ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No. 1677 of 2023

Date	Order with signature of Judge

For hearing of bail application

03.10.2023

Mr. Muhammad Tahir Bukhari advocate for the applicant/accused
Mr. Muntazir Mehdi, Additional PG.

Through this bail application under Section 497 Cr.P.C., the applicant Muhammad Saleh has sought admission to post-arrest bail in F.I.R No.64/2023, registered under Section 392/397/34 PPC, lodged at Police Station Docks Karachi. The earlier bail plea of the applicant has been declined by the learned Additional Sessions Judge I/ Model Criminal Trial Court (West) Karachi vide order dated 10.05.2023 in Criminal Bail Application No. 2096/2023, on the premise that the present applicant along with his accomplices committed robbery from the complainant and attempted to flee away from the scene however due to commotion the police came at the spot and arrested the applicant and recovered Rs. 210/- and cell phone of the complainant.

2. The accusation against the applicant is that on 06.02.2023 he along with accomplices, robbed the complainant of his valuable articles, and attempted to flee away from the place of incident, however, he was captured by police, and alleged recovery was effected from him.

3. It is, inter alia, contended that the applicant is innocent and has falsely been implicated in this case; he next contended that in the same FIR the co-accused namely Zain-ul- Abideen got bail before arrest bearing No. 745/2003 from Ist Additional Session Judge West Karachi dated 25.02.2023; that upon the rule of consistency the applicant/accused is liable for the concession of bail; that nothing has been recovered from the possession of the applicant / accused and alleged recovery has been foisted upon the applicant with malafide intention; that there is no direct and indirect evidence is available on the record which connects the applicant/accused with the commission of a crime and mere allegation by the prosecution are not sufficient unless sufficient evidence found therein; that the case of the prosecution is highly managed and the doubtful story is being preplanned by the complainant and police; that it is well-settled principle of law that the lesser punishment shall be considered at the bail stage. He further submitted that the Investigating Officer has shown the place of the incident as Babri Masjid, Madina Chowk, however in the challan and mushirnama of the place of the incident he has disclosed the

location as Alfalah Mashid, Alfalah Chowk, which makes the prosecution case doubtful; that there is discrepancies in the memo of arrest and FIR; that the mushirnama of arrest does not show that any weapon was recovered; that there is violation of Section 103 Cr. P.C which requires further inquiry. He lastly prayed for allowing the bail application.

4. The complainant has failed to put his appearance though notices were served upon him through the SSP concerned however he has chosen to remain absent and on his behalf learned Additional PG has opposed the application on the premise that the applicant with his accomplices committed robbery with the complainant and 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 reveals that the applicant/accused along with accomplices, robbed the complainant of his valuable articles, and attempted to flee from the place of the incident, however, he was captured by police and alleged recovery was effected from him. Prima facie the applicant has been arrested in the aforesaid case and in the meanwhile the complainant identified his alleged robbed articles. The Investigating Officer has prepared the mushinama of the place of the incident and the location whereof is a street near Babri Masjid Madina Chowk, Machar Colony Karachi whereas, in the charge sheet, the Investigating officer has disclosed that due to a switch of cell phone of the complainant, he could not see the place of the incident, however, he further disclosed that he inspected the place of the incident which was located at Gali near Alfalah Masjid, Alfalah Chowk, Muhammadi and also attempted to show the arrest of the applicant and recovery from him at Police Station Docks on 06.02.2023, which prima facie creates doubt in the prosecution story on the premise that when the applicant was allegedly captured by the police at the spot near Babri Masjid, Madina Chowk, Machar Colony Karachi as to how his arrest and recovery was later on shown at the police station on 06.02.2023. All facts require further inquiry into the guilt of the applicant.

