

IN THE HIGH COURT OF SINDH KARACHI

CR. BAIL APPLICATION NO. 1981 OF 2023

(The State Versus Abid)

CR. BAIL APPLICATION NO. 2073 OF 2023

(The State Versus . Muhammad Asghar)

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Mr. Muhammad Akbar Awan Advocate for the Applicant in
Cr. Bail Application INo. 1981 of 2023

M/s. Muhammad Riaz Abbasi and Malik Muhammad Ejaz,
Advocates along with Applicant in Cr. B.A. No. 2073/2023

Mr. Muhammad Iqbal Awan, Additional Prosecutor General
for the State along with LPI Shama Afaq of P.S. Women

Date of hearing : 18th October 2023

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ORDER

Omar Sial, J.: A young woman, "S", reported to the police on 15.04.2023 that on 29.03.2023, she was lured by a female relative of her ex-husband to an apartment in the Qayumabad area in Karachi, where she was raped by the applicants who were intoxicated at that time. The accused ensured compliance with the despicable act by keeping a weapon on the survivor's one-year-old daughter. To keep her silent in the future, the accused recorded videos and took photos of the survivor. S managed to escape the following day. F.I.R. No. 224 of 2023 was registered under sections 376, 506(ii) and 34 P.P.C. at the Defence police station.

2. Accused Abid applied for post-arrest bail three times before the learned trial court, but each time was unsuccessful. The last of such dismissals was by the learned 3rd Additional Sessions Judge,

Karachi South, on 25.08.2023. Accused Asghar applied for pre-arrest bail, which was dismissed on 15.05.2023 by the learned 3rd Additional Sessions Judge, Karachi South. The two accused have now approached this court seeking bail.

3. Learned counsel for the applicants argued that (i) there was a delay of 17 days in the lodging of the F.I.R., (ii) the DNA report does not disclose any involvement of the applicants, (iii) there are no eyewitnesses, (iv) the statement under section 164 Cr.P.C. recorded by S was not in line with the stipulated procedure as sections 164-A and 164-B Cr.P.C. were not complied with, (v) the F.I.R. is a counter-blast to F.I.R. No. 70 of 2023 which was registered by accused Asghar under sections 454, 354, 292 and 506 P.P.C. and (v) that S had no objection if bail was granted to the applicants. On the contrary, the learned Additional Prosecutor General, assisted by the learned counsel for the complainant, fully supported the bail dismissal order.

I have heard the learned counsels for the applicant, the complainant, and the learned Additional Prosecutor General. I will first address the specific arguments raised by the learned counsel for the applicants.

Delay in the F.I.R.

4. Delay in such cases is hardy material at the bail stage. Victim shaming and blaming, insensitive and crude police procedures, and a perhaps misconceived idea of protecting family honour coupled with fear and trauma may all contribute towards a survivor of gang rape being hesitant to report the trauma she has been exposed to. Police declining to register an F.I.R. compelling the survivor to approach the learned Ex-Officio Justice of Peace through an application filed under section 22-A of the Code seems to be the primary cause for the delay. In this case, a delay in lodging the F.I.R. will not turn the balance for the grant of bail in favour of the applicants. It will be the learned trial court, which will finally determine whether the delay in registration was with some ulterior motive and, if it was, what would the impact of such delay be on the prosecution case.

DNA and medical reports

5. S was allegedly raped on 29.03.2023; however, she was medically examined on 26.04.2023 by the medico-legal officer at the Jinnah Hospital. As was expected, the medico-legal officer concluded that she could opine nothing.

6. The DNA report which exists in the police file and which has also been filed by the counsel for the applicants (SFDL Case No. 2023-759 dated 17.05.2023 issued by the Sindh Forensic DNA and Serology Laboratory) concludes that no seminal stain was found on S's clothes. No other report has been shown to me by either the prosecution or the defence. In such a situation, I am baffled as to where the opinion contained in the last few lines of the Supplementary Challan dated 01.08.2023 was obtained. Neither the prosecution nor the investigating officer present were able to explain this. The learned counsel for the applicant also expressed his inability to produce such a report. This is an area of further inquiry, and I do not doubt that the learned trial court will be able to ascertain the truth of the matter when evidence is led at trial. At the moment, however, the clean chit given to accused Abid in the Supplementary Challan, based on a report that perhaps does not exist or, at the very least, has not been shown to this Court, casts doubts on the investigation.

