ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.1386 of 2024

Date	Order with signature of Judge

For hearing of bail application

Date of hearing and Order:- 05.7.2024

Mr. Abdul Qudoos Jatoi advocate for the applicant / accused
Mr. Mumtaz Ali Shah, Assistant PG alongwith IO/ASI Mumtaz Ali, PS Steel Town Karachi

---

O R D E R

Adnan-ul-Karim Memon, J:- Through this bail application under Section 497 Cr.P.C., the applicant Ghulam Mustafa has sought admission to post-arrest bail in F.I.R No.228/2024, registered under Section 392/397/398/34 PPC, lodged at Police Station Steel Town, Karachi.

2. The charge against the applicant Ghulam Mustafa is that he along with his accomplice committed robbery of Rikshaw and cash amount of Rs.25000/- and he was arrested along with recovery of snatched mobile phone. His earlier bail application has been dismissed by the learned Additional Sessions Judge VIII Malir, Karachi vide order dated 11.06.2024 passed in Criminal Bail Application No. 2774 of 2024 on the ground that the applicant failed to agitate fresh ground in the bail application merely not objecting to the bail by the complainant is no ground to grant bail to the applicant.

3. Conversely, learned APG for State vehemently opposed the grant of bail application and submitted that mere filing of an affidavit of no objection by the complainant created a dent in the prosecution case. He further submitted that filing of affidavit meant that the applicant/accused had admitted the offense and he patched up the matter with the complainant outside the Court. He further argued that this is a case of heinous nature offense under Sections 392/397/398 PPC, which are not a compoundable offense.

4. I have heard learned counsel for the applicant/accused, learned APG, and complainant, who put his appearance on 02.07.2024 and raised his no objection if the bail is granted to the applicant and perused the material available on record.

5. From the record, it also transpires that the applicant/accused was brought before the police by the complainant and was booked in the case upon his statement in police custody though his name was subsequently given by the complainant in the FIR with a narration that on 21.04.2024 on his efforts he arrested applicant and produced him before the police. The record reflects that the alleged incident took place on 01.04.2024 and the same was reported on 22.04.2024 after a considerable time. If this is the position of the case the trial Court has to see whether there is any evidence against the applicant in the alleged crime.

6. The Supreme Court in the case of *The State through Director Anti-Narcotic Force, Karachi v. Syed Abdul Qayum* [**2001 SCMR 14]**, while dilating upon the evidentiary value of statement made before the police in the light of mandates of Article 38 of the Qanun-e-Shahadat Order, 1984, inter alia, held that statements recorded by police during investigation are inadmissible in the evidence and cannot be relied upon.

7. In the present case, though the FIR was against the unknown persons yet upon arrest of the present applicant/accused there appears no test-identification parade has been held. 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 Farman Ali v. The State [1997 SCMR 971], wherein the Honourable Supreme Court of Pakistan, inter alia, has held:-

> ***"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. The record shows that the applicant/accused is neither a previous convict nor a hardened criminal and has been in continuous custody since his arrest and is no longer 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. 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. From the tentative assessment of the evidence in the hand of the prosecution, it appears that there is hearsay evidence against the present applicant/accused. Nonetheless, the truth or otherwise of charges leveled against the accused could only be determined at the conclusion of trial after taking into consideration the evidence adduced by both parties. It may be observed that the offense

alleged against the applicant/accused falls outside the prohibitory clause of Section 497, Cr.P.C. In such case, grant of bail is a rule and refusal is an exception. Reliance in this regard can be placed on the cases of Tariq Bashir and 5 others v. The State [PLD 1995 SC 34] and Mohammed Tanveer v. the State [PLD 2017 Supreme Court 733].

9. An important question arises in the present case, as to whether based on the affidavit of the complainant; concession of bail can be extended to the applicants/ accused.

10. To answer the aforesaid question, while deciding a bail application, only allegations made in the FIR, statements recorded under Section 161 Cr. P.C., nature, and gravity of the charge, other incriminating material against the accused, legal pleas raised by the accused, and relevant laws have to be considered. I am of the tentative view that at the stage of consideration of bail application, either anticipatory or regular bail such an affidavit could not be taken into consideration.

