

**ORDER SHEET  
IN THE HIGH COURT OF SINDH, KARACHI**

Crl. Misc. Application No. 49 of 2020

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Date \_\_\_\_\_ Order with signature of Judge \_\_\_\_\_

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For hearing of main case.

Date of hearing 15.12.2020

Date of Order 16<sup>th</sup> March, 2021.

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M/s. Muhammad Ashraf Kazi, Faiz Muhammad Durrani & Irshad Ali, Advocates for the Applicant.

Syed Meeral Shah, Addl. P.G, Sindh/respondent No.1.

Mr. Nasir Raza, Advocate for Respondent No.2.

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**KAUSAR SULTANA HUSSAIN, J:----** By this Criminal Misc. Application No. 49 of 2020 under Section 561-A R/W Section 497(5) Cr.P.C, the applicant/complainant assailed the interim pre-arrest bail order and its confirmation order as well dated 23.12.2019 and 07.01.2020 respectively, passed on bail before arrest application No. 3120 of 2019 (Re-Dawood v. The State) by the Court of learned Vth Additional Sessions Judge Karachi (Malir), hence this Criminal Misc. Application for cancellation of said orders and to commit him into custody. Relevant facts in short are that:

*"ASI Muhammad Asif received an application from the office of Head Mohrar on 13.12.2019, at 10.30 PM addressed to DSP Police Station Quaidabad, District Malir Karachi by the Manager ® Fazal Ali for taking legal action against security guard namely Abdul Ghafoor, Imran, Imran Asif, Zeeshan, Gul Hussain Baloch, Jaleel-ud-Din*

*and Adnan, which was incorporated into FIR, stating therein that the above named accused persons are employees of the complainant's company; for last few days, information was being received from their company (Younus Textile Mills Limited) particularly from Unit No.7 that huge quantity of clothes were being stolen, and one group is involved in stealing the clothes in organized manners. Whereas, during the theft of clothes they used to switch off the Cameras for the purpose to escape themselves. Through their informers it further came in their knowledge that in this offence security staff Abdul Ghafoor and Imran are also involved and Imran Asif and Zeeshan Asif employees of production department used to carry one vehicle bearing No.JZ-0060 Maker FAW, white Colour with the container, in which they used to load the stolen clothes, whereas in committing this offence the Manager Gul Hussain Baloch, Jaleel-ud-Din and Adnan are also fully involved and legal action may be taken against the accused persons."*

*I have heard the learned counsel for the parties and also have gone through the entire available record with due care and caution.*

*The learned counsel for the applicant/complainant has submitted that the bail granting order is patently illegal, erroneous, factually incorrect and has resulted in miscarriage of justice; that it is well settled principle of law that at the bail stage deeper appreciation of evidence cannot be undertaken so to touch the merits of the case and prejudice the case of the either parties, but the*

*learned trial Court discussed the merits in detail. The learned counsel for the applicant/complainant has further argued that there is apprehension that the respondent No.2 will temper with the prosecution evidence and witnesses, which would hamper the smooth case and there is likelihood of his absconsion to another country. He prayed for setting aside the orders dated 23.12.2019 and 07.01.2020 respectively passed by the learned Vth Additional Sessions Judge, Karachi (Malir) being void, illegal ab-initio having no force of law. The learned counsel for the applicant/complainant has relied upon the following case laws :-*

*2019 SCMR 1129 (Rana Abdullah Khaliq v. The State & others). The point discussed by the Hon'ble apex Court in this case is that "a Petitioner (accused) seeking judicial protection is required to reasonably demonstrate that intended arrest is calculated to humiliate him with taints of mala fide".*

*The learned counsel for the applicant/complainant has also relied upon 2010 MLD 435 (Lahore) (Cool Industries (Pvt), Ltd, through Manager v. Shafique Ahmed and 4 others), but the facts of this case law are distinguishable from the facts of this case.*

*On the other hand the learned counsel appearing on behalf of the respondent No.2 accused Dawood son of Khatri Tayyab has argued that the order passed by the learned V<sup>th</sup> Additional Sessions Judge, Karachi (Malir) has suffered with no illegality or infirmity as passed after considering all the facts and within the canons of law. Per learned counsel, the respondent No.2 has not*

