

**IN THE HIGH COURT OF SINDH CIRCUIT COURT,
LARKANA.**

Crl. Bail Appln. No. S- 185 of 2021.

Applicant: Pathan Khan son of Gul Hassan Lolai, through Mr. Waqar Ahmed Chandio, Advocate.

The State: Through, Mr. Muhammad Noonari, DPG.

Complainant: Muhammad Urs, through Mr. Atta Hussain Chandio, Advocate.

Date of hearing
& order: 30.07.2021.

ORDER

Adnan-ul-Karim Memon, J: -Applicant Pathan Khan Lolai has already been admitted to adinterim pre-arrest bail by this court vide order dated 30.04.2021, in Crime No.27/2021 registered for offenses punishable under sections 148, 149, 114, 324, 506 (2), 504 amd 337-H (2) PPC at police station Sijawal.

2. Mr. Waqar Ahmed Chandio learned counsel for the applicant has submitted that the learned trial Court has failed to appreciate the mala fide of the complainant in nominating the applicant, and the material prima facie showing non-involvement of the applicant in the alleged offense of causing injuries to the injured. Learned counsel for the applicant reiterated the arguments as made earlier before this court which was recorded on 30.4.2021, as well as in the memo of the bail application. He prayed for confirmation of the pre-arrest bail of the applicant in the said F.I.R.

3. On the other hand, Mr. Muhammad Noonari learned Deputy Prosecutor General assisted by Mr. Atta Hussain Chandio learned counsel for the complainant has opposed this bail application on the ground that the case falls within the ambit of the prohibition contained in section 497 Cr.PC, therefore, the applicant is not entitled to the concession of extraordinary relief. He referred to various documents attached to the statement dated 19.7.2021 and argued that the applicant has misused the concession of pre-arrest bail granted to him by this court by dispossessing illegally to the complainant from the subject land, in this regard he referred to a report of SHO Police Station Sijawal. In support of his contention he relied upon the case of *Muhammad Tariq and another v. The*

State (2008 YLR 22), and argued that the applicant has been specifically nominated to cause injury to the complainant therefore, section 324 PPC is attracted and thus he is not entitled to the concession of pre-arrest bail. However, on the contrary, learned counsel for applicant has referred to the medical report and has argued that the medical officer opined that the complainant received a lacerated wound and rather than punctured wound from the alleged bullet, therefore, case of the applicant required through a probe which could be done only after the recording of the evidence.

4. I have heard the learned counsel for the parties and perused the record of the case. The learned trial Court has declined the relief of pre-arrest bail to the applicant observing that pre-arrest bail is an extra-ordinary relief and can only be extended to an innocent person who is implicated in the case based on mala fide, but the applicant has failed to point out to any mala fide. The learned trial Court did not appreciate that the "mala fide" is a state of mind that cannot always be proved through direct evidence, and it is often to be inferred from the facts and circumstances of the case.

5. Prima-facie the role attributed to the applicant in the F.I.R is that he fired upon Zulfiqar Ali the uncle of the complainant who allegedly received on his right arm, whereas the Medical report, prima facie show "one incised wound"; and later on opined by the Medical Officer as "lacerated type wound on right elbow joint". Whereas the complainant disclosed the firearm injury on the right arm of his uncle, therefore, the question regarding the attraction of section 324 PPC is required to be determined by the learned trial Court after the recording of the evidence.

6. Besides above, the material available on record as to the alleged involvement of the present applicant shows the following factual position of the case:

- i. *The alleged incident took place on 15.03.2021, whereas the same was reported on the next day.*
- ii. *Prima facie, the mashirnama of injuries shows one incised wound on the right arm, whereas medical report dated 15.04.2021, one lacerated type wound measuring about 0.5 x 0.5 cm on right elbow joint and it is for the learned trial Court to look into the matter after recording the evidence whether Section 324 PPC is attracted or otherwise.*

- iii. *Civil dispute between the parties on a certain piece of land is available on record. Thus, the learned trial Court has to see pro and contra on the subject matter.*
- iv. *The applicant has pleaded malafide humiliation and unjustified harassment at the hands of the complainant in connivance to the Police.*

7. As per the statement dated 02.7.2021 filed on behalf of the applicant, supported by the case diary dated 21.6.2021 of the learned trial Court, which prima facie shows that the applicant is attending the learned trial Court regularly. The investigation of the case is completed and the applicant is no more required for further investigation. Primarily, no useful purpose would be served by sending him behind the bars for reasons discussed supra. However, at the bail stage, it is noted that the court must base its conclusion as to the involvement of the accused on some solid material collected during the investigation, and not on surmises or conjectures, either tentatively at the bail stage or finally at the judgment stage.

