

ORDER SHEET
THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.1121 of 2023

DATE	ORDER WITH SIGNATURE OF JUDGE(S)
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For hearing of bail application

17.7.2023

Mr. Noor Nabi Samoo, advocate for the applicants alongwith applicants
Mr. Inayat Ali Malkani, advocate for the complainant
Mr. Muntazir Mehdi, Additional PG

Through this bail application, the applicants seek pre-arrest bail in FIR No.07/2023 dated 21.2.2023 for offenses under sections 302/114/337H (2)/506(ii) and 35 PPC registered at PS Jati District Sujawal.

2. The allegations against the applicants as contained in the FIR are that they participated in the alleged incident of murder of deceased Allah Dino and Ismail took place on 19.2.2023 in connivance with their accomplices. Their bail plea was rejected by the trial Court vide order dated 13.3.2023 on the premise that their presence was established at the spot and two poor fishermen lost their lives in the aforesaid tragic incident.

3. It is, inter alia, contended by the learned counsel for the applicants that enmity between the parties is admitted in the FIR, therefore false implication of the applicants in the instant case cannot be ruled out; that there are general allegations of making aerial firing against the applicants/accused at the time of the alleged incident and no injury has been assigned to them; that there is a delay of two days in lodging the FIR; that the allegations against the applicants were that they made aerial firing and no active role was described against them in the FIR. He next contended that with mala fide intention the whole family of the applicants has been roped in this case. He added that no recovery has been made from the applicants; that the case of the present applicants is of mere presence which requires further inquiry; that the mere presence of the applicants does not attract offense under Section 302 PPC. He prayed for allowing the bail application.

4. Learned APG assisted by learned counsel for the complainant has opposed the bail application of the applicants on the ground that the names of the applicants are much available in the FIR with the specific role of aerial firing. He next submitted that the delay in FIR has been explained with reasons; that the applicants are involved in the murder of two persons; therefore, they are not entitled to the concession of extraordinary relief.

Learned Counsel for the Complainant has contended that applicant accompanied by their accomplices, each lethally armed fired upon the deceased Allah Dino Thahim and Ismail Thahim which hit them on their body. The said allegation is prima facie supported by the medical evidence. The offense alleged against him falls within the prohibitory clause of section 497(2) Code of Criminal Procedure. In these circumstances they are not entitled to the concession of bail; that the applicants shared their common intention with the co-accused to kill the two innocent persons; that the principle of vicarious liability is fully attracted to the applicants. He next contends that there is no universal rule of law that a person who has not caused any injuries to the deceased cannot be burdened with common intention under section 34 of the Pakistan Penal Code or common object; that the participation of the applicants in the assault in question prima facie shows their involvement in the occurrence; that the motive of murder of deceased is apparent from the fact that the applicants had come along with co-accused to the place of incident to fight and commit murder of deceased persons; that the entire act was preplanned, and that in such circumstances, bail should be refused; that recovery is always a corroborative piece of evidence and as to what is the effect of recovery or non-recovery can be gone into only once evidence is recorded; that mere non-recovery of weapon from the applicants at the bail stage cannot be a ground for granting bail to the applicants; that existence of a common intention amongst the participants in a crime is the essential element for application of section 34 PPC which is fully attracted in the present case. It is further contended that the reason for the delay in lodging of FIR has been fully explained; that the present applicants have facilitated the co-accused to get murder of deceased persons. He lastly submitted that this is a case of double murder of two innocent persons, therefore, prayed for the dismissal of the bail application.

5. On the query of this Court as to whether the present applicants caused any injury to the deceased or any PWs, the learned counsel for the complainant replied in negative and stated that the allegation against the applicants was that they made aerial firing only, however, he supported the impugned order of dismissal of the bail application.

6. I have heard learned Counsel for the Applicant, learned Counsel for the Complainant, and learned Additional Prosecutor General as well and have minutely perused the material available on record.

7. The tentative assessment of the record reflects that the incident took place on 19.2.2023 and reported the incident to the police after two days i.e. on 21.2.2023. The role of the applicants is of their mere presence at the spot

and no overact has been shown against them. Since the applicants have been attending the trial Court, therefore, no fruitful result will come out if they are sent behind bars. Additionally, the case against the applicants requires further inquiry on the ground that their role is yet to be determined by the trial Court so far as their presence on the spot is concerned.

8. From the perusal of the record, it reflects that there is the allegation of generalized nature of resorting to aerial firing against the applicants nominated in the crime report, yet they are not alleged to have even attempted to cause any injury either to the deceased or to any of the P.Ws, and active role of causing injuries to deceased resulting into their death is attributed to co-accused, their culpability in the alleged crime certainly calls for further probe as it would be decided by the learned trial court after the recording of evidence during the trial, entitling them for the relief sought for, therefore at this juncture, the entire prosecution story requires further inquiry into the guilt of the applicants.

9. This Court is conscious of the fact that the concept of pre-arrest bail is an extraordinary relief, which is limited to rare cases based upon trumped-up charges rather it has to be extended sparingly.

10. To avail such relief, it is obligatory to establish that the prosecution has been launched, which is based upon malafides, and ulterior motives, and if it is materialized, it would certainly cause irreparable loss to his/her reputation.

