IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No.529 of 2023

Sadaqaat Ali applicant through:	Mr. Fayazuddin Rajpar advocate
The State, through:	Mr. Muntazir Mehdi, APG
Abid Ali, complainant through:	Nemo
Date of hearing: **& order :**	**10.08.2023** ----------

O R D E R

Adnan-ul-Karim Memon, J. – Applicant Sadaqaat Ali seeks Pre-arrest bail in F.I.R No.36/2023, registered under Sections 392/397/34 PPC at PS Sukhan Karachi. His earlier bail plea has been declined by the trial Court vide order dated 10.2.2023.

2. Accusation against the applicant is that on 24-01- 2023 he along with his accomplices entered into the shop of the complainant and took a cash amount of RS. 4,50,000/- and snatched his mobile phone and also snatched the cash amount of RS. 90,000//. from three customers, for that he made a hue and cry, upon which peoples apprehend the co-accused along with a pistol while the other accused managed to escape, apprehended accused disclosed his name as Tufail and also named the present applicant as his accomplice and FIR of the incident was lodged with at PS Sukhan to the above effect.

3. It is inter alia contended that the applicant is innocent and has nothing to do with the alleged offense; the feature or Hulia of the applicant is not mentioned in the FIR; the complainant has not disclosed the source of information about the identity of the applicant; no incriminating article has been recovered from the applicant; that the applicant has been named in the FIR on the stamen of co-accused which has no value under the law; that the police officials are trying to arrest the applicant/accused and repeatedly raiding on the house of applicant/accused as well as his close relatives houses and there is serious apprehension of the applicant to be arrested and if he is arrested it would be subject to humiliation and disgrace. He prayed for confirmation of his bail.

4. Conversely, learned A.P.G for the State opposed the bail application and submitted that although the question of vicarious liability of an accused can also

be looked into at the bail stage, however, it is not an absolute rule that it must always be left to be determined in the trial, he added that in the facts and circumstances of the case, the applicant is not entitled to the relief of bail before arrest even if the question of his vicarious liability for the offense of committing robbery along with his accomplices is left to be determined in trial. He further argued that the argument of the learned counsel for the applicant is based on a mistaken understanding of the legal position regarding the grant of bail in offenses that do not fall within the prohibitory clause of section 497(1), Cr.P.C. He next submitted that it is true that in such offenses, bail is to be granted as a rule, but not as of right. However, bail can be refused in such offenses, when the case of the applicant/accused falls within any of the three well-established exceptions: (i) likelihood to abscond to escape trial; (ii) likelihood to tamper with the prosecution evidence or influence the prosecution witnesses to obstruct the course of justice; and (iii) likelihood to repeat the offense.

5. Heard the learned counsel for the applicant/accused as well as learned APG for the State and perused the material available on record.

6. Perusal of the record reveals that the applicant was not arrested on the spot and no recovery was effected from him and he has been booked in the aforesaid crime at the statement of co-accused. The Supreme Court in the case *The State through Director Anti-Narcotic Force, Karachi v. Syed Abdul Qayum* [2001 SCMR 14], while dilating upon the evidentiary value of the statement of co-accused made before the police in light of mandates of Article 38 of the Qanun-e-Shahadat Order, 1984, inter alia, held that statements of co-accused recorded by police during investigation are inadmissible in the evidence and cannot be relied upon. A similar view has been reiterated by the apex Court in the case of *Raja Muhammad Younas v. The State* [2013 SCMR 669], wherein it has been held as under:

> "2. …….After hearing the counsel for the parties and going through the record, we have noted that the only material implicating the petitioner is the statement of co-accused Amjad Mahmood, Constable. Under Article 38 of Qanun-e-Shahadat Order, 1984, admission of an accused before police cannot be used as evidence against the co-accused……"

7. It would not be out of place to mention here that evidence of an accomplice is ordinarily regarded suspicious, therefore, the extent and level of corroboration has to be assessed keeping in view the peculiar facts and surrounding circumstances of the case. It is a well-settled principle of the administration of justice in criminal law that every accused is innocent until his guilt is proved and this benefit of doubt can be extended to the accused even at the bail stage, if the facts of the case so warrant. The basic philosophy of criminal jurisprudence is that the prosecution has to prove its case beyond reasonable doubt and this principle applies at all

stages including pre-trial and even at the time of deciding whether the accused is entitled to bail or not which is not a static law but growing all the time, molding itself according to the exigencies of the time.

