

ORDER SHEET
IN THE HIGH COURT OF SINDH KARACHI

Crl. Bail Application No. 1676 of 2024

DATE	ORDER WITH SIGNATURE OF JUDGES
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For hearing of main case.

24-09-2024

Mr. Saleem Nawaz Wazir, Advocate for applicant.
Ms. Rahat Ahsan, Deputy Prosecutor General, Sindh.

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Omar Sial, J.: Mazahir has sought pre-arrest bail in crime number 115 of 2024 registered under sections 364-A and 376 P.P.C. and sections 3 and 4 of the Sindh Child Marriage Restraint Act, 2013. The learned 10th Additional Sessions Judge, Karachi West, dismissed on 13.07.2024 the bail application filed by the applicant in that court.

2. The F.I.R. mentioned above was registered on 19.04.2024 on the complaint of Ghulam Rasool, who reported an offense that had occurred earlier that same day. Rasool recorded that the applicant had kidnapped his 13-year-old daughter Tansia along with one of his accomplices named Habib.

3. Learned counsel for the applicant submits that an offense under sections 364-A and 376 P.P.C. is not made out as Tansia had married Mazahir of her own free will. In response to a query from the court as to what he had to say about the commission of an offense under the child marriage restraint law, learned counsel agreed that the Police Surgeon had carried out an ossification test, which had concluded that Tansia was 13 years old and that the documents examined by the investigating officer also appeared to show that Tansia was 13 years old. He, however, termed the documents false and the Police Surgeon's report inaccurate because Tansia was 19 years old. He could, however, not provide the remotest of evidence to support his assertion. Learned Deputy Prosecutor General has vehemently

opposed the bail and submitted that rape will occur even if a child gives her or his consent.

4. I have heard the learned counsel for the applicant and the learned Deputy Prosecutor General. My observations and findings are as follows.

5. With much respect, I disagree with the stance taken by the learned counsel. Speaking hypothetically, even if there is documentation to show that Tansia married Mazahir with her consent, such consent would not come to Mazahir's aid as the definition of rape in section 376 P.P.C. now makes immaterial the permission of a child less than 16 years of age. Punishment for rape falls within the prohibitory clause of section 497 Cr.P.C. Prima facie ingredients for an offense under section 364-A P.P.C. may also have been satisfied. Once again, the punishment falls within the prohibitory clause of section 497 Cr.P.C.

6. The evidence on record now reflects that Tansia is a minor, i.e., 13 years of age. Upon a tentative assessment, an offense under the Sindh Child Marriage Restraint Act, 2013 is also made out. The punishment for an offense under that law falls within the non-prohibitory clause of section 497 Cr.P.C. However, considering the principles enunciated by the Supreme Court in the case of Tariq Bashir and 5 others vs. The State (PLD 1995 SC 34), I have looked at a 20-year-old eloping with a 13-year-old, admittedly marrying her and consummating the marriage, as an exceptional circumstance to deny the applicant the concession of bail in an offense, the punishment of which falls within the non-prohibitory clause.

7. Regarding the counsel's submission that an ossification test be conducted again, he is free to approach the learned trial court. If, in a new test, the Police Surgeon determines the girl to be an adult, the applicant would be at further liberty to re-apply for bail on that new ground. I also do not find any malafide on the part of the complainant in registering this case. Upon a

tentative assessment, it seems at this preliminary stage that the father of the minor reported an offense that had occurred and that there was no malafide in him doing so. Malafide is a requirement for the grant of pre-arrest bail.

8. The investigating officer should ensure that every person who facilitated the marriage of a minor, particularly the persons who solemnized the marriage of the couple, is investigated. It is not enough that Mazahir alone is burdened with guilt. As a child is involved in this case, the trial court shall use its best endeavors to expedite the trial and preferably finish it within four months. It must also be ensured that the 13-year-old is not intimidated or harassed during the trial.

9. Bail application is dismissed.

JUDGE