

IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

Crl. Bail Application No.S-135 of 2023

Crl. Bail Application No.S-134 of 2023

Crl. Bail Application No.S-141 of 2023

Crl. Bail Application No.S-161 of 2023

Crl. Bail Application No.S-191 of 2023

DATE OF HEARING	ORDER WITH SIGNATURE OF JUDGE.
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1. For orders on O/objection at flag-A.
2. For hearing of bail application.

Date of hearing 16.06.2023

Mr. Qurban Ali Malano, Advocate for the applicant in Crl. B.A No.S-141/2023.

Mr. Rukhsar Ahmed Junejo, Advocate for the applicant in Crl. B.A No.S-134/2023.

Mr. Muhammad Asif Kolachi, Advocate for the applicant in Crl. B.A No.S-135/2023.

Mr. Muhammad Ali Naper, Advocate for the applicant in Crl. B.A No.S-161/2023.

Mr. Saeed Ahmed Bhatt, Advocate for the applicant in Crl. B.A No.S-191/2023.

Mr. Imran Mobeen Khan, Assistant Prosecutor General Sindh for State.

ORDER

1. By this common order, I intend to dispose of the aforesaid Criminal Bail Applications which arise out of FIR No.35/2023 lodged by the Reserve Inspector Police at PS Rohri District, Sukkur under Sections 120-B, 221, 222, 223 PPC.
2. The applications involve the same FIR and common questions of facts and law. Applicants PC Mumtaz Hussain Malik, HS Qamaruddin Khuhro and Babar Ali Khokhar (journalist) have

sought pre-arrest bail from this Court after the Addl. Sessions Judge Sukkur-V Sukkur (“the trial court”) vide impugned order dated 25.02.2023 dismissed their pre-arrest bail applications. Applicant WASI Sher Ali Bullo’s first bail application got rejected by the trial court. After that, he filed a second bail application before the same court, which was dismissed vide order dated 10.03.2023. He is now seeking from this Court release from custody through his post-arrest bail application. Finally, Applicants PC Ilahi Bux Bhutto and PC Rustum Ali also seek release from custody by this Court after the learned trial court dismissed their first bail application vide order dated 21.03.2023.

3. The background of the case is that the Office of the Senior Superintendent of Prison Central Prison & Correction Facility Sukkur, on 14.02.2023, sent a letter to the Senior Superintendent requesting that a lifer, Qadir Bux @ Babu, is to be taken from Sukkur Central Prison to the Medical Superintendent GMMC Hospital, Sukkur for medical treatment on 15.02.2023 at 0900 hours. The S.P. sent a police vehicle for this purpose to the Central Prison. It appears that two prisoners were scheduled to be taken to the hospital that day, namely Qadir Bux @ Babu and Raheem Bux. According to the entry and exit records of the Prison’s Register, only Raheem Bux was taken to the hospital. Raheem Bux left the prison at 1045 hours and returned at 1230 hours. Meanwhile, at 1030 hours, Qadir Bux @ Babu allegedly left the jail in a private vehicle without handcuffs in the company of PC Ilahi Bux Bhutto, PC Rustum Ali and two other passengers, one of whom was identified as Babar Ali Khokhar, a journalist. The driver of the private vehicle (the fifth passenger) remains surprisingly unidentified. HS Qamaruddin Khuhro and PC Mumtaz Hussain

Malik had keys to the lock-up and alleged they followed proper procedures and protocols for handling the convicts. PC Ilahi Bux Bhutto and PC Rustum Ali contend that they were on duty in a picket outside the jail and carried out orders on the instructions of WASI Sher Ali Bullo. Babar Ali Khokhar claims he is innocent as he was merely a passenger in the private vehicle. Assistant Superintendent Asif Ali Korai signed the letter to take the convict to the hospital for medical treatment and gave instructions to the jail officers. Akhtar Ali, the brother of the convict, perhaps was the driver. All the above are nominated in the Crime Report No.35/2023 filed on behalf of The State by Inspector Mubasshir Hussain Shah, posted as Reserve Inspector Police Line Sukkur on 17.02.2023 at 2300 hours. Although the FIR impleads eight (8) persons, two out of the eight have been let off as shown as per Column No.2 of the charge sheet dated 27.02.2023, namely, the Deputy Superintendent Central Prison-I, Sukkur, Asif Ali Korai, and the brother of the escaped convict, Akhtar Ali.¹

4. According to the learned Counsels for the applicants, FIR No.35/2023 is filed after a delay of two days; and is based on hearsay evidence. The complainant is not an eyewitness to the incident; no specific date, time, or place where the alleged conspiracy was hatched by the accused is mentioned in the FIR. ASP Asif Ali Korai, nominated in the FIR, has been let off in column no.2 of the charge sheet based on the same evidence on which the six (6) applicants have been charge-sheeted. The FIR was lodged to save the skin of other police officials, including senior officers. The applicants have been falsely roped in, without any justification, and on ulterior motives of the high-ups. Babar Ali is a

¹ Asif Ali Korai was denied bail by the Additional Sessions Judge-V, Sukkur Order dated 25.02.2023 but his name is now removed.

journalist, and the offences charged relate to public servants. WASI Shabbir Ali Bullo's only fault mentioned in the FIR is "due to negligence." No other crime is made out. Finally, the offences against the applicants do not fall within the prohibitory clause of Section 497(1) Cr.P.C. The FIR is malafide. This is a fit case for further inquiry.

