

Order Sheet

IN THE HIGH COURT OF SINDH, KARACHI

Cr. Bail Application No. 266 of 2021.

Zainul Abedin v. The state

07.05.2021

M/s. Shahid Akhtar & M. Saleem Khan, Advocates for the applicant/accused.

Mr. Riasat Ali, Advocate for the complainant.

Ms. Rubina Qadir, D.P.G.

ARSHAD HUSSAIN KHAN, J.- Through this bail application, Applicant/Accused Zainul Abedin son of Muhammad Akram is seeking post-arrest bail in Crime No.645 of 2020 registered with Police Station Sir Syed, Karachi, for offences under Sections 376, 337-A(i) PPC.

2. The prosecution case as per FIR is that on 17.11.2020 at about 2310 hours complainant Muhammad Khalid lodged FIR No.645/2020 stating therein that on 04.11.2020 his wife at about 1400 hours went to *Budh Bazar, UP Mor*, with one of her daughters for some shopping while his both sons were went to *Madarsa* for studies and whereas his daughter Saira (the victim) was all alone at home, during which his neighbor Zainul Abedin (the applicant/accused) came to the house of the complaint and said to his daughter that his mother has called her, upon which Saira went with him at the house of the applicant/accused to see his mother. However, when they reached at the applicant's house, the applicant took Saira to a bed room and closed the door from inside and thereafter he committed rape. It has been stated that due to fear and further the applicant/accused threatened her not to disclose the incident to anyone, the victim did not tell to anybody. Nevertheless, on 16.11.2020 the victim told the incident to her mother (wife of the complaint) and on the next day the complaint's wife met with mother of the accused and informed about the incident she got furious and along with some other women beaten the complaint's wife resulting which she sustained injury on her head. Thereafter, the FIR was lodged.

3. After registration of FIR, the investigation followed and in due course, the present applicant was arrested and sent up to stand trial where he moved bail after arrest application, which was declined, vide order dated 21.01.2021, giving rise to instant bail application.

4. Learned counsel for the applicant has mainly contended that the applicant is innocent and has falsely been implicated in the case with malafide intentions and ulterior motives, hence applicant/accused is entitled for concession of bail. It is further contended that actual fact is that so-called victim and his family members since last couple of months compelled to applicant/accused to marry with her, which was refused by the applicant/accused and his family members on the refusal the so-called victim and her family cooked such story, just to teach lesson, hence the matter requires further inquiry. Further contended that DNA did not match with the applicant/accused hence on this sole ground alone applicant/accused is entitled for concession of bail. Further argued that applicant/accused is aged about 15 years he is less than 18 years thus accused was child at the time of alleged incident and his case is covered by Juvenile Section, hence he is entitled for concession of bail. Also contended that the FIR was lodged with unexplained delay of about 14 days. Learned counsel for the applicant urged that the prosecution case against the present applicant calls for further enquiry and the accused /applicant is entitled to the concession of bail.

5. Conversely, learned DPG, assisted by the learned counsel for the Complaint, has contended that the applicant/accused has been named in the FIR with the specific role of committing *Zina* with the complainant's daughter, hence the applicant after having been involved in such an inhuman act of ruining life of an unmarried girl of 14 years old by committing *Zina-bil-Jbr* with her, does not deserve any leniency and while supporting impugned order she has vehemently opposed instant bail application. It is also argued that the incident took place on 04.11.2020 and the victim was medically examined on 20.11.2020 therefore, report of DNA is immaterial. It is further contended that delay in lodging of FIR in such type of cases is also immaterial as the honour and dignity of the family involves. In support of her

submissions, learned DPG has relied upon the cases reported as 2011 YLR 1744 and 2013 P.Cr.L.J. 396.

6. I have heard learned counsel for the applicant/accused, learned Assistant Prosecutor General, Sindh, for the State as well as complainant's counsel and have also gone through the material available on the record.

7. Perusal of the record reveals that serious allegations of committing *Zina-bil-Jabr* with complainant's daughter Mst. Saira, an unmarried girl of 14 years old, has been levelled against the present applicant/accused in the FIR. Insofar as the false implication and delay of 14 days in lodgment of FIR is concerned, there is nothing on the record to show that there existed any enmity or even any sort of controversy between the complainant or his family and the applicant/accused. Even otherwise, keeping in view the circumstances, the statement of victim that she was under fear as such she could not disclose the factum of rape to anybody, thus, delay in such like cases is not material but natural. Besides, primarily the medico legal report of the victim shows that she is not *virgo intacta* also substantiate the version of the complainant taken in the FIR. Furthermore, the contention of the applicant that he has been charged falsely with ulterior motive is also misconceived, because it is not possible for an unmarried girl to falsely implicate the accused in such an offence, which could remain a stigma not only for her life, but also for the whole family. Moreover, the offence of *Zina* involving moral turpitude destroys the entire psychology of a girl /victim by putting her and her family to public shame. It is a stigma with which her whole family has to face with and is the most hatred crime. The offence of *Zina* is offence not against the individual only but it is also against the good conscience of the society. Scanning of the record reveals that the victim in her statement under Section 164 Cr.P.C. has fully implicated the applicant. The false implication of applicant/accused by the victim without any cogent reason and sufficient cause has not been asserted. [established]

8. Insofar as the non-matching of DNA with the applicant is concerned, the report reflects that on 24.11.2020 serological analysis

was performed on vaginal swab of victim for the presence of human biological fluid in respect of incident which took place on 04.11.2020 and as such how seminal material could be identified on the vaginal swab of the victim after such a delay. Thus, non-matching of DNA is immaterial, at this stage, and as such does not entitle the applicant for the concession of bail. The report may be relevant but not the sole criteria for the grant of bail. In this regard, reliance can be placed on the cases of *Ihsanullah alias Sanu v. The State* [2015 YLR 2592], *Majeed alias Machan v. The State* [2004 YLR 1294], *Nadeem Masood v. The State* [2015 P.Cr.L.J 1633], *Zafar Ali v. The State* [2011 P.Cr.L.J 1964], *Babar Ali v. The State and another* [2015 MLD 593] and *Mansoor alias Gudo v. The State* [2014 MLD 377].

9. It is well settled that for deciding a bail application the court has to make the tentative assessment and deeper appreciation of evidence is not required. In this respect, reliance can be placed on the cases of *Saleh Muhammad v. The State* [PLD 1986 SC 211] and *The State v. Zubair and 4 others* [PLD 1986 SC 163].

10. The case law relied upon by the learned Assistant Prosecutor General, Sindh supports the stance of the complainant in the case.

11. In view of the above position on the facts and law coupled with the dictum laid down in the cases referred to above, at this stage, the present applicant, being involved in such a heinous offence which falls within the ambit of prohibitory clause of Section 497, Cr.P.C. has failed to make out a case for concession of bail and as such instant bail application is dismissed. However, the applicant may repeat his bail application before the learned trial court after material evidence is brought on the record, if creating a fresh ground for bail.

12. Needless to state that the observations made herein are tentative in nature and only for the purpose of instant bail application and shall not influence the trial court while deciding the case.

JUDGE