IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No. 413 of 2025

Applicant	:	Muhammad Farman Qureshi Through Ms. Uzma Saeed, Advocate
Respondent	:	The State through Mr. Qamaruddin Nohri, DPG Sindh duly assisted by Mr. Abbas Ali Sehar, advocate
Date of hearing	:	16.04.2025
Date of order	:	24.04.2025

O R D E R

KHALID HUSSAIN SHAHANI, J. – Applicant Muhammad Farman Qureshi seeks post-arrest bail in a case bearing Crime No.476/2024, offence under section 376 PPC of P.S Shah Faisal Colony Karachi. The bail plea of the applicant was declined by the Court of learned Additional Sessions Judge-VII Karachi East vide order dated 18.10.2024.

2. According to the prosecution's case, the complainant Muhammad Anwar was operating a cloth shop, while a tailor named Farman [applicant] had a shop located in front of his residence. In 2022, the complainant's daughter, Zareena, visited Farman's shop to have her clothes stitched. The accused allegedly took her cell phone, called her to his residence, administered intoxicating substances, and forcibly raped her. The accused also recorded a video of the assault. Subsequently, he promised to marry her, but used the video to blackmail her, continuing to sexually assault her at various locations and on multiple occasions. In 2023, Farman allegedly gave Zareena pills, which caused her to fall into depression. When a marriage proposal for the girl was arranged, she became distressed and revealed the entire sequence of events to her mother. As a result, the complainant filed the present FIR, alleging that the accused had been committing continuous rape from 2022 until June 2024.

3. The learned counsel mainly contended that the accused is innocent and has been falsely implicated in the case with malicious intent and

ulterior motives. The counsel, in the written objection, claimed that the accused and the victim had an ongoing relationship, but challenged the victim's character. It was argued that although the accused had contact with the victim, no unlawful act had been committed. It was further asserted that the father of the victim had sent a marriage proposal, which was rejected, leading to the filing of this FIR with no grounds. The counsel emphasized that Section 376 PPC does not apply, as no evidence of forcible conduct had been presented. It was also pointed out that there is no medical evidence linking the applicant to the alleged offence. The learned counsel further noted the significant delay of about two years in lodging the FIR, for which the prosecution had not provided a satisfactory explanation. Additionally, the medical examination of the victim was discussed, with no conclusive evidence found. The learned counsel lastly prayed for the confirmation of bail for the accused, citing the case law at 2016 P.Cr.L.J 1888.

4. On the other hand, the learned APG for the State, assisted by the learned counsel for the complainant, vehemently opposed the bail application. It was contended that the accused, who works as a tailor, obtained the mobile phone number of the victim, persuaded her to meet, and took her to a location near Azeem Pura. There, it is alleged that the accused, after administering substances to the victim, engaged in misconduct and recorded the incident. The opposition further argued that for an extended period of time, the accused allegedly coerced the victim using the video to exert control over her. The learned APG highlighted that the victim was medically examined, and it was recorded that her hymen was old, torn, and healed, while she is unmarried. In support, the learned counsel for the complainant referred to case law, including 2017 P.Cr.L.J 1642, 2015 SCMR 825, 2022 YLR Note 117, PLD 1969 W.P Lahore 38, and 1997 P.Cr.L.J 1351.

5. Before discussing the merits of the instant bail application, this court is mindful of the fact that the pre-arrest bail is an extra ordinary relief to be granted only in extraordinary situations to protect innocent persons against victimization through abuse process of law for ulterior motives and bail before arrest cannot be granted unless the person seeking it satisfies the

conditions specified through subsection (2) of section 497 Cr.P.C, not just this but in addition thereto, he must also show that his arrest was being sought for ulterior motives, particularly on the part of the police to cause irreparable humiliation to him and to disgrace and dishonor him, however, in the present case accused failed to show any malice or mala fide on the part of complainant for his involvement in this heinous offence. Reliance is placed on the case of *Rana Muhammad Arshad Vs. Muhammad Rafique* (PLD 2009 SC 427.

