

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.493 of 2022

| | |
|------|-------------------------------|
| Date | Order with signature of Judge |
|------|-------------------------------|

For hearing of bail application

08.09.2023

Mr. Altaf Hussain Khoso assisted by Mr. Muneeb Ahmed Advocate for the applicant along with applicant.

Mr. Ali Akbar Advocate for complainant a/w complainant

Mr. Zahoor Shah, APG alongwith IO/SI Rana Zulfiqar Ali, PS Surjani Town, Karachi

Applicant Khalid Hussain seeks indulgence of this Court against the order dated 25.11.2021 passed by Additional Sessions Judge-VI, (West) Karachi in Bail Application No. 5519/2021, whereby his pre-arrest bail application was dismissed. Now applicant seeks his admission, on pre-arrest bail in F.I.R No.1570/2021, registered under Sections 302/34 PPC at Police Station Surjani Town, Karachi.

2. The accusation against the applicant, as per contents of the F.I.R, is that on 26.09.2021, he in connivance with his accomplices fired upon Ghulam Sarwar father of the complainant, who succumbed to injuries and died in the Abbasi Shaheed Hospital during treatment, such incident was reported to the Police Station Surjani Town, Karachi, who registered the criminal case against the applicant and his accomplices on 27.4.2023.

3. At the outset learned APG submitted that the case against the applicant is based on the statements of PW Zahid and Naveed, who described the role of the applicant, who along with other accused, allegedly fired upon the deceased Ghulam Sarwar, who succumbed to injuries and died during treatment in the Hospital. He further submitted that the Mashirnama, medical report and statement of PWs confirm that the deceased received 03 injuries at the hands of all accused involved in the subject FIR.

4. Mr. Altaf Hussain Khoso learned counsel for the applicant has refuted the stance of the learned APG and argued that the applicant has nothing to do with the alleged offense and he has been falsely roped in this case on the sole statement of PW Zahid Hussain, whose statement contradicts with the statement of PW Naveed Ahmed. He further contended that the story appears to be false, fabricated, manipulated, and managed; that the FIR is delayed about one day to the alleged incident. He next argued that the

investigation officer submitted challan before the Magistrate, wherein the name of the applicant was kept in column No.2 of the charge sheet on the premise that his presence had been shown either at Kotri District Jamshoro or at Naseerabad, Taluka Mehar, however, due to matrimonial issues between the parties, the applicant has been booked in the present case with mala fide intention and ulterior motives to compel him to bow before the complainant party to fulfill their illegal demands. He has further contended that the investigation officer collected the CDR record of the applicant, which clearly shows that the applicant was not available at the place of the incident; in such circumstances, bail to the applicant could be granted even in case of a capital charge on the plea of alibi as facts and circumstances of the case also justify the aforesaid account as per investigation report. He emphasized on the ground that the applicant has joined the investigation and regularly appears before the trial Court as such no more required for further investigation. He added that for purposes of bail, the law is not to be stretched in favor of prosecution and the benefit of the doubt, if any arises, must go to the accused even on bail stage. He prayed for allowing the instant bail application.

5. Mr. Ali Akbar, learned counsel for the complainant submitted that sufficient incriminating material was collected by the police to connect the applicant with the alleged crime. He further argued that the grant of pre-arrest bail is an extraordinary remedy and now the applicant is seeking judicial protection and failed to demonstrate that his intended arrest is calculated to humiliate him. Per learned counsel, pre-arrest bail is not a substitute for post-arrest bail and it seriously hampers the course of the investigation; the maximum punishment for the offense under Section 302 PPC is life imprisonment or death, which comes in the prohibitory clause of Section 497(1) Cr. P.C. He prayed for the dismissal of the bail application.

6. Learned APG has supported the impugned order declining bail to the applicant and contended that the applicant is specifically named in the crime report with the allegation of causing a firearm injury on the deceased with a lethal weapon. He, however, frankly conceded that during the investigation, no recovery of crime empties, if any, and/or weapon has been affected either by the applicant and/or from the co-accused. He prayed for the dismissal of the bail application.

