

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Transfer Application No. 15 of 2023

Date	Order with signature of Judge
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For hearing of main case

22.12.2023

Mr. Muhammad Farooq advocate for the applicant

Mr. Rafique Ahmed advocate for respondent

Ms. Rubina Qadir Assistant P.G

ORDER

Through this Criminal Transfer Application under Section 528 Cr. P.C., the applicant Zaheer Ahmed seeks transfer of sessions case No. 4047 of 2022 pending before VIIth Additional Sessions Judge Karachi East to any other Court having jurisdiction, inter-alia on the ground that he has lost faith upon the presiding officer as he has expressed his view to convict the applicant in the F.I.R No.159 of 2022, under section 364-A, 216, 363, PPC read with TIP 3 (i), Act, 2018, 3/4 Sindh Child Marriage Restraining Act, 2013 registered at PS Alfah Karachi having been influenced by the conduct of the counsel representing the complainant side. His earlier Transfer Application on the aforesaid ground has been declined by the learned Sessions Judge Karachi East vide order dated 22.1.2023 on the premise that the applicant has failed to substantiate his allegations against the presiding officer of his being biased and siding with the complainant party in the proceedings, an excerpt whereof is reproduced as under:-

“I have given my anxious consideration to the arguments advanced on behalf of learned counsel for the parties and perused the comments submitted by the learned Presiding Officer. Perusal of contents of memo of Transfer Application shows that no particular ground for transfer of the case has been agitated except stating the words of losing the faith upon the trial Court and the same has not been substantiated through any material evidence. Moreover, the ground taken by the applicant that on 08.12.2022 Mr. Asghar Ali Abro, counsel for the accused went for obtaining copies of reports of 3rd doctor from the court of learned VIIth Additional Sessions Judge, Karachi East then he came to know that Mr. Jibran Nasir, advocate for respondent was inside the chamber, who has raised objection regarding confidentiality of the matter, which then resulted ouster of Mr. Asghar Ali Abro, hence element of business was sensed by the applicant's side but such arguments is not upto the mark as such same has been categorically denied by the learned Presiding Officer and so as no substantial evidence has been produced so that it can be presumed that the learned Presiding Officer is having any business against applicant side. Besides, learned counsel for the applicant has raised arguments that learned Presiding Officer without hearing accused side did pass an order on an application Under Section 19 of Sindh Child Marriage Restraining Act, 2016, whereby consent of Dua Zahra was required to be obtained but that too has been justified by the learned Presiding Officer in

comments that notice was issued upon application Under Section 19 of Sindh Child Marriage Restraining Act, 2016 and legally consent from inmate was required, however, said application is still pending for adjudication and as well as notices have already been issued to the parties. The above arguments of counsel for the applicant are not justified for questioning integrity of the Presiding Officer. Record reveals that proper opportunity is being offered to the parties by the learned VIIth Additional Sessions Judge, Karachi East. Apart from that the contention of the applicant regarding conduct and attitude of the Presiding Officer by stating that the same is not upto the mark and even for such contention no substantial evidence has been brought on record, which may justify that the conduct and attitude of the Presiding Officer is not upto the mark rather the applicant has not substantiated his version. Hence, I find that such ground is not helpful to the applicant. In this regard I am fortified with the case law relied by the counsel for the respondent No.1 reported in PLD 1955 Lahore 16 (Laldin Vs The Crown). So far as, case laws relied by the learned counsel for the applicant are concerned with profound respect, the facts and circumstances whereof, are quite distinguishable from the facts and circumstances of instant case. In view of above facts and circumstances, I find that the applicant has not made out his case for transfer of Cr. Case No.4047/2022. Consequently, I find that the instant Cr. T.A is devoid of merits, which is hereby dismissed accordingly.”