6. Now coming to the merits of the instant bail application, record manifests that the FIR is undoubtfully registered with remarkable delay but such delay is always not fatal to the case of prosecution since there is no renowned enmity exists between the parties and the facts of the case are triggering the other circumstances as well. In the case of *Muhammad Ajaib Vs. Mehboob Khan* (2000 P.Cr.L.J 1484), it was observed by the Supreme Court Azad Jamu & Kashmir that *"delay in lodging the F.I.R. in absence of any allegation of substitution or concoction was not fatal to the prosecution case"*. In the case of *Haq Nawaz Vs. The State* (2008 P.Cr.L.J 484), the Lahore High Court was of the view that the delay in lodging of FIR in absence of previous enmity would not matter much. In the case of *Mian Muhammad Nawaz Sharif Vs. The State* (PLD 2002 Karachi 152), this court held, delay or promptness in lodging the F.I.R. shall not in all cases lead to an inference about truth or otherwise of the case set up in the F.I.R. Where the facts were remarkably peculiar and by delaying the F.I.R. prosecution had not gained anything and had produced enormous evidence which was trustworthy and believable, the delay in lodging of the F.I.R. was immaterial in circumstances. In the case of *Sher Khan Vs. The State* (1996 P.Cr.L.J 668), the Federal Shariat Court was of the view that delay per se in lodging the F.I.R. is generally not sufficient to cast a doubt whether the prosecution case unless, either by evidence or otherwise, it is shown that delay was caused as the complainant was involved in making out a false case against the accused.

7. Coming back to the new round of argument of the learned advocate for the accused that the accused was in contact with victim and there was a relationship between the parties and she tried to divert the mind of this

Court towards the consensual rape. In this regard, I would like to refer the case law cited at 2016 P.Cr.LJ 1888 (Imran Vs. The State), relied by the learned advocate for the accused wherein the consent, vitiated consent and will is interpreted and well defined. For understanding the relevant portion is reproduced as under; -

*"**375. Rape:-***

A man is said to commit rape who has sexual intercourse with a woman under circumstances falling under any of the five following descriptions,

(i) against her will;

(ii) without her consent;

(iii) with her consent, when the consent has been obtained by putting her in fear of death or of hurt;

(iv) with her consent, when the man knows that he is not married to her and that the consent is given because she believes that the man is another person to whom she is or believes herself to be married; or

(v) With or without her consent when she is under sixteen years of age.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Also of relevance is section 90 PPC, which is reproduced as under:

90. Consent known to be given under fear or misconception:

A consent is not such a consent as is intended by any action of this Code, if the consent is given by a person under fear of injury or under a misconception of fact, and if the person doing the act knows, or has reason to believe, that the consent was given in consequence of such fear or misconception or

As it could be seen from the special provisions of section 375, "will" and "consent" are differentiated, meaning thereby even if there is a will but no consent, rape will be actualized, and vice versa. To start with, I would thus like to focus on the first ingredient of section 375 being 'against her will', which relates to psychological state of the prosecutrix (as compared to 'without her consent', which refers to actions and performative). The word 'will' implies the faculty of reasoning power of mind that determines, whether to do an act or not. There is a fine distinction between an act done 'against the will' and 'an act done without consent'. Every act done 'against the will' is obviously 'without the consent.' But every act 'without the consent' is not 'against the will.' To me clause (1) of section 375 applies where the woman is in possession of her senses and therefore, capable of consenting. Courts have explained that the expression 'against her will' ordinarily means that the intercourse was done by a man with a woman despite her resistance and opposition.

Examination of the statement of the victim and the evidence clearly shows that she was not a consenting party, and the rape was committed against her will. Testimony of victim in cases of rape is held to be of vital significance and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Court ought not to find

any difficulty in convicting the accused on prosecutrix's testimony alone as per the cases reported as 2007 SCMR 605 and PLD 2011 SC 554.

With regards the second ingredient of section 375, being the act done 'without her consent', I note that the term 'consent' has been given to mean "an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side" by the Stroud's Judicial Dictionary (Fifth Edition - page 510). There is no dispute that an act done with consent always means the act done with free will or done voluntary. In this case, though the victim's consent for taking her out of her home was obtained on the basis of some past friendship or allurement with hidden intent, therefore to me, this tainted consent or a consent of this nature which is based on deception and fraud, cannot be termed, prima facie, to conclude that she consent to the sexual act also. Had the victim known that ultimately she would be rapped, there is no doubt in my mind that she would have not refrained herself from leaving home with the accused. Then a question would arise what was the purpose for which she gave consent and left home with him. To me, it was a fraud that was practiced on her and she was deceived, therefore such type of consent is rightly held to be the consent obtained without her consent. Consent obtained by deceitful means, as per the language and intent of section 375 is no consent and comes within the ambit of the ingredients of definition of rape, as well as, qualifies the exception provided for under section 90 of being a 'vitiated consent' given under a 'misconception of fact'.

