

ORDER SHEET
IN THE HIGH COURT OF SINDH KARACHI

Cr. Bail Application No. 1959 of 2021

DATE

ORDER WITH SIGNATURE OF JUDGES

For hg of bail application.

Mr. Liaquat Ali, Advocate for applicant.

Mr. Abrar Ali Khichi , Addl.P.G. a/w SIP Manzoor Ahmed, I.O. of case.

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Omar Sial, J.: Fazal-ur-Rehman Mughal, has sought post arrest bail in crime number 292 of 2021 registered under sections 377 (after investigation converted to section 377-B) and 511 P.P.C. at the Madina Colony police station. Earlier, his application seeking bail was dismissed by the learned 2nd Additional Sessions Judge Karachi (West) on 29-9-2021.

2. Facts of the case are that the aforementioned F.I.R. was registered on the complaint of Mohammad Shafiq who on 7-7-2021 reported an incident that had occurred on 5-7-2021. He narrated that he is a labourer and that when he returned home from work on 5-7-2021 he was told by his wife that their neighbor, Fazal-ur-Rehman (the applicant) had taken their 8 year old son Atif with him. Later, the complainant's daughter aged 4 years told her mother that the applicant had taken of his trousers and had also taken Atif's trousers off. Atif's mother went out to investigate what had happened and upon seeing her the applicant picked up his trousers and ran away. The applicant could not be found for 2 days but was taken into custody on 7-7-2021. The DNA report obtained by the investigating officer concluded that Atif had not been sodomized. The charge against the applicant was therefore converted to one under section 377-B.

3. Learned counsel for the applicant has argued that no incident such as the one reported had occurred and that the F.I.R. is a false one that was registered only because a substantial bribe was paid by the complainant to the police. He further argued that there was a delay of 2 days in the lodging of the F.I.R; that there were no independent witness; that it was inconceivable that such an incident could occur on the staircase of the apartments; that the case had been filed with an ulterior motive and due to a family dispute.

4. The learned Additional Prosecutor General has argued against the grant of bail and has submitted that the applicant is a young boy and police had no reason to falsely accuse the applicant. He also was of the view that the family of the complainant is very poor and could not have paid a substantial bribe to the police; that it was inconceivable that a parent would falsely accuse someone of committing such an act with their little son.

5. I have heard the learned counsel for the applicant as well as the learned Additional Prosecutor General. The parents of the victim were also present though they did not engage a counsel. My observations and findings are as follows.

6. The record reveals that Atif was taken to the National Institute of Child Health on 8-7-2021 and was admitted there till 10-7-2021. At that point he had told the doctor that he had been abused, orally and anally, multiple times by his neighbor. The doctor however did not find any signs that Atif had been sodomized. As mentioned above it was due to this report that the charge under section 377 P.P.C. was converted to one under section 377-A punishable under section 377-B P.P.C. To facilitate reference the two sections are reproduced below:

377-A. Sexual abuse. Whoever employs, uses, forces, persuades, induces, entices, or coerces any person to engage in, or assist any other person to engage in fondling, stroking, caressing, exhibitionism, voyeurism or any obscene or sexually explicit conduct or simulation of such conduct either independently or in conjunction with other acts, with or without consent where age of person is less than eighteen years, is said to commit the offence of sexual abuse.

377-B. Punishment. Whoever commits the offence of sexual abuse shall be punished with imprisonment of either description for a term which may extend to seven years and liable to fine which shall not be less than five hundred thousand rupees or with both.

In light of the above sections, the acts of which the 8 year old victim complained of prima facie fall within the definition of *sexual abuse* as contained in section 377-A P.P.C. Apart from telling the doctor that he had been abused multiple times by his neighbor (which is ostensibly the applicant), the victim has also recorded his section 161 Cr.P.C. statement to this effect. I notice however that the section 161 Cr.P.C. statement of the victim has been recorded nearly 2 weeks after the registration of the F.I.R. At the moment there is no explanation

on the record as to why the delay took place. Similarly, no cogent reason for the 2 day delay in the lodging the F.I.R. is also on record. Be that as it may, keeping the age of the victim in mind and the nature of the offence alleged, at this preliminary stage, I am not inclined to give the applicant the benefit of the delay in the registration of the F.I.R. as well as for the delay in recording his section 161 Cr.P.C. statement. Children who have experienced abuse often keep it a secret. It may take the victim a lot of time before he or she speaks about it. Of course, it is the learned trial court which will decide the impact of delay after evidence is led at trial.

7. Looking at the condition and background of the victim's family, I am finding it difficult to be convinced at this stage that they paid a substantial bribe to the police to falsely accuse the applicant. I see no reason for them to do so. The learned counsel has argued that somebody else had given the bribe money to the victims parents is an assertion that must be proved at trial. At this stage there is no evidence to substantiate the same. Prima facie there appears no reason for the complainant to falsely implicate the applicant.

8. I, most respectfully, do not agree with the learned counsel's argument that it is not conceivable that sexual abuse of a child could occur on the staircase of the building. It is well researched now that sexual abuse is an offence that can occur any place and usually by a person who is well known to the child victim. While it is not unusual that there are no eye witnesses to the commission of an offence of sexual abuse, yet in this particular case, it appears that the mother of the victim may have witnessed the occurrence.

9. An offence under section 377-A is punishable with a potential sentence of 7 years and thus falls within the non-prohibitory clause of section 497. I am cognizant of the principle laid down by the Honorable Supreme Court in the case of **Tariq Bashir and 5 others vs The State (PLD 1995 SC 34)** wherein it has been held that bail should usually be granted in cases where the punishment of the offence alleged falls within the non-prohibitory clause of section 497 Cr.P.C. The case however makes such a principle subject to extraordinary and exceptional circumstances. I am of the view that the circumstances and nature of the present case make it an exceptional case.

10. The bail to the applicant was denied vide the short order dated 3-11-2021 and above are the reasons for the same. As there are some aspects of the case that require clarification, and ostensibly the alleged perpetrator is also a young person, it is an appropriate case where directions may be given to for an early disposal of the case. While acknowledging that learned trial courts are dealing with a very heavy case volume, the learned trial court is directed to use its best efforts to dispose of this case within 3 months.

JUDGE