

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

Criminal Bail Application No.1609 of 2023

Date	Order with signature of Judge
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For hearing of bail application

09.8.2023

Khawaja Shams-ul-Islam advocate and Mr. Imtiaz Ali Shah advocate for the applicants alongwith applicants
Mr. Waqar Alam Abbasi advocate for the complainant
Mr. Rafiq Rajourvi, Additional AG
Mr. Muntazir Mehdi, Additional PG alongwith ASI Aijaz Ahmed, PS Malir Cantt. Karachi.

Through this criminal bail application, the applicants Asad Shahid Soorty and Zaheeruddin Babur seek pre-arrest bail in F.I.R No.349/2023, registered under Sections 109/365/419/170/34 PPC at PS Malir Cantt. Karachi.

2. Due to the direct approach by the applicants to this Court, the following order dated 22.7.2023 was passed:-

“To appreciate whether the applicants can bypass in approaching the Sessions Court having jurisdiction in bail matters or this Court can entertain the bail before arrest application directly under Section 498 Cr.P.C., as both the Courts have concurrent jurisdiction, let notice be issued to the Advocate General Sindh, Prosecutor General Sindh as well as to complainant.

Without touching the merits of the case, applicants are admitted to interim pre-arrest bail in FIR No.349/2023 registered under Section 109/365/419/170/34 PPC at PS Malir Cantt. District Malir, subject to their furnishing solvent surety in the sum of Rs.200,000/- (rupees two hundred thousand only) each and PR bond in the like amount to the satisfaction of the Nazir of this Court. The applicants are directed to join the investigation.”

3. To the aforesaid query, learned counsel for the applicants submitted that the applicants could approach this Court directly and it is not an absolute rule under the law that they at the first instance approach the trial Court in terms of law laid down by the Supreme Court in the case of *Raees Wazir Ahmad v. The State* [2004 SCMR 1167]. He further submitted that the reason for approaching this Court directly is that police in connivance with the complainant has cordoned off the Sessions Court concerned and there was/is a direct threat to the lives of the applicants at the hands of the complainant party who created mob of advocates and attempted to create hurdle for the applicants to enter in the premises of Sessions Court, as such they could not approach the trial Court. However, the aforesaid assertion has been denied by the complainant.

4. Mr. Muntazir Mehdi, learned Additional PG assisted by Mr. Waqar Alam Abbasi advocate for the complainant raised their voice of concern about entertaining the pre-arrest bail application of the applicant without approaching the trial Court and submitted that judicial propriety demands that the applicants need to apply for their pre-arrest bail before the relevant trial Court in the first instance. They emphasized that in the present case, no compelling circumstances have been pointed out by the applicants to bypass the Sessions Court. The learned Additional PG pointed out that even the report obtained by the Investigating Officer from the concerned SSP, recommending the cancellation of the subject case under 'C' class, however, it is not binding upon the Court and the learned Magistrate is yet to approve the report under Section 173 Cr.P.C. or may take the cognizance of the offense, therefore, this plea of the applicants is not tenable under the law at this stage. However, they prayed for the conversion of the instant bail application into protective bail enabling the applicants to surrender before the trial Court as the co-accused has already approached the trial Court.

5. At this stage, I reminded the learned Additional PG that the power of the High Court and the Court of Session, under section 498 Cr.P.C., to grant pre-arrest bail is thus co-extensive and concurrent with that of the Sessions Court under Section 498 Cr.P.C., however, only propriety demands that the Court of the first instance should be approached first. They agree with the aforesaid proposition, but insisted on the dismissal of the instant bail application under Section 498 Cr.P.C. Learned Additional PG further submitted that the applicants/accused have failed to establish any malafide on the part of the complainant and police to book them in the present crime.

6. The aforesaid stance of the learned Additional PG has been refuted by the learned counsel for the applicants/accused inter-alia on the ground that this Court has concurrent and co-extensive jurisdiction with the Sessions Courts for the grant of pre-arrest bail. He emphasized that both the Courts have concurrent jurisdiction and while considering a grant of bail to an accused under the aforesaid section and the merits of the case have to be considered though such observations may be tentative. He asserted that there are compelling reasons to approach this Court and now the applicants have approached this Court, therefore, judicial propriety demands that the instant bail application may be heard and decided on merits rather than converting the same into protective bail as portrayed by the complainant.

