

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No. 871 of 2024

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

For hearing of bail application

Date of hearing and Order:- 10.07.2024

Mr. Muhammad Jameel advocate for the applicant
Mr. Umair Usman advocate for the complainant
Ms. Rubina Qadir, DPG.

ORDER

Adnan-ul-Karim Memon J:- Through the instant bail application, the applicant Shahzad Junaid has approached this Court for a grant of post-arrest bail in terms of Section 497 Cr. P.C., in FIR No. 273/2023 registered for the offenses under Section 420/468/471/34 PPC, of P.S Sahil Karachi. During the investigation Section 406 PPC was added to the charge sheet by the Investigating officer. His earlier bail was declined by IX Additional Sessions Judge (South) Karachi vide order dated 18.03.2024 on the ground that a huge amount of complainant has been usurped by the applicant under the garb of sale and purchase of Plot in DHA Karachi, therefore his case falls within the ambit of section 406, 420/468/471/34 PPC; besides applicant failed to show any ill will on the part of the complainant; besides he also failed to bring his case within the ambit of Section 497(2) Cr.P.C.

2. The complaint against the applicant is that the complainant Ghulam Murtaza had met with his broker Sikandar in October 2023, from whom he had earlier conducted transactions of two plots, and introduced him to another broker namely Asad Rizvi. Sikandar showed him Plot No. 220, Street No. 29, Phase VIII, measuring 1000 Sq. Yards, transfer order dated 08.10.2015 of Shahzad Junaid (present Applicant). Based on this transfer order, the complainant desired to purchase the plot and for that purpose, the complainant and Asad Rizvi agreed to a sum of Rs. 11 Crores and 50 Lacs as such, on 13.10.2023, the complainant issued a cash token cheque of Rs. 10 lacs, which was handed over to Asad Rizvi and was encashed from his account on 13.10.2023 while he maintains Shahzad Junaid's receiving with himself a total payment of Rs. 4 Crores 70 lacs which were given to them for the plot. The complainant and Sikandar contacted Shahzad and Asad and requested for the transfer of the said plot in his name but they both dilly-dallied and responded that the same will be done soon. On 21.12.2023, the complainant sent Sikandar to verify the transfer order dated 08.10.2015 at DHA office for verification where DHA staff informed that the transfer order dated

08.10.2015 in the name of Shahzad Junaid Plot No. 220, Street No. 29, DHA Phase VIII-A, which was given to them by Shahzad Junaid and Asad Rizvi was fake as DHA had no record of the said transfer order. Therefore, the complainant claimed against Asad Rizvi and Shahzad Junaid who by fraud had usurped his amount of Rs. 4 Crores and 70 Lacs by making fraudulent transfer orders and fake agreements.

3. Mr. Muhammad Jameel learned counsel for the applicant has submitted that the case lodged against the applicant is civil but the complainant with malafide intention converted it to Criminal litigation to harass the applicant. It is further contended that he has been falsely implicated in this case by the complainant in connivance with police with mala fide intention and ulterior motives for the sole purpose of harassment and criminal intimidation. He has contended that the learned Additional Sessions Judge was bound to consider the facts and law but failed to see it and dismissed the bail plea of the applicant which violates Article 10-A of the Constitution of the Islamic Republic of Pakistan. He has further contended that the alleged sale agreement dated 25.10.2023, receipt, and transfer orders are all fake/fabricated documents and the same have never been signed/handed over by the applicant to the complainant as portrayed by him; that the complainant in assistance with co-accused Asad Rizvi had manipulated the signatures of the applicant to implicate him in the instant matter. He next contended that all the offenses alleged against the applicant do not fall within the prohibitory clause of subsection (1) of section 497, Cr.P.C. and thus attract the principle that grant of bail in such offenses is a rule and refusal an exception as authoritatively enunciated by the Supreme Court in several cases. In support of his contention, he relied upon the cases of *Fida Hussain v The State* **PLD 2002 SC 46**, *Ubedullah v The State* **2003 P Cr. L.J 1921**, *Abid Mahmood v The State* **2017 SCMR 728**, *Hussain Haqani v The State* **2000 P Cr. L.J 161**, *Zaigham Ashraf v The State* **2016 SCMR 18**, *Muhammad Nadeem Anwar v National Accountability Bureau* **PLD 2008 SC 645**, *Dayar Khan v The State* **2001 P. Cr. L.J 1654**, *Muhammad Tanveer v The State* **PLD 2017 SC 733**, *Iftikhar Ahmed v The State* **PLD 2021 SC 799**, and *Tariq Bashir and others v The State* **PLD 1995 SC 34**. He prayed for allowing the Cr. Bail Application.