7. I have heard learned counsel for the parties and have perused the material available on record with their assistance.

8. While deciding the bail application this Court has to consider, Allegations made in the FIR, statements made in the FIR, and other

incriminating material against the accused as well as the plea raised by the accused.

9. Keeping in view the aforesaid factors, I am also cognizant of the fact that the grant of pre-arrest bail is an extraordinary remedy in criminal jurisdiction; it is the diversion of the usual course of law, arrest in cognizable cases; protection to the innocent being hounded on trump-up charges through abuse of process of law, therefore, the accused seeking judicial protection is required to reasonably demonstrate that intended arrest is calculated to humiliate him with taints of mala fide; it is not a substitute for post-arrest bail in every run of the mill in the criminal case as it seriously hampers the course of the investigation. However, in the present case, the tentative assessment of the record reflects the following aspects of the case:-

- i. *The alleged offense took place on 26.09.2021 at 1910 hours and was reported to police on 27.09.2021 at 0400 hours*
- ii. *Complainant Ikhtiar Ali is not an eyewitness of the incident, however, he was informed about the alleged incident by his cousin Zahid on the phone, and on his arrival at the place of the incident he got information that his father had received firearm injuries at the hands of his uncle Faraz, Pervez, Ashiq Ali and one Khalid Hussain with whom he had family dispute.*
- iii. *The Investigating Officer prepared an inquest report under Section 174 Cr. P.C.*
- iv. *The medico-legal officer found four injuries on the body of deceased Ghulam Sarwar.*
- v. *Statement of PW Zahid was recorded under Section 161 Cr. P.C. on 27.9.2021 in which he nominated accused Faraz, Pervez Ali, and Ashiq Ali, they instigated accused Faraz to kill the deceased who received firearm injury on his chest and accused Pervez also fired from his pistol which hit the deceased beneath his left arm near the chest and accused Khalid Hussain fired upon the deceased which hit on his left thigh.*
- vi. *The statement of PW Naveed was recorded on 26.10.2021, he narrated a different story of the incident so far as the alleged firing is concerned.*
- vii. *Police collected CDR (Call Data Record) of the cell phone of the applicant, which discloses his location at Naseerabad Dadu, however, police implicated him in the present case on the premise that his involvement cannot be ruled out as he disclosed that he had alleged affair with the wife of Intiaz.*
- viii. *Applicant has taken the plea of alibi that at the time of the alleged incident he was not available at the place of incident and the Investigating Officer recorded the statement of witnesses of the locality namely Munawar Ali Kambrani and Ashiq Hussain who allegedly stated that the applicant was with them and not available at the place of incident and requested for fair investigation of the case.*
- ix. *The co-accused Ashiq Hussain lodged FIR No.04/2019 against the present complainant under Sections 457/380 PPC at PS Thari Mohabbat District Dadu Taluka Mehar.*

- x. *No recovery of a crime weapon has been effected from the arrested accused or from the present applicant, no crime empty has been found from the place of incident as per the Investigating Officer, and also no bloodstained dust was found from the place of incident.*

10. Though the offense under Section 302 attracts the stringency of the prohibitory clause of Section 497 Cr.P.C. The concession of pre-arrest bail can be extended to an accused if the reasonable grounds to connect him with the commission of a crime are found lacking from the record. However, at the same time, it is the well-settled proposition of law that the right of pre-arrest bail is limited only to those cases which are based on mala fide, enmity, or where no offense is shown to have been committed from the bare reading of FIR.

11. In the present case, the allegation against the applicant is that the whole occurrence was committed by the applicant/accused, however, there is no denial of the fact that the occurrence took place in the evening, which was promptly reported. As far as the allegation against the applicant is concerned, there are certain aspects of the case, which require determination to conclude whether the applicant is entitled to extraordinary relief or not.

12. Prima-facie the entire case of the prosecution rests upon the statement of PW Zahid Hussain, that he caused the injury to the deceased on his upper knee of left leg and the fatal injury caused by co-accused. During the medical examination of the deceased, the Doctor gave details regarding the dimensions of the injury as 0.7cm x 0.5cm rounded shape of right thigh with no entry wound. However, as per SIO present in court, no recovery of the alleged weapon was effected by any of the accused including the applicant after joining the investigation, even though no crime empty was recovered for the place of incident. Besides, no bloodstained earth was recovered from the place of incident. In such a state of affairs, in my tentative view the whole aspect of the case needs to be looked into by the trial court whether the applicant participated in the alleged crime or his plea of Alibi was supported by any material collected during the investigation as he states that since he has surrendered himself initially to the trial court and then to this court and he has been attending the trial court without default on his part as per report of the trial court.