11. The Supreme Court in the recent judgment has held that the practice to grant ad-interim bail is an extension of such a remedy to act as a shield to protect innocent persons facing the highhandedness of the individuals or police authority against frivolous litigation. Speaking the term ad-interim is a misnomer as it has fallen in practice. It is worth mentioning that ad-interim is not mentioned in any provision rather this idea has been derived from the Order XXXIX Rules 1&2 of the Code of Civil Procedure, 1908 ("Code of 1908).

12. The rationale to grant ad-interim bail is synonymous with passing a prohibitory injunction; however, the concept of ad-interim bail is more precious as compared to the prohibitory injunction. In the former, the liberty of the person is involved whereas, in the latter, only property rights are in question. The status of the accused becomes "custodia legis" during the period when ad-interim bail is granted till its final adjudication subject to furnishing of sureties to the satisfaction of the Court.

13. The provision of Section 497(2) Cr.P.C confers powers upon the Court to grant bail during the investigation, inquiry, or trial subject to an opinion formed by the Court that material placed before it is not sufficient to establish guilt and it still requires further inquiry into his/her guilt whereas Section 498 Cr.P.C deals with two situations:-

- i) *The fixation of the amount or bond according to the circumstances;*
- ii) *Conferment of powers to grant bail to a person who is not in custody;*

14. Although the provision of section 498 Cr. P.C. is neither ancillary nor subsidiary to section 497 Cr. P.C. but is an independent Section, however, a bare reading of the language of sub-section (2) of Section 497 Cr.P.C. provides considerations for grant of bail under section 497(2) Cr.P.C. it practically merged section 497/498 Cr.P.C. into one aspect qua concept of pre-arrest bail persuading it to act conjointly in all fairness.

15. The practice for grant of extraordinary relief has passed through the transitory period with divergent interpretations qua its scope since its inception, however, the law is not static rather it is growing day by day. The Supreme Court while handing down a salutary judgment titled "Meeran Bux vs. The State and another" (PLD 1989 Supreme Court 347) enunciated the concept of pre-arrest bail which was more innovative, liberal, crafted in consonance with the intent of the legislature, hence, it has conceptually widened its scope in its entirety, elaborating its concept in the spirit of section 497/498 Cr.P.C. It was reiterated in another judgment of the Supreme Court titled "Syed Muhammad Firdaus and Others v. The State (2005 SCMR 784). The Supreme Court virtually introduced a broadened mechanism of interpretation to adjudge the element of malafide or malice at the touchstone of the merits of the case. In the said case, mentioned above, the accused who has ascribed the injury to the deceased on the leg (simple) was granted pre-arrest bail by Sessions Judge which was recalled by the learned High Court while exercising suo-motu revisional jurisdiction, however, the order of learned Sessions Judge was restored by the Supreme Court while elaborating the principle in the above said terms.

16. Keeping in view the facts and circumstances narrated above as well as the principles of pre-arrest bail set forth by the Supreme Court it has made it abundantly clear that while granting pre-arrest bail, the Court can consider the merits of the case in addition to the element of malafides/ulterior motives which has to be adjudged. As a consequence, courts of law are under the bounded duty to entertain a broader interpretation of the "law of bail" while interpreting material placed before it more liberally to arrive at a conclusion

that is badly required due to the apparent downfall in the standard of investigation.

17. Otherwise liberty of a person is a precious right that has been guaranteed under the Constitution of the Islamic Republic of Pakistan, 1973. To abridge or curtail liberty merely on the ground of being involved in a criminal case without adjudging it on merits would certainly encroach upon the right against free life. This right should not be infringed upon, rather it has to be protected by the act of the Court otherwise it may frustrate the concept of safe administration of criminal justice.

18. The accumulative effect of the whole discussion and while seeking guidance from the above-referred case law, this Court is of the considered opinion that the applicants have made out a case for grant of extraordinary relief of pre-arrest bail, hence are squarely entitled to the same keeping in view their plea of unjustified arrest and humiliation at the hands of police as the applicants have specifically pleaded that they have mala fide been shown by the complainant at the place of the incident whereas they claimed that they were not even available at the place of incident, but they have been mala fide booked in this case due to enmity between the parties already admitted in the FIR, besides, they surrendered before the trial Court based on their imminent arrest at the hands of police on the behest of the complainant, who was at loggerhead with the applicants, however, their bail plea was declined by the trial Court, this could be the cause to the applicants to save themselves from the irony of police to approach this Court and as such their plea was accepted by this Court vide order dated 24.5.2023 without touching the merits keeping in view the mala fide and ulterior motive of the police to arrest the applicants, however, aforesaid factum could be thrashed out by the trial Court after recording the evidence.

19. The grounds agitated by the learned counsel for the complainant cannot be assessed at the bail stage without recording the evidence in the matter as such the applicants have made out a case of pre-arrest bail in the aforesaid crime at this stage.

20. These are the reasons for my short order dated 17.07.2023 whereby I have allowed the bail application and confirmed the interim bail granted to the applicants vide order dated 24.5.2023 on the same terms and conditions.

21. The observation recorded hereinabove is tentative which shall not prejudice the case of either party at the trial.

JUDGE