IN THE HIGH COURT OF SINDH, KARACHI

Criminal Bail Application No.524 of 2016

Imran

vs.

The State

Before: Mr. Justice Zulfiqar Ahmad Khan

Date of Hearing	:	02.05.2016.
Date of Order	:	30.05.2016
Applicant	:	Through Mr. Samsam Ali Khan, Advocate
Respondent	:	Through Ms. Akhtar Rehana, Addl.P.G.

O R D E R

Zulfiqar Ahmad Khan, J.:- Applicant has moved this bail application being aggrieved and dissatisfied with the Order dated 11.03.2016, passed by the learned IV-Additional Sessions Judge, Karachi (West) in Sessions Case No.2513/2015, arising out of F.I.R No.299 of 2015, under sections 376, 506, 337-A(i)/34 PPC, registered at Police Station Iqbal Market, Karachi (West).

Brief facts of the case are that complainant Anita who resided in a low income community of Karachi, while at home on 11.09.2015 received a call from the accused Imran asking her to come out of her home, whereupon she was taken on a motorcycle driven by Imran to a vacant room, where the accused committed rape with her and thereafter she was brought by the accused on the same motorcycle to the house of Mst.Bushra, *Bhabi* of the accused. The complainant informed Mst.Bushra about the rape committed by the accused Imran, on which Mst.Bushra replied that it was good for her and now she will have to marry the accused at all costs. Subsequently, Mst. Sidra, cousin and mother of the accused Imran also came to that house and kept on threatening the complainant to make herself be ready to merry Imran. As the complainant was not ready to marry Imran, she was beaten up, thereafter, the

accused Imran and his elder brother Faisal took the complainant on motorcycle and left her near her home but forcibly put petrol in her mouth. They also uttered that if she would have any shame then she should eat something else (poisonous) and die. After reaching home, the complainant not being feeling well, in the morning was brought by her parents through Ambulance to Abbasi Shaheed Hospital for a medical checkup and treatment. During the treatment, ASI of PS Iqbal Market appeared at the hospital and recorded her statement under section 154 CrPC which was incorporated in the FIR book. During investigation, the complainant was medically examined by WMLO who confirmed that the complainant was subjected to rape. The IO let off the accused Mst.Bushra and submitted Challan against the remaining accused. The accused Mst.Margina and Faisal were granted pre-arrest bail on 15.12.2015 and the co-accused Amin also filed request for a post-arrest bail which was dismissed. The present accused also filed a post-arrest bail application in the Sessions Case, however, his counsel at trial stage did not press the said bail application, which was dismissed, as not pressed.

From the impugn order, I note that Mr. Mohammad Khan, learned counsel for the accused in the initial case argued that the two accused were let off during the investigation and two accused namely Faisal and Mst.Margina were granted bail. He added that there was delay in lodging the FIR, which was not reasonably explained and there were no independent witnesses nor was the statement of the victim recorded during the investigation under section 164 CrPC. According to him the medical certificate was challenged by the accused and the Medical Board had suspended the said medical certificate. He also pointed out that DNA report was not also in favor of the prosecution, hence the case became one of 'further enquiry' and prayed that accused Imran be released on bail. These assertions were challenged in the first bail application by the learned DDPP who opposed the grant of bail to the accused

on the ground that his previous bail application was dismissed as withdrawn and no fresh ground was shown in that bail application.

In the impugn order the learned Adl. Session Judge refused the bail by recording that the previous bail application, which was filed by the accused (though later withdrawn) is to be treated as dismissed on merits and held that the grounds shown in that initial bail application cannot be pressed in the subsequent bail application. To the learned Judge, the only fresh ground was the decision of Special Medical Board whereby MLC in respect of the complainant Anita that was kept in abeyance/suspended on the DNA report. I however upon examination note that the reason of such abeyance/suspension as provided for in the Annexure D-5 is not on any technical ground, rather it is on the account of victim's unavailability to appear (on the date and time stipulated in the said letter) before the special medical board constituted. One can easily imagine the restrictions imposed on the free movement of a rape victim by domestic and social forces, not to mention the looming threat from the perpetrators of the offence themselves. I therefor will not give much weight to such findings rendering keeping the report in abeyance and/or suspension. However, what is important to note in the said letter of 27.02.2016 is that the Medical Superintendent, Services Hospital, Karachi confirmed that the Board was constituted in respect of MLC No.6625/2015, dated 12.09.2015 which was in respect of the injuries from petrol intoxication, and not for rape. Thus such abeyance/suspension has no effect on the confirming of rape having been committed. The learned Judge has fully recognized this fact that the medical certificate that was suspended was not in respect of the allegations of rape which has been separately issued by WMLO Dr. Farkhanda Qureshi on 12.09.2015 after the examination of the victim, wherein it was confirmed that rape has been committed upon the victim, it was only in respect of petrol intoxication.

