ORDER SHEET
IN THE HIGH COURT OF SINDH CIRCUIT COURT MIRPURKHAS

B.A No.S-98 of 2024

(Waseem @ Joni Vs. The State)

DATE ORDER WITH SIGNATURE OF JUDGE

Date of hearing & Order 15.08.2024

Mr. Rashid Ali Shah, Advocate for the applicant
Mr. Afzal Karim Virk, Advocate for the complainant
Mr. Dhani Bux Mari, Assistant P.G Sindh

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O R D E R

Adnan-ul-Karim Memon, J. The applicant Waseem alias Joni through the instant bail application, sought his release on post-arrest bail in F.I.R No.43 of 2024 for the offense under section 392, 34 PPC, at Police Station Tando Jan Muhammad. During the investigation, the investigation officer added section 397 PPC to the charge sheet.

2. His earlier bail plea was declined by the trial court vide order dated 23.05.2024 on the premise that the applicant is specifically nominated in FIR for robbing a motorcycle and cash amount from the complainant and the same motorcycle was also recovered, and that, he has a previous criminal record.

3. The details and particulars of the F.I.R. are already available in the bail application and F.I.R., same could be gathered from the copy of F.I.R. attached with such application, hence needs not to reproduce the same hereunder.

4. Learned counsel for the applicant mainly contended that, the applicant has been implicated in this case due to previous enmity between the parties; that there is the inordinate and scandalous delay of about 2 days in registration of the F.I.R, which is fatal to the prosecution as to its veracity and genuineness; that there is no recovery of weapon from the custody of the applicant and alleged recovery of Motercycle was effected on 1.5.2024 by showing the arrest of the applicant by police without referring the case to Magistrate for identification of the recovered material, as such application of Section 397 P.P.C would be determined at the time of trial; that recovery of incriminating article from possession of applicant is foisted upon the applicant. Learned counsel submitted that in terms of section 397, P.P.C. the robbery or dacoity committed by the offender by using any deadly weapon or causing grievous hurt to any person would come within the definition of section ibid. Since the applicant/accused has not used the weapon to "fire" it cannot be said that show of weapon comes under such definition prescribed in

section 397, P.P.C Learned counsel further contended that the applicant has been in jail since his arrest and the case has been challaned, as such custody of the applicant is not required by police.

5. Learned Assistant P.G assisted by the learned counsel for the complainant has opposed the bail plea of the applicant with the narration that the applicant/accused is nominated in FIR with the specific role of robbing cash and a motorcycle from the complainant on 24.4.2024 and said motorcycle has also been recovered from the applicant on 1.5.2024. Besides, the applicant/accused is stated habitual offender and also involved in crime No.69/2023 of PS Tando Jan Muhammad. The offense under section 392 PPC is heinous, an offense against society which cannot be taken lightly, therefore, there are reasonable grounds to believe that the applicant/accused along with co-accused have committed robbery from the complainant as described in the FIR. Besides, at the bail stage, only a tentative assessment is to be made and nothing has been brought on record to show any ill-will or *malafide* on the part of the complainant. All the P.Ws have supported the version of the complainant as such sufficient material is available on the record against the applicant/accused to connect him with the alleged offenses.

6. I have heard learned counsel for the parties and have gone through the material available on record.

7. It appears that the alleged incident had taken place on 24.4.2024 and F.I.R was registered on 26.4.2024, with a delay of about 2 days. Such inordinate and scandalous delay in reporting the matter to the police in a robbery case is fatal to the prosecution and this sole fact makes the entire case of prosecution doubtful. It is well-settled law that, the delay in reporting the matter to the police is usually caused due to factors i.e. deliberation, negotiation, and discussion, therefore, it falls within the ambit of deliberation and afterthought, and as such it is always considered to be fatal for the prosecution making the case of accused one of further inquiry. Complainant Muhammad Tarique in the F.I.R. has clearly stated that 4 accused persons committed the alleged offense. Police lodged F.I.R. under sections 392/34 PPC but the challan has been submitted under sections 397 PPC. Dacoity has been defined in section 391 PPC as under:-

> "**391. Dacoity.** When five or more persons conjointly commit or attempt to commit a robbery, or where whole number of persons conjointly committing or attempting to commit a robbery, and person present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding is said to commit "dacoity"

8. Yet the prosecution has to establish its case regarding the application of section 397 PPC at trial. Belongings to the complainant have been allegedly recovered from the possession of the present accused after a considerable period,

during investigation requires deeper appreciation to the extent whether the motorcycle allegedly recovered on 1.5.2024 after a considerable period without the identity of the accused by police as police party did not produce the applicant before Magistrate for identification parade after his arrest whether he was the person who robbed the complainant or otherwise.