4. Mr. Umair Usman advocate for the complainant had contended that one Sikandar Ali had shown plot No. 220, Street No.29 Phase-VIII, DHA Karachi based on said transfer order complainant purchased the same against a sum of Rs. 11,5000,000/-, in connection of such sale transaction, he had given a token amount of Rs. 10,00,000/- via cheque to co-accused Asad Rizvi for which applicant Shahzad Junaid had given receiving and thereafter complainant handed over five pay orders worth of Rs. 10,00,000/- each to the applicant and Asad Rizvi and such sale agreement was executed between the complainant and the applicant on 25.10.2023; and on the

said date complainant also handed over cheques worth of Rs. 30,00,000/- each to the applicant which were accordingly encashed by the applicant. He further contended that in connection with the sale agreement, the complainant further paid amounts on different dates, and in the aggregate, he paid a sum of Rs. 4,70,00,000/- (Rupees Four Crores Seventy Lacs) but despite receiving such a huge amount the applicant and Asad Rizvi failed to get the sale transaction completed and avoided to get transfer the plot in his name. On verification of documents from the DHA office, he came to know that the transfer order dated 08.10.2015 which was given to the complainant by the applicant and Asad Rizvi was a fake document, hence accused had committed fraud the complainant by deceiving him and depriving him of his huge amount based on forged and fabricated documents. He emphasized that for seeking the concession of bail, the applicant has to show that the evidence collected against him during the investigation gives rise to clear-headed suspicions regarding his involvement however in the present case reasonable grounds are not made out to enlarge the applicant on bail as admittedly he has received the huge amount from the applicant in sale purchase transaction in such circumstances he cannot claim bail as a matter of right based on the plea that the offenses do not fall within the ambit of prohibitory clause of section 497(1) C.rPC. he added that sufficient incriminating material is available on record to connect the applicant with the commission of the offenses charged for and thus not entitled to post-arrest bail as the complainant wants his amount back. On the plea, that the applicant has not signed the sale agreement for that offense can only be determined after recording evidence in the trial. And since the other offense punishable under sections 406,420 and 468 of the P.P.C. do not fall within the prohibitory clause, he submitted that, the applicant may not be allowed post-arrest bail under subsection (1) of section 497, Cr. P.C. as he is directly involved in the subject crime and even bail can be refused in such offenses when the case of the applicant falls within any of the three well-established exceptions: (i) likelihood to abscond to escape trial; (ii) likelihood to tamper with the prosecution evidence or influence the prosecution witnesses to obstruct the course of justice; and (iii) likelihood to repeat the offense. As regards as the rule of consistency or parity for considering the grant of bail to the applicant is concerned, the FIR and the bail granting order of the co-accused are distinguishable to the role assigned to the present applicant who caused heavy financial loss to the applicant by receiving the pay orders in his account and then failed to deliver the property in question by preparing the forged documents of the sale agreement and letter of DHA. He relied upon the cases of Hilal Khattak v The State **2023 SCMR 1182**, Malik Muhammad Tahir v The State **2022 SCMR 2040**, Zafar Iqbal v Muhamamd Anwar & others **2009 SCMR 1488**, Salman Mushtaq & others v The State **2024 SCMR 14**, Muhammad Iftikhar Khan v The State **2023 SCMR 885**, Muhammad Imran v The State **PLD 2021 SC 903**, Abdul Rehman v The State **2022 SCMR 526**, Bakhti Rahman v The State **2023 SCMR 1068**, Muhammad Atif v The

State **2024 SCMR 1071**, Mohi Ud Deen v The State **2021 SCMR 1486**, Seema Fareed & others v The State **2008 SCMR 830**, Sardar Khalid Saleem v Muhammad Ashraf & others **2006 SCMR 1192** and Mazhar Iqbal v The State **2010 SCMR 1171**. He lastly prayed for the dismissal of the criminal bail application.

5. Ms. Rubina Qadir, DPG has opposed the bail plea of the applicant and 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.

