ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.1467 of 2024

Date	Order with signature of Judge

For hearing of bail application

Date of hearing and Order:- 15.7.2024

Mr. Abdul Qudoos Jatoi advocate for the applicant
Mr. Shoaib Safdar Umar, Assistant PG alongwith ASI/IO 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.178 /2024, registered under Section 392,397,34 PPC, lodged at Police Station Steel Town Karachi.

2. The earlier bail plea of the applicant has been declined by the learned VIII Additional Sessions Judge (Malir) Karachi vide order dated 11.6.2024 in Criminal Bail Application No. 2773/2024 on the ground that the applicant along with his companions snatched/robbed the rickshaw No.AAB-9761 from complainant Muhammad Bilal beside cash amount of Rs.2000/- and mobile phone from his possession and he was subsequently arrested in FIR No.228/2024 on 22.04.2024 and then in this FIR No.178/2024 under section 397/398/392/34 PPC on 23.04.2024 in the presence of complainant Muhammad Bilal and co-mashir Ali Haider during the investigation and upon the pointation of the applicant, the robbed/snatched rickshaw was secured, which prima facie connects the applicant with the offense for that he has been charged.

3. During the investigation co-accused was identified by the complainant however the applicant was not forwarded for identification parade, the reason that the complainant pointed out to the investigating officer about the arrest of the applicant in another crime, this is hardly a ground to accept such version of the learned prosecutor for the simple reason that applicant was not nominated in the FIR in such situation, holding of identification test would necessary in cases where names of the culprits were not given in the FIR. Holding such a test was not only a check against fake implications but was a good piece of evidence against genuine culprits. Holding of identification test, could not be dispensed with simply because the accused, who had already committed the robbery, had been subsequently found in possession of robbed articles.

4. I have heard the learned counsel for the parties and perused the record with their assistance.

5. It has vehemently been argued by the learned Additional Prosecutor General, Sindh that the applicant has also been involved in other criminal cases, and if bail is granted to him, he would jump the bail bond and would attempt to tamper the prosecution evidence, therefore, he is not entitled to any indulgence in the matter of bail. I, however, have not felt persuaded to agree with the learned Additional Prosecutor General, Sindh in this regard for the reasons that in my humble opinion, before conviction, it is presumed that every accused is innocent. Insofar as the case in hand is concerned, despite repeated queries by this Court, learned Additional Prosecutor General, Sindh has failed to establish that the applicant was ever convicted in any case registered against him, therefore, he cannot be refused bail merely on the ground that certain other criminal cases have been registered against him. In this regard, I am supported by the case of *Jafar @ Jafri v. The State reported in* **2012 SCMR 606**.

6. The expressions “habit” and “habitually” used in section 110 have not been defined in the Cr.P.C. The prime object of the said provision is ensuring the good behavior of the person liable to proceedings thereunder to serve the larger public interest i.e. safety and security. The authorities are, therefore, expected to exercise powers under section 110 Cr.P.C. with great caution. Bald allegations that a person by habit or habitually commits the offenses highlighted in the said provision are not sufficient to proceed under section 110 Cr.P.C. The allegation must substantially be supported by cogent evidence. Such powers, therefore, cannot be exercised as a tool of oppression against innocent, poor, and helpless people. Section 75 of the Pakistan Penal Code, 1860 (the “PPC”) makes the accused of an offense mentioned in Chapter XII or XVII of the PPC liable to enhanced punishment if he has earlier been convicted of the offenses mentioned in the said chapters.

7. Section 221(7) of Cr.P.C., therefore, provides if the accused is previously convicted of any offense and because of such previous conviction is liable to enhanced punishment and it is intended to prove such previous conviction affects the punishment which the court may think fit to award for the subsequent offense, the fact, date and place of previous conviction shall be stated in the charge and if such statement has been omitted in the charge, the court may add it any time before the sentence is passed. The onus to prove the previous conviction of an accused lies on the prosecution. It is, therefore, the duty of the Investigating Officer to investigate the previous conviction of the person

accused of an offense mentioned in Chapter XII or XVII of PPC, to collect evidence regarding the previous conviction of the accused, and produce before the trial court. Section 221(7) of Cr.P.C. further caters to a situation where the fact of previous conviction has been omitted in the charge. The fact of a previous conviction can subsequently be added to the charge at any time before the sentence is passed. The duty of the Investigating Officer is, therefore, onerous. He has to work round the clock to follow and fetch the record of previous conviction(s) of a person accused of an offense mentioned in section 75 PPC.

8. In the instant case, neither the applicant, as per contents of the FIR, referred to above, is nominated as an accused, nor a warrant has been issued against him under sections 75/87, Cr. P.C was arrested upon his statement in police custody; even after his arrest in the above case, he was not forwarded to the Magistrate for his identification parade to the effect that he was the person who robbed subject Rikshw from the place of the incident as reported by the complainant for the reason, confession before the police is not admissible in evidence under the law. So far as recovery of the subject vehicle from the custody of the applicant is concerned, firstly, the recovery of the stolen vehicle has been effected on the pointation of the applicant and its evidentiary value is yet to be determined by the learned trial court after recording evidence; mere possession of the stolen property is not sufficient to constitute an offense under Section 411 PPC rather in addition it has got 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, however, the prosecution has not applied section 411 PPC in the charge sheet rather section 412 PPC has been invoked and the ingredient whereof are yet to be determined by the trial court.

9. Primarily, to constitute an offense under the aforesaid Section, the prosecution is not only required to prove the possession but also to establish the knowledge about the property to be stolen. In the present case, the prosecution has presented the case to the extent that the subject Rickshaw was stolen and involved in the subject FIR and came into possession of the applicant, which was later on recovered from his possession, be that as it may, if the aforesaid section is supposed to be applied, the maximum punishment provided under the statute for the offense under Section 411 PPC is three years and the same does not fall within the prohibitory clause of Section 497 Cr.P.C. It is settled law that grant of bail in offenses not falling within the prohibitory clause is a rule

and refusal is an exception. The liberty of a person is a precious right which cannot be taken away without exceptional foundations.

10. Keeping in view the peculiar facts and circumstances of the present case, the possibility cannot be ruled out that the applicant has been involved in the cases by throwing a wider net by the Police under the garb of the pretext that the applicant is a professional criminal. Mere allegations are no grounds to decline bail for an accused. It is now established that while granting post and pre-arrest bail, the merits of the case can be touched upon by the Court. Reliance is placed on *Miran Bux Vs. The State* (**PLD 1989 SC 347**), *Sajid Hussain @ Joji Vs. The State* (**PLD 2021 SC 898**), *Javed Iqbal Vs. The State* (**PLD 2022 SCMR 1424**) & *Muhammad Ijaz Vs. The State* (**2022 SCMR 1271**). Even otherwise the offense does not attract the prohibitory clause of section 497(1), Cr.P.C. Thus the case calls for further probe, in the peculiar facts and circumstances of the case and the dicta laid down by the Supreme Court of Pakistan in the case of *Tanveer v. The State and another* (**PLD 2017 SC 733**), the case against the applicants requires further inquiry within the meaning of sub-section 2 to Section 497 Cr.P.C.

11. For what has been discussed above, I have no doubt in my mind to hold that the applicant has made out a case for further inquiry into his guilt within the meaning of section 497(2), Cr.P.C. Consequently, this bail application is allowed and the applicant is allowed post-arrest bail subject to his furnishing bail bonds in the sum of Rs.200,000 (Rupees two hundred thousand only) and P.R Bond in the like amount to the satisfaction of the learned trial Court.

12. 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, if 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

Shafi