

IN THE HIGH COURT OF SINDH, KARACHI

Present:-

Mr. Justice Ali Haider 'Ada'

Crl. Bail Appln. No. 2839 of 2024

Applicant : Hussain Baloch son of Muhammad Ali,
Through Mr. Abid Ali, Advocate.

Respondent : The State,
Through Syed Mumtaz Ali Shah,
Assistant Prosecutor General, Sindh
A/w Syed Iftikhar Ali (Father of Victim).

Date of Hearing : 10.02.2025.

Date of Order : 10.02.2025.

ORDER

ALI HAIDER 'ADA', J:- Through this bail application, applicant Hussain Baloch son of Muhammad Ali seeks his release on post arrest bail in Crime No.926 of 2023 of P.S Sachal, Karachi, under Section 377 & 34 PPC. The applicant had filed his bail application before the Court of Vth Additional Sessions Judge, Malir, Karachi, who after hearing the parties, has turned down his request vide order dated 20.11.2024; hence, this application has been maintained.

02. The brief facts of the case are that Syed Naqi Shah was awaited for his friend in the meantime two persons came on motorcycle there one boy aged about 12 years was also sitting together, as they asked to accompany with them when they reached at pointed place wherein 5/6 unknown persons already available, if seen again, identified as them, beaten and sodomy with complainant as well as with boy whose aged about 12 years. The incident was reported to the police on 20.08.2023, although the alleged incident occurred on 19.08.2023. Furthermore, the prosecution states that the present accused was arrested based on spy information on 08.09.2023, and his medical examination was conducted on 09.09.2023. An identification parade was held before the learned Magistrate on 15.09.2023. Additionally, the victim was examined by the Medical Officer on 20.08.2023. The prosecution further claims that the accused persons also captured photographs and video clips of the alleged incident.

03. Learned counsel for the applicant/accused submits that there is a delay in the registration of the FIR, which remains unexplained and amounts to more than 27 days. Additionally, the identification parade was conducted six days after the alleged incident. The police have no record to show that the applicant/accused was not seen by the complainant prior to the identification parade. Furthermore, he submits that the report of the Forensic DNA and Serology Analysis concluded that the DNA profile obtained from the epithelial fraction of the stain section can be excluded as a possible contributor. He also submits that the challan has already been submitted by the police, and the applicant/accused is not required for further investigation. The applicant/accused has been in custody for 17 months without trial. Lastly, the learned counsel prays that bail may be granted to the applicant/accused

04. On the other hand, the learned Additional Prosecutor General of Sindh opposes the bail application on the grounds that the offence is heinous in nature and that the applicant/accused played an active role in the commission of such an unnatural offence. Furthermore, it is submitted that the contentions of the learned counsel for the applicant/accused are not merely tentative, but require a deeper appreciation. Under these circumstances, the applicant/accused is not entitled to the grant of post-arrest bail."

05. One Syed Iftikhar Ali, the father of the victim, is also present and relies on the Prosecutor General's submission, stating that the applicant/accused is fully involved in this case. He asserts that the applicant/accused has committed zina with his son and prays that the applicant/accused is not entitled to the grant of post-arrest bail.

06. Heard arguments and perused the material available on record.

07. The record reflects that a boy, approximately 12 years old, was also listed as a victim in the FIR. However, the police/investigating agency neither included him in the investigation nor established a prima facie case. Furthermore, the record shows that the DNA report, in which the examiner concluded as follows: -

"Results and Conclusion:

Trace amount of seminal material was identified on stain sections taken from pants of Naqi Abbas s/op Iftikhar Ali (item#4.1-4.6)

The DNA profile obtained from ephithelial fraction of stain section taken from pants (item#4.1) is inconclusive mixture of at least five individuals and no comparison could be made.

The DNA profile obtained from sperm fraction of stain section taken from pants (item#4.1) is mixture of at least three individuals. Naqi Abbas s/o Iftikhar Ali (item#V1), Muhammad Arif (item#S1) Riaz (item#S2) and Hussain Ali s/o Muhammad Ali (item#S3) can be excluded as a possible contributor in this mixed DNA sample."

08. Therefore, the conclusion also excludes the possible contribution, while further report states that the DNA profile obtained from the sperm fraction of the stain section taken from the victim is a mix of at least three individuals. The applicant cannot be excluded as a possible contributor to this mixed DNA. This view becomes doubtful, contradicting the earlier conclusion and requiring further evidence.

09. The record reflects a delay in the registration of the FIR without any plausible explanation, and such delay raises doubts about the prosecution's case. It is well-established law that any doubt regarding the applicant/accused be considered even at the bail stage. The delay in the identification parade is evident, but the Investigating Agency has failed to explain the reason for this delay. Upon reviewing the identification parade, it is clear that the complainant/victim did not specifically describe the role of the applicant/accused but instead collectively identified the accused. Additionally, if pictures and videos were captured, the Investigating Agency has a primary duty to collect the mobile phone/data from the applicant/accused and seize it in order to gather evidence to support or challenge this aspect, but this crucial step appears to be missing. The law on bail seeks to strike a balance between the rights of the accused and the rights of the state, with the presumption of innocence until proven guilty. The offence under Section 377 of the PPC falls within the prohibitory clause, but the mere heinous nature of the offence is no grounds to deny bail to the applicant/accused

10. Therefore, in view of the above, once the attraction of Section requires evidence, then the matter falls under the ambit of Section 497 (2) Cr.P.C. Accordingly, instant bail application is hereby allowed. Applicant **Hussain Baloch son of Muhammad Ali** shall be released on bail subject to furnishing his solvent surety in the sum of Rs.100,000/- (Rupees One

Hundred Thousands Only) and PR Bond in the like amount to the satisfaction of learned trial Court.

11. It may be pertinent to mention here that the observation(s) made hereinabove is/are tentative in nature and shall not prejudice the case of either party during trial. However, if the applicant is found misusing the concession of bail, learned trial Court may proceed against him.

JUDGE

Manthar Brohi