

ORDER SHEET  
**IN THE HIGH COURT OF SINDH AT KARACHI**  
**Criminal Bail Application No. 1638 of 2023**

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

**30.08.2023**

Syed Muhammad Mehdi Shah advocate for the applicant alongwith applicant.  
Mr. Talib Ali Memon, Assitstant PG alongwith Ijaz Ahmed Qureshi, PS  
Gulshan-e-Iqbal, Karachi  
Mr. Abdul Hafeez advocate for the complainant

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Through the instant bail application, the applicant Muhammad Mehboob has approached this Court for a grant of pre-arrest bail in terms of Section 498 Cr. P.C. in FIR No. 290/2023 registered for the offense under Section 420, PPC of P.S Gulshan-e-Iqbal Karachi. His bail was declined by IV-Additional Sessions Judge (East) Karachi vide order dated 13.07.2023, on the premise that NOC in respect of the property given by the applicant to the complainant proved to be false as such there is nexus between the applicant and the commission of alleged offence and recalled the interim order dated 23.6.2023 passed earlier.

2. The accusation against the applicant is that on 02.03.2023, he cheated the complainant and induced him to deliver an amount of Rs.33,50,000/- and on request, the applicant issued three cheques and committed to transfer the subject plot in his favor, however, neither the plot was transferred nor his legitimate amount handed over to him, such report was lodged on 08.06.2023 with PS Gulshan-e-Iqbal, however, the applicant succeeded and obtained an interim order from the Court on 25.07.2023 without joining the investigation.

3. Learned counsel for the applicant has submitted that the case lodged against the applicant is of a civil nature but the complainant with malafide intention converted it to Criminal litigation to harass the applicant. It is further contended that there is a delay of about two months in lodging the FIR for which no plausible explanation has been furnished by the complainant. He has further contended that the applicant and complainant were working together as estate agents. He further submitted that the complainant asked him to submit his cheque for encashment from the account of the applicant; and that after some time there was a quarrel between the complainant and the applicant over the share of commission of the deal on which complainant was annoyed and issued threats of dire consequence. He added that Section 420 PPC is scheduled as theailable offense. He has lastly prayed for allowing the bail application.

4. Mr. Talib Ali Memon, Assistant PG assisted by learned counsel for the complainant has opposed the bail plea of the applicant and submitted that the accused is not able to demonstrate any malafides in lodging the FIR nor is his arrest being sought with malafides, which remains the primary test for the grant of pre-arrest bail. Learned counsel submitted that the grant of pre-arrest bail is an extraordinary relief that may be granted in extraordinary situations, to protect the innocent person against victimization through abuse of law for ulterior motives; and that pre-arrest bail is not to be granted as a substitute or an alternative to post-arrest bail. On the point of the bailable offense, learned counsel submitted that Section 420 is bailable, however, the same is also a cognizable offense and there is the fraud of 33 lacs and the complainant has been able to provide proof of payment which was made through cheque and the said cheques were encashed, however, the applicant provided fake NOC to the complainant in respect of the subject property. Per learned counsel, the complainant moved the application to the competent authority for insertion of Section 468, 469, 471 PPC and other enabling provisions, however, the Investigating Officer failed and neglected to insert the sections in the charge sheet. In support of his contentions, he relied upon the letter dated 24.5.2023 issued by SHO PS Gulshan-e-Iqbal for a legal opinion on the premise that aforesaid sections were attracted, but unfortunately the same could not thrashed out. Learned counsel referred to the agreement and submitted that the prima facie case is made out against the applicant as he has admitted in the interrogation report dated 19.8.2022. He prayed for the dismissal of the bail application as the applicant had failed to show malafide on the part of the complainant and police. At this stage, learned APG has pointed out that the SDPO Gulshan-e-Iqbal District East Karachi opined and requested the competent authority to grant him permission for registration of case under Section 420, 468, 469 and 471 PPC vide letter dated 25.5.2023. Be that as it may, it is for the prosecution to take decision and investigate the matter properly if the aforesaid offences are made out during the course of investigation, however, this Court restricts to dilate upon the subject issue and it is for the trial Court to look into that aspect as well.

