

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No.1739 of 2023

Date	Order with signature of Judge
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For hearing of bail application

28.8.2023

Ms. Azra Hameedi advocate for the applicant/accused
Mr. Ashraf Hussain Advocate for the complainant alongwith complainant
Mr. Abrar Ali Khichi, Addl. P.G along with I.O/ASI Sajjad of P.S
Peerabad.

Through this bail application under Section 377/511 PPC., the applicant has sought admission to post-arrest bail in F.I.R No. 244/2023, registered under Section 377/511 PPC at Police Station Peerabad, Karachi.

2. The accusation against the applicant as narrated in the crime report is that he allegedly committed sodomy with Naik Muhammad aged about 7 years, such report of the incident was given to Police Station Peerabad, Karachi, who registered F.I.R No. 244/2023, registered under Section 377/511 PPC against the applicant and arrested him accordingly, however, in the charge sheet the prosecution added Section 364-A and 377-B PPC. The earlier bail plea of the applicant has been declined by the learned Sessions Judge (South) Karachi vide order dated 12.06.2023 in Cr. Bail Application No. 3354/2023.

3. The applicant being aggrieved by and dissatisfied with the aforesaid bail declining order has approached this Court inter-alia on the ground that the applicant has been falsely implicated in the case. He has contended that there is a serious contradiction in the final medico-legal report as well DNA and Serology Report; that no seminal material was identified on anal swab (item No.1) and anal swab for DNA (item No.2); that as per DNA and Serology Report no seminal material was detected on stain sections taken from Qameez of Naik Muhammad but the learned trial Court did not consider such facts and dismissed the bail application of the applicant without applying judicial mind. She further contended that although a DNA test has been conducted no grouping test of the semen allegedly found on Qameez of the victim to ascertain whether the same belonged to the applicant/accused, therefore matter required further inquiry. She further contends that there is an inordinate delay in lodging the FIR for which no plausible explanation has been given. She next argued that the allegations leveled against the applicant are false and frivolous and there is no evidence available on the record to connect the

applicant with the commission of the alleged crime, as such, the applicant deserves the concession of post-arrest bail. Per learned counsel during the medical examination of the victim, the doctor found no visible redness, abrasion, bruise, laceration, tear, or any other violent mark on the body of the alleged victim. Learned counsel emphasized that in the absence of a grouping test of the semen, it could not be held with certainty that the victim was subjected to sodomy by the applicant especially when the applicant is also a minor aged about 14 years as per birth certificate issued by NADRA; and his case does fall within the definition of child under the Juvenile Justice System Ordinance. Learned counsel asserted on the point that the liberty of a minor applicant is at stake, which is a precious right, that has been guaranteed under the Constitution of the Islamic Republic of Pakistan, 1973, and the same cannot be taken away merely on bald and vague allegations leveled by the complainant coupled with the statement of victim who is aged about 7 years, who was/is not competent to record his statement under the law, however, he was tutored to say against the applicant, while recording his statement under Section 164 Cr.P.C. and in such circumstances, the case of the applicant squarely falls within the ambit of Section 497(2) Cr.P.C., entitling for further inquiry into his guilt. In support of his contention, he relied upon the cases of *Muhammad Aslam vs. The State* **2023 SCMR 397**, *Abdul Mateen vs. The State* **2022 MLD 464**, *Mursaleen vs. The State* **2018 YLR 114**, *Mazhar Ali vs. The State* **2019 P. Cr. L.J 899** and *Amanullah vs. The State* **2013 PCrLJ 1440**. She lastly prayed for allowing the bail application.

4. Learned Addl. P.G. assisted by the learned counsel for the complainant has opposed the bail application and states that the learned trial Court has rightly dismissed the bail plea of the applicant. It has been contended that the applicant is specifically nominated in the crime report with a specific allegation of committing sodomy with the minor nephew of the complainant against his wishes. He next submitted that it is a settled principle of law that in such cases the statement of the victim itself is sufficient for proving the charge against the accused. therefore, he does not deserve any leniency by this Court. He prayed for the dismissal of the bail application.