7. In the present case, prima facie no test-identification parade has been held so far as the applicant/accused is concerned. It is well-settled

that in cases where the names of culprits are not mentioned, holding of test-identification parade becomes mandatory. Reliance in this regard can be placed on the case of <u>*Farman Ali v. The State*</u> [**1997 SCMR 971**], wherein the Supreme Court of Pakistan, inter alia, has held that: -

> *"7. Holding of identification test becomes necessary in cases, where names of the culprits are not given in the F.I.R. Holding of such test is a check against false implication and it is a good piece of evidence against the genuine culprits....."*

8. It is well-settled law that the process of identification parade has to be carried out having regard to the exigencies of each case in a fair and non-collusive manner and such exercise is not an unchangeable ritual, inconsequential non-performance whereof, may result in failure of the prosecution case, which otherwise is structured upon clean and probable evidence. Reliance is placed on the case of <u>*Tasar Mehmood v. The State*</u> (**2020 SCMR 1013**). Even otherwise, it is settled law that holding of identification parade is merely a corroborative piece of evidence. If a witness identifies the accused in Court and his statement inspires confidence; he remains consistent on all material particulars and there is nothing in evidence to suggest that he is deposing falsely, then even the non-holding of the identification parade would not be fatal for the prosecution case. Reliance is placed on <u>*Ghazanfar Ali v. The State*</u> (**2012 SCMR 215**) and <u>*Muhammad Ali v. The State*</u> (**2022 SCMR 2024**). However, in the present case, the name of the applicant has been disclosed in the FIR, as he was arrested by the police while fleeing away from the spot, and after his purported arrest shown at the Police Station as per mushirnama of arrest, it was incumbent upon the complainant to identify the accused in the identification parade rather than inside the police lockup in terms of Article 22 of the Qanun-e-Shahadat Order, 1984.

09. In FIR Sections 393 and 397 PPC has been applied. Section 391 PPC provides that when five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity". The punishment under Section 395 is that whoever commits dacoity shall be punished with imprisonment for life, or with rigorous imprisonment for a term which shall not be less than four years nor more than ten years and shall also be liable to a fine. Section 393 PPC pertains to an attempt to commit robbery which is punishable with R.I for a term that shall be extended up to 07 years whereas Section 397 PPC provides the punishment for an attempt to commit robbery or dacoity when armed with deadly weapons for which the accused shall be punished not less than 07 years.

10. Keeping in view the punishments provided in the above Sections, while deciding the bail application lesser sentence out of an alternate sentence may be taken into consideration for determining whether the case falls under the prohibitory clause of Section 497(1) Cr. P.C., I am of the considered view that the case of the applicant requires further inquiry. Besides the alleged offenses do not fall within the prohibitory clause of Section 497(1) Cr.P.C.

11. Prima facie, in such circumstances, the trial Court has to determine the guilt of the applicant whether he was vicariously liable for the act of co-accused or he was also in league with them; besides the other infirmities as discussed supra requires thorough probe and this could only be possible after recording the evidence.

12. Additionally bail has already been granted to co-accused Zain-ul-Abideen @ Jinal and in that eventuality, the applicant has become entitled to the concession of bail on the principle of rule of consistency. Even otherwise, the offenses mentioned in the FIR are yet to be thrashed out by the trial Court. In these circumstances, it is rightly contended by the learned counsel for the applicant that the applicant is entitled to a grant of post-arrest bail on the principle of consistency. On the aforesaid proposition, I am guided by the decision of the Supreme Court in the case of *Shahzad Vs The State* **2023 SCMR 679**.

13. The record shows that the applicant/accused is not a previous convict. Moreover, the applicant/accused has been in continuous custody since his arrest and he is no longer required for any investigation nor the prosecution has claimed any exceptional circumstance, that could justify keeping him behind bars for an indefinite period pending the determination of his guilt. It is well-settled that while examining the question of bail, the Court has to consider the minimum aspect of the sentence provided for the alleged offense.

14. For what has been stated above, without going deep into the merits of the case, I hold that it is a fit case for the admission of the applicant to bail, consequently, he is admitted to bail subject to furnishing security in the sum of Rs. 2,00,000/- (Two Hundred Thousand only) with one surety of the half amount of security and P.R Bond in the like amount to the satisfaction of learned trial Court. The trial court is to take pains to expedite the trial and conclude the same within two months positively, if not concluded in time, at least the complainant must be examined in the intervening period; and, in case,

the charge has not yet been framed the same shall be framed on the next date of hearing.

15. Before parting with this order, it is observed that the observations made in this order are tentative and the same would have no bearing on the outcome of the trial of the case. It is made clear that in case, the applicant/accused during proceedings before the trial Court, misuses the concession of bail, then the trial Court would be competent to cancel the bail of the applicant/accused without making any reference to this Court.

JUDGE