2. Briefly the facts of the case are that complainant Syed Mehdi Ali Kazmi lodged FIR No.159 of 2022 under Section 364-A PPC read with section 3(1) of the Prevention of Trafficking in Persons Act 2018, wherein it is alleged that his daughter Dua Zehra aged about 14 years was enticed away by unknown accused. In the intervening period, the alleged detinue Dua Zehra was produced before this Court in Petition No.D-8191 of 2022, and this Court vide order dated 06.01.2023 disposed of the petition with the following observations:-

“Accordingly, this petition in the terms as above is disposed of. However, in order to ensure safety and wellbeing of the child Ms. Dua Zahra, the Child Protection Officer, who is present in Court is directed to visit the child in her parents home every Saturday along with a lady police officer not below the rank of Inspector. The report of which shall be submitted regularly before the Family Court. The Family Court would be competent to take notice of any infirmity or irregularity and decide it accordingly, independent of this order”.

3. The investigation was carried out and on conclusion of the investigation, the Investigating Officer submitted a Final Report under Section 173 Cr. P.C before the learned Trial Court, however, the learned Magistrate took cognizance of offenses under Sections 363/364- /368/34 PPC, Section (ii)/4 of Prevention of Trafficking in Persons Act 2018, and Section 3/4 of Sindh Child Marriages Restraint Act, 2013 against the applicant and others. In the intervening period, the applicant filed a Constitution Petition being CP. No. 4477/2022 for quashing of FIR, which was disposed of vide order dated 18.08.2022 which is reproduced herewith-

"Through this petition petitioner seeks quashment of FIR 159/2022 which has already been challaned before the concerned trial Court and the petitioner has alternate remedy before the learned trial Court and as such this petition is not maintainable in the constitutional jurisdiction of this Court which is hereby disposed of."

4. The applicant approached the Trial Court for quashment of the F.IR which was dismissed and he again approached this Court by filling Criminal Miscellaneous Applicant No. 493 of 2022, which was too dismissed vide order dated 30.09.2022, an excerpt whereof is reproduced as under:-

"10. The upshot of the above discussion is that since the learned trial Court has taken cognizance of the case, therefore quashing of proceedings directly by this Court would amount to interruption in ordinary legal course particularly in the presence of alternate remedy available to the applicant in terms of section 249-A/265-K, Cr.P.C. Consequently, this criminal miscellaneous application being not maintainable is hereby dismissed."

5. Thereafter the applicant moved the transfer application before the learned Sessions Judge, which was dismissed as discussed supra and now the applicant has approached this Court for transfer of the subject case to another Court. The learned Trial Court furnished comments before this Court vide letter dated 17.03.2023 with the narration that previously the applicant moved transfer application on a similar ground but the same was dismissed vide order 21.01.2023 and he ensured that the Trial will be concluded after giving equal opportunity to both the parties. He also expressed his voice of concern that such an application is based on baseless grounds and wastage of precious time of the Court.

6. At the outset, I inquired from the learned counsel for the applicant as to how this transfer application is maintainable.

7. Learned counsel states at the bar that the learned Presiding Officer is not providing a fair Trial to the applicant as embodied in Article 10-A of the Constitution. He referred to the statement dated 20.03.2023, in support of the application for transfer of the case and argued that when the Trial Court has made up its mind to convict the applicant by expressing its view by taking concrete steps to try the purported offenses which the applicant had never committed as the marriage between the couple is still intact and the same has not yet been repudiated under the law as such the applicant cannot be saddled with the alleged offenses and the Trial of the applicant will be a futile exercise however the learned Presiding Officer is bent upon to convict the applicant by hook or crook. Learned counsel for the applicant contended that the learned Trial Court had failed to take into consideration the statement of Mst.Dua Zehra made before the learned