5. I have heard learned counsel for the parties and perused the material available on record.

6. Tentative assessment of the record reflects the following aspect of the case:-

- a. *The alleged offense occurred on 14.04.2022 and reported to the police on 15.04.2023.*

- b. The complainant in the FIR disclosed the factum that the applicant took away his nephew Naik Muhammad aged about 7 years, in his house and attempted to commit sodomy.*
- c. As per the memo of arrest of the applicant it is alleged that he was attempting to commit sodomy with victim Naik Muhammad.*
- d. As per MLO report dated 15.04.2023 no mark of injury was seen over the body of the above-named victim, and the finger stained with blood, two swabs taken for semen serology and DNA analysis, blood samples taken for DNA analysis, cloths sealed for chemical analysis for DNA + semen serology.*
- e. As per the final medico-legal report dated 22.06.2023 the DNA profile obtained from the sperm fraction of the stain Section taken from Qameez of Naik Muhammad is a mixture of at least two individuals with the major and minor components. The DNA profile from the major component of sperm fraction matches with the DNA profile obtained from the blood samples of Peer Muhammad however no material was detected on the stain Section taken from Shalwar Qameez of Naik Muhammad. No seminal material was identified on the anal swab therefore no further DNA analysis was conducted.”*

7. Prima facie it appears from the report of Sindh Forensic DNA and Serology Laboratory, no seminal material was identified on the anal swab (item No.1) and anal swab (for DNA) (item No.ii) of Naik Muhammad) and no further DNA analysis was conducted on the aforesaid items. The above question of whether the applicant was contributory to the alleged crime needs to be thrashed out by the trial Court by examining the medico-legal officer and/or expert from Sindh Forensic Laboratory on the subject issue as this Court only tentatively assesses the case based on the material produced before this Court, which prima facie show the case against the applicant for further inquiry in terms of the report submitted by the prosecution.

8. On legal premises, the Juvenile Justice System Ordinance, 2000 (XXII of 2000), has been repealed by the promulgation of the Juvenile Justice System Act, 2018 (to be referred to hereinafter as the Act of 2018). Under section 2(b) of the Act of 2018, "Child" has been defined as a person, who has not attained the age of eighteen years. The applicant being below the age of 18 years, thus, falls within the definition of section 2(b) of the Act of 2018. According to section 6(3) of the Act of 2018, a juvenile arrested or detained for the commission of a minor or a major offense for this Act shall be treated as if he was accused of commission of the bailable offense. For the sake of convenience and ready reference, the aforesaid section is reproduced below:-

"S. 6(3). Where a Juvenile is arrested or detained for commission of a minor or a major offence for the purposes of this Act, he shall be treated as if he was accused of commission of a bailable offence."

9. The "major Offence" and "minor offense" have been defined in Section 2(m) of the Act of 2018 as under:-

"Major offense" means an offense for which punishment under the Pakistan Penal Code, 1860 (Act XIV of 1860) or any other law for the time being in force is more than three years and up to seven years imprisonment with or without fine".

"minor offense" means an offense for which maximum punishment under the Pakistan Penal Code, 1860 (Act XIV of 1860) or any other law for the time being in force is imprisonment up to three years with or without fine."

10. The NADRA record file shows that the applicant was born on 15.2.2009, which makes him about 14 years old. It appears that the learned trial Court was not assisted properly and the age of the applicant was not brought to its attention in terms of Section 6 of the Juvenile Justice System Act, 2018.

11. A holistic reading of the above Sections of the Act of 2018 reflects that a juvenile i.e. (a person less than 18 years of age) accused of a major or minor offense, should be granted bail as of right unless it appears that there are reasonable grounds for believing that the release of such juvenile may bring him in association with criminals or expose him to any other danger. If the offense for which a juvenile is charged is heinous, the juvenile may be declined bail if he is 16 years or older. In the present case, the applicant prima facie, according to the NADRA record appears to be 14 years of age and thus, would be entitled to the concession given in the Act of 2018 to persons falling within the ambit of that Act, 2018.

12. It is yet to be seen whether the case of the applicant, being a child of 14 years, falls within the exception contained in section 83 P.P.C. which provides as follows.

"83. Act of a child above seven and under twelve of immature understanding. Nothing is an offence which is done by a child above ten years of age and under fourteen, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion."