9. Prima facie the weapon has not been recovered from the possession of the applicant and it is yet to be determined whether the word "use of a weapon" as defined in section 397 PPC should be interpreted to the extent that it was used to commit the crime and without the weapon, it is difficult to commit such offense as portrayed by the applicant besides no recovery has been shown in the present case, so for the weapon is concerned this factum requires detailed deliberation which is not permissible at the bail stage. Additionally, the law would require that after the arrest of the accused, who is not nominated in the FIR but is alleged to have been seen by the complainant or other witnesses, his identification parade shall be immediately held so that the chances of his exposure to the complainant and witnesses before identification parade are excluded and sanctity of the identification parade is kept reliable. however this factum is missing in the present case based on the analogy that the name of the applicant is mentioned in the F.I.R, prima-facie this not the essence of law that when the accused commits the offense and his identity has already been shown in the F.I.R just after his arrest his identification parade shall not be conducted, this is a misconceived approach for the simple reason that Article 22 of the Qanun-e-Shahadat Order, 1984 provides mechanics to enable the witnesses to establish the identity of unacquainted assailants, a dilemma increasingly confronting prosecution in the detection of culprits in expanded urban neighborhoods. For convenience of reference, it is reproduced below:-

> “Facts necessary to explain or introduce relevant facts.—Facts necessary to explain or introduce a fact in issue or relevant fact, or which support or rebut an inference suggested by a fact in issue or relevant fact, or which establish the identity of anything or person whose identity is relevant, or fix the time or place at which any fact in issue or relevant fact happened, or which show the relation of parties by whom any such fact was transacted, are relevant in so far as they are necessary for that purpose.”

10. Juridical wisdom, legislated with ingenious brevity par excellence, is nonetheless widely spaced to meet diverse situations as calamities seldom come about under ideal or identical circumstances; the same applies to the responses by those who encounter such situations as crisis impacts differently upon individuals’ faculties and nerves to sustain and endure themselves during the ordeal, therefore, it would be unrealistically inexpedient to apply dogmatic standards with empirical exactitude to settle the question of assailant’s identity. There may be situations where witnesses are expected to be more expressive and descriptive but there may

well be contra situations as well. Similarly, Rule 26.32 of the Police Rules, 1934, inter alia, provides as under:-

> (a) "The proceedings shall be conducted in the presence of a magistrate or gazetted police officer, or, if the case is of great urgency and no such officer is available, in the presence of two or more respectable witnesses not interested in the case, who should be asked to satisfy themselves that the identification has been conducted under conditions precluding collusion."

11. The survey of the above provision of law renders it abundantly clear that the process of test identification parade has to be essentially carried out, having regard to the exigencies of each case, in a fair and non-collusive manner, free from the taints of prejudice; a contra claim must rest upon evidential basis; the exercise is not an immutable ritual, inconsequential non-performance whereof, may cause failure of prosecution case, otherwise structured upon clean and probable evidence, these all factums requires further inquiry.

12. In the above-stated circumstances, bail cannot be refused to the applicant/accused on the grounds of the seriousness of the offense. After the arrest of the present applicant/accused no identification parade was held through eye-witnesses. Prima facie, a case against the applicant/accused requires further inquiry as contemplated under section 497(2) Cr. PC. Therefore concession of post arrest bail is extended to the applicant/accused in the aforesaid crime subject to his furnishing solvent surety in the sum of Rs.200,000/- (Two Hundred Thousand Rupees), and P.R bond in the like amount to the satisfaction of the trial Court.

13. Needless, to mention here that the observations made hereinabove are tentative and would not influence the trial Court while deciding the case of the applicant/accused on merits.

JUDGE

"Ali Sher"