

IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA.

Cr.Bail Application No. S-136 of 2017.

Applicants : Muhammad Bilal son of Lalo Khan and Asma, daughter of Lalo Khan by caste Bozdar, through Mr. Rashid Mustafa Solangi, Advocate

State : Mr. Aijaz Mustafa Samtio, DDPP alongwith Investigation Officer.

Complainant : Barkat Ali through Mr.Habibullah. G. Ghouri, Advocate.

Date of hearing : 16.06.2017.

ORDER

ADNAN-UL-KARIM MEMON, J.- The Applicants, namely, Muhammad Bilal son of Lalo Khan and Asma daughter of Lalo Khan both by caste Bozdar are seeking release on bail in F.I.R. bearing No.19/2017 for offence under section 365-B and 376/2 P.P.C. of Police Station Rehmatpur.

2. Facts of the prosecution case are that on 10.03.2017 complainant namely Barkat Ali son of Ali Madad Ghanghro registered above specified F.I.R. alleging therein that his daughter namely Mst. Saira, aged about 23/24 years is final year student of Chandka Medical College, Larkana residing in Marvi Hostel. He further asserted that on 05.02.2017 at about 05:00 p.m. he alongwith his cousin Irshad and nephew Waseem Ahmed reached at the main gate of Marvi Hostel, where they saw one white colour Toyota Corolla GLI car parked in and found that accused Mohammad Umar, Bilal and Abu-Bakar all by caste Bozdar and one unidentified person were available there. He further alleged that his daughter Mst. Saira came out from the hostel

and accused Mohammad Umar Bozdar caught her hand and forced her to sit in the car but she resisted and cried. Whereupon, other accused persons took out pistols and pointed out towards complainant party threatening them to keep quiet and they took away his daughter Mst. Saira. Thereafter, the complainant lodged instant F.I.R.

3. Investigating Officer submitted charge sheet under Section 173 Cr.PC on 06.04.2017 in which he placed the names of Applicants in column No.2. However, learned Judicial Magistrate vide order dated 06.04.2017 did not agree with the Report of Investigating Officer and directed the Applicants to join the proceedings and subsequently sent up the case to the court of Learned Sessions Judge, Larkana for trial. Applicant No. 1 and 2 namely Bilal and Asma moved respective Bail Applications bearing No.388 and 358 of 2017 before the learned Sessions Judge, Larkana. Both the said Bail Applications were transferred to learned VIth Additional Sessions Judge, Larkana who vide respective orders dated 06.04.2017 dismissed the Bail Applications.

4. Mr. Rashid Mustafa Solangi, learned counsel for the Applicants has argued that Mst. Saira contracted valid marriage with the co-accused namely Muhammad Umar son of Lalo Khan Bozdar on 28.01.2017. Such statement of Mst. Saira was recorded before the Learned Judicial Magistrate, Model town, Lahore vide order dated 09.02.2017. He next contended that father of Mst. Saira was in rage over love marriage of his daughter and lodged false F.I.R against Applicants and others in order to take revenge from them. He next contended that Complainant has stated in the FIR that on 25.02.2017 the alleged incident (mention the incident as per contents of F.I. R.) took place. Whereas, Mst. Saira in her statement under section 164

Cr.PC. disclosed the date to be 25.01.2017, which requires further enquiry into the guilt of Applicants. He next contended that alleged abductee (Mst. Saira) was neither kidnapped by the Applicants nor was compelled to marry co-accused namely Muhammad Umar Bozdar. Therefore, F.I.R. lodged by the Complainant is based on ulterior motives with malafide intention to compel the family of Applicants to give divorce to the alleged abductee (Mst. Saira). He next contended that alleged abductee was recovered from Lahore on 15.03.2017 while her statement was recorded under section 164 Cr.P. C. on 18.03.2017, which has casted serious doubt on the version of alleged abductee (Mst. Saira) and Complainant. He next contended that the Investigating Officer after completing the usual investigation recommended the names of Applicants in column No.2 of Report under Section 173 Cr. P. C. for want of insufficient evidence. Therefore, the Applicants cannot be saddled with criminal liability of alleged abduction of abductee as they have nothing to do with the alleged abduction and the story put forward by the Complainant is totally misconceived and concocted. He further argued that doctor has opined that no fresh sexual act has been committed with alleged abductee at the time of her examination which means that the allegations leveled by the Complainant and alleged abductee in her 164 Cr.P.C. statement that she was raped are nullified. Therefore case requires further enquiry. He next contended that the case of Applicants does not fall within the ambit of section 365-B PPC read with section 376 PPC hence, the Applicants are entitled to concession of bail. He next contended that Nikah between alleged abductee and co-accused namely Muhammad Umer was validly performed in accordance with law and the same has not yet been called in question before any

competent court of law. Therefore, criminal case is misconceived against the Applicants. He next argued that statement of abductee which was recorded after lapse of couple of days seems to have been obtained under pressure and coercion by Complainant. He lastly contended that both the Applicants are minors, therefore entitled to concession of bail. In support of his contentions, he has placed reliance on the case of ***Shahid Imran v. The State (2012 Cr.LJ-230) and Sirajuddin v. Saghiruddin alias Goga & another (1970 SCMR 30)***.

