

IN THE HIGH COURT OF SINDH CIRCUIT COURT MIRPURKHAS

CrI. Bail Application No.S-164 of 2024
(Zeeshan Vs. The State)

DATE ORDER WITH SIGNATURE OF JUDGE

Date of hearing & Order 04.10.2024

Mr. Ghulamullah Chang, advocate for the applicant (a/w applicant on bail)
Mr. Leela Ram, advocate brief holding on b/o Mr. Shankar Lal, advocate
for the complainant

Mr. Dhani Bux Mari, A.P.G Sindh a/w Investation Officer

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ORDER

Adnan-ul-Karim Memon, J: This bail application under section 498 Cr. P.C is filed on behalf of applicant Zeeshan, seeking his admission to pre-arrest bail in F.I.R No.38 of 2024 for the offense punishable under sections 377-B PPC at Police Station Mithi, District Tharparkar.

2. The trial court dismissed the applicant's previous bail application No.175/2024, filed under section 498 of the Criminal Procedure Code (Cr.P.C.) on 13-07-2024. The court's decision was based because the alleged offense falls within the ambit of the prohibitory clause of S.497 Cr. P.C; that the victim himself and witnesses have named the applicant in their statements under section 161 Cr. P.C; that the delay in registration of FIR in such like cases is always considered immaterial by superior Courts. Moreover, given the victim's tender age of 16/17 years and the prima facie evidence of the offense, the applicant was not entitled to bail.

3. The accusation in the FIR against the applicant is that he committed sodomy/sexual intercourse with the complainant's son on 19-05-2024.

4. Learned counsel for the applicant argued that accusations against the applicant are false and fabricated; that there is no evidence to support claims; that no bystanders intervened despite public location and daytime; that FIR delay suggests malicious intent; that the applicant has no criminal history and low flight risk; that applicant has cooperated with the court and investigating officer; that education of the applicant will be jeopardized by sending him behind the bars; the prosecution witnesses are biased. On the medical issue of the victim, he argued that the medico-legal

officer opined that no male DNA profile or semen stains were found on the victim's superficial and deep anal swabs (Item 1.0); that victim's clothing (Item 2.0) nothing was found; that DNA analysis was not performed on the blood sample of the accused (Zeeshan) due to the absence of semen evidence; that the anal swabs and clothing of the victim do not contain any evidence of semen; that based on the medical history, clinical examination, and the negative DNA/semen results, there is not enough evidence to link the accused (Zeeshan) to the alleged sodomy. He added that the case requires further investigation to determine guilt. He relied upon case of Abdul Ghaffar Vs. The State & another [2016 SCMR 1523]. He prayed for allowing the bail application.

5. Learned APG assisted by the learned counsel for the complainant has argued that the accused is directly named in the FIR with a specific role in the heinous crime of sexual abuse against a minor. The victim's statement, supported by an impartial eyewitness, strongly implicates the accused; that the crime, punishable with a minimum of 14 years imprisonment, falls within the prohibitory clause of Section 497 Cr. P.C.; that the delay in filing the FIR has been adequately explained, considering the sensitive nature of the case and the initial attempt to resolve the matter privately; that while the negative DNA report is considered, it is not conclusive, especially when the ocular testimony is strong. He relied upon cases of Abdul Manan Vs. The State [2023 P.Cr.L.J 73], Amanullah Vs. The State [PLD 2009 SC 542], Sakhi Rehmat Vs. The State [2021 MLD 75], Ghulam Hussain Vs. The State [2020 YLR 1959], Abdul Raheem Vs. The State & another [2023 MLD 1384], Aziz-ul-Rehman alias Babul Vs. The State [2022 P.Cr.L.J 828], unreported bail orders of this Court dated 08-02-2021 Re- Wajid Vs. The State [B.A No.S-424/2020], unreported order of Islamabad High Court dated 30-07-2021 Re- Mubeen Ahmed Vs. The State & another [Crl. Misc No.S-631-B/2021], unreported order of Lahore High Court dated 09-11-2021 Re- Muhammad Sajid alias Sajo Vs. The State etc [Crl. Misc No.-59005-B/2021]. He prayed for the dismissal of the bail application.

