

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application 475 of 2020

Mujahid Khan

vs.

The State

For the Applicant / Accused : Mr. Shahid Akhtar Awan
Advocate
Mr. Muhammad Salman Khan
Advocate

For the Prosecution / State : Mr. Abrar Ali Khichi
Additional Prosecutor General

For the Complainant : Mr. Liaquat Ali Awan
Advocate
Mr. Qadir Raza Shaizada
Baloch, Advocate
Mr. Muhammad Shabbir Shakir
Complainant

Date of hearing : 28.04.2020

Date of announcement : 28.04.2020

ORDER

Agha Faisal, J. This matter pertains to the alleged rape of a fourteen year old girl (student of Class VII), in respect whereof F.I.R. 156 of 2019 was registered against the applicant, being a twenty eight year old married man living in the vicinity of the victim, on 08.07.2019 before P.S. Shahrāh e Noor Jahan, Karachi, Central, and *challan* submitted before the trial Court on 02.12.2019.

2. Learned counsel submits that the earlier plea for bail by the applicant was rejected by the Court of the learned IInd Additional Sessions Judge Karachi Central, in Bail Application 145 of 2020, hence, the present proceedings.

3. After considering the submissions of the learned counsel and sifting¹ through the material placed before the court, for and against the applicant, reproduction whereof is eschewed herein², it is observed as follows:

a. The allegation levelled against the applicant, being a neighbor of the complainant / victim, was that on 06.07.2019 he kidnapped the fourteen year old victim and subjected her to rape. Subsequent thereto, reliance was placed on a purported *nikah nama* seeking to absolve the applicant of culpability.

¹ *Shoaib Mahmood Butt vs. Iftikhar Ul Haq & Others* reported as 1996 SCMR 1845.

² *Muhammad Shakeel vs. The State & Others* reported as PLD 2014 Supreme Court 458.

- b. Learned counsel for the applicant pleaded entitlement to the concession of bail on the premise that no case for statutory rape³ was made out as it applies only to girls under the age of fourteen; there was a two day delay in registration of the F.I.R.; and that a statement was given by the victim that she was not abducted.

The Prosecution asserted that the applicant was not eligible for the relief sought *inter alia* as he was named in the F.I.R.; intercourse was an admitted fact, apparently having occurred even prior to the date of the purported *nikah nama*; the underage status of the victim was demonstrated by the NADRA record as well as the medical report, which included the result of an ossification test as well; and the applicant's avoidance of the trial proceedings was borne from the record.

Learned counsel for the Complainant, while rendering assistance to the Prosecution, supplemented that the applicant (and the victim) have given statements to show that intercourse took place (even prior to the purported *nikah nama*); the fact that the victim was underage was borne from the record, hence, a case of rape was *prima facie* made out; the applicant was admittedly a married⁴ man twice the age of the victim and there was no mention of the previous marriage in the purported *nikah nama*⁵, which was stated to be fraudulent; there was no delay in reporting the matter to the police; the statement of the victim with regards to abduction was a result of coercion and regardless thereof it had no bearing on the offence of rape having been perpetrated by the applicant upon the victim.

- c. The primary issue for the court to deliberate is the definition of statutory rape per the P.P.C. Section 375(v) thereof stipulates that sexual intercourse with a girl under the age of sixteen, with or without her consent, amounts to rape and the punishment thereof⁶ places the offence squarely within the prohibitory clause, in so far as bail matters are concerned.

The learned counsel for the applicant had argued that the relevant age stipulated in the law was fourteen, as opposed to sixteen, however, when confronted with the updated text of the law⁷ for the time being in force, he conceded that he had mistakenly been relying upon an earlier version of the provision and withdrew his challenge in regard hereof.

- d. In so far as the necessary constituent of the offence of rape is concerned, the explanation in Section 375 P.P.C. stipulates that penetration is sufficient to constitute sexual intercourse.

The material placed before the Court pointed to the occurrence of sexual intercourse prior and subsequent to the date of the purported *nikah nama*. The statements of the

³ Per Section 375(v) P.P.C.

⁴ Per the statement of the applicant given to the Police.

⁵ Clause 21, requiring particulars of existing wife etc., is demonstrably blank.

⁶ Per Section 376 P.P.C.

⁷ Sections 375 and 376 P.P.C. inserted vide the Protection of Women (Criminal Laws Amendment) Act 2006 with effect from 02.12.2006, in view of the original provisions having been repealed by Section 19(3)(a) of the Offence of Zina (Enforcement of Hudood) Ordinance 179.

applicant (and the victim) were placed before the Court showing that intercourse took place on successive dates prior in time to the purported *nikah nama* and it was also shown that at no time since the date thereof, till date, have such statements been denied or controverted. Even otherwise the issue of consent would become marginalized if the victim was underage.

