

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No.1891 of 2023

Date	Order with signature of Judge
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For hearing of bail application

28.9.2023

Mr. Shujjat Ali Khan advocate for the applicant
Mr. Raheel Samsam advocate for the complainant
Mr. Khadim Hussain Addl P.G along with SI/IO Muhammad Akbar of PS Boat Basin

Through this criminal bail application, the applicant Syed Nida Muhammad Agha seeks post-arrest bail in FIR No.350/2023, registered under Section 406/420 PPC at PS Boat Basin Karachi, after his bail plea has been declined by learned IX-Additional District & Sessions Judge, Karachi South vide order dated 22.8.2023 in Cr. Bail Application No. 2805 of 2023.

2. The allegations against the applicant/accused is that on 24.04.2022 he misplaced vehicle No.TLZ-767 along with the Furnace oil of the complainant, in connivance with his accomplice, which was entrusted to him by the complainant was/is allegedly snatched from the applicant at gunpoint by some assailants accused and the PSO charged Rs. 1,21,39,418/- from the complainant. The complainant pleaded that the applicant had committed fraud and forgery and usurped the Furnace oil of the complainant and caused him a loss of Rs. 1,32,91,380/- such report of the incident was lodged with PS Boat Basin Karachi on 16.06.2023 after a delay of 14 months.

3. Learned counsel for the applicant/accused has mainly contended that the applicant is innocent and has falsely been implicated in this case; that the alleged incident took place on 24.04.2022 whereas the FIR was registered on 16.06.2023 with an unexplained delay of about 14 months, which creates serious doubt; that the applicant is behind the bar since the day of his arrest and that charge sheet has been submitted in the matter as such the accused is no more required for further investigation. He next contended that the dispute between the parties is civil and Sections 420 and 406 PPC are not attracted. Learned counsel further emphasized that in the case of criminal breach of trust dishonest misappropriation is the main ingredient of the offense, which factum is missing in the present case for the reason that he at that time informed the complainant about snatching of the vehicle at gunpoint by unknown assistants thus penal consequences of Section 405 and 406 PPC would not be attracted. He

further elaborated on the subject point and submitted that a mere breach of a promise, agreement or contract does not ipso facto attract the definition of the criminal breach of trust contained in Section 405, P.P.C, and such a breach is not synonymous with criminal breach of trust. He also argued that the Rule of prudence, stipulated that the prosecution had to prove its case beyond the shadow of a doubt and the accused has not to prove his innocence, until and unless proven guilty by the competent Court of law, even benefit of slightest doubt would necessarily be extended in favor of the applicant/accused at bail stage and not otherwise. He added that the offenses do not fall within the ambit of the prohibitory clause and the applicant/accused is entitled to the grant of post-arrest bail.

4. Learned counsel for the complainant has argued that the applicant/accused was nominated in the FIR with a specific role and no enmity between the accused and the complainant could be established. He also argued that the case of the prosecution was fully supported by witnesses, independent, and credible material is available on record to connect the accused with the commission of the offense. Learned counsel further submitted that the plea of the applicant that the subject vehicle containing Furnace oil belonging to the complainant was snatched from him on the way by the alleged robbers thus he lodged such report of the incident to the concerned police, but neither the alleged culprit has been arrested nor the vehicle containing Furnace oil has been recovered rather his aforesaid plea has been discarded by the Investigating Officer by canceling the F.I.R No.287/2022 under Section 382/34 PPC under 'C' Class and appropriate order has already been passed by the concerned Judicial Magistrate vide order dated 14.10.2022. He further submitted that the applicant showed his willingness to refund the money that he owes to the complainant as per his admission before Nek Mards as per agreement as disclosed in the crime report and in this regard, he has deposited the property documents to the complainant, however of less value of the subject amount involved in the case and also has shown his willingness to deposit reasonable security to the trial Court, which shows his complicity in the offense. He added that the applicant is charged, under Section 406 of the Pakistan Penal Code, with criminal breach of trust in respect of the property entrusted to him as a carrier and he committed criminal breach of trust as defined under Section 406 in respect of the property as such he could be tried under Sections 406 and 407 PPC. Learned counsel further submitted that the matter is ripe for evidence, therefore, he is not entitled to the concession of post-arrest bail

at this stage and only directions could be issued to the trial Court to conclude the trial within a reasonable time.

5. During the hearing of the case, learned counsel for the complainant was directed to seek instructions from the complainant on the proposition put forward by the applicant. The complainant who is present along with his counsel is reluctant to accept the assertion of the applicant on the analogy that if the applicant is allowed this concession every owner of the vehicle will do the same crime and there will be no end to it as such there should be a deterrence to avoid such happening in future. Be that as it may, I am only concerned that the present *lis* is to be decided on merits rather than based on certain concessions of the complainant if any.

6. Learned Additional PG also opposed the grant of bail to the applicant/accused on the ground that admission of the applicant and other documentary proof is available on record to connect the applicant with the alleged crime and the applicant/accused has failed to establish any mala fide on the part of the complainant and police to book him in the subject crime. Learned Additional PG emphasized that it casts a heavy duty upon the courts to provide the complainant safeguard within the limits of law as there is sufficient material oral and documentary available as well as admission of the applicant on the record to establish that the case of the applicant does not fall within the purview of Section 497(2), Cr. P.C. as such he is not entitled to claim for further inquiry into his guilt. The learned trial Court has passed a well-reasoned order to which no exception can be taken. He has prayed for the dismissal of the application.

