

IN THE HIGH COURT OF SINDH, KARACHI

Before:

Mr. Justice Mohammed Karim Khan Agha, J.

Criminal Bail Application number, name of the Applicant and his counsel.

Criminal Bail Application No.399 of 2017

Muhammad Waqas V. The State.

Through Shaikh Javed Mir, Advocate for the applicant.

Mr. Zafar Ahmed Khan, D.P.G., for the State.

Mr. Muhammad Ali Lari, Advocate for the Complainant.

Date of hearing: 22.01.2018

Date of order: 25.01.2018.

ORDER.

Mohammed Karim Khan Agha, J: Through this criminal bail before arrest application, the applicant seeks confirmation of his pre-arrest bail in crime No. 352/2016, under Section 376/337-J PPC lodged at P.S. Saddar, Karachi

2. According to the contents of the FIR, it is stated by the complainant that on 02.01.2014 at about 1000-1100 hours applicant/accused Waqas Bhatti alongwith his aunt Zaib alias Zaibu visited Mst. Sundas alias Alisha in the house of her aunt Shabana at Karachi where she was alone. Accused Waqas Bhatti offered a drink to the complainant lady who after drinking it became unconscious and when she regained her senses she found herself to have been raped by applicant/accused. When she raised cries applicant/accused kept her on hope that he would marry her. Applicant/accused had also recorded video of rape and showing the same to

complainant lady he kept on cohabiting with her afterwards. Ultimately the complainant Sundas got pregnant and on intervention of their relatives applicant/accused, agreed to marry complainant if she aborted her child but fetus having gone older than six months, abortion could not be done hence complainant delivered a son on 20.04.2015 at Qamar-ul-Islam Hospital at Punjab Colony, Karachi but applicant/accused with connivance of attending lady doctor Sunita carried away child and after two months he refused to marry the complainant Sundas unless her father paid him fifteen lacs rupees and accused further threatened the complainant that in case of non-payment of money he would kill the child. Complainant therefore, filed petition before Justice of Peace at Karachi and getting the order lodged this FIR on 07.12.2016.

3. Learned counsel for the petitioner contended that the FIR had been filed after a period of 2 years and 10 months which delay enabled the concoction of the false and fabricated FIR against him; that there was inconsistencies in the prosecution statements especially in relation to the place of the incident, whether the petitioner was pregnant before she came to the house where the incident allegedly took place, who the new born baby was handed over to; that he was at work at the time of the incident for which he had relied on an attendance sheet; that co-accused Dr.Sunita had already been granted pre arrest bail by the trial court and thus based

on the rule of consistency he was also entitled to bail and as such for all the above reasons it was a case of further inquiry. When confronted on the issue of malafides the petitioner pointed to the police inquiry report which had exonerated him which according to him itself showed the malafides on the part of the complainant by lodging the false FIR against him. In support of his contentions learned counsel for the applicant placed reliance on numerous authorities.

4. On the other hand learned state counsel and learned counsel for the complainant opposed the confirmation of the pre arrest bail granted to the applicant. According to them the applicant had been charged with a very serious non bailable offense which carried the death penalty; that there was sufficient material on record to connect the applicant to the crime; that in cases of rape it was not unusual for there to be a delay in the filing of the FIR due to the constraints imposed by society; that the applicant had filed a S.164 statement narrating the true events; that there was absolutely no malafides on the part of the complainant and that the police report which the applicant had relied upon was the outcome of a bias investigation as the police were mixed up with the applicant as found by the court in its order dated 17-04-2017 and thus for all the above reasons the applicant was not entitled to pre arrest bail and the pre arrest bail of the applicant should be recalled with immediate effect. Learned counsel for the complainant relied upon **Mahmmod Shah v. Syed Khalid Hussain Shah and others** (2015 SCMR 869),

Jamroz Khan v. Aamir Khan and others (2013 CLC 542), **Mst. Fatima Begum and another v. Khush Naseeb Khan and others** (PLD 2005 Lahore 641), **Rehman Ghani and others v. Shahzad Khan and others** (2010 CLC 610) and **Mst. Saabran Bibi and 9 others v. Muhammad Ibrahim and 12 others** (2005 CLC 1160). He also relied upon the order dated 17.04.2017 for transfer of investigation.

