

ORDER SHEET
IN THE HIGH COURT OF SINDH CIRCUIT COURT
MIRPURKHAS
B.A No.S-106 of 2024

(Imtiaz Ahmed & another Vs. The State)

DATE ORDER WITH SIGNATURE OF JUDGE

Date of hearing & Order 07.08.2024

Mr. Mir Muhammad Nohri, Advocate for the applicants

Mr. Shahzado Saleem, Additional P.G Sindh

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ORDER

Adnan-ul-Karim Memon, J. Through the instant bail application, the applicants Imtiaz and Imran have approached this court for a grant of pre-arrest bail in terms of Section 498-Cr.P.C in FIR No.128/2024 registered for offenses under Section 381-A, 34 PPC of P.S Umerkot City, District Umerkot.

2. Their pre-arrest bail application was declined by the Sessions Judge, Umerkot vide order dated 29.05.2024 on the ground that names of applicants/accused transpired in the FIR who were seen & identified by complainant while taking away his motorcycle; that no previous enmity existed between the complainant and applicants; or even no malafide has been attributed against the police and complainant regarding false implication of the applicants in the subject crime.

3. The defense counsel is arguing for the bail of two brothers accused of a crime on the grounds that both brothers are innocent and have been falsely implicated; that the FIR was lodged with malicious intent and after an unexplained delay of two days. Learned counsel for the applicants contended that the delay in filing the FIR casts doubt on the prosecution's credibility. He added that the accused have no criminal record or involvement in similar cases, as no conviction has been shown against them. He next argued that they have not misused interim bail; that there's no risk of them fleeing, and the police is trying to arrest them for ulterior motives and harass them; that offense allegedly committed by applicants/accused does not fall within the prohibitory clause. He prayed for allowing the bail application.

4. At the outset, learned Additional Prosecutor submits that though the complainant has been served such factum is disclosed vide Order dated 27-02-2024, and today he is called absent without intimation; however, he opposes the confirmation of bail for the accused brothers on the ground that applicants are nominated in the FIR with the allegations of theft of the Motorbike of the complainant and after the grant of bail before arrest they failed to join the investigation; therefore, they are not entitled to confirmation of their bail early granted by this court and lastly prayed for rejection of their bail application.

5. I have heard the learned Counsel for the parties present in court and perused the record with their assistance.

6. I am also well aware of the fact that the grant of pre-arrest Bail is an extraordinary relief that is extended in exceptional circumstances when glaring malafide is shown on the part of the prosecution to cause unjustified harassment and humiliation of a person in case of his arrest. Besides, 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 applicants were ever convicted in any case registered against them, therefore, they cannot be refused bail merely on the ground that certain other criminal cases have been registered against them as portrayed by the prosecutor. In this regard, I am supported by the case of *Jafar @ Jafri v. The State* reported in **2012 SCMR 606**. The expressions “habit” and “habitually” used in section 110 Cr.P.C have not been defined in the Cr.P.C book. 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. Primarily, to constitute an offense under Section 381-A PPC, 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 Motorcycle was stolen by the applicants and came into possession of the co-accused, 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 is seven years however under Section 411 PPC is three years, which provides dishonestly receiving stolen property and the same does not fall within the prohibitory clause of Section 497 (1) 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. So far as the applicability of section 381-A PPC, the trial Court has to determine, if the prosecution brings any cogent material to connect the applicants with the alleged crime, as the issue of confession before the police by co-accused and subsequent recovery of Motorcycle from him, who has been enlarged on post-arrest bail by the trial Court vide Order dated 01-06-2024, needs through Probe.

9. Keeping in view the peculiar facts and circumstances of the present case, the possibility cannot be ruled out that the applicants have been involved in the cases by throwing a wider net by the Police under the garb of the pretext that the applicants are professional vehicle snatchers as portrayed by the Prosecutor. 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 as charged does not attract the prohibitory clause of section 497(1), Cr.P.C. Thus the case falls within the ambit of the word malafide on the part of police and complainant in terms of section 498 Cr.P.C, more particularly in the peculiar facts 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 probe.

10. In such circumstances, the Supreme Court in the recent case has held that a person shall not be released on bail if there appear to be reasonable grounds for believing that he has been guilty of an offense punishable with death or imprisonment for life or imprisonment of 10 years, though the offenses do not fall within the prohibition contained in Section 497 Cr. P.C, however, in pre-arrest bail this Court is only required to see the ulterior motives and malafide of the complainant and police and will also tentatively assess the material and can also touch the merits of the case so far as the allegations contained in the F.I.R, and statement of PWs and other material points available on the police file. However, in the present case, the allegation against the applicants is that they took away the Motorbike of the complainant and it is urged that the complainant identified the applicants while taking away his Motorcycle, whereas there was no acquaintances between parties with each other previously, the question arises as to how applicants were named in the F.I.R., whereas the recovery of the subject motorcycle had been shown from the co-accused Usamn who has been enlarged on bail

by the trial court, as discussed supra. In such circumstances, the Rule of consistency is attracted in the present case, for the simple reason that the Rule of consistency is a rule under which an accused seeks bail from the court alleging that based on the grant of bail to the co-accused, equal treatment shall be extended based on consistency and equality. This rule is attractive and plays a pivotal role in deciding whether or not an accused should be released on bail when a co-accused is granted bail, therefore this benefit is extended to the applicants.

11. Consequently, the criminal bail application filed by applicants Imtiaz and Imran, seeking pre-arrest bail under Section 498, Cr.P.C. in FIR No.128/2024 registered for offenses under Section 381-A, 34 PPC, P.S Umerkot City, District Umerkot is accepted and the interim order dated 05-06-2024, passed by this Court, is confirmed on the same terms and conditions, subject to their furnishing additional solvent surety in the sum of Rs.50,000/- (Fifty thousand) each and PR bond in the like amount to the satisfaction of the Additional Registrar of this court.

12. The observation recorded hereinabove is tentative and shall not prejudice the case of either party at trial. However, the learned trial Court shall endeavor to examine the complainant positively within two months. If the charge has not been framed, the same shall be framed on the date so fixed by the trial Court, and a compliance report shall be submitted through the Additional Registrar of this Court. The Additional Registrar shall ensure compliance with the order within time.

JUDGE

“Ali Sher”