7. The accusation against the applicants is that on 20.7.2023 at about 6.20 p.m. he was forcibly kidnapped by the applicants by impersonating themselves to be the member of Military Intelligence (MI), however, he escaped from their clutches and reported the matter to Malir Cantt. Police Station Karachi who lodged the F.I.R No.349/2023, under Sections 109/365/419/170/34 PPC.

8. Applicants being aggrieved by and dissatisfied with the inclusion of their names in the F.I.R No.349/2023 directly approached this Court under Section 498-A Cr. P.C for grant of pre-arrest bail, which application was entertained by this Court vide order dated 22.7.2023.

9. On merits, learned counsel for the applicants argued that the applicants are innocent and have falsely been implicated in the instant case as well they have nothing to do with the alleged offense as portrayed by the complainant though they were not present at the place of incident thus the malice and mala fide, as well as an ulterior motive on the part of the complainant, cannot be ruled out. Learned counsel attempted to give a brief history of the case and submitted that applicant No.2 is an employee of M/s Soorty Enterprises (Pvt.) Ltd.; that the complainant namely Muhammad Mansoor Bilal was an employee in M/s Soorty Enterprises (Pvt.) Ltd. as Manager Merchandise. He took advantage of the confidence of the company of applicant No.1 and started cheating and committing fraud with the company; as such an FIR No.1013/2023 under Section 381/34 PPC PS Korangi Industrial Area, Karachi was lodged against him by the company. Learned counsel further contended that instead of arresting the complainant in the aforesaid FIR, the SHO of PS Malir Cantt. Karachi lodged a false FIR No.349/2023 under Sections 109, 365, 419, 170, and 34 PPC at PS Malir Cantt. Against the applicants as a counterblast by showing that the complainant was allegedly abducted by applicant No.1; that the SHO concerned without realizing the consequences lodged the present false, baseless, and frivolous FIR against the applicants on 20.7.2023 at 19:45 hours. He further contended that on the same day i.e. 20.7.2023, the complainant obtained bail in FIR No.1013/2023 from the Court of IV-Additional Sessions Judge, Karachi East. It is further contended by the learned counsel that Section 109 PPC has been falsely inserted in the FIR which is not applicable in the present case and the applicants have nothing to do with the alleged crime; that the applicants have been falsely involved by the complainant to defame them as a counterblast to the FIR lodged against the complainant and also to extort money from the applicants; that the complainant was arrested on 20.7.2023 by the SHO Malir Cantt. in respect of FIR lodged by the applicants bearing No.1013/2023 dated 17.7.2023, therefore, there is no

question of abduction arises at all; that the falsity and fakeness of the FIR can be gauged from the aforesaid facts. He next submitted that the co-accused has already been admitted to bail by the trial Court, therefore, following the rules of consistency the applicants are also entitled for bail. Learned counsel further submitted that no specific role has been attributed to the applicants in the FIR, however, the ingredients of Section 109 PPC are yet to be determined by the trial Court if the prosecution brings the case before the trial Court. Learned counsel argued that the punishment under the same offenses do 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 reason that the malafide of the complainant is apparent in the present case though he was well aware of the fact that applicants were not available at the spot and he took the matter to the police on hearsay evidence to compel the applicants to withdraw from the case lodged against him, however, he managed the story in connivance with the concerned SHO. 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.

10. Mr. Waqar Alam Abbasi, learned counsel for the complainant has opposed the bail application inter alia on the ground that no extraordinary circumstances exist in favor of the applicants to approach this Court for their pre-arrest bail as the co-accused as well as complainant appeared before the trial Court and obtained bail before arrest, therefore, the propriety demands that the applicants should surrender before the trial Court rather than this Court. In support of his contentions, learned counsel for the complainant has relied upon the cases The State v. Zubair (2002 SCMR 177), Muhammad Riaz v. The State (2002 SCMR 184), Imtiaz v. Azam Khan (2021 SCMR 111), and The State v. Zubair (PLD 1986 SC 173) and lastly, he prayed for dismissal of the bail of the applicants.

11. I have considered the arguments advanced by learned counsel for the applicants as well as learned APG assisted by learned counsel for the complainant and perused the record with their assistance.