5. I have considered the arguments of the parties, perused the record and the case law cited at the bar.

6. It is made clear that the findings in this order are only of a tentative nature and shall have no bearing on the outcome of the trial which shall be decided by the trial court on merits after recording of the evidence and completion of the trial.

7. At the outset I am of the view that the case law cited by the complainant are of little, if any, relevance to the case in hand.

8. To my mind the key aspect to deciding this bail application is the delay in the filing of the FIR by the complainant. As per the FIR the offense under S.376 PPC was committed on 02-01-2014 however the FIR was not lodged until 07-12-2016 i.e. 2 years and 10 months after the event. The only explanation given for such a long delay is that this was a matter of family honour. In my view a delay of a few

days in the family thinking through the best steps to be taken may have been justified as was indicated in the case of **Shah Feroze Rind V The State** (2009 P.Cr.LJ 409). However there appears to be no justification for delaying lodging the FIR for almost 3 years which has gone completely unexplained except to the extent that the applicant kept the complainant on false hopes of marriage.

9. The whole object of promptly registering an FIR is to rule out the possibility of any concoction/cooking up of the same. In this case a delay of almost 3 years has opened the door for all kinds of concoction to be made.

10. In my view the crime of rape is considered a horrific crime in all societies and nearly all women and their families in all such societies undergo a great trauma in reporting rape. Women who are subject to such a horrific crime should be encouraged to report the same at the earliest and should be given the full support of society in so doing so that the perpetrators of such crimes can be brought to book while the evidence, including forensic, is fresh and any stigma associated with the crime with respect to the victim can be eradicated.

11. In this case if the complainant was raped she not only kept quiet about this crime for an extremely lengthy period but it seems according to the FIR that she continued to co habit with the applicant. At the time of the rape she would not even have known that she was pregnant. It would appear

from the time line that the initial rape did not cause the pregnancy but rather her continued co habiting with the applicant which she was doing under her own free will and consent. No material was produced showing any alleged video recording of the rape which may have been used to blackmail the complainant in not reporting the rape or to compel her to cohabit with the applicant. The fact that the complainant took so long to report the rape tends to show an element of malafide on her part based on the particular facts and circumstances of the this case and as such malafide can be inferred. In this respect reliance is placed on the recent Supreme Court case of **Khalil Ahmed Soomro and others V State** (unreported dated 28-07-2017).

12. Even if the police investigation was found to be biased and the trial judge took cognizance of the case as is his right under the law it is still noticeable that there are contradictions in the witness statements as to whether the complainant was pregnant at the time when she came to live at the house where she was allegedly raped and who the child was handed over to; it also appears from the applicants work attendance record that he may not have been in Karachi at the time of the rape. It is true that the complainant has made a S.164 statement in support of her contentions but this has been made at a very belated stage. Likewise it is not in my view particularly relevant that the co-accused Dr.Sunita has been granted pre arrest bail as the role of the applicant is far more serious.

13. What however was the most troubling and saddest aspect of this hearing is that neither the applicant (the alleged father) nor the complainant (mother) seemed to have any interest in their child. None of them knew where the child was. The mother alleged it was with the father but she had taken no steps under the law to seek the custody of the child.

14. On balance therefore after taking all the factors into account I am of the view that malafides can be inferred on the part of the applicant for not filing the FIR for almost 3 years and that on account of the delay in filing the FIR and the various contradictory statements that this is a case of further inquiry. Thus the applicant's pre arrest bail is confirmed on the same terms and conditions.

15. The bail application stands disposed of in the above terms.