The memorandum of the present bail application specifically pleads that the victim is pregnant and corroboration thereof, in the form of medical reports, is also available on file. In addition thereto paternity is also admitted by the applicant, hence, the occurrence of intercourse appears to be admitted.

- e. The age of the victim was demonstrated first by the NADRA Underage Children Registration Certificate, dated 11.03.2018, wherein the victim and two of her siblings are mentioned and the birth date of the victim is stated to be 19.07.2005. This would denote that on the date of the alleged offence, being 06.07.2019, the victim was fourteen years old.

Additionally, an age certificate was issued by the Office of the Police Surgeon Karachi which categorically states that according to the ossification data the bone age of the victim is “*between fourteen to fifteen years, nearer to fifteen years*”. The victim was examined in such regard on 12.07.2019 and the findings delivered are in consonance with the NADRA certification referred to supra.

- f. The next issue to address is the purported delay in the registration of the F.I.R. The record shows that the victim went missing on 06.07.2019 at 1945 hours. It was argued that the father of the victim, complainant, reported the matter to the police and upon dissatisfaction with the timeliness of their response lodged a written application on 07.07.2019. The F.I.R. is dated 08.07.2019, however, per learned counsel the same does not show any delay on the part of the complainant. It may suffice to record that for the consideration of this bail application no case for unjustified delay in registration of the F.I.R. is made out.
- g. It is also pertinent to consider the import (weightage for purposes hereof) of the victim’s statement stipulating that she was not abducted. Notwithstanding the contention of the complainant that the relevant statement was given under duress, it is noted that the statement has no nexus with the alleged offence of rape per Section 375(v) P.P.C., which could be proven, or otherwise, independent of whether kidnapping was proven or not⁸.
- h. Learned APG had argued that the applicant had avoided cooperating in the trial and *inter alia* upon demonstration thereof his second pre arrest bail application⁹ had also been dismissed. Learned counsel also drew the Court’s attention to the order dated 02.12.2019 whereby the learned Court had recorded the

⁸ Per Qazi Faez Isa J. in Judgment dated 17.04.2020 in *Irfan Ali Sher vs. The State (Jail Petition 324 of 2019)*.

⁹ Order dated 15.01.2020 in Bail Before Arrest Application 2015 of 2019 before the learned II Additional Sessions Judge Karachi Central.

unjustified absence of the applicant on numerous dates of hearing¹⁰.

4. A tentative¹¹ assessment of the material¹² placed before the court demonstrates the existence of some tangible evidence, which, if left unrebutted, may lead to the inference of guilt¹³ and reasonable grounds have been shown linking the applicant with the cited offence/s¹⁴, punishable with imprisonment of ten years or more, in respect whereof the law¹⁵ disapproves of the concession of bail.

5. It is also gleaned that the Prosecution has expressed cogent reasons indicating¹⁶ the applicant's involvement in the alleged offence/s and the arguments articulated by the applicant's counsel did not qualify the present facts and circumstances to fall within the ambit of further inquiry¹⁷.

6. In view hereof, it is the assessment of this Court that the learned counsel for the applicant has been unable to set forth a fit case for grant of post-arrest bail, hence, the present application is hereby dismissed.

7. It is considered pertinent to record that the observations herein are of tentative nature and shall not influence and / or prejudice the case of either party at trial.

JUDGE

¹⁰ There was manifest non-disclosure of any other bail application having been determined and the relevant previous orders were placed on record only after specific directions having been rendered vide order dated 14.04.2020.

¹¹ *Shahzaman vs. The State* reported as *PLD 1994 Supreme Court 65*.

¹² *Asif Ayub vs. The State* reported as *2010 SCMR 1735*.

¹³ *Tariq Bashir & Others vs. The State* reported as *PLD 1995 Supreme Court 34*.

¹⁴ *Muhammad Imran vs. The State* reported as *2016 SCMR 1401*.

¹⁵ *Section 497(1) Code of Criminal Procedure 1898; Sohail Waqar vs. The State* reported as *2017 SCMR 325*.

¹⁶ *Rehman Ullah vs. The State* reported as *2020 SCMR 357; Ravida vs. Amjad & Others* reported as *2018 SCMR 28; Haji Shahid Hussain & Others vs. The State* reported as *2017 SCMR 616*.

¹⁷ As enumerated per *Section 497(2) Code of Criminal Procedure 1898; Muhammad Faiz vs. The State* reported as *2015 SCMR 655*.