7. Prima facie, the allegations are well explained by the complainant in his F.I.R to the extent that the applicant in connivance with his accomplices caused a huge financial loss to him by receiving the pay orders by encashing them but failed to deliver the possession of the subject plot; and, now he wants his amount back.

8. Prima facie the last assertion of the learned counsel for the complainant is not tenable in law for the reason that invoking the Provisions of PPC is not intended to be used for recovery of an alleged amount through bail proceedings as it is only to determine the guilt of a criminal act and award of a sentence, fine, or both as provided under the PPC. On the other hand, for recovery of any amount, civil proceedings provide remedies. The Supreme Court has held in the recent judgment that commercial integrity is an ethical standard that would require evidence for establishing, its absence in the conduct of an accused to a degree that constitutes dishonesty by him within the meaning of the aforesaid sections of P.P.C.

9. In the facts of the present case as discussed supra, such an assessment can be made at the trial to evaluate whether any improper benefit, if at all, has been derived by the applicant on account of the investment made by the complainant through his business transaction with the accused on the sale and purchase of plot in question. However, this aspect of the matter cannot be determined at the bail stage in the present case, however, the trial court would be in a better position to thrash out the aforesaid analogy under law.

10. The only question involved in the present bail matter is whether the bail can be refused in sections 420 and 471 PPC., which are bailable offenses, whereas Section 468 is punishable by up to seven years. In such circumstances, when the offenses do not fall within the prohibition contained in Section 497(1) Cr.P.C and punishment of the offense is less than 10 years, the Supreme Court in the case of Iftikhar Ahmed v The State **PLD 2021 SC 799** has given loud and clear directions to all courts in the country that granting 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.

11. Coming to the proposition bail in an offense punishable up to seven years, broadly speaking a person accused of a bailable offense has a right of admission to bail and an arrested person can be refused bail if it appears to the Court concerned that "reasonable grounds" exist for believing that he has been guilty of an offense punishable with death or imprisonment for life or imprisonment for ten years. Allegations against him are that he cheated the complainant and deprived him of his legitimate amount on the pretext that he would return the plot. Under the Code of Criminal Procedure 1898 (Act V of 1898) {Code} for bail the offenses are divided into two categories termed "Bailable offence" and "Non-bailable offence". These are defined under Section 4(b) as under: -

(b) "Bail able offense, "non-bail able offence": "Bailable offence" means an offence shown as bail able in the Second Schedule or which is made bail able by any other law for the time being in force; and "non-bailable offence means any other offence"

12. It is not disputed that in the case in hand offences under Section 420, 471, leveled in FIR are bailable, whereas Section 468 is not bailable and punishable upto seven years. Sections 496, 497, and 498 of the Code although are interconnected but reading of the same constructs certain distinctions. These provisions for better understanding are reproduced as under: -

"496. In what cases bail to be taken: When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer incharge of a police station or appears or is brought, before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings, before such Court to give bail, such person shall be released on bail, Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as; hereinafter provided: Provided, further that nothing in this section shall be deemed to affect the provisions of Section 107, sub-section (4), or Section 117, sub-section (3).

497. When bail may be taken in case of non-bailable offence: (1) When any person accused of any 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 appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years:

498. Power to direct admission to bail or reduction of bail: The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the case, and shall, not be excessive, and the High Court or Court of Session may in any

case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police officer or Magistrate be reduced.”

13. A plain reading of Section 496 of the Code makes it clear that powers under this provision can be exercised by a Court only for a person other than a person accused of a non-bailable offense. Whereas perusal of Section 497 also leaves no ambiguity that these powers are to be exercised in case of a non-bailable offense. However, powers under section 498 are beyond any such restrictions of bailable or non-bailable offense as it says that “the High Court or Court of Session may in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail. Words “in any case” used in this provision makes no difficulty to understand that a person is irrespective of the fact that he is the accused of a bailable or non-bailable offense can be admitted to pre-arrest bail.

14. When reading all Sections (496, 497, and 498) together there remains no uncertainty that while deciding an application, may it be for bail after arrest or pre-arrest, in the bailable offense the Court is left with no discretion to refuse the concession to an accused as in such eventuality the grant of bail is a right and not favor, whereas in the non-bailable offense the grant of bail is not a right but concession/grace.

