

IN THE HIGH COURT OF SINDH KARACHI

CRL. BAIL APPLICATION NO. 518 OF 2023

Applicant : Muhammad Tahir Jatoi,
through Mr. Imdad Ali Malik,
Advocate

Respondent : The State
through Mr. Muhammad Iqbal
Awan, Additional Prosecutor
General Sindh

Complainant : Muhammad Ayoub Kolachi
through Mr. Muhammad Moosa,
Advocate along with victim
Mst. Kaneez Fatima

Date of hearing : 24th October 2023

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ORDER

Omar Sial, J.: Mohammad Ayub Kolachi lodged F.I.R. No. 118 of 2022 under section 365-B P.P.C. at the Bin Qasim police station on 02.04.2022. He reported that his daughter Kaneez Fatima had left for school in a rickshaw driven by Ali Raza but did not return home. Ali Raza was nominated accused.

2. Ali Raza told the police that he had dropped Kaneez Fatima at her school in the morning, but when he returned to pick her up at home time, the school's watchman told him that Fatima had not come to school. He had then informed her father of her absence. The record reflects that at some time after the disappearance of his daughter, her father, the complainant, recorded another statement in which he nominated (i) Mohammad Tahir Jatoi, (ii) Khuda Baksh Jatoi and one Mohammad Sultan as the culprits.

3. It transpired in the police investigation that Kaneez Fatima had married Mohammad Tahir Jatoi (the applicant in these proceedings)

out of her own free will and, in that connection, had appeared before the Sukkur Bench of this court to record her statement that she had married Tahir. At that stage, a charge under sections 3 and 4 of the Sindh Child Marriage Restraint Act, 2013, was also included against Mohammad Tahir Jatoi. Kaneez Fatima was sent to Darul Aman on the instructions of this Court, and it appears that some days later, she opted to go back home with her parents. Around 23.05.2022, Kaneez Fatima took a somersault on her earlier stance and now alleged that Mohammad Tahir Jatoi had kidnapped her and that all her appearances in court and earlier statements were obtained from her under duress.

4. Learned counsel for the applicant has argued that the applicant and Kaneez Fatima are husband and wife. In contrast, learned counsel for the complainant says that even if the applicant has married Kaneez Fatima, an offence under the Sindh Child Marriage Restraint Act 2019 had been committed. He has not denied the earlier appearances and statements made by Kaneez Fatima but defends them on the ground that Kaneez made them at gunpoint.

5. I have given the situation considerable thought. The problem arose when an ossification test was done on the girl, which indicated she was "17 to 18 years of age". On the other hand, her school records show the girl to be 15 years old. I cannot exclude Kaneez Fatima from all liability regarding what has transpired. On a tentative assessment, her consent to elope with the applicant appeared there. However, her consent, if she is a minor, means little. Section 361 P.P.C. provides that whoever takes or entices any minor under fourteen years of age if a male, or under sixteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from legal guardianship.

6. It further appears from the order impugned that a charge under section 376 P.P.C. has also been added against the applicant.

Section 376 is the penal provision for the offence of rape. It carries a potential sentence of 10 to 25 years or imprisonment for the remainder period of natural life, thus falling within the non-prohibitory clause of section 497 Cr.P.C. "Rape" has been defined in section 375 P.P.C. as "A man is said to commit rape who has sexual intercourse with a woman under the circumstances falling under any of the five following descriptions: *"(v) with or without her consent when she is under sixteen years of age."* It is also pertinent to point out that the definition of "rape" as amended through the Criminal Laws (Amendment) Act, 2021 has been enhanced rape is no longer hostage to penetration.

7. I was inclined to give some benefit to the applicant if the question before me was solely a breach of the Sindh Child Marriage Restraint Act; however, this thought changed when it was brought to my notice that the applicant has a minimum of two (as only two have been shown to me) and three (according to the version of the complainant). Upon a tentative assessment, it appears that one nikahnama has been annexed with the bail application showing the marriage solemnised in Sukkur, while the other, which the applicant ostensibly sent to the complainant via WhatsApp, shows the marriage solemnised in Karachi. The learned counsel for the applicant denied that the applicant has the Karachi nikahnama; however, they remained unable to answer why the applicant sent a copy to the complainant through WhatsApp. As is often the case, such offences have shown below-average and stereotypical investigation. The investigating officer does not seem to have looked at the issue from a trafficking or gender lens. The molvi who solemnised the nikah and the witnesses to the ostensible free-will affidavits and nikahnama should have been brought within the ambit of investigation. The genuineness of the nikahnamas floating around should also be investigated. As mentioned above, Kaneez Fatima, too, has contributed to her plight.

8. The provisions of the law referred to above make it clear that the applicant, apart from an offence under the Sindh Child Marriage Restraint Act, 2013, may also have a case to answer pursuant to kidnapping and rape laws, both of which carry potential life sentences and thus fall within the non-prohibitory clause of section 497 Cr.P.C.

9. There has been a marked increase in cases of a similar nature. The modus operandi is the same. Usually, a simple and unexposed girl is seduced through the Internet or telephone; one fine day, she leaves home surreptitiously and elopes with her lover; the family registers an F.I.R. for kidnapping, rape and underage marriage; the couple produces a freewill affidavit and a nikahnama (in most cases executed in Punjab); they then come back to Sindh where they make an appearance before the Sessions Court as well as the High Court where the girl professes her love for her "husband" and states that she is an adult and has married with her own free will. The case against the "husband" is dropped based on such appearances and statements. It would all be fine if the girl was an adult and it was a genuine case of love. Unfortunately, this does not seem to be the case in many situations. The girl, having burnt all her boats, is at the mercy of the "husband"; thus, her vulnerability leads her to either an enslaved person's life or, worse, being trafficked. She cannot go home due to the fear of an honour killing. And given her past conduct, nobody believes that she was kidnapped, raped or trafficked by the "husband". In some cases, a girl with a supportive family returns home (as in the present case) and takes a complete somersault on her earlier conduct. By then, enough doubt has been created in the case, of which doubt the perpetrators take advantage. Counsels who appear in such matters, as well as the police who investigate, completely lose sight of the possibility of the girl being trafficked through such a modus operandi and mechanically deal with the case. In my view, showing leniency where a minor is involved will only encourage traffickers to continue unabated.

10. An essential element for the grant of pre-arrest bail is also missing in the circumstances of the present case, nor has it been argued.

11. Learned counsel has argued that Sahib Dino, a co-accused in this case, was given bail and thus, the applicant, too, is entitled to bail on the grounds of consistency. With much respect, I am not inclined to agree with learned counsel. Sahib Dino's role in the whole episode was that the couple (when things were good between them) soon after eloping had made a pit stop at his house where Kaneez Fatima had changed out of her school uniform into regular clothes and then left with the applicant. The difference between the role assigned to Sahib Dino and the applicant is noticeable.

12. As mentioned above, upon a tentative assessment, the applicant may have a case to answer for offences leading to a life in prison. It also seems that the applicant can tamper with evidence and exert undue influence on the victim. While it should be understood, I still hasten to add that none of the above observations should be interpreted to mean that the applicant is guilty of the offences he is charged with. That is for the learned trial court to decide in the first instance after it has reviewed the evidence produced.

13. Application is dismissed.

JUDGE