F.I.R. No. 70 of 2023

7. Upon a tentative assessment, it cannot be said with certainty whether the current case is a counter-blast to F.I.R. No. 70 of 2023 or whether the registration of that F.I.R. was the reason for the alleged hostility of the applicants. It is an issue that will have to be decided at trial. A cursory review of F.I.R. No. 70 of 2023 reveals that the complaint is that the modesty of a woman was outraged. That case will be decided on its own merits. If a woman has been violated in that case, the investigator of that case shall ensure a fair and comprehensive investigation, and the perpetrators of that case

should also be dealt with an iron hand, however, in accordance with the law.

No objection from the survivor

8. The offence with which the applicants are charged is not compoundable. A “no-objection” affidavit will not impact the case. Further, the applicants have produced the affidavit, not the survivor (though ostensibly she has sworn it). In such a situation, whether the affidavit was sworn devoid of coercion, pressure, or undue influence cannot be determined.

No independent witness

9. In a crime of rape, the argument raised by the learned counsel that there were no independent witnesses who saw the rape is misplaced and misconceived apart from being insensitive and absurd. It does not merit an observation by this court.

Non-compliance of sections 164-A and 164-B of the Code

10. Section 164-A Cr.P.C. provides that a victim of rape will be medically examined. In this case, S was examined medically. Section 164-B Cr.P.C. provides that DNA samples, where practicable, shall be collected from the victim with her consent or with the permission of her natural or legal guardian and the accused within an optimal period of receiving information relating to the commission of such offence. I am confused at the stance taken by learned counsel in this regard. On the one hand, he says that a DNA test was not conducted (which is partially true). At the same time, on the other, he relies upon two lines reproduced from an ostensible DNA report, which has been incorporated in the Supplementary Challan. Learned counsel is blowing hot and cold at the same time. Nonetheless, this argument of the counsel will have no bearing on whether bail is granted.

Solitary statement of the survivor

11. It is a well-settled principle that in a rape case, the solitary statement of the survivor is sufficient to base a conviction on if the same is trustworthy and confidence-inspiring. This principle has been reiterated in several Supreme Court and High Court judgments. Upon a tentative assessment, and may I hasten to emphasise that it is tentative, the statement recorded by the survivor appears stable enough at this preliminary stage for the balance to tilt in favour of dismissing these bail applications. I am also not satisfied that the applicants would not tamper with evidence. The affidavit of no objection filed by counsel and the yet unexplained insertion in the Supplementary Challan is my reason for making this preliminary observation.

Investigation

12. I am saddened by the investigation conducted in this court. The survivor had told the police that the perpetrators had recorded videos of her and had also taken photographs. The investigating officer, however, felt it unnecessary to explore what the survivor told her. When queried by this court as to why such a lapse occurred, it was clear that the lady investigator had no plausible answer apart from shifting the burden of the lapse on the survivor. The investigating officer's insensitivity in such a matter is unacceptable and not in line with the prestige and dignity of the police force, many of whose officers have given their lives to protect the citizens of this country, while many others work in the most dangerous of circumstances to protect the lives and properties of the ordinary person. It is expected and hoped for the sake of reform in the police department that I.G. Sindh will once again reiterate to the investigators the sensitive nature of gender-based violence cases and take measures to improve the level of investigation in such crimes. The I.G. Sindh should also remind his officers of the directions given by the Supreme Court and the High Courts of Pakistan on how rape

cases should be handled. The opinion of the learned Prosecutor General should be obtained in this regard. S.S.P. South shall ensure that the allegation of videos and photos of the survivor being taken is professionally investigated. The comments I have made in this paragraph are with a view of guidance and reform and should not be interpreted to impute any finding of guilt on the applicants. It is their fundamental right to be given a fair trial, and they are considered innocent until proven guilty.

Order of the Court

13. The learned trial court has given compelling reasons to dismiss the bail applications of the two accused, and I agree with those reasons. I have no doubt that the provisions of the Anti-Rape (Trial and Investigation) Act 2021 will be considered by the learned trial court in the conduct of this trial. Considering the importance of this case from a gender-based violence perspective, I believe that the learned trial court should conclude the trial in a maximum period of 90 days from the date of this order, even if it entails hearing the case on a day-to-day basis. I do not doubt that the learned trial court will do its best to comply with the preceding direction.

14. Let a copy of this order be sent to the learned Prosecutor General, I.G. Sindh, and S.S.P. South so that they can take note of the observations made in paragraph 12 above.

15. Bail applications are dismissed.

JUDGE