Division Bench of this Court in the earlier round of litigation, whereby she denied the accusation of kidnapping/abduction or enticing her by anyone including the applicant. However learned trial court has also failed to consider the fact that the marriage was solemnized outside the Sindh Province, hence application of the Sindh Child Marriage Restraint Act, 2013 was/is misconceived, that the offence under Section 363/364-A PPC is misapplied as Mst. Dua Zehra has already attained the age of puberty and Marriage has already been consummated as such no case at all is made out against the applicant in terms of law laid down by the Supreme Court in the case of Mouj Ali v Syed Safdar Hussain 1970 SCMR 437, wherein the Child Marriage Restraint Act 1929 was an issue while deciding such controversy the Supreme Court passed appropriate order on the subject issue, which is also subject of the present Transfer Application. Learned counsel also referred to Mulla's Principles of Mohammadan Law wherein Section 273 provides that the marriage brought about by another Guardian is also not valid unless she, resorted to her operation to repudiate the marriage on attaining puberty; that no evidence regarding the commission of an offense under Section 3(ii) and 4 of Prevention of Trafficking in Persons Act 2018 is available on record, that learned Trial Court has also wrongly assumed the jurisdiction of the offense under Anti Rape (Investigation and Trial) Act, 2021, that the impugned order has been passed without jurisdiction and in haste manner without applying the judicious mind. The learned counsel for the applicant has contended that no offense is made out against the applicant and the learned Trial Court inter-alia erroneously took the cognizance of the offenses through the impugned order without appreciating the law and the material available on the record in such circumstances, judicial propriety demands that the aforesaid case may be transferred to another Court having jurisdiction for smooth Trial of the accused, based on the law on the subject and if the Trial of the applicant continued with the present Trial Court the applicant will be highly prejudiced. He prayed for allowing the transfer application.

8. On the other hand, learned Addl PG duly assisted by learned counsel for the complainant has supported the impugned order by stating that the learned trial Court has rightly taken cognizance of the offense. Learned counsel representing the complainant has submitted that the applicant has failed to put forth any convincing reason which may justify this Court for the transfer of the subject criminal case from the court of VIIth Additional Sessions Judge Karachi East to any other Court. He added that the reason assigned by the applicant that he lacks the confidence upon the presiding officer being under the influence of counsel for the complainant, is not a valid ground to claim transfer. He further argued that nowadays it is a general practice that one of the parties would

think that he will not get justice and hurriedly believed the rumors and file transfer application in routine; that at this stage of the case, it cannot be justified that the Presiding Officer will not act fairly or impartially but it is upon the Presiding Officer to decide the case on its own merits; learned counsel referred the documents filed today and submitted that this Court has already dismissed the various applications of the applicant and even Supreme Court has taken cognizance of the matter as such this Court does not have to set aside the order of the learned sessions judge, who refused to transfer the case, being designated court to try the offenses under Anti Rape (Investigation and Trial) Act, 2021. Learned counsel submitted that Mst. Dua Zehra is underage and cannot perform Nikah, therefore offense has been committed under the Sindh Child Restraint Marriage Act, 2013. Learned counsel has emphasized that the marriage of children is under the age of 18 is unlawful and the marriage contract is void ab initio. He added that a girl below the age of 16 was/is married in violation of the Act 2013. He further argued that law prohibits sexual intercourse with a child under the age of 16 and even if a child was/is to consent to engage in sexual intercourse the action of the accused is still constitute the offense and would be punishable under the Act 2013 read with Pakistan Penal Code and other enabling provision of law, as such the Trial of the applicant has rightly been dealt with by the designated Court under the Anti Rape Law, therefore, he sought dismissal of instant transfer Application.

9. I have heard the learned counsel for the parties on the issue of the instant transfer application and have perused the material available on record including the reference record so made available before this Court

10. To the proposition so put forward by the learned counsel for the complainant, suffice it to say that it is a general and indisputable rule that where there is a legal right, there is also a legal remedy whenever that right is invaded. It is a settled and invariable principle in the laws that every right, when withheld must have a remedy and every injury its proper redress. Under Articles 4 & 10-A of the Constitution, every person has a right to be dealt with under the law and have a fair trial. This principle has always been considered one of the fundamental principles of law and natural justice. On the aforesaid proposition, I am guided by the decisions of the Supreme Court in the cases of Sarafray Saleem's Case – PLD 2012 SC 232, Mian Muhammad Nawaz Sharif's Case – PLD 2009 SC 644, Imtiaz Ahmed Mahmood's Case – PLD 2003 SC 40, and Mst. Zahida Sattar's Case – PLD 2002 SC 408

11. In the present matter, the question arises whether this Court can order for transfer of a session case from one Court to another court under Section 526 Cr.P.C.