5. I have heard the learned counsel for the parties and have perused the material available on record.

6. Broadly speaking a person accused of a bailable offense has a right of admission to bail and an arrested person can be refused bail if it appears to the Court concerned that "reasonable grounds" exist for believing that he has been guilty of an offense punishable with death or imprisonment for life or imprisonment for ten years. This Court is confronted with the situation as the applicant has applied for his pre-arrest bail in bailable offenses under Section 420 PPC. Allegations against him are that he cheated the complainant and deprived

him of his legitimate amount on the pretext that he would return the plot within 10 days.

7. Under the Code of Criminal Procedure 1898 (Act V of 1898) {Code} for bail the offenses are divided into two categories termed “Bailable offence” and “Non-bailable offence”. These are defined under Section 4(b) as under: -

*(b) "Bailable offence, "non-bailable offence": "Bailable offence" means an offence shown as bailable in the Second Schedule or which is made bailable by any other law for the time being in force; and "non-bailable offence" means any other offence"*

8. It is not disputed that in the case in hand offence leveled in FIR is bailable. Sections 496, 497, and 498 of the Code although are inter-connected but reading of the same constructs certain distinctions. These provisions for better understanding are reproduced as under: -

*“496. In what cases bail to be taken: When any person other than a person accused of a non bailable offence is arrested or detained without warrant by an officer incharge of a police station or appears or is brought, before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings, before such Court to give bail, such person shall be released on bail, Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as; hereinafter provided: Provided, further that nothing in this section shall be deemed to affect the provisions of Section 107, sub-section (4), or Section 117, sub-section (3).*

*497. When bail may be taken in case of non-bailable offence: (1) When any person accused of any non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, he may be released on bail but he shall not be so released if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life or imprisonment for ten years:*

*498. Power to direct admission to bail or reduction of bail: The amount of every bond executed under this Chapter shall be fixed with due regard to the circumstances of the, case, and shall, not be excessive and the High Court or Court of Session may in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail, or that the bail required by a police officer or Magistrate be reduced.”*

9. A plain reading of Section 496 of the Code makes it clear that powers under this provision can be exercised by a Court only for a person other than a person accused of a non-bailable offense. Whereas perusal of Section 497 also leaves no ambiguity that these powers are to be exercised in case of a non-bailable offense. However, powers under section 498 are beyond any such restrictions of bailable or non-bailable offense as it says that “the High Court or Court of Session may in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail. Words “in any case” used in this provision makes no difficulty to understand that a person is irrespective of the fact that he is the accused of a bailable or non-bailable offense can be admitted to pre-arrest bail.

10. When reading all Sections (496, 497, and 498) together there remains no uncertainty that while deciding an application, may it be for bail after arrest or pre-arrest, in the bailable offense the Court is left with no discretion to refuse the concession to an accused as in such eventuality the grant of bail is a right and not favor, whereas in the non-bailable offense the grant of bail is not a right but concession/grace.

11. Prima facie, the only offense 420 PPC has been invoked in the FIR as well as in the challan without corresponding offense. The offense under Section 420 PPC deals with cheating and dishonestly, inducing the person to deliver the property and provides that whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter, or destroy the whole or any part of valuable security, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

12. Though the offense under Section 420 PPC is bailable, the offense, however, is cognizable. As pointed out by the learned APG Sindh, the interim pre-arrest bail granted to the Accused has thwarted the investigation.

13. Perusal of the F.I.R. reflects that there is a delay of about three months in lodging the F.I.R., and the explanation so furnished for such delay does not appear to be satisfactory. Though the complainant remained silent for the aforesaid period and did not report the matter to the police, which prima facie shows something on his part. The delay in lodging F.I.R. falls within the ambit of deliberation and afterthought, therefore, it is always considered to be fatal for the prosecution case in bail matters. Moreover, this offense does not fall within the prohibitory clause of Section 497 Cr.P.C. Furthermore, the applicant has already joined the trial and attended the trial Court regularly.