13. The Supreme Court in the case of *Muhammad Umar Vs. The State and another* (PLD 2004 SC 477), while granting bail to the accused, observed that a perusal of the medical certificate of the injured revealed that allegedly the accused fired upon the outer side of the right leg's middle part of the injured, therefore, prima facie, he had no intention to fire upon the vital part of the injured to launch the murderous assault. Even otherwise, the question of guilt or innocence of the applicant would be determined by the learned trial Court after recording the evidence.

14. Regarding the assessment of the plea of alibi at the bail stage, the case of Zaigham Ashraf v. The State (2016 SCMR 18).

15. The grounds agitated by the learned counsel for the complainant that the grant of pre-arrest bail means that the accused is exempted from joining the investigation and by not joining the investigation, the prosecution case may suffer for want of recovery of incriminating articles and other material, which may be necessary to connect the accused with the commission of alleged crime. This ground cannot be assessed at the bail stage without recording the evidence in the matter for the simple reason that as per the Police file the applicant has joined the investigation and recorded his statement as well, as he was properly interrogated by the investigation officer, besides his defense version was also recorded in which he pleaded his innocence in the alleged crime by recording the statement of independent witnesses; including his call data recording was obtained, however, this version of the applicant was discarded by the learned trial court while rejecting his bail plea, as such the applicant has made out a case of pre-arrest bail in the aforesaid crime at this stage. 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 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;*

16. Although the provision of Section 498 Cr. P.C. is neither ancillary nor subsidiary to Section 497 Cr. P.C. is an independent Section, however, a bare reading of the language of sub-Section (2) of Section 497 Cr. P.C. provides considerations for the grant of bail under Section 497(2) Cr. P.C. practically merged Sections 497/498 Cr.P.C. into one aspect qua concept of pre-arrest bail persuading it to act conjointly in all fairness. The practice of granting extraordinary relief has passed through the transitory period with divergent interpretations of 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 Sections 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 mala fide 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 the Sessions Judge which was recalled by the learned High Court while exercising suo-moto revisional jurisdiction, however, the order of learned Sessions Judge was restored by the Supreme Court while elaborating the principle in the above said terms.

17. Keeping in view the facts and circumstances narrated above and the judgments pronounced by the Supreme Court on the subject issue, 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 mala fides/ulterior motives, which has to be adjudged in the light of law laid down by the Supreme Court in the case law stated supra. As a consequence, Courts of law are under a 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, which is badly required due to the apparent downfall in the standard of investigation. Otherwise, the 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 grounds 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, 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. Keeping in view the guidelines of the Supreme Court in the case of Zaigham Ashraf and other cases discussed above, and on a tentative assessment of the circumstances discussed above, I am of the view that notwithstanding this is the stage of bail; the Applicant’s plea of alibi cannot be ignored. The statement of the witnesses Zahid Hussain and Naveed is a statement under Section 161 Cr. P.C., who has narrated different aspects of the case; therefore, does not come in the way of granting bail when the applicant has otherwise succeeded in bringing his case within the ambit of mala fide and ulterior motives on the part of the complainant within the meaning of Section 498 Cr. P.C. There is nothing on record so far to show that the applicant has a criminal history. All these aspects of the case, if evaluated conjointly, the case of the applicant squarely falls within the ambit of Section 498 of Cr. P.C.

19. For what has been discussed above, the applicant has made a case for a grant of bail. Consequently, the applicant is admitted to pre-arrest bail and the interim order passed earlier vide order dated 15.2.2022 is confirmed, subject to his furnishing additional surety in the sum of

Rs.200,000/- (rupees two hundred thousand) with P.R Bond in the like amount to the satisfaction of the Nazir of this Court.

20. The observation made herein above is tentative and shall not prejudice the case of either party on merits at the trial.

JUDGE

>>