8. Moreover, the applicant's role of causing an injury to the injured on his non-vital part coupled with, civil/criminal litigation on a certain piece of land between the parties, ulterior motive such as humiliation and unjustified harassment is a valid consideration for the grant of bail. The entire episode as discussed supra requires a thorough probe by the learned trial Court. Prima-facie, the injuries on the person of injured did not fall within the prohibition contained in section 497(1) Cr. P.C and were on non-vital parts of his body. besides the above, the applicant had joined the trial and attending the court regularly.

9. In view of the above facts and circumstances, I am of the tentative view that the Applicant-accused has made out a case for grant of Pre arrest Bail at this stage, in such circumstances, I find it a fit case for exercise of discretion to admit the applicant to pre-arrest bail from unjustified arrest, consequent humiliation, and the curtailment of his right to liberty.

10. Before preceding further on the case in hand, I have come across with the recent pronouncement of the Honorable Supreme Court in bail before arrest matter has held that no doubt, a police officer has, under section 54 of the Cr.P.C., the power to arrest a person who has been involved in any

cognizable offense or against whom a complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned. Having the power to arrest is one thing but the justification for the exercise of that power is quite another. A police officer that arrests a person must be able to justify the exercise of that power in making the arrest apart from his having the power to do so. He cannot arrest a person, only because he has the power to do so. He must also show sufficient grounds for making the arrest. The legal position is that when it prescribes that every police officer must "apprehend all persons whom he is legally authorized to apprehend and for whose apprehension sufficient grounds exist. And Rule 26.1 of the Police Rules, 1934 explains this by providing that the authority given under Section 54 of the Cr.P.C. to the police to arrest without a warrant is permissive and not obligatory. As per the said Rule whenever escape from justice or inconvenient delay in completion of the investigation or commencement of the trial is likely to result from the police failing to arrest, they are bound to do so, but in no other cases. Ordinarily, no person is to be arrested straightaway only because he has been nominated as an accused person in an FIR or in any other version of the incident brought to the notice of the investigating officer by any person until the investigating officer feels satisfied that sufficient justification exists for his arrest. The investigating officers should not mechanically arrest a person accused of having committed a cognizable offense, rather they must exercise their discretion in arresting such person judiciously by applying their mind to the particular facts and circumstances of the case and consciously considering the question: what purpose will be served and what object will be achieved by the arrest of the accused person.

11. Coming to the powers of this Court and the Courts of Sessions to grant pre-arrest bail, first and foremost, must be examined in the constitutional context of liberty, dignity, due process, and fair trial. Primarily, Pre-arrest bail is like a check on the police power to arrest a person. The non-availability of incriminating material against the accused or non-existence of a sufficient ground including a valid purpose for arresting the accused person in a case by the investigating officer would as a corollary be a ground for admitting the accused to pre-arrest bail, and vice versa. The reluctance of the courts in admitting the accused persons to pre-arrest bail by

treating such relief as an extraordinary one without examining whether there is sufficient incriminating material available on record to connect the accused with the commission of the alleged offense and for what purpose his arrest and detention is required during investigation or trial of the case, and their insistence only on showing mala fide on part of the complainant or the Police for granting pre-arrest bail does not appear to be correct, especially after recognition of the right to a fair trial as a fundamental right under Article 10-A of Constitution of Pakistan, 1973. Protection against arbitrary arrest and detention is part of the right to liberty and fair trial.

12. This Court has, in many cases, granted pre-arrest bail to accused persons after finding that there are no reasonable grounds for believing their involvement in the commission of the alleged offenses and has not required independent proof of mala fide on part of the Police or the complainant before granting such relief. Despite the non-availability of the incriminating material against the accused, his implication by the complainant and the insistence of the Police to arrest him are the circumstances which by themselves indicate the mala fide on the part of the complainant and the Police, and the accused need not lead any other evidence to prove mala fide on their part.

13. For the aforesaid reasons, the interim pre-arrest bail already granted to the applicant vide order dated 30.4.2021 is hereby confirmed. However, the applicant is required to furnish further solvent surety in the sum of Rs.50000/- (*Fifty Thousand Rupees*) and PR bond in the like amount to the satisfaction of the Additional Registrar of this Court within one week from today.

14. The observation made hereinabove is tentative shall not prejudice the case of either party at trial.

Judge