8. During the investigation, the prosecution could not collect any material to show that applicant has any nexus with the alleged offense. In FIR Sections 392, and 397 PPC has been applied. Section 392 PPC pertains to an attempt to commit robbery which is punishable with R.I for a term that shall be extended upto 07 years whereas Section 397 PPC provides the punishment for an attempt to commit robbery or dacoity when armed with deadly weapons for which the accused shall be punished not less than 07 years. Keeping in view the punishments provided in the above Sections, while deciding the bail application lesser sentence out of an alternate sentence may be taken into consideration for determining whether the case falls under the prohibitory clause of Section 497 (1) Cr. P.C,

9. The record shows that the challan has been submitted in Court and the applicant/accused is no more required for any investigation nor the prosecution has claimed any exceptional circumstance, which could justify sending him behind bars pending determination of his guilt. It is well settled that while examining the question of bail, Court has to consider the minimum aspect of the sentence provided for the alleged offense.

10. In the case of *Aamir Bashir and another v. The State and others* (2017 SCMR 2060), the Supreme Court held that besides making out a prima-facie case for the grant of pre-arrest bail, the accused petitioner has to show some mala fide on the part of the complainant and the investigating agency, motivated by caprice and ulterior motive to humiliate and disgrace the accused person in case of arrest, however, at bail stage, except in very rare cases, it is difficult for an accused person to furnish tangible proof about the element of mala fide or foul play on the part of the complainant or the arresting agencies, therefore the Court has to look at the material available on record and draw inferences therefrom about the mala fide or ulterior motive on account of which the intended arrest of the accused is motivated. The Supreme Court also reiterated the guiding principles laid down in the case of *Khalid Javed Gillan v. The State* (**PLD 1978 SC 256**), that while deciding bail petitions only a tentative assessment of the material and facts available on record is to be made and deeper appreciation of the same shall be avoided and that any fact which may not be sufficient to cast doubt of absolute nature on the prosecution case, but equally sufficient to be considered for grant of bail, cannot be lightly ignored.

11. From the tentative assessment of the evidence in the hand of the prosecution, it appears that there is hearsay evidence against the present applicant/accused, while it is yet to be determined if he is e involved or not, which is possible only after the recording of the evidence by the trial Court.

12. As far as the contention of learned APG that the applicant is involved in other criminal cases is concerned, it would suffice that mere involvement in other cases would not disentitle her/him from the relief of bail if she/he otherwise succeeds in bringing his/her case within the meaning of further inquiry. Needful to add that liberty of a person is a precious right that has been guaranteed by the Constitution of the Islamic Republic of Pakistan, 1973. Hence in cases, where there is a slight tilt towards the grant of bail, the same needs to be preferred over letting one to send him in jail for an indefinite period in the name of trial when the conclusion thereof can competently impose due punishment for such released person. Further, the learned APG has not brought on record any material that the applicant / accused has been convicted in any other case, hence, mere involvement in criminal cases cannot be ground to withhold the concession of bail in the given circumstance. Reliance is placed upon the cases of *Moundar and others v. The State* (PLD 1990 SC 934), *Babar Hussain v. State* (2020 SCMR 871), and *Muhammad Rafique v. State* (1997 SCMR 412).

13. In view of the peculiar facts and circumstances of the case, I am of the tentative opinion that prima facie, the applicant/accused has succeeded to bring his case within the purview of malafide intention and ulterior motives on the part of police and as such is entitled to confirmation of bail. Therefore, the interim pre-arrest bail earlier granted to the applicant/accused vide order dated 10.3.2023 is hereby confirmed.

14. Before parting with this order, it is observed that the observations made in this order are tentative and the same would have no bearing on the outcome of the trial of the case. It is made clear that in case, if applicant/accused during proceedings before the trial Court, misuses the concession of bail, then the trial Court would be competent to cancel the bail of the applicant/accused without making any reference to this Court.

15. This criminal bail application stands disposed of.

JUDGE