11. So far as Section 397 PPC is concerned the same provides the following punishment:-

> "***397. Robbery or dacoity, with attempt to cause death or grievous hurt****. If, at the time of committing robbery or dacoity, the offender uses any deadly weapon, or causes grievous hurt to any person or attempts to cause death or grievous hurt to any person, the imprisonment with which such offender shall be punished shall not be less than seven years.*"

12. 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 seven 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 seven years, however, the prosecution was only bothered to invoke Section 397 PPC without corresponding offense. 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. Since the alleged recovery has not been made from the present applicants/accused and they have only been charged with receiving stolen property, the complainant has shown his reluctance to prosecute the applicant at the bail stage and all the aspects of the case shall be taken care of by the trial Court. It is also the case of the prosecution that the applicant was only arrested on his statement and after his arrest, no recovery has been effected from his possession.

13. No doubt, the applicant is not nominated in FIR; however, it is delayed for about 21 days, for which no reasonable explanation has been furnished by the prosecution for such inordinate delay. Besides he has not been identified by the complainant before the magistrate.

14. The delay in criminal cases, particularly when it is unexplained, is always presumed to be fatal for the prosecution. In the circumstances and because of the dicta laid down by the Supreme Court of Pakistan in the case of *TANVEER V.S The STATE* (**PLD 2017 SC 733**), the case against the applicant needs to be looked into by the trial court on the allegations leveled against him by the prosecution as the entire case of the applicant is based on his statement. On the aforesaid proposition, I am guided by the decisions of the Supreme Court in the cases of *Noman Khan v The State* **2020 SCMR 666** and *Abdul Majeed Afridi v The State* **2022 SCMR 676**.

15. The Supreme Court in the case of *Tariq Bashir vs. The State* (**PLD 1995 S.C 34**) has held that the grant of bail in bailable offenses is a right while in non-bailable offenses is concession/grace. The applicants/accused has been in jail since his arrest and is no longer required for investigation, moreover, there is nothing on record that the present applicants are previous convicts.

16. Going ahead on the subject, there is no cavil to the proposition that courts, by the very purpose of their creation, are required to do justice. The expression “justice” in its broadest sense, is the principle that every individual must receive, which he deserves according to law. Justice is a notion described as the constant perpetual will to allot to every man what is due to him. Every criminal wrong must be reciprocated with procedural stringency and penal consequences. However, courts, even at the bail stage, are not bound by the provisions of law applied in the FIR rather have to see the offence applicable from the contents of the prosecution case. Additionally, it is also a well-settled principle of law that mere heinousness of offense is no ground to reject the bail plea. The basic concept of bail is that no innocent person's liberty is to be curtailed until and unless proven otherwise.

17. The essential prerequisite for the grant of bail by sub-Section (2) of Section 497, Cr.P.C. is that the Court must be satisfied based on the material placed on record that there are reasonable grounds to believe that the accused is not guilty of an offense punishable with death or imprisonment for life. The condition of this Clause is that sufficient

grounds exist for further inquiry into the guilt of the accused, which would mean that the question should be such, that has nexus with the result of the case and can show or tend to show that the accused was not guilty of the offense with which he is charged.

18. Primarily, grant or rejection of bail is a discretionary relief but such discretion should be exercised fairly and judicially. The word discretion when applied to Court means sound discretion judiciously guided by law and to lessen the hardship of the people. For what has been discussed above, prima facie the applicant has made out a case for further inquiry into his guilt within the meaning of Section 497(2), Cr.P.C.

19. For the foregoing reasons, the applicant is admitted to post-arrest bail in F.I.R No.228/2024, registered under Section 392/397/398/34 PPC, lodged at Police Station Steel Town Malir Karachi subject to his furnishing solvent surety in the sum of Rs. 100,000/- (Rupees One Hundred Thousand Only) and P.R Bond in the like amount to the satisfaction of trial Court.

20. 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 applicants/accused during proceedings before the trial Court, misuse 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

Shafi