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

8. Prima facie, the entire case of the applicant is based on the term criminal breach of trust in connivance with his accomplices on the premise that he had misplaced vehicle No.TLZ-767 containing Furnace oil belonging to the complainant which was entrusted to the applicant, however, he failed to bring the subject material to the destination and with malafide intention failed to account for the same, thus causing loss to the complainant and undue benefit to himself in the business; in the intervening period, the Pakistan State Oil (PSO) charged Rs.1,32,91,380/- also charged from the complainant of such amount.

9. To appreciate whether the applicant is entitled to post-arrest bail based on the aforesaid allegations.

10. In principle, the essential ingredients of the offense of criminal breach of trust are as follows:-

- a) *Entrustment.*
- b) *Dishonest misappropriation or conversion to his own use by the person in whom the confidence reposed.*
- c) *Dishonest use or disposal of property in violation of any direction of law.*
- d) *Dishonest use or disposal of property in violation of any legal contract.*
- e) *Offence of dishonest misappropriation of conversion to one's own use is not contingent upon time spent rather it is the co-occurrence of actus rea and mens rea.*
- f) *The offense Section 406 is punishable with imprisonment of either description of a term which may extend to (seven) years, or with a fine, or with both.*

11. Careful appraisal of the legal position of the case as discussed supra prima-facie, in the case of criminal breach of trust, the property is voluntarily delivered by the aggrieved person whereas in the case of cheating aggrieved person is deceitfully induced to part with the property. In the case of criminal breach of trust element of dishonesty occurs after the entrustment of the property whereas in the case of cheating the dishonest intention from the very outset is a *sine qua none*. In the present case, the complainant shows himself to be a businessman, who has been deprived of his legitimate amount in the shape of Furnace oil contained in the vehicle, which was entrusted to the applicant and as per his narration in the F.I.R lodged by him against unknown assailants, which F.I.R has already been disposed of under Cancel Class vide order dated 14.10.2022 passed by the learned Judicial Magistrate Steel Town District Malir Karachi.

12. Perusal of the F.I.R. reflects that there is a delay of about 14 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 did not report the matter to the police and agitated his grievances before the Nek Mards, which prima facie shows the intention of the complainant to recover his amount by hook or crook. 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.

13. From bare perusal of the First Information Report it is clear that it is a case of pure civil nature. Prima facie there was a business dealing between the parties and the basic ingredients of sections 406 and 420 are yet to be determined by the trial court after recording the evidence of the parties and complainant ultimately wants his amount back, which is not the function of this court to initiate recovery proceedings through the present bail proceedings as the remedy on the aforesaid proposition is available to the complainant under the law.

14. In principle bail can be granted or refused in offenses that do not fall within the prohibitory clause of section 497(1), Cr.P.C. The exceptions that justify the refusal of bail are also well settled by several judgments of the Supreme Court, which are: the likelihood of the accused if released on bail absconding and escaping trial; tampering with the prosecution evidence, or influencing the prosecution witnesses to obstruct the course of justice; and to repeat the offense. This being the legal position of the case, I have asked the learned counsel for the complainant and learned Additional PG to show how the applicant's case falls in any of the said three well-established exceptions. They, however, could not explain and satisfy as to which one of the said exceptions is attracted to the applicant's case. Their only response was that there was/is sufficient incriminating material available on the record to connect the applicant with the commission of the criminal breach of trust or cheating.

15. To elaborate further on the subject, in principle under section 497(2), Cr.P.C., under which the bail is granted to an accused as of right if it appears to the court that there are no reasonable grounds for believing that the accused has committed the offense alleged against him rather there are sufficient grounds for further inquiry into his guilt. To decide the prayer for the grant of bail in the exercise of the discretionary power of the court under section 497(2), Cr.P.C. the availability of insufficient incriminating material to connect the accused with the commission of the offense alleged against him is also one of the relevant considerations.

16. Prima facie, the offense under Section 420 PPC is bailable, and Section 406 P.P.C. is non-bailable, however, it does not fall within the prohibitory clause of Section 497, Cr. P.C. but the Supreme Court has held in the case of Malik Muhammad Tahir Vs. The State **2022 SCMR 2040** that this principle is not absolute, rather it depends upon the facts

and circumstances of each case, however, the facts of the case at hand are altogether different.

17. Adverting to the ground of the complainant that the trial has already commenced as such no bail is to be granted. Prima-facie, trial commences in criminal cases when the first witness in the case was/is examined in chief directly by the Court followed by the charge as per law. In the present case, no such witness has yet been examined by the trial Court. Besides the applicant is charged with offenses punishable under sections 420 and 406 P.P.C, which are not punishable with death; prima facie, his bail plea is, also covered by section 497(2) Cr. P.C., as he has been incarcerated in jail with effect from 04.08.2023. So this assertion of the complainant is of no help to him at this stage.

18. In view of the facts and circumstances of the case, I am of the tentative view that the assertion of the complainant that the applicant will abscond if released on bail. Prima facie this assertion cannot be accepted at this stage for the reason that the police are duty bound to procure the attendance of all the PWs, and even accused before the trial court when the trial begins, however, the trial court can safeguard the attendance of the accused in the trial after securing sufficient sureties, therefore prima-facie the case of the applicant thus, does not fall within any of the three well-established exceptions that may have justified refusing bail to him. The bail application of the applicant is accepted and he is admitted to bail subject to his furnishing security in the sum of Rs.500,000/- (Five lacs) with two sureties in half of the security amount in the shape of valid property documents and P.R bond in the like amount to the satisfaction of the trial court. The trial Court shall examine the complainant on the next date of hearing and charge is not framed the same shall be framed on the next date of hearing.

19. Needless to mention that this concession of bail may be canceled by the trial court in the exercise of its power under section 497(5), Cr.P.C. if the applicant misuses it in any manner, including the causing of delay or otherwise hindering the expeditious conclusion of the trial.

JUDGE