*been nominated in the FIR but later on during investigation the co-accused Jaliludin and Gul Hussain have disclosed the name of the present applicant/accused in their statements before police and per Article 38 & 39 of Qanon-i-Shahadat statement of the accused made against the co-accused before police has no evidentiary value and inadmissible in law. Per learned counsel for Respondent No.2, Article 43 of Qanoon-i-Shahadat, 1984 is not applicable in this matter as no circumstantial evidence has come on record as yet against the Respondent No.2 and out of 21 Prosecution Witnesses only eight (8) witnesses have been examined and the co-accused, who made confession as alleged by the prosecution is to be proved before the learned trial Court. The learned counsel on the point of involvement of accused on the statement of co-accused has relied upon the judgments reported in 2016 P Cr.L.J 535 (Lahore) Umar Khubaib v. The State & two others) and 2017 YLR Note 206 (Sindh) Ali Jaffar v. The State, 2011 YLR 355 (Karachi) Bhsanullah Khan v. The State, PLJ 2005 SC (AJ&K) 65 (Appellate Jurisdiction) and 1991 MLD 1324 (Lahore) Mst. Tahira Shoukat v. The State. It has been observed by the Courts in general that statement of accused given during investigation before police cannot be used against co-accused as it is prohibited under Article 34 of Qanoon-e-Shahadat.*

*The learned counsel for the Respondent No.2 requests for dismissal of the present application of the applicant/complainant.*

After hearing arguments of both the side and perusal of the record, I have observed that the instant FIR was lodged on written complaint of the complainant on the basis of discreet inquiry conducted by them as Manager Security of the Mill was

receiving information regarding theft of clothes by the organized group from Unit No.07 of Younis Textile Mills, in spite of such prior discreet inquiry they could not gather information regarding involvement of the respondent No.2 in this case. On the contrary on the basis of disclosure of the co-accused before police during investigation the prosecution has involved the respondent No.2 in this case. However, generally the superior/higher Courts are reluctant to interfere into the order extending concession of bail and wisdom behind this reluctance is that once concession of bail is granted by a Court of competent jurisdiction then very strong and exceptional grounds are to be required to hamper with the concession extended to a person, who is otherwise clothed with free life and any contrary action of the Court would be equivalent to curtailing precious right of liberty of such person guaranteed by the constitution of Pakistan.

The Hon'ble Supreme Court in case of Samiullah and another v. Laiq Zada and another (before Mr. Justice Sajjad Ali Shah and Mr. Justice Sayyed Mazahar Ali Akbar Naqvi) reported in 2020 SCMR 1115 relied upon by the learned counsel for Respondent No.2, has observed the following grounds upon which bail granted to a accused may be cancelled/re-called:

- i. If the bail granting order is patently illegal, erroneous, factually incorrect and has resulted into miscarriage of justice.
- ii. That the accused has misused the concession of bail in any manner.
- iii. That accused has tried to hamper prosecution evidence by persuading/pressurizing prosecution witnesses.
- iv. That there is likelihood of absconsion of the accused beyond the jurisdiction of court.
- v. That the accused has attempted to interfere with the smooth course of investigation.

- vi. That accused misused his liberty while indulging into similar offence.
- vii. That some fresh facts and material has been collected during the course of investigation with tends to establish guilt of the accused.

The learned counsel for the applicant/complainant has prayed for cancellation of bail granted by the Court of competent jurisdiction on the ground of having sufficient evidence collected by the prosecution against the respondent No.2. After having perusal of the entire record, I am of the view that on the basis of collected evidence, if the prosecution, would be able to prove its case against the respondent No.2 before the learned trial Court, then the respondent No.2 may be punished/convicted accordingly, but before proving it before the learned trial Court on the basis of alleged evidence, cancellation of bail in absence of strong and reasonable grounds would amount to punish the respondent No.2 before or without trial. The learned counsel for the applicant/complainant raised further ground for cancellation of bail that the learned trial Court in its order of granting bail discussed merits of the case in detailed. In my view it is the function of the Court to pass order but on the basis of this ground bail of the accused/respondent No.2 is not be liable to be cancelled. It is further contended by the learned counsel for the applicant that the respondent No.2 will tamper with the prosecution evidence and witnesses. I have gone through the calendar of witnesses and found that two witnesses are learned Judicial Magistrates and remaining witnesses are police officials and no private witness is in list, hence question of tempering of evidence or witnesses does not arise. The other grounds are also related either with function of the Court or other irrelevant

reasons, which cannot be considered for cancellation of bail, even contents of alleged E.mail of the respondent No.2 also does not cover the allegation of threats as no dire consequences or life threatening intention is reflecting in it. I therefore, found no reason on evaluation of the record to cancel or re-call the order of the learned trial Court, as no misuse of concession of bail by the respondent No.2 in any manner has been pointed out by the learned counsel for the applicant/complainant, hence instant Crl. Misc. Application of the applicant/complainant is dismissed on merits alongwith pending applications.

Faheem/PA

JUDGE