Levelling new round of arguments Mr. Samsam Ali Khan, learned counsel of the accused in the present case posed the following contentions:

(i) The lady was the consenting party and she had accompanied the accused of her own will and, therefore, the accused cannot be convicted for the said offence of rape under section 375;

(ii) Results of DNA Test Report dated 27.02.2016 are in favor of the accused; and

(iii) There is a discrepancy between the statements made by the accused in FIR and in that she made before the IO, as well as, all evidence is against the accused, etc.

To me, except for the first two assertions, all other submissions of the learned counsel for the accused seem to be identical to those made before the trail court and the impugned order has addressed them properly. I would therefore start with responding to the first assertion in the following, for which I find it relevant to reproduce full text of section 375 of PPC, 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 which is also reproduced in the following:

> 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.

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 S.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 mean 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 2011 PLD 554 SC.

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 intend, 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, therefor 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 S.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 these 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.

Now I would like to consider the case-law referred by the learned counsel which is discussed in the following:

(1) Salman Akram Raja and another v/s. Government of Punjab, through Chief Secretary and others (2013 S.C.M.R 203)

This judgment encourages use of DNA technology by the courts. The said case also directs that request for administration of DNA test should be made at the earliest stage of the case. In the present case, there are two medical reports at hand and the one that is undisputed, actually confirms that rape was committed. Discussion on the scientific value of DNA report after delays of more than two months of taking the sample is already presented in the foregoing.

(2) Muhammad Sajid v/s. The State (2000 P.Cr.L.J 1948); Jehangir v/s. The State (1987 P.Cr.L.J 964) and Akbar Ali v/s. The State (2003 P.Cr.L.J 385)

The view expressed in these cases that solitary statement of the victim not being sufficient to warrant conviction of the accused has been reversed in the light of the Apex court judgments reported as 2007 SCMR 605 and 2011 PLD 554 SC.

(3) Umar Din and another v/s. The State (2007 P.Cr.L.J 1627)

In this case the lady was seen with the accused in public places and it was alleged that she did not make any hue and cry nor sought help from the public. Facts of the case in hand are different. The lady was taken to an isolated place where she was raped. She had no

opportunity to make hue and cry, thus the instant case can be distinguished accordingly.

To conclude, in the instant case where the complainant was neither willing nor that she consented for the sexual act forced upon her by the accused, therefore in my view the necessary ingredients which are to be satisfied to bring home the charge under section 376 of the PPC have been satisfied, and in the light of the pronouncements of the Apex Court (2007 SCMR 605 and 2011 PLD 554 SC) holding that the testimony of the victim is of vital significance and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Court ought not to have any difficulty in adjudicating the matter on prosecutrix's testimony alone. It appears that there is enough material to arrive at the *prima facie* conclusion that the applicant was involved in the offence, as well as, added with the fear that the applicant, belonging to a relatively influential class, if released on bail at this stage it is most likely that he would intimidate or influence the victim and/or the witnesses. One could also imagine a strong likelihood that in the above circumstances, the victim would make herself scarce and might flee from the justice, I am therefor not inclined to grant bail at this stage. For the aforesaid reasons, this bail application is dismissed.

The observations made in this order shall however not affect the decision of the case at any stage of the trial or other proceedings.

Adequate medical attention shall be provided to the victim. MIT-II should liaise with MLO and the victim (if needed) and submit reports in this regard at frequent intervals.

Judge