12. Before touching upon the merits of the case, it would be appropriate to discuss the preliminary objection raised by the learned counsel for the complainant that the applicants have filed a direct bail application seeking their pre-arrest bail before this Court without exhausting the remedy of approaching the Court of first instance i.e. Sessions Court concerned. Primarily, it is not an absolute rule in terms of law laid down by the Supreme Court in the case of Raees Wazir Ahmad v. The State [2004 SCMR 1167]. In the present case, applicants have

pleaded that the reason for approaching this Court directly is that police in connivance with the complainant have cordoned off the Sessions Court concerned as such they could not approach the trial Court. Additionally, there is no denial to the fact that the jurisdiction of the Sessions Court and the High Court is concurrent. Even otherwise, the applicants have not availed one remedy, which was available to them while agitating their grievance before this Court; therefore, they lost one opportunity causing no prejudice to the complainant party. Besides the law on the subject is very clear that the Superior Court can entertain the application for pre-arrest bail and grant relief to the accused in appropriate cases where the accused could inter alia establish that he was prevented from approaching the lower Court concerned in the first instance as discussed in the preceding paragraphs.

13. Primarily, an accused normally can approach in the first instance the Court of Sessions for bail before arrest as propriety so demands but depending on the compelling circumstances, an accused can approach the High Court directly by invoking its concurrent jurisdiction. In the present case, the applicants have also pleaded that they could not approach the trial Court due to resistance created by the complainant in connivance with the police and they had grave apprehension of being killed and/or kidnapped if they enter into the premises of the learned Sessions Court and keeping in view the aforesaid factum they approached this Court for protection. Under the aforesaid circumstances, the High Court is empowered to entertain the bail application of the aggrieved person under Section 498 Cr.P.C. without waiting for the decision of the learned Sessions Court if approached by the accused and in the present peculiar facts and circumstances of the case, this Court vide order dated 22.7.2023 entertained the application and granted them interim bail. So far as the narration of the complainant that it will open the floodgate if the direct bail before arrest application is entertained by this Court. I am not convinced of the aforesaid proposition so put forward by the learned counsel for the complainant for the reason that if the accused is entitled to bail under the law on merit, consequences could not be taken into consideration while entertaining the bail plea of the accused if he has directly approached this Court under Section 498 Cr.P.C. On the aforesaid proposition, I am guided by the decisions of the Supreme Court in the cases of *Abdul Majeed Afridi Vs.the State* (2022 SCMR 676), *Khair Muhammad, and another v. The State through P.G Punjab and another* 2021 SCMR 130, *The State v. Malik Mukhtar Ahmed Awan* 1991 SCMR 322; *Rafiq Ahmed Jilani v. The State* 1995

PCr.LJ 785; *Shamrez Khan v. The State* 1999 PCr.LJ 74 and *Meeran Bakhsh v. The State and another* PLD 1989 SC 347.

14. Having dealt with the question of jurisdiction of this Court, the tentative assessment of the record reflects the following aspects of the case:

- a. Allegations against the applicants are that on 20.7.2023, the complainant was allegedly abducted at their instance on the pretext of an inquiry in Garrison Headquarters, however, the complainant managed to escape away in front of Malir Cantt. Police Station.
- b. Co-accused Imran Khan Malik has been admitted to pre-arrest bail by the trial Court vide order dated 07.8.2023.
- c. The management of M/s Soorty Garments registered FIR No.1013/2023 against the complainant for offenses under Section 381/34 PPC as PS Korangi Industrial Area Karachi regarding theft of garments.
- d. The complainant lodged FIR No.349/2023 of 20.7.2023 after lodging FIR No.1013/2023 by the applicant party.
- e. The applicants have joined the investigation in terms of the order dated 22.7.2023 vide interrogation reports dated 24.7.2023.
- f. The applicants are neither previous convicts nor hardened criminals as they have joined the investigation and are no more required for any further investigation; therefore, sending the applicants behind bars would serve no useful purpose.
- g. That all the offenses with which the applicants are charged do not fall within the prohibitory clause of Section 497 Cr.P.C.
- h. Prima facie the prosecution has given two versions of the incident, one before the Police by the complainant and a second report submitted by the investigating officer before the SSP concerned for disposal of the case under 'Cancel' class, which makes the case of the applicants that of two versions based on malafide intention and ulterior motives on the part of the complainant.

