

ORDER SHEET
IN THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD

Criminal Bail Application No.S-257 of 2019

Criminal Bail Application No.S-450 of 2019

DATE	ORDER WITH SIGNATURE OF JUDGE
------	-------------------------------

Date of hearing : 17.08.2020

Date of decision: 31.08.2020

Mr. Ishrat Ali Lohar Advocate for applicant in Criminal Bail Application No.S-257/2019.

Mr. Masood Rasool Babar Memon Advocate for applicant in Criminal Bail Application No.S-450/2019.

Mr. Nazar Muhammad Memon, Addl.P.G.

O R D E R

-.-.-.-.-

RASHIDA ASAD, J: This common order is intended to dispose of Cr. Bail Application No. 257/2019 filed by applicant namely Imtiaz Magsi which is a post arrest bail application under Section 497 Cr.P.C and Criminal Bail Application No. 450/2019 filed by Manghoo Mal, an application for Bail Before Arrest. Applicant Imtiaz Magsi happened to be Assist Food Controller and as such he was posted as Incharge PRCE Sarhari and responsible for procurement of wheat during crop season 2016-2017 and 2017-2018. Whereas applicant Manghoo Mal is a wheat trader/commission agent carrying his business at District Sanghar.

2. Both the instant bail applications have emerged from FIR No. 01/2019 registered at Police Station Anti-Corruption Establishment

(AEC) Sanghar under section 409, 34 P.P.C., R/w section 5(2) of ACT-II of 1947 lodged by Yar Muhammad Rind who conducted enquiry into the matter of a complaint made by District Food Controller Sanghar, for criminal breach of trust and misappropriation of government exchequer, allegedly committed by applicant Imtiaz Magsi and others in respect of wheat, pp and jute bags causing loss of Rs. 1155009994.50.

3. It transpires from the record, confronted and confirmed by the learned counsels for the applicants, that both the applicants having admitted their guilt repaid and deposited following amounts into the government treasury:

a.	Imtiaz Magsi.	-	Rs.	4217280.00
b.	Mangoo Mal.	-	Rs.	1102455.00

4. The prosecution case as precise is that applicant Imtiaz Magsi, an Assistant Food Controller was posted as Incharge at PRC Sarhari for wheat procurement Crop 2016-2017 & 2017-2018 who in due course reported through prescribed book and registers the procurement, arrival and issue of wheat and payments made through bank. Such details are fully mentioned in the complaint and FIR. On routine departmental scrutiny, it revealed that entries made in the record by the said applicant/accused with regard to dispatch of wheat from PRC Sarhari to Karachi were fake and false just made to balance out the missing wheat. Further, shortage of weight filled in the bags was also noted. The value of misappropriated wheat and the pp/jute bags comes to Rs. 115509994.50.

5. After registration of FIR, accused Imtiaz Magsi was arrested and in the interim report under Section 173 Cr.P.C he was singly sent up for trial. Whereas, a result of further investigation, it was found that applicant Mangoo Mal was also privy to the offence having connived with the principal accused and abetted him to misappropriate 300 wheat bags containing 30590 Kilograms wheat and as such the applicant Mangoo Mal was implicated and sent up for trial vide Final Report under Section 173 Cr.P.C dated 03.04.2019.

6. Heard and perused the record with the assistance of learned counsels for the applicants and the state counsel. Learned counsels for the applicants/accused are, mostly, in a unison; their arguments include that applicants are innocent, case of the applicants is that of further enquiry, case does not fall under the prohibitory clause of Section 497 Cr.P.C; Section 5(2) of PCA (Act-II), 1947, does not attract in this case; the prosecution case is hit by principle of double jeopardy; there is inordinate delay in registration of FIR; applicants are not assigned specific role; bail should not be declined and/or withheld as punishment and the prosecution's case appears to be doubtful. Additionally, the learned counsel for applicant Mangoo Mal argued that mala fide lurking behind the intended arrest of the applicant as there is no iota of evidence whatsoever of any mens rea on the part of the applicant and further the applicant has made the government loss good; the applicant is not nominated in the FIR. Learned counsels relied on the following case law;