13. As regards section 377 P.P.C., admittedly, there is no specific allegation of commission of sodomy against the applicant. In the FIR, he is only charged for an attempt to commit sodomy upon the victim. As far applicability of Section 364-A and 377-B PPC is concerned, the same is required to be looked into by the trial Court whether the aforesaid sections are attracted or otherwise. The complainant just reached there and allegedly saw the occurrence. Similarly, no one from the public/people, who were allegedly attracted to the spot, has come forward to substantiate the version of the complainant. Neither, any medico-legal report of the alleged victim supports the version of the complainant to show any bruises, scratches, or signs of violence on the body of the victim nor any semen on the clothes of the victim has been taken into possession, to substantiate the version of the complainant in respect of forcible drag of the victim inside the house of the applicant,

is a serious debatable question. Besides, in the absence of any proof of penetration which is an essential ingredient to constitute the offense of sodomy, the applicability of section 377, P.P.C. is also a matter of further inquiry. For the sake of arguments, if the allegation of the complainant is taken into consideration, it can be a case of an attempt to commit sodomy. As there is no specific provision under the Pakistan Penal Code that provides punishment for the offense of an attempt to commit sodomy, therefore, recourse shall be made to section 511, P.P.C., which caters to such like situation, according to which whoever attempts to commit an offense punishable by Pakistan Penal Code with imprisonment for life or imprisonment, or to cause such an offense to be committed, and in such attempt does any act towards the commission of the offense, shall, where no express provision is made by the Pakistan Penal Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offense, for a term which may extend to one-half of the longest term of imprisonment provided for that offense or with such fine as is provided for the offense, or with both. The longest term of imprisonment provided for the offense under section 377, P.P.C., is imprisonment for life or imprisonment of either description for a term which shall not be less than two years or more than ten years, and shall also be liable to fine. One-half of 10 years comes to 05 years, which also falls within the definition of a major offense under the Act of 2018. In this view of the matter, by use of the word "Shall" in section 6(3) of the Act of 2018, the applicant is to be treated as a juvenile offender and an accused of an alleged offense under the said offense.

14. Once the Supreme Court has held in categorical terms that grant of bail in offenses not falling within the prohibitory limb of Section 497 Cr.P.C. shall be a rule and refusal shall be an exception then, the subordinate Courts should follow this principle in its letter and spirit because principles of law enunciated by the Supreme Court under Article 189 of the Constitution of the Islamic Republic of Pakistan, 1973 has binding effect on all subordinate Courts. On the aforesaid proposition, I seek guidance from the decisions rendered by the Supreme Court in the cases of *The State v. Syed Qaim Ali Shah* (1992 SCMR 2192), *Tariq Bashir v. The State* (PLD 1995 SC 34), and *Khan Asfandyar Wali and others v. Federation of Pakistan* (PLD 2001 SC 607).

15. I expect the Courts below to adhere to these binding principles in the future and not to act mechanically in the matter of granting or refusal of bail because the liberty of a citizen is involved in such matters;

therefore, the same should not be decided in a vacuum and without proper judicial approach.

16. The applicant has been behind bars since his arrest and concession of bail could not be withheld by way of premature punishment. On the aforesaid proposition, the reliance is placed upon the case of Abid Ali alias Ali vs. The State (2011 SCMR 161) and Husnain Mustafa Vs. The State and Another (2019 SCMR 1914). There are also various pronouncements in support of this principle. As a consequence, the applicant has made a case for a grant of relief of post-arrest bail and, hence is entitled to the same.

17. The grounds agitated by the learned counsel for the complainant cannot be assessed at the bail stage without recording the evidence.

18. Resultantly, this bail application is allowed. The applicant/accused is admitted to post-arrest bail in the aforesaid crime provided he furnishes surety in the sum of Rs.200,000/- (Rupees two lac only) and P.R bond in the like amount to the satisfaction of the trial Court.

19. The observation recorded hereinabove is tentative and shall not prejudice either party in the trial. The learned trial Court shall take efforts to conclude the case within four months and atleast complainant must be examined within one month positively and if the charge is not framed, the same shall be framed on the next date of hearing after completing the codal formalities.

JUDGE