Court considered Section 497 Cr.P.C with its amended provision, whereby the right of bail on the ground of statutory delay was restored to the Statute Book and the criminal petition was converted into appeal and the petitioner was admitted to bail on the ground of statutory delay.

17. I, therefore, come to the tentative view that the delay in concluding the trial of the applicant beyond the period of one year from the date of his arrest/detention has not been occasioned by an act or omission of the applicant or any other person acting on his behalf, and that in the facts and circumstances of the case the accused does not appear to be a hardened, desperate or dangerous criminal. The applicant has, thus, made out a case for grant of bail under the third proviso to section 497(1) Cr.P.C.

18. The trial Court has failed to correctly appreciate the scope of the third and fourth proviso to section 497(1) Cr.P.C in the light of the fundamental rights guaranteed by the Constitution.

19. This bail application is, therefore, allowed: and the applicant is admitted to post-arrest bail subject to his furnishing solvent surety in the sum of Rs.100, 000/- with PR Bond in the like amount to the satisfaction of the trial court.

20. 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. It is, however, made clear that in the event if, during proceedings, the applicant/accused misuses the bail, then the trial court would be competent to cancel his bail without making any reference to this Court.

JUDGE