6. I have heard the learned counsel for the parties and perused the record and case law cited at the bar.

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

i) The investigating officer recovered the victim's clothes and recorded statements from witnesses. A JIT was formed to investigate the case, and the victim's statement was recorded under section 164 CrPC. The IO submitted the charge sheet against the accused under sections 377 and 377-B PPC. The investigating officer sent the blood sample of the accused as well as the victim for a DNA test to Sindh Forensic DNA & Serology Laboratory for opinion.

ii) Medico-legal officer, vide his conclusive report opined that on semen analysis (semen stains/sperm fractions), medical history, physical exam, DNA/semen report, and serology testing, found that there was/is no conclusive evidence linking applicant Zeshan or any other suspect to the alleged sodomy.

iii) DNA report suggests that the anal swab samples and clothing of the victim, Deewan S/O Kanji, did not contain any semen stains or sperm fractions.

iv) Initial medical report of the victim revealed a minor abrasion in the anal canal but no other significant abnormalities were found.

v) The peri-anal skin was shaved and free of any rashes, excoriations, or other abnormalities. The anal orifice was slightly gaping and showed a small abrasion (1x0.2 cm) at the 2 o'clock position. The anal rugosities (normal folds in the anal canal) were present and not inflamed. The anal tone was normal, indicating that the muscles around the anus were functioning properly. No tears were noted in the anal orifice. No anal conditions such as fissures, hemorrhoids, infections, or abscesses were identified during the examination.

vi) Statement of the victim was recorded under section 164 CrPC belatedly.

vii) Section 377-B of the Pakistan Penal Code (PPC) deals with "unnatural sex with a minor." It is a serious offense with a severe punishment, including imprisonment of at least 14 years.

8. The law on bail is now well settled. In cases where the offense falls outside the non-prohibitory clause of section 497(1) of Cr.P.C., bail is to be granted as a matter of course, and rejection of the same is an exception. Where, however, an offense falls within the prohibitory clause, bail can only be granted if the court concludes that there is no reasonable ground for believing that the accused has committed a non-bailable offense or where an accused makes out a case of further inquiry into the guilt of the accused or in case the accused is under the age of 16 years or is sick or infirm.

9. Due to the punishment prescribed in section 377B as originally promulgated the offence under section 377A did not fall in the prohibitory clause of section 497(1) of Cr.P.C. The legislature then amended section

377B to enhance the punishment, rendering the offense under section 337A non-bailable and one that falls within the prohibitory clause of section 497(1) Cr.P.C.

10. The law on bail attempts to strike a balance between the individual rights of the accused and the collective rights of the society that are seemingly in conflict. An individual has the right to liberty, to be presumed innocent until proven guilty and not to be subjected to pretrial punishment. The society, on the other, has a collective interest in maintaining safety, affording citizens protection against crime and violence, and ensuring that no one is allowed to obstruct justice. These can seem contradictory rights. Bail is denied in cases where the accused is a flight risk or is likely to engage in obstruction of justice if released on bail or is accused of an offense of such nature that his release creates a risk that he might engage in a repetition of the offense charged or that his conduct is such that releasing him into the society would subject other individuals within the society to the possibility of harm.

11. Prima facie it appears from the report of Sindh Forensic DNA and Serology Laboratory, no seminal material was identified on the anal swab. 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.

12. As far as the applicability of Section 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 as the complainant was informed and other witnesses just reached there and allegedly did not see the occurrence. Similarly, no one from the public/people 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 signs of violence on the body of the victim nor any semen on the clothes of the victim has been detected, to substantiate the version of the complainant/victim in respect of forcible drag of the victim inside the

otaque 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.

13. 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).

14. The concession of pre-arrest bail could not be withheld by way of premature punishment as no fruitfull result will come out to send the applicant behind bars for an indefinite period in a case where the medico-

legal officer opined that on semen analysis (semen stains/sperm fractions), medical history, physical exam, DNA/semen report, and serology testing, found that there was/is no conclusive evidence linking applicant Zeshan or any other suspect to the alleged sodomy. Besides DNA report suggests that the anal swab samples and clothing of the victim, Deewan S/O Kanji, did not contain any semen stains or sperm fractions. 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 pre-arrest bail and, hence is entitled to the same.

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

16. For the aforesaid reasons this bail application is allowed and the interim pre-arrest bail already granted to the applicant vide order dated 24.07.2024 is hereby confirmed on the same terms and conditions, subject to furnishing additional surety of Rs 1,50,000/- (one hundred and fifty thousand) and P.R Bond in the like amount for the satisfaction of Additional Registrar of this Court.

17. The observation recorded hereinabove is tentative and shall not prejudice either party in the trial. The learned trial Court shall make efforts to conclude the case within four months and at least the complainant/victim 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