

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

Criminal Bail Application No.510 of 2023

Date	Order with signature of Judge
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For hearing of bail application

18.7.2023

Mr. Zamir Ahmed Bhutto advocate alongwith Mr. Tasleem Ahmed advocate for the applicant alongwith applicant Muhammad Abid
Mr. Siraj Ali Khan, Additional PG
Mr. Umar Farooq, advocate for the complainant
ASI Hanif Niazi, PS Docks, Karachi
Mr. Gulab, Traffic Supervisor, KPT
SI Tanveer, Port Security Force, KPT

Applicant Muhammad Abid seeks pre-arrest bail in F.I.R No.2 of 2023 under section 380/420/468/471/34 PPC of PS KPT, Keemari Karachi as he was earlier granted interim pre-arrest bail by the trial Court which was later on recalled vide order dated on 25.02.2023.

2. The accusation against the applicant as per FIR lodged by the SI Tanveer Akhtar is that Traffic Supervisor Gulab of Karachi Port Trust (KPT) informed that at night of 10.1.2023 and 11.1.2023, he was on night duty at about 02:45 vehicle No.TLE 170 loaded with bags of CANOLA was checked and its number plate was found forged on the premise that this number vehicle had already allowed its exit from the gate of NOB KPT. Upon preliminary inquiry, it was found that the applicant was the owner of the aforesaid vehicle, who in connivance with driver Abu Sufyan tele-clerk Faizan and driver Ghulam Rasool committed theft of the cargo from KPT by committing fraud and forgery, such a report of the incident was lodged with PS accordingly. The applicant being aggrieved by and dissatisfied with the inclusion of his name in the F.I.R voluntarily surrendered before the trial Court and after the rejection of his bail he appeared before this Court and interim protection in terms of Section 498 Cr.P.C. was given to the applicant based on the ground of malafide intention and ulterior motive on the part of Police and Complainant.

3. The learned counsel for the applicant/accused argued that the applicant is a transporter doing business for a long time and provides service for the transportation of articles and other related items from one place to another place on a fare/charge basis. According to him, the F.I.R was lodged after a considerable delay and only when the accused

petitioned for habeas corpus for recovery of his loaded trailer and driver who were illegally detained by the complainant with malafide intention. The learned counsel further contended that the applicant is innocent and has falsely been implicated in this case with malice and for ulterior motives; that one of the accused persons has already been admitted to bail, therefore, following the rule of consistency the applicant is also entitled for bail; that the applicant is previously non-convict and is ready to furnish reasonable surety to the satisfaction of the Court. He next argued that out of the three alleged offenses, two offenses i.e., under Section 420 & 471 PPC are bailable. As far as the offense under Section 468 PPC is concerned, it is noticeable that no specific role has been attributed to the applicant in the FIR, therefore, as far as the allegation of forgery of the number plate of the vehicle is concerned, which requires authenticated proof by the KPT official, however, the aforesaid assertion could be determined by the trial Court. Learned counsel argued that the punishment under the said offense does not fall within the prohibitory clause of Section 497 Cr.P.C. thereby making it a matter in which grant of bail is a rule and refusal an exception for the reason that the malafide of the KPT official is apparent in the case as they took sufficient time to lodge the case when they deliberated the matter with Police and thereafter booked the applicant in the case of theft of bags of CANOLA oil, though they were well aware of the fact that the applicant was not available at the spot, however, they managed the story just to hush up the matter to cover up their apparent negligence and burden was shifted upon the applicant on the wrong notion. He next argued that proof of the allegations in this regard could not be placed on record. He contends that the principal accused has been granted post-arrest bail by the trial Court; therefore, following the rule of consistency, the applicant also deserves the same treatment to be meted out. In support of his contentions, he relied upon the case of *Muhammad Kashif Iqbal v. The State* (2022 SCMR 821), and *Naeem Qadir Shaikh v. The State* (2022 SCMR 2068). He prayed for allowing the bail application.

4. The learned APG assisted by learned counsel for the complainant opposed the bail application inter-alia on the ground that the applicant is the mastermind of the whole scheme of theft committed by the accused persons within the premises of KPT as the present applicant posed himself to be the owner of vehicle TLE-170, which entered the restricted area of the port by showing the documents of the importer for loading of the goods namely Canola. According to him, the present applicant associated with the crime got loaded the vehicle and remained successful to take out another vehicle with the number plate (TLE-170), loaded with canola

goods, after due verification by showing the gate pass and subsequently, with the same number plate he got loaded a 024 vehicle by managing the fake documents and using the photocopy of earlier gate pass, which was detected on inquiry. He submitted that a preliminary inquiry was conducted and after being satisfied with the allegations lodged FIR against the accused person, thus there is no delay on the part of KPT. According to him, the ownership of the vehicle is not disputed as the present accused is the owner. Per learned counsel CDR of the present accused also matches with the absconding accused persons as they were/are in contact. He emphasized that the applicant cannot be granted anticipatory bail to subvert or undermine investigative procedure/process that essentially includes arrest to bring the statutory exercise to its logical end for effective and meaningful prosecution of the offense through the collection of information/evidence consequent upon arrest. In support of his contention, he relied upon the case of *Kamran Attaullah v. The State* (2021 SCMR 449). He prayed for the dismissal of the bail application.