14. The concept of trust envisages that one person (the settlor) while relying upon another person (the trustee) and reposing special confidence in him commits property to him. There is a fiduciary relationship between the two in law. Section 405 PPC defines criminal breach of trust as follows:

*405. Criminal breach of trust.— Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property, in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or willfully suffers any other person so to do, commits criminal breach of trust.*

15. The essential ingredients of criminal breach of trust under section 405 PPC are: (i) the accused must be entrusted with property or dominion over it; (ii) he must have dishonestly misappropriated the property or converted it to his use or disposes it of in violation of any trust or willfully suffers any other person to do so. The offense of criminal breach of trust resembles the offense of embezzlement under the law. The punishment for ordinary cases is provided in section 406 PPC but there are aggravated forms of the offense also which are dealt with under Sections 407 to 409 PPC.

16. The first condition mentions three important terms: entrustment, dominion, and property. "Entrustment" means handing over possession of something for some purpose without conferring the right of ownership<sup>2</sup> while "dominion" refers to "the right of control or possession over something, such as dominion over the truck". The term "property" has been used without any qualification so it must be understood in the wider sense. There is no reason to restrict its meaning to movable property. Further, the word "property" must be read in conjunction with "entrustment" and "dominion". A trust contemplated by section 405 PPC would arise only when the property belongs to someone other than the accused.

17. According to the second condition, the accused must be shown to have mens rea. Section 24 PPC defines "dishonestly" as the doing of an act to cause wrongful gain to one person or wrongful loss to another person. Thus, in the context of section 405 PPC, the property must be lost to the owner or he must be wrongfully kept out of it. Dishonest misappropriation may sometimes be inferred from the circumstances if there is no direct evidence. This second condition is satisfied by any one of four positive acts, namely, misappropriation, conversion, use, or disposal of property.

18. The offense of criminal breach of trust as defined in section 405 PPC is distinct from the offense of cheating under section 420 PPC. In principle, property obtained by cheating is not capable of being fraudulently converted under section 405. The notion of a trust is that there is a person trustee or trustee, in whom confidence is reposed by another who commits property to him; this again supposes that the confidence is freely given. A person, who obtains property by trick from another, bears no resemblance to a trustee and cannot be regarded as a trustee under Section 405. The essence of the offense under section 405 is the dishonest conversion of the property entrusted, but the act of cheating itself involves a conversion. Conversion signifies the depriving of the owner of the use and possession of his property. When the cheat afterward sells or consumes or otherwise uses the fruit of his cheating, he is not committing an act of conversion, for the conversion is already done, but he is furnishing evidence of the fraud he

practiced to get hold of the property. Therefore, cheating is a complete offense by itself. The offense under Section 420 PPC is complete as soon as delivery is obtained by cheating, and without further acts of misappropriation, there can be no breach of trust.

19. The law recognizes a distinction between the investment of money and the entrustment thereof. In the former, the sum paid or invested is to be utilized for a particular purpose while in the latter case, it is to be retained and preserved for return to the giver and is not meant to be utilized for any other purpose.

20. Primarily, breach of trust when associated with dishonesty triggers criminal liability. Thus, even temporary misappropriation may attract Section 405 PPC. On the other hand, negligence which results in loss of the entrusted property may make a person liable for damages under the civil law but would not expose him to criminal prosecution. Criminal prosecution is possible only if it is shown that the person was entrusted dominion over a particular asset.

21. The element of entrustment contemplated by section 405 PPC is conspicuously missing in the instant case. There is essentially a dispute between the owner of the vehicle and the driver regarding transporting the goods on the vehicle and its earnings. Hence, in view of what has been discussed above, in my tentative opinion, the trial Court has to see whether Section 420 PPC is attractive or otherwise.

22. In the result, this application is allowed. Ad-interim pre-arrest bail already granted to the applicant is hereby confirmed subject to his furnishing further security/cash amount in the sum of Rs.500,000/- (Rupees five hundred thousand) with one surety in the like amount to the satisfaction of the Nazir of this Court.

23. Needless to say the observations made in this order are tentative and shall not influence the trial Court while concluding the case. The learned trial Court is to expeditiously proceed with the trial under the law and examine the complainant within one month and if the charge is not framed, the same shall be framed positively on the next date of hearing and it is for the trial Court to see whether offenses under Section 468, 469 and 471 PPC are made out or otherwise. In case of abuse or misuse of the concession of bail by the applicant, including causing a delay in the conclusion of the trial, the prosecution may approach the competent Court for cancellation of bail under Section 497(5), Cr.P.C. and the trial Court itself can do so in accordance with law.

24. This criminal bail application stands disposed of.

JUDGE

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