12. To answer the aforesaid proposition, it is well-settled law that any aggrieved person can file a Transfer Application before this Court under Section 526, Cr.P.C. if there appears reasonable apprehension of injustice being done due to the conduct of the court subordinate to the High Court. The said grievances must be agitated before this Court but should be supported by legal requirements of law. It would be advantageous to go through provisions of Section 526, Cr.P.C. which read as follows:-

“Section 526. High Court may transfer case or itself try it.

(1) Whenever it is made to appear to the High Court:-

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or (b) that some question of law of unusual difficulty is likely to arise, or (c) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same, or (d) that an order under this section will tend to the general convenience of the parties or witnesses, or (e) that such an order is expedient for the ends of justice, or is required by any provision of this Code; it may order: (i) that any offence be inquired into or tried by any Court not empowered under sections 177 to 184 (both inclusive), but in other respects competent to inquire into or try such offence.

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case or appeal be transferred to and tried before itself; or (iv) that an accused person be sent for trial to itself or to a Court of Session. (2) When the High Court withdraws for trial before itself any case from any Court [...] it shall observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn.

(3) The High Court may act either on the report of the lower Court, or the application of a party interested, or on its own initiative.

(4) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Advocate-General, be supported by affidavit or affirmation.

(5) When an accused person makes an application under this section the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if so ordered, pay any amount which the High Court may under this section award by way of compensation to the person opposing the application.

(6) Notice to Public Prosecutor of application under this section. Every accused person making any such application shall give to the Public Prosecutor notice in writing of application, together with a copy of the grounds on which it is made; and no order shall be made on the merits of the application unless at least twenty four hours have elapsed between the giving of such notice and the hearing of the application.

(6A) When any application for the exercise of the power conferred by this section is dismissed, the High Court may if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding [five hundred rupees] as it may consider proper in the circumstances of the case.”

13. Primarily, the court should practice without discrimination and bias. Justice should be given in such a manner that a clear image of the judiciary has to be maintained in the minds of litigants. To have good faith in the court, the court should maintain high moral standards among the members of the judiciary under the Code of Criminal Procedure. Justice can be achieved only when the court deals in the presence of both parties and the court has the power to move cases from one court to another. But

the rights of the parties cannot be curtailed, controlled, or interfered with subject to exceptions provided under the law.

14. The concept of impartiality or bias of a judge has been discussed exhaustively by the Supreme Court in its judgment in the case of the *Government of NWFP & Another vs. Dr. Hussain Ahmed Haroon & Others*, **2003 SCMR 104**. It is well-settled law that the transfer of a matter from one court to another could only be granted in exceptional circumstances, where it was shown that the same would be in the interest of justice. Reliance is placed upon the judgment in the case of *All Pakistan Newspapers Society & Others vs. Federation of Pakistan & Others* **PLD 2012 Supreme Court 1**.

15. Prima facie the ground raised by the learned counsel for the applicant is tenable based on certain reservations; in such circumstances, he simply intends to seek a fair trial in the criminal case pending adjudication, which is only possible if he reposes confidence in the trial court. However, in the best interest of justice, coupled with the stance taken by the learned trial Court through comments. It would be appropriate for the Trial Court not to express its view so that the parties may have confidence.

16. In such circumstances, without prejudice to the stance of the learned Trial Court, the Judicial propriety demands that Sessions Case No. 4047 of 2022 pending before VIIth Additional Sessions Judge Karachi East needs to be transferred to the Court of learned Sessions Judge Karachi East for the smooth trial of the applicant. However, the learned Trial Court will be at liberty to see whether the offenses applied by the prosecution are applicable/attracted in the present case or otherwise in terms of the different statements made by Mst. Dua Zehra before this Court and/or before the concerned Court as pointed out by the learned counsel for the applicant. The aforesaid exercise can only be possible if the Trial Court frames the charge and during framing the charge if finds the offenses are attracted, the same shall be taken care of and if the offenses are not attracted, the appropriate order shall be passed under law after providing meaningful hearing to the parties.

17. Before parting with this order I expect from the learned Sessions Judge East Karachi for swift disposal of the aforesaid Sessions Case within a reasonable time and in the meanwhile ensure that the trial is fair in all respects by looking at all the aspects of the case at the time of framing the charge.

18. In view of the above the instant Criminal Transfer Application is disposed of along with pending application(s).

JUDGE