5. 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 and case law cited at the bar.

6. This Court is conscious of the fact that the concept of pre-arrest bail is an extra-ordinary relief, which is limited to rare cases based upon trumped-up charges rather it has to be extended sparingly and to avail such relief of Extra-ordinary, it is obligatory to establish that the prosecution has been launched, which is based upon malafides, ulterior motives and if it is materialized, it would certainly cause irreparable loss to his reputation.

7. The Supreme Court in the recent judgment has held that such 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 individuals or authority against frivolous litigation. 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 propriety 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.

8. The provision of Sec.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 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;*

9. However in the present case, the tentative assessment of the record reflects the following aspect of the case, which prima-facie, determines the fate of the present bail application.

- i) The alleged offense took place on 10/11-01-2023 and was reported to police on 03.02.2023 with a delay of 25 days.
- ii) The alleged theft of 49-ton Canadian canola oil bags has not yet been recovered including Trailer number TMH-122.
- iii) The role of the applicant has been shown that he was in contact with the other accused who allegedly committed theft of canola oil bags and used a forged get pass to get clear a loaded 22-wheel Trailer from KPT with the number plate TLE-170 on which another alleged Trailer TMH-122 displaying fake number plate as TLE-170 loaded with canola oil. The aforesaid factum needs to be thrashed out by the trial Court.
- iv) The applicant filed a petition before the learned Sessions Judge for releasing of detinue Ghulam Rasool and Abbu Sufiyan and the Magistrate was appointed vide order dated 31.01.2023 to conduct a raid at the traffic sessions Karachi Port Trust East Wharf Keemari Karachi. A raid was conducted and the report was submitted vide letter dated 01.02.2023 with the narration that nothing could be recovered. He further disclosed in the report that vehicle TLE-170 had been detained by the authority under the suspicion of theft as such said vehicle was found using two different registration plates/passess and the matter was disposed of vide order dated 01.02.2023 by the Additional Sessions Judge. The report prima-facie shows that Magistrate was initially not allowed to enter into the premises of KPT, however, after some passage of time he was allowed, as such prima-facie the raid was fruitless.
- v) Co-accused Jamshed Khan has been granted bail before arrest by the learned trial Court.
- vi) A charge sheet has been submitted to the trial Court, wherein tele-clerk Faizan Shafique's' name has been placed in column No.2 of the charge sheet.
- vii) Prima-facie, findings of an inquiry by the KPT regarding a fake gate pass are not available.

- viii) The forensic examination report of vehicle TLE-170 prima-facie shows that no other number has been deciphered under the present chassis serial (CD-450 NN-15118).
- ix) No analysis report of CCTV video recording has been obtained yet.
- x) CDR report and other material relied upon by the prosecution is yet to be confronted to the accused before the trial Court.
- xi) An offense under Section 380 is non-bailable. Two offenses i.e., under Section 420 & 471 PPC are also bailable. So far as the applicability of Section 34 of PPC is concerned, it lays down the principle of constructive liability whereby if several persons would unite with a common purpose to do any criminal offense, all those who assist in the completion of their object would be equally guilty. The foundation for constructive liability is the common intention in meeting the accused to do the criminal act and the doing of such act in furtherance of the common intention to commit the offense. However, the liability of the applicant is yet to be determined by the trial Court.
- xii) Specific details of mala fide intention or ulterior motives have been alleged against the KPT officials and Police in this bail application.

10. No doubt, the applicant is nominated in FIR; however, it is delayed for about 25 days, for which no reasonable explanation has been furnished by the prosecution for such an inordinate delay; merely saying that the official procedure was/is being conducted was/is not justifiable action to delay prosecution. The delay in criminal cases, particularly when it is unexplained, always presumes to be fatal for the prosecution. The offense, with which the applicant stands charged for Section 380 PPC, carries a maximum punishment of up to 07 years. In the circumstances and in view of the dicta laid down by the Supreme Court of Pakistan in the case of TANVEER V.S The STATE and another (PLD 2017 SC 733), the case against the applicant needs to be looked into by the trial court on the allegations leveled against him by the prosecution as the entire case of the applicant is based on malafide and ulterior motives on the part of prosecution; besides the alleged offenses do not exceed the limits of the prohibitory clause of Section 497(1) Cr.P.C.