5. Learned Assistant Prosecutor General admits the delay in the registration of the FIR but argues that it is not fatal. He submits that specific roles have been assigned to each applicant/accused. Sher Ali Bullo has confessed before the Police. Grounds of pre-arrest bail cannot be considered in post-arrest bail. Section 222 PPC is not bailable. No case for either malafide or further inquiry is made out.
6. I have heard the learned Counsels for the applicants/accused, the APG and perused the record.
7. The applicants/accused have been charged with offences which are bailable except section 222 PPC. Section 222 PPC becomes non-bailable because the convict, Qadir Bux @ Babu, is/was a lifer. Even though the offence under section 222 PPC is not bailable, the punishment for committing such an offence falls within the non-prohibitory clause of section 497 Cr.P.C.
8. Further, whether section 120-B PPC is to be treated as bailable or non-bailable depends on the object of the offence under Sections 222 PPC and Sections 221 and 223 PPC. Be that as it may, a bare perusal of the FIR reveals that no specific date, time and place where the conspiracy was hatched has been mentioned in the crime report. No eyewitnesses on the date of occurrence of the

crime are mentioned in the FIR. Neither names nor the number of witnesses are mentioned in the crime report. Although the applicants/accused have been brought into the picture as having been present on the day of occurrence of the crime, their testimonies which will set out the background, motive, culpability, and extent of roles of the applicants, inter se, and others involved when the conspiracy was hatched and after that executed is presently neither available on record and is likely to be ultimately determined during the trial. Prima facie, at this stage, the specific roles of each accused in juxtaposition to the other are not distinguishable. A useful purpose would only be served (and for consistency) if the bail of the co-accused in custody is accepted and the other co-accused on interim pre-arrest bail is granted, especially based on the same evidence. All the applicants/co-accused, until further inquiry and the conclusion of the trial, appear to be on the same footing.

9. The IO appears to have failed to collect any evidence. There needs to be an explanation of whom and how authorisation was obtained to remove the convict for medical treatment, how jail doors became porous, and prison gates became easy to pass through. A private car entered the prison and was parked next to the government prison van. Details of the escape, including what transpired after the vehicle drove out of the Central Prison, are yet to be brought on record. The APG has argued that the appellant/accused, Babar Ali Khokhar, the journalist and the convict's brother, Akhtar, were frequent visitors to the escaped convict; however, in the same breath, he acknowledges that no proper record was kept of the persons visiting the jail. There is no information apart from the S.I.'s letter regarding whose

instructions/orders the convict was allowed to come out of the barracks. No medical reports are referenced explaining when the convict became sick, how long he was ill, and how sick he was when he required medical treatment at a hospital. It is assumed that ASI Asif Ali Korai was in the know regarding the past health and prognosis for medical treatment when he ordered the convict to be taken to the hospital. The aforementioned missing elements in the investigation, together with the pick-and-choose selection of the applicants/accused by the complainant, appear to suggest malafide and ulterior motives on the part of the complainant apart from building a case for further inquiry.

10. Upon a tentative averment, it appears that what is primarily reflected in this case is the appalling negligence of the police and jail authorities. It appears as a matter of first impression, based on the review of the evidence collected and available on file, that proper security measures were not in place to ensure the safe and secure movement of convicts within and when needed out of prison. No record has been shown to me which would evidence the procedure and protocol prescribed in the jail for such movement. Orders and instructions have been made and followed verbally and over mobile phones. According to the APG, as per the records, on the day of the crime, the applicants/accused took instructions to take the convict to the hospital by phone from ASI Asif Ali Korai. In all the bail applications filed by the police officers, they have taken the defence that they were following the orders of their superiors. Yet only verbal is available. No record has been shown to me which would even confirm what exactly the duties were assigned to the applicants on security duty or, for that matter, who was supposed to handle and takeover of convicts and

was unavailable on the date of the crime. Hence, the applicants got involved in the case. Ilahi Bux Bhutto and Rustum Ali claim that their duty was outside the prison and that they had no authority to have the prisoner taken out of jail and handed over to them. They claim that their testimony and the record will show that they were indeed posted on the outskirts/pickets of the prison. What I also find highly unusual is that the FIR, as well as the subsequent challan, filed offers neither any explanation as to how a private vehicle was allowed entry not only into the inside of the prison walls but also near the jail gate with complete freedom of movement inside the jail premises to apparently be parked next to a government van nor any explanation is provided as to how the convict managed to escape nor where the convict got off from the motor vehicle (the applicants Ilahi Bux Bhutto, Babar Ali Khokhar and the escaped convict were all sitting together inside the car as it left the prison) nor is the owner of the private vehicle identified/disclosed so far. The extremely weak investigation has further created doubt about the accuracy of identifying the true culprits. It can also not be denied that at the end of the day, the prime responsibility of control and operations of prisons was that of Assistant Superintendent Asif Ali Korai, Deputy Superintendent Central Jail Sukkur, who surprisingly was not even charged. I am not able to eliminate malafide on the part of the police as I have also noticed that while the applicants have been asking the IO to record the statements of several of their colleagues, who ostensibly will vouch that none of the applicants was present as alleged by the prosecution. Yet, the IO has not recorded such statements. What also transpires after hearing the APG is that the primary evidence collected by the IO are statements of co-accused. Per se, such statements may not be admissible in