- (i) PLD 2017 SC 733.
- (ii) 2019 YLR 415.
- (iii) 2017 PCr.L.J (Note) 206.
- (iv) 2016 PCr.L.J 1151
- (v) 2016 YLR 2460.
- (vi) 2015 MLD 321.
- (vii) 2014 YLR 1984
- (viii) PLD 2012 Lah 406.
- (ix) 2011 YLR 2657
- (x) 2003 YLR 2395
- (xi) 2004 MLD 1940.
- (xii) PLD 2017 SC 730
- (xiii) 1995 SCMR 170
- (xiv) 1978 SCMR 64.
- (xv) 2018 YLR 908
- (xvi) 2017 MLD 1957
- (xvii) 2016 YLR 2460
- (xviii) 2012 YLR 2913.
- (xix) 2001 PCr.L.J 730
- (xx) 1998 MLD 202

7. Learned state counsel has contended that there is ample oral and documentary evidence to inescapably connect the applicants with the alleged offence whereby a colossal financial loss has been inflicted to the public exchequer and having admitted guilt applicants have repaid a small chunk of loss, principle of double jeopardy is not applicable to

the instant case as the other FIRs pertains to the distinct offences for theft of pp/jute bags and not for the offence of misappropriation of wheat which is subject matter of present case culminating into defalcation/criminal breach of trust liable to be punished for life imprisonment; that there is no mala fide on account of registration of case.

8. Perusal of the record reveals that a huge quantity of wheat which was in the entrustment of applicant Imtiaz Magsi was found to be missing and there is sufficient and ample documentary evidence to connect the said applicant with the alleged offence of criminal breach of trust. Admission made by applicant Mangoo Mal for having received 300 wheat bags from former applicant significantly connect the later and prima facie demonstrate his involvement being privy to the alleged offence. Re-payment of the value of such wheat in the government treasury completely rules out the mala fide and false implication of both the applicants in the alleged offence. The fact that the accused persons refunded the amount fully and/or partially after the act of their defalcations came to be discovered, does not absolve them of the offence committed by them

9. There can be no escape from the fact that the applicant Imtiaz Magsi is nominated in the FIR with a specific role of defalcation of public money through misappropriation of wheat in his entrustment and from the evidence available on record, no exception could be taken to his prima facie involvement in the offence. At the bail stage, only a tentative assessment is to be made and deeper appreciation is not permissible. As regard to the argument that applicant is entitled for grant of bail on the principle of double jeopardy, on scrutiny of the record and evidence it is found that such ground is not available to the applicant as both the alleged offences are of distinct nature and sentence provided for the offence under Section 409 PPC falls within the prohibitory clause and thus the applicant cannot claim right of bail as available to the accused persons whose case does not fall within the prohibitory clause of Section 497 Cr.P.C.

10. As regard to the bail plea of applicant Mangoo Mal who is seeking Bail Before Arrest under Section 498 Cr.P.C, it is to be noted that apart from the material and evidence collected during investigation, on tentative assessment, sufficiently connect the applicant with the crime/offence, the document annexed with the bail application rather signifies the admission of the accused for having received 300 wheat bags from official accused and any exception to his role being privy to the offence could only surface after deeper appreciation of evidence at trial which cannot be done at this stage. Grant of pre-arrest bail was an extraordinary remedy, essentially rooted into equity, it was a judicial power which was to be cautiously exercised with a view to protect the innocent from the horror of abuse of process of law, in prosecution initiated by consideration and for purposes stained with mala fide. Such judicial protection was not to be extended in every run of the mill criminal case. Reliance is placed on 2020 SCMR 168. The ration of case law relied upon by the learned counsels for the applicants is not applicable to the facts of the instant case and as such the same are distinguishable for the reason that, case of the present applicants falls within the prohibitory clause of Section 497 Cr.P.C; the facts of the case does not attract the principle of double jeopardy; the tentative assessment of material and evidence available rules out the plea of case being one of further enquiry; and chance of false implication of the applicant in the alleged offence is not borne out.

11. Resulting to the above discussion I do not feel inclined to grant bail to the applicants and as such the bail applications (both) are liable to be dismissed and accordingly the same stand dismissed. Consequently, ad-interim order dated 02.05.2019 in bail application No. S-450/2019 is hereby recalled. View and observation made hereinabove are tentative in nature and the trial Court shall not influence by the same while deciding the case on merits.

JUDGE