5. Mr. Habibullah G. Ghouri, learned counsel for Complainant has contended that name of Applicant No.1 is mentioned in the F.I.R and name of Applicant No.2 was disclosed by the victim (Mst. Saira) in her statement under seduction 164 Cr.P.C. recorded by learned 3rd Judicial Magistrate, Larkana. He next contended that victim (Mst. Saira) in her statement disclosed that Applicants are involved in committing Zina with her. He next argued that offence of Zina is punishable for life imprisonment, therefore, Applicants are not entitled to concession of bail at this stage. He next contended that life of the victim has been ruined at the hands of Applicants and other co-accused. He next contended that case of the Applicants falls within the prohibition contained in section 497(1) Cr.P.C. He lastly contended that case of the Applicants does not require further inquiry.

6. Mr. Aijaz Mustafa Samtio, learned DDPP has opposed grant of bail to the Applicants while adopting the arguments of learned counsel for the Complainant.

7. I have heard learned counsel for the Applicants, learned DDPP for the State, learned counsel for the Complainant, perused the material available on record and case law cited at the Bar.

8. I am conscious of the fact that while deciding a bail application, court has to consider the allegations leveled in the FIR, statements recorded under Section 161 Cr.P.C., nature and gravity of charge, other incriminating material against the accused and pleas raised by him in defence. In this regard, reference is respectfully made in the case of ***Shahzad Ahmed v. The State (2010 SCMR 1221)***.

9. Record reflects that victim (Mst. Saira, daughter of Barkat Ali) in Private Complaint lodged by her for offence under section 452 and 506/2-PPC stated before Learned Judicial Magistrate, Lahore that she contracted marriage with one Muhammad Umar Bozdar on 28.01.2017 with her own free will. She further stated that she was not abducted by anyone and Respondent (Barkat Ali/father of victim) and others are annoyed with her over the said marriage. She further disclosed that on 08.02.2017 she was at her house when Respondents (in Private Complaint) reached there and warned her of dire consequences if she did not take divorce from her husband. She further disclosed that she was rescued by the people of vicinity.

10. I have noted that much emphasis has been laid by the learned counsel for the complainant on the plea that the alleged abductee recorded her statement under section 164 Cr.P.C. wherein she leveled allegation of her abduction, rape and forced marriage against the Applicant No.1 and others. Per learned counsel, she further stated that accused namely Muhammad Umar contracted marriage with her under pressure and coercion.

11. I have further noted that respective statements of victim before Learned Judicial Magistrate, Lahore and Learned 3rd Judicial Magistrate, Larkana are contradictory. Therefore, a pivotal question arises as to which one of the above said two statements of the victim is true? The answer to this question can only be found at the trial after recording evidence and not at the bail stage.

12. Prima facie following aspects of the case are apparent on the face of record:

(a) This case appears to be of elopement because the alleged abductee appeared before two different courts of law and made two completely different statements whereby in her first statement before learned Judicial Magistrate, Lahore she admitted that her Nikah was performed with co-accused namely Muhammad Umer Bozdar.

(b) Nikah was allegedly performed on 28.1.2017 and F.I.R was lodged on 10.3.2017 i.e after more than two months showing the date of incident as 25.2.2017.

(c) No apprehension existed of tampering with evidence of prosecution.

(d) There is delay of 13 days in lodging of F.I.R for which no plausible explanation is put-forth giving rise to presumption of false implication of Applicants in the case.

(e) During the course of investigation the Applicants have been declared innocent. This aspect also casts doubt on the prosecution case.

(f) Applicants are behind the bars since 15.3.2017.

13. During course of arguments learned counsel for the Applicants produced National Data Registration Certificate of Applicant No.2 issued by NADRA which shows that Applicant No.2 was born on 02.02.2001 and is aged about 16 years. Learned counsel also produced Age Certificate of Applicant No.1 issued by Medical Board constituted under the Order of concerned Magistrate showing the age of Applicant No.1 as 17 years. Learned counsel for the Complainant

objected that this ground cannot be considered by this Court at this stage because to this ground for the said plea was not taken before the learned Trial Court. However, learned counsel did not dispute the age of Applicant No.02.

14. It is a well settled proposition of law that bail can be granted even in a case of capital offence if accused prima facie establishes the ground that he/she is a minor. In this regard reference is made in the decision rendered by the Honorable Supreme Court in the case of **SIRAJ DIN v. SAGHIR-UD-DIN alias GOGA and others (1970 SCMR 30)**.

15. Record further reflects that Nikahnama dated 28.01.2017 executed between victim and co-accused Muhammad Umar Bozdar is available on record and the same has not yet been declared to be illegal and unlawful by any competent court of law.

16. Tentative assessment of Medical evidence reveals that doctor in view of external as well internal examination, Pathologist Report and Pathological examination opined that alleged abductee is not a virgin and no fresh sexual act has been committed which Prima facie shows that the alleged abductee was not subjected to gang rape. In other words, Medical Report of alleged abductee does not support the prosecution case with respect to the allegations of gang rape/zina.

17. I have further noted that per F.I.R. the Applicant No.2 is not assigned active role in the subject crime. Therefore, at this stage case of the prosecution requires further inquiry into the guilt of the Applicants as contemplated under Subsection (2) of Section 497 Cr.P.C.

18. In light of the above facts and circumstances, I am of the opinion that Applicants have made out a case for grant of bail. Accordingly, the instant Bail Application is allowed and the Applicants, namely, Muhammad Bilal and Asma are admitted to bail subject to their furnishing solvent surety in the sum of Rs. 200,000/-each and PR bond in the like amount to the satisfaction of Trial Court.

19. The above findings are tentative in nature which shall not prejudice the case of either party at the trial.

20. These are the reasons of short order dated 16.6.2017.

J U D G E

Abid H. Qazi/ **