15. According to Section 365, PPC, whoever kidnaps or abducts any person with the intent to cause that person to be secretly and wrongfully confined, shall be punished with imprisonment of either description for a term that extends to seven years, and shall also be liable to fine. Whereas another section incorporated in the FIR, i.e. Sections 419 and 170 PPC, describes the offense of cheating by personation punishable with imprisonment of either description for a term which may extend to seven years, with a fine, or with both. Besides the offence of personating as a public servant the same is also with imprisonment of either description, for a term which may extend to two years, or with a fine, or with both. However, in the present case, the Investigating officer who is present in Court has categorically stated that he has investigated the aforesaid crime and found the case of the complainant liable for cancel class, if this is the stance of the investigating officer what to say about the intention of the complainant to lodge F.I.R against the applicants Section 365, 419 and 170 PPC on the same day when he succeeded in obtaining his bail before arrest, in F.I.R lodged by the applicant party against him, from the trial

Court and also succeeded to lodge a criminal case against the applicants for his alleged kidnapping and impersonation on the part of applicants. Prima-facie this could be the reason on the part of the complainant to lodge a counter case against the applicants.

16. In the instant case, prima-facie the prosecution itself has two versions vis-à-vis the complainant party according to which the applicants were not present at the time of the alleged incident, however, at their instance, the co-accused attempted to abduct the complainant and the second of the investigating agency according to which the applicants prima facie did not abate the offense behind the scene to attract Section 109 PPC. Additionally, the report submitted by the investigating officer before the SSP concerned for disposal of the case under 'C' class, makes the case of the applicants that of two versions based on malafide intention and ulterior motives on the part of the complainant. All these considerations prima facie render the case against the applicants one of further inquiry into their guilt. On the aforesaid proposition, I seek guidance from the decisions of the Supreme Court in the case of Ehsan Ullah vs. The State (2012 SCMR 1137) and Zaigham Ashraf versus State, etc. (PLJ 2016 SC 14). The Supreme Court has already cautioned the learned Courts below in Muhammad Tanveer v. State (PLD 2017 SC 733).

17. Primarily, considerations for pre-arrest bail are different from that of post-arrest bail. Pre-arrest bail is an extraordinary relief, whereas post-arrest bail is an ordinary relief. While seeking pre-arrest bail it is the duty of the accused to establish and prove malafide on the part of the Investigating Agency or the complainant. Bail before arrest is meant to protect innocent citizens who have been involved in heinous offenses with malafide and ulterior motives. The aforesaid principles are being faithfully adhered to date; therefore, the grant of pre-arrest bail essentially requires considerations of malafide, an ulterior motive, or abuse of the process of law. However, it is well settled by now that it is not possible in every case to prove the malafide but the same can be gathered from the facts and circumstances of the case. Even otherwise, if an accused person has a good case for post-arrest bail then merely at the wish of the complainant, he cannot be sent behind bars for a few days by dismissing his application for pre-arrest bail. 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. On the aforesaid proposition, I am guided by the decision of the Supreme Court in the case of Khalil Ahmed Soomro vs. The State (PLD 2017 S.C 730), Likewise, in the case of Shahzada Qaiser Arfat alias Qaiser v. The State and another (PLD 2021 SC 708), the Supreme Court was pleased to reiterate the aforesaid view.

18. About the plea of the learned counsel for the complainant that the rule of consistency does not apply in the present case as they have not approached the trial Court. In this scenario, 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. The grounds agitated by the learned counsel for the complainant cannot be assessed at the bail stage.

19. The epitome of above discussion is that the applicants have succeeded in making the case for the confirmation of the pre-arrest bail, hence, this bail application is allowed and the ad-interim pre-arrest bail already granted to the applicants vide order dated 22.7.2023 is confirmed subject to their furnishing of further bail bonds in the sum of Rs.100, 000/- (Rupees one hundred thousand only) each with one surety in the like amount each to the satisfaction of the Nazir of this Court

20. Needless to mention that any observations made in the above order are tentative and shall not influence the trial Court in any manner if the matter proceeds. However, it is made clear that findings recorded on the subject point i.e. direct entertaining the bail before arrest application before this Court shall not be treated as a precedent in all bail before arrest cases as the facts and circumstances of the present case are peculiar.

JUDGE

