

ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Criminal Bail Application No.971 of 2024

Date	Order with signature of Judge
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For hearing of bail application

Date of hearing and Order:- 15.07.2024

Mr. Imran Khan advocate for the applicant
Mr. Khadim Hussain, APG
Complainant Muhammad Iqbal present alongwith his counsel Mr.
Muhammad Hanif

ORDER

Adnan-ul-Karim Memon, J:- Through this bail application under Section 497 Cr.P.C., the applicant Muhammad Imran has sought admission to post-arrest bail in F.I.R No.299/2024, registered under Section 364-A PPC at Police Station Awami Colony, Karachi.

2. The earlier bail plea of the applicant has been declined by the learned Additional Sessions Judge-VII (East) Karachi vide order dated 29.04.2024 in Cr. Bail Application No. 1847/2024 on the premise that the FIR was initially lodged against the unknown accused person, however, the present applicant/accused was later identified by the abductee/victim as well as through CCTV footage of the incident. A statement under sections 161 and 164 Cr. P.C. of the abductee/victim was also recorded, wherein she further implicated the present applicant/accused. The present applicant/accused was involved in a similar crime, which was reported in the year 2008 vide FIR No. 30 of 2008, under section 364-A, at Police Station Zaman Town.

3. Learned counsel for the applicant has argued that the essential ingredients of the charge of kidnapping were missing. He added that there is no iota of evidence adduced by the prosecution pointing out that it was a case of kidnapping of the minor girl. No step whatsoever was taken by the applicant which amounts to taking or enticing her away out of the, keeping of her lawful guardian. However, to invoke section 364-A, the first condition contemplated therein is the kidnapping of a minor within the meaning of section 361 PPC in the absence of which other provisions contained in section 364-A PPC become redundant and cannot be resorted to. It was next contended by him that the applicant neither committed Zina-bil-Jabr with the minor nor there was any attempt on his part to commit zina-bil-jabr with her. He never wanted to hurt the minor. Therefore, it was not even a case of an attempt to commit Zina or Zina-bil-

Jabr. Learned counsel further submitted that nothing has been brought on record that may suggest the intention of the applicant to attempt to abduct Baby, therefore the charge against the applicant whether to fall within the ambit of section 363 PPC or under Section 364-A PPC, which factum is prima-facie misplaced. He added that 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 an offense under section 364-A PPC. As there is no specific provision under the Pakistan Penal Code that provides punishment for the offense of an attempt to commit an offense under section 364-A PPC, 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. As per learned counsel the longest term of imprisonment provided for the offense under section 364-A, P.P.C., is 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 a fine. One-half of 10 years comes to 05 years, which also falls within the definition of a major offense. He added that 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. He submitted that the applicant has been behind bars since his arrest and concession of bail could not be withheld by way of premature punishment. He prayed for allowing the bail application.

4. learned counsel for the complainant has submitted that the baby was saved in a timely and she raised her voice which prompted the applicant to leave and get her out of his Byke by the grace of Allah, otherwise applicant could have committed the crime with her and she would have been killed thereafter and her dead body would have been available in the ditch in the heaps of garbage.

5. Learned Additional P.G. has submitted that the applicant was shamefully attempting to indulge in his lust with the minor but she was saved due to her raising voice.

6. I have heard the learned counsel for the parties and perused the record with their assistance.

7. In the light of the foregoing submissions of the parties, it will be advantageous to refer to sections 361 and 364-A PPC as under:-

"Section 361 PPC: kidnapping from lawful guardianship.- 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, said to kidnap such minor or person from lawful guardianship.

Explanation: The words lawful guardian in this section include any person lawful interested in the care or custody of such minor or other person.

Exception: This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody, of such child unless such act is committed for an immoral or unlawful purpose.

" Section 364-A. Kidnapping or abducting a person under the age of ten.- Whoever kidnaps or abducts any person under the age fourteen in order that such person may be murdered or subjected to grievous, hurt, or slavery, or to the lust of any person or may be so disposed of as to be put in danger of being murdered or subjected to grievous hurt, or slavery, or to the lust of any person shall be punished with death or with imprisonment for life or with rigorous imprisonment for a term which may extend to fourteen years and shall not be less than seven years."

8. To invoke the provisions of section 364-A, it is incumbent upon the court to first see whether there was kidnapping within the meaning of section 361 PPC which envisages the co-existence of three elements contained therein namely (i) The minor was taken or enticed away by the kidnapper. (ii) The minor was out of the keeping of the lawful guardian (iii) The keeping of the minor was without the consent of the guardian. Once kidnapping is established, the question under section 364-A would be as to whether the appellant intended to murder the victim or subject her to grievous hurt or lust.

9. The words 'take' and 'entices away' used in section 361 PPC are key words to the offense of kidnapping implying some action on the part of the kidnapper to take or entice away the kidnappee followed by keeping the kidnappee out of the lawful guardianship of the guardian without his

consent. The expression "taking" and "enticing" call for some positive steps taken by the accused to remove the girl from the custody of her guardian. Neither Section 361 PPC nor Section 363 PPC would have any application if the girl of her own accord the word 'kidnapping' connotes stealing away a child without the permission of a person under whose custody or care the child is'.

10. Primarily it is worth noting that 'whoever takes or entices any minor'. The word 'takes' no doubt, means physical taking but not necessarily by use of force or fraud. The word 'entice' seems to involve the idea of inducement or allurements by giving rise to hope or desire in the other, and further, the two words read together suggest that if the minor leaves her parental home completely uninfluenced by any promise, offer or inducement emanating from the guilty party, then the latter cannot be considered to have committed the offense of kidnapping. But if the guilty party has laid a foundation by inducement, allurements threat, etc., and if this can be considered to have influenced the minor or weighed with her in leaving her guardian's custody or keeping and going to the guilty party then prima facie it would be difficult for him to plead innocence on the ground that the minor had voluntarily come to him.

11. Prima facie some material in the shape of the statement of the victim baby has been brought on record that prima facie suggests what was the intention of the applicant to attempt to abduct the Baby, such statement of the minor, prima facie, cannot be brushed aside at this stage as she has stated that she was induced by the applicant to have a ride on bike and due to her raising voice she was left by the applicant / accused, however, at this stage, this Court cannot form a tentative view to the extent that what was the basic intention of the applicant to give ride to the baby victim on his motorbike though he was/is alien to her, such factum is yet to be determined by the trial Court after recording her statement in Court in presence of the applicant within one month to determine whether the charge against the applicant fall within the ambit of Section 363 PPC or under Section 364-A PPC, which factum needs to be looked into by the trial Court, therefore, at this stage the applicant cannot be set free without ascertaining the aforesaid factum, which is only possible if the statement of the victim baby is recorded.

12. Resultantly, this bail application is dismissed with direction to the trial court to examine the baby Amna aged about seven years within one month positively and if the charge is not framed the same shall be framed on the date so fixed by the trial Court, however the direction in this bail

application shall not be ignored by the trial Court and compliance shall be placed on record through MIT-II of this Court positively.

13. The observation made hereinabove is tentative which shall not prejudice the case of either party at trial if the case proceeds under the law.

JUDGE

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