11. The delay in criminal cases, particularly when it is unexplained, always presumes to be fatal for the prosecution. The case is being tried by the concerned Court, though the offense under Section 380 is non-bailable, however, the ingredients of the offence of theft of goods are yet to be proved against the applicant before the trial court; primarily Section 380 PPC explicitly provides that whoever commits theft in any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or used for the custody of property shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine, though the law on the subject is clear to the extent that if the prosecution may succeed to prove its case against the accused the punishment of more than 03 years cannot be visualized under the circumstances.

12. I have noticed that out of the three alleged offenses, two offenses i.e., under Section 420 & 471 PPC are bailable. As far as the offense under Section 468 PPC is concerned, it is noticeable that prima-facie, there is no direct role attributed to the applicant in the FIR about the theft of Canola Oil, the prosecution has merely said that the applicant had instructed the co-accused to commit theft and change the number plate of the vehicle, prima-facie these allegations of theft and forgery of the number plate of vehicle required authenticated proof to be produced before the trial court by the KPT official to substantiate the aforesaid narration with documentary evidence, however, the aforesaid assertion could be determined by the trial Court after recording the evidence of the parties, as at the bail stage this Court cannot say for and against the parties on the aforesaid points.

13. I have specifically asked the learned APG and the learned counsel for the complainant to show from record any material, which could prima facie connect the applicant with the commission of the alleged crime but except the Call Data Record (CDR), and some official slips issued by KPT, were relied upon with the narration that the applicant was/is in contact with co-accused and he instructed them to commit theft and fraud and upon his instruction the co-accused has done the illegal act. This allegation that the whole occurrence was committed by the accused at his instigation needs to be looked into by the trial Court, for the reason that there are three ingredients essential to dub any person as conspirator i.e. (i) instigation, (ii) engagement with co-accused, and (iii) intentional aid qua the act or omission to attract the aforesaid crime. All three ingredients prima facie are lacking in this case as no recovery of the theft article has

been made by the I.O. despite a considerable period, perhaps I.O. was waiting for some miracle to happen.

14. As for as the question of CDR is concerned, the Supreme Court in several cases has held that in the absence of any concrete material the Call Data Record is not a conclusive piece of evidence to ascertain the guilt or otherwise of an accused.

15. Keeping in view the facts and circumstances narrated above, it has made it abundantly clear that while granting pre-arrest bail, Court can consider the merits of the case in addition to the element of malafides/ulterior motives which has to be adjudged in the light of law laid down by the Supreme Court in its various pronouncements. 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.

16. 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.

17. The accumulative effect of the whole discussion is that this Court is of the tentative opinion that the applicant has made out a case for the grant of extraordinary relief of pre-arrest bail, hence is squarely entitled to the same. Besides the co-accused has already been admitted to bail by the trial court, thus the rule of consistency is fully attracted in this matter.

18. About the plea of the learned counsel for the complainant that the rule of consistency does not apply between pre-arrest and post-arrest bail, I rely upon the case of *Kazim Ali and others versus The State and others*, **2021 SCMR 2086**. In the said case, the Supreme Court dispelled such a view and held that where the role ascribed to a large number of accused was general, which cannot be distinguished from each other, and technical ground that consideration for pre-arrest and post-arrest bail are on different footing would be only limited up to the arrest of the accused persons because soon after their arrest they would become entitled to the concession of post-arrest bail on the plea of consistency and as such the accused persons in such case were admitted to pre-arrest bail.

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 applicant has 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 18.07.2023 whereby I have allowed the bail application and confirmed the interim bail granted to the applicant vide order dated 08.3.2023 subject to furnishing further surety in the sum of Rs.400,000/- (Rupees Four Lac only) and P.R bond in the like amount to the satisfaction of Nazir of this Court.

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

22. Applicant present before the Court is directed to continue his appearance before the trial Court without negligence and in case he misuses the concession or temper with the prosecution's evidence than the trial Court is competent to take legal action against him as well to his surety in terms of Section 514 Cr. P.C. Trial Court is also hereby directed to make necessary arrangements for securing the attendance of the prosecution witnesses and conclude the trial within the shortest possible time under intimation to this Court through MIT-II. Let a copy of this Order be communicated to the trial Court through learned Sessions Judge, concerned. Learned MIT-II to ensure compliance.

JUDGE

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