15. Prima facie, the offense 420 PPC has been invoked in the FIR as well as in the challan with a corresponding offense. The offense under Section 420 PPC deals with cheating and dishonestly, inducing the person to deliver the property and provides that whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter, or destroy the whole or any part of valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Though the offense under Section 420 and 471 PPC are bailable, the offense, however, are cognizable and non-cognizable. As far as Section 406 PPC is concerned, the same was added at a belated stage in the charge sheet, though the same offense is not bailable but punishable upto three years and in case the same is committed by a clerk and by servant the same is punishable up to seven years. So far as the criminal breach of trust is concerned, the concept of trust envisages that one person (the settlor) while relying upon another person (the trustee) and reposing special confidence in him commits property to him. There is a fiduciary relationship between the two in law. Section 405 PPC defines criminal breach of trust as follows:

405. Criminal breach of trust.– Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property, in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits criminal breach of trust.

16. The essential ingredients of criminal breach of trust under section 405 PPC are: (i) the accused must be entrusted with property or dominion over it; (ii) he must have dishonestly misappropriated the property or converted it to his use or disposes it of in violation of any trust or willfully suffers any other person to do so. The offense of criminal breach of trust resembles the offense of embezzlement under the law. The punishment for ordinary cases is provided in section 406 PPC but there are aggravated forms of the offense also which are dealt with under Sections 407 to 409 PPC. The first condition mentions three important terms: entrustment, dominion, and property. “Entrustment” means handing over possession of something for some purpose without conferring the right of ownership² while “dominion” refers to “the right of control or possession over something, such as dominion over the truck”. The term “property” has been used without any qualification so it must be understood in the wider sense. There is no reason to restrict its meaning to movable property. Further, the word “property” must be read in conjunction with “entrustment” and “dominion”. A trust contemplated by section 405 PPC would arise only when the property belongs to someone other than the accused. The law recognizes a distinction between the investment of money and the entrustment thereof. In the former, the sum paid or invested is to be utilized for a particular purpose while in the latter case, it is to be retained and preserved for return to the giver and is not meant to be utilized for any other purpose. Primarily, breach of trust when associated with dishonesty triggers criminal liability. Thus, even temporary misappropriation may attract Section 405 PPC. On the other hand, negligence which results in loss of the entrusted property may make a person liable for damages under the civil law but would not expose him to criminal prosecution. Criminal prosecution is possible only if it is shown that the person was entrusted dominion over a particular asset.

17. There is essentially a dispute between the seller and purchaser of the subject property. Hence, because of what has been discussed above, in my tentative opinion, the trial Court has to see whether Section 406 PPC is attractive or otherwise and the application of the same would be resolved by the Trial Court after recording the evidence.

18. Perusal of the F.I.R. reflects that there is a delay in lodging the F.I.R., as the complainant remained silent for the aforesaid period and did not report the matter to the police in time, therefore, it is always considered to be fatal for the prosecution case in bail matters.

19. Sections 420 and 471, P.P.C. are bailable while sections 468, P.P.C. being punishable for seven years do not fall within the prohibitory clause of section 497(1), Cr.P.C. The Supreme Court in the case of *Iftikhar Ahmed v The State* **PLD 2021 SC 799**, has held in categorical terms that granting 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 and directed the Courts of the country to follow this principle in its letter and spirit because principles of law enunciated by the Supreme Court are constitutionally binding [under Article 189] on all Courts throughout the country.

20. It is an admitted fact that the co-accused Syed Asad Rizvi has been granted post-arrest bail by the trial Court vide order dated 24.02.2024 in Bail Application No. 26 of 2024 based on further inquiry, which remains under challenge by the complainant as stated. So far as the rule of consistency is concerned the Supreme Court in the recent judgment has held that the same proposition is attracted and applied after the grant of bail to a co-accused. In such cases, the grant of bail is a rule and refusal an exception.

21. In the result, this application is allowed, subject to his furnishing security/cash amount in the sum of Rs.25,00,000/- (Rupees Twenty-five Lacs) with one surety in the like amount and P.R bond to the satisfaction of the trial Court.

22. The observation recorded hereinabove is tentative and shall not prejudice either party at the trial and the trial Court shall conclude the matter within two months by examining the complainant on or before the date of hearing so fixed by the trial Court and if the charge is not framed the same shall be framed on the aforesaid date, in case of failure the matter shall be referred to MIT II for placing the matter before the competent authority for an appropriate order on administrative side.

JUDGE

Shafi