With regards the second assertion that the DNA Laboratory Report dated 29.01.2016 declared "No human male DNA profile was identified in the vaginal swab", I note from the said report that the case was received at the National Forensic Science Agency on 16.11.2015. While per FIR, rape was committed on 11.09.2015, which means that whatever swab samples were presented to the said DNA Laboratory, they were more than two months old. It is not sure how these samples were preserved in this long period of time since external factors (such as temperature and humidity) and internal factors (other bodily fluids) affect the validity of a sample. Study shows that earlier the samples are collected and tested, the higher the chances of yielding solid results. DNA testing from vaginal swabs can reliably lead to an offender only if the sample is tested within the first 7 days of rape (See: http://www.forensicmag.com/articles/2015/01/ dna-forensic-testing-and-use-dna-rape-kits-cases-rape-and-sexual-assault), therefore the conclusion given in the said report of non-finding of a male DNA from the swab tested after more than two months of rape is not surprising at all. Some foul play is also evident from the fact that the said report suggests that the swab sample has been consumed, leaving no opportunity to challenge the results shown in the said report.

With regards the contention of the learned counsel about missing seminal stains, beside the foregoing reasons of late DNA testing, reference could also be made to Parikhs Textbook of Medical Jurisprudence and Toxicology by C.K. Parikh which describes 'sexual intercourse' to mean the slightest degree of penetration of the vulva by the penis with or without emission of semen. It is therefore quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. Similar views are also found in Modi in Medical Jurisprudence and Toxicology (23rd Edition - pages 897) where it is stated that to constitute the offence of rape, it is not necessary that there would be complete penetration of the penis with emission of semen and the rupture of hymen. Partial penetration of the penis within the labia majora or the vulva or pudenda with or without emission of semen or even an attempt at penetration is quite sufficient for the purpose of law. It is, therefore, quite possible to commit legally the offence of rape without producing any injury to the genitals or leaving any seminal stains. These views also find consistency with the explanation given in respect of

section 375, which shows that penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape."

8. From the above case of Imran (Supra), it is well established that the consent if taken by way of deception is called as "vitiated consent" which means "no consent". Hence prima facie accused has committed an act against the will of victim.

9. The contention of the learned counsel for the applicant regarding the absence of direct forensic/DNA support is not sufficient to dislodge the other available evidence at this stage. As laid down by the Hon'ble Supreme Court in number of cases that availability or otherwise of DNA evidence does not independently determine the fate of a sexual offence case and it has been consistently held that the sole testimony of the complainant & victim, if found to be confidence-inspiring, may be sufficient to connect an accused with the alleged offence. In case of Shakeel Ahmed Vs. The State (PLD 2010 Supreme Court 47) it was held (in paragraph 9),

> *"It is well-established by now that "omission of scientific test of semen status and grouping of sperms is neglect on the part of prosecution which cannot materially affect the other evidence."*

10. I would like to concur the other case laws titled as Haji Ahmad v. State (1975 SCMR 69), and case of Irfan Ali Sher v. State (Jail Petition No. 324/2019, decided on 17 April 2020) the Honorable Supreme Court (in paragraph 3), has been pleased to held,

> *"As regards the semen not being sent for DNA forensic determination with a view to link it with the perpetrator is not a requirement of law''.*

11. Furthermore, in *Criminal Appeal No. 251/2020* decided on 04.01.2021 and *Criminal Petition No. 75-Q/2021* decided on 21.10.2021, the Hon'ble Apex Court observed that such offences often occur in solitude, and therefore insistence on the presence of independent eyewitnesses may not be appropriate. It is a settled principle of criminal jurisprudence that for the purpose of bail, only a tentative assessment of the material is to be undertaken, without delving into a detailed evaluation of the evidence. From the material placed before the Court, the allegations appear to be specific, supported by the victim's own account, and

sufficiently corroborative at this stage to justify the denial of bail. No ground for further inquiry or exceptional circumstance warranting the exercise of discretion in favour of the applicant has been made out.

12. Given the above, prima facie the applicant has failed to make out a case for bail. Accordingly, interim pre-arrest bail order dated: 14.02.2025 is re-called and the bail application is dismissed.

13. Needless to mention, the observations made herein are tentative in nature and shall not prejudice either party during the course of trial.

J U D G E