ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.1304 of 2024

Date	Order with signature of Judge
For hearing of bail application	

Date of hearing and Order:- 11.07.2024

Mr. Jehan Zaib advocate for the applicant
Ms. Rubina Qadir, Deputy PG alongwith IO/PI Mir Muhammad Lashari, SIU Saeedabad Karachi
Complainant Mehrab Khan is present in person

O R D E R

Adnan-ul-Karim Memon, J:- Through this bail application under Section 497 Cr.P.C., the applicant Ayazullah has sought admission to post-arrest bail in F.I.R No. 260/2023, registered under Section 397/398/511/34 PPC, lodged at Police Station Docks Karachi. The earlier bail plea of the applicant has been declined by the learned Additional & Sessions Judge XI West Karachi vide order dated 05.04.2024 in Criminal Bail Application No. Nil/2023/Sessions Case No. 2041/2023 on the premise that he was arrested along with Suzki which was used in the crime where two accused were killed at the hands of the complainant, during committing robbery, besides the applicant has a criminal history.

2. Learned counsel for the applicant/accused has argued that there is no ground to believe that the applicant/accused has committed any offense with which he stands charged otherwise the story narrated in the FIR is concocted and fabricated thus the case requires further inquiry. He has further argued that the applicant has not previously been convicted of any offense; that no identification test of the applicant was held before the Illaqa Magistrate to call the complainant and other witnesses to identify the applicant before the Illaqa Magistrate and the complainant did not identify the present applicant, therefore, he may be admitted to post-arrest bail in the aforesaid crime.

3. Learned APG has opposed the bail plea of the applicant on the ground that FIR was lodged without delay; that specific role has been assigned to the applicant as he drove away the Suzuki with the injured accused who passed away and the vehicle used in the crime was recovered with bullet marks; no enmity has been shown to the police; that sufficient material is available against the applicant to connect him with the crime; that police officials are good witnesses like others; that Section 397 PPC caries punishment for up to 07 years; that the crime is against the society.

He added that the applicant has been involved in similar kinds of cases in the past. He prayed for the dismissal of his bail application.

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

5. I am cognizant of the fact that, 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 law have to be considered, however, the applicant is charged with an offense punishable under Section 397 PPC, which carries imprisonment of up to seven years. The point, that requires consideration at the bail stage, is that as to whether there is material in the case is sufficient to refuse bail to the applicant under Section 397/34 PPC. It shall be advantageous to reproduce Section 397 PPC herein below:-

> ***"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."***

6. The prosecution has applied in FIR Section 397 PPC. Whereas Section 392 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 bother 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. It is also the case of the prosecution that the applicant was not arrested on the spot but somewhere else after a couple of days and after his arrest, holding of test identification parade was necessary in terms of the judgment of the Supreme Court in the case of *Farman Ali v. The State* [**1997 SCMR 971**], which factum is missing in the present case, the reasons best known to the investigation officer, who allegedly narrated that applicant disclosed his identity when he was interrogated at the time of his arrest from Shershah, if this is the stance of the investigating officer let this aspect be taken care of by the trial Court after examining him. Admittedly, the name of the Applicant is not mentioned in the F.I.R. Prima facie there lacks material that the recovery

of the Suzuki was made from the Applicant as the complainant has narrated a different story by not disclosing the Number plate of Suzuki as to how the investigating officer came to know that this was the same Suzuki which was used in the alladged crime, and even no identification was conducted through the complainant to the effect that he was his accused who was along with other accused who were killed by him on the day of the alleged incident. Besides the alleged offense occurred on 28.5.2024 whereas the the applicant has been shown to have been arrested after the date of the offense, which prima facie shows something fishy on the part of the police.

7. In similar circumstances, the Supreme Court of Pakistan in the case of *Qamar alias Mitho v. The State and others* (**PLD 2012 Supreme Court 222**), has granted bail. Moreover, the applicant/accused has been in continuous custody since his arrest and 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 determination of his guilt. It is well-settled law that while examining the question of bail, the Court has to consider the minimum aspect of the sentence provided for the alleged offense. This case does not fall within the prohibitory clause thus keeping in view the law laid down in the case of *Zafar Iqbal v. Muhammad Anwar and others* (**2009 SCMR 1488**) ordaining that where a case falls within the non-prohibitory clause the concession of the grant of bail must favorably be considered and should only be declined in exceptional cases. In the instant case, no exception has been pointed out by the prosecution, especially in the circumstances.

8. Further the prosecution has applied Section 411 PPC, in the above circumstances, it is expedient to reproduce Section 411 PPC.

> ***"Section 411.***
> ***Dishonestly receiving stolen property. Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either disruption for term which may extend to three years or with fine or with both."***

9. A bare perusal of the aforementioned provisions of law demonstrates that the same is applicable in the class of persons, who trade in such stolen articles known as receivers as the complainant has failed to recognize the applicant. Primarily, a person, immediately, after theft found to be in possession of the stolen property, the presumption would be that either he is a thief or in possession of goods with knowledge that those are stolen. Mere possession of the stolen property is not sufficient to constitute

an offense under the aforementioned provisions rather in addition it has to be established that the person in possession of the stolen property had dishonestly received or retained the property knowing or having the reasons to believe the same to be stolen. The onus is always on the part of the prosecution to prove the essential elements of the offense. In case of failure on the part of the prosecution to prove the basic ingredients i.e. receipt or retention of property belonging to someone else, the property being stolen, the existence of knowledge or belief on the part of the person found in possession, and the receipt and retention as dishonest, no bail can be refused as in such circumstances it is well settled that no conviction can be awarded on such analogy. The prosecution to establish an offense under the aforesaid section, must not only prove that the property is stolen, but it must also be established that the person charged with having stolen property either knows the property to be stolen or has reasonable grounds for believing the same to be stolen.

10. Insofar as the contention of the learned Additional Prosecutor General that the applicant/accused is involved in another criminal case is concerned. The Supreme Court of Pakistan in the case of *Jamal Uddin* [supra] has also held as follows:-

> **"5. The argument that the petitioner has been involved in two other cases of similar nature would not come in the way of grant of the petition so long as there is nothing on the record to show that he has been convicted in any one of them."**

11. Besides the above, it is also well-settled law that mere pendency of criminal cases against any of the accused does not ipso-facto disentitle him for grant of bail. Reliance in this regard has been placed on the case of *Tarique and others v. The State* [**2018 MLD 745**]. The record also shows that the applicant/accused is not a previous convict nor a hardened criminal as no record has been produced to the aforesaid effect. Moreover, he has been behind bars since his arrest and 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. Consequently, while taking into consideration the statement of the complainant before the Court and his affidavit, the applicant is admitted to post-arrest bail subject to his furnishing solvent surety in the sum of Rs. 200,000/ - (Rupees two lacs) and P.R. Bond in the like amount to the satisfaction of the trial court.

12. Needless to say the observations made in this order are tentative and shall not influence the trial Court while concluding the case. The learned trial Court is to expeditiously proceed with the trial under law, and in case of abuse or misuse of the concession of bail by the applicant, including causing a delay in the conclusion of the trial, the prosecution may approach the competent Court for cancellation of bail under Section 497(5), Cr.P.C. In th invervening period DIG West shall probe the matter afresh and acertain the genuiness of death of two people at the hands of complainant without discrimination and shall submit his findings before the trail Court , therefore said exercise shall be conducted within seventeen days without fail. Let a copy of this order be transmitted to DIG West for compliance.

JUDGE

Shafi