evidence. However, the learned trial court will decide this issue after the evidence is led at trial. Prima facie, it appears that a lop-sided investigation has taken place. Keeping in view the evidence collected, doubt in my mind is created regarding the accuracy of the investigation and whether the powerful and high-up have been let off. Indeed, the complainant of the case has candidly acknowledged in the FIR that it was filed based on a chain of “information to high-ups and such report in writing submitted to SSP Sukkur, the SSP Sukkur entrusted the enquiry to DSP Illahi Bux Soomro, SDPO Site Sukkur, and the enquiry officer submitted such enquiry report to SSP Sukkur [hence the crime report].” All these matters require further inquiry.

11. Learned Counsels have also argued that there was a delay in the registration of the FIR. Prima facie, as a matter of fact, this submission is correct. Yet what the impact of this delay will be on the prosecution’s case will be determined at trial. Suffice it to say that at the moment, keeping in view the circumstances of the case due to deliberation and consultations and seeking instructions from the high-ups to cover up the negligence in the chain of command of officers (from medical to operations to investigations) involved both at the level of the police and the jail authorities, cannot be conclusively ruled out in the nomination of the present applicants/accused only. Hence, on this score, too, the case requires further inquiry.
12. At this point, the applicants/accused who were granted interim pre-arrest bail have joined the investigation, and all the applicants, including those in custody, are participating. An interim charge has been submitted, and the trial will now proceed. The evidence in support of the case of the prosecution is

yet to commence. The trial will be expected to produce evidence of conclusive nature to prove the ingredients of criminal conspiracy on the part of the applicants/accused, including that they intentionally and deliberately allowed or aided the convict to escape from the prison, evidence showing that the convict escaped due to the applicant's gross negligence apart from the failure of those officers involved in the chain of command both at the Central Prison, Police and Medical Facilities. As such, the matter calls for further inquiry.

13. Additionally, all the applicants/accused are public servants (except for journalist Babar Ali), and there is no likelihood of their abscondence. Additionally, neither the crime is of a nature which may involve the evidence being tampered with, nor is there any likelihood of the offence being repeated. Hence the case also requires further inquiry as contemplated under Section 497(2) Cr.P.C., and the applicants are entitled to the concession of bail. Even otherwise, the applicants/accused are to be afforded the right of the benefit of the doubt, which can be extended at the bail stage.²
14. In view of the facts and circumstances discussed herein above, a case is made out for confirmation of the interim pre-arrest and also post-arrest bail applications. Consequently:
 - (i) the interim pre-arrest bail given to PC Qamaruddin and HC Mumtaz Hussain Malik is hereby confirmed subject to each furnishing solvent surety in the sum of PKRs.200,000 (Two lacs only) and with P.R. bond in the like amount to the satisfaction of the Additional Registrar of this Court. The surety already submitted by the said applicants at the time

of grant of pre-arrest bail by this Court may be adjusted in the said amount;

- (ii) the interim pre-arrest bail given to Babar Ali Khokhar is hereby confirmed on the same terms and conditions as allowed by this Court in its Order dated 06.03.2023; and,
- (iii) WASI Sher Ali Bullo, PC Ilahi Bux Bhutto and Rustum Ali are all granted post-arrest bail and shall be released forthwith subject to each furnishing a solvent surety in the sum of PKRs.200,000 (Two lacs only) and with P.R. bond in the like amount to the trial court's satisfaction.

15. The applicants are directed to cooperate fully with the IO of the case. If the IO makes a complaint of non-cooperation by the appellants/accused, then the learned trial court will be empowered to cancel the concession of bail granted herein by itself with no further reference to this Court. Even otherwise, if applicants/accused during trial before the trial Court misuse the concession of bail, then the trial Court will be competent to cancel their bail without making any reference to this Court.
16. Keeping in view the observations I have made above, one thing which is apparent in my mind is that there has been negligence on the part of the Police and the Jail Authorities. I.G. Prisons Sindh and I.G. Sindh are both directed to conduct an extensive and thorough inquiry into this matter and take the necessary departmental action against all officers found delinquent.

² *Ihtisham Ali Cheema v. The State*, 2022 SCMR 624

17. Suffice it to say the observations made here-in-above are tentative and only for this bail application. Nothing herein shall affect the determination of the facts at the trial or influence the trial Court to decide on the case's merits.

18. All five bail applications stand allowed in the above terms.

The above are the reasons for the short order passed on 16.06.2023.

The office is directed to place a signed copy of this order in the above captioned CrI. Bail application(s).

JUDGE

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