

ORDER SHEET
IN THE HIGH COURT OF SINDH KARACHI

Crl. Bail Application No. 1713 of 2022

DATE

ORDER WITH SIGNATURE OF JUDGES

For hearing of bail application.

17-04-2023

Mr. Muhammad Faisal Malik, Advocate a/w applicant.
Mr. Muhammad Asif, Advocate for complainant a/w Mr. Farhan Ahmed, Advocate.
Mr. Talib Ali Memon, A.P.G.
Complainant Mst. Shazia a/w her daughter Zoha.

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Omar Sial, J.: Sohail Mehmood has sought pre-arrest bail in crime number 689 of 2022 registered under sections 354, 377-B, 509, 376 and 511 P.P.C. at the Zaman Town police station in Karachi. Earlier, his application seeking bail was dismissed on 31.08.2022 by the learned 7th Additional Sessions Judge, Karachi East.

2. It appears that finally a brave lady, for the sake of her 15 year old daughter, has come and reported that her husband, the applicant, has been molesting and sexually abusing her 15 year old daughter since she was 11 years old. On 27.06.2022, the applicant attempted to rape the survivor and it was then that the little girl broke her silence and told her mother, the complainant, as to what trauma she had been exposed to by the applicant for 4 years. She told the mother that constant threats from the applicant had made her not tell anybody of the abuse.

3. The counsel for the applicant argued that the allegation was false as the F.I.R. in itself records that it was, according to counsel, "at best", an attempt to rape. He submitted that the mother and daughter were lying simply because of the reason that the mother wanted a *khulla*. According to the counsel the survivor has stated different dates of when the attempt to rape was made and that in any case the applicant was on a bus on 27.06.2022, the date on which the rape is said to have been attempted. In order to prove his *alibi* he produced a bus ticket. At the outset, I must

record that I am extremely saddened and disappointed at the quality of arguments made by the counsel for the applicant. His entire argument was not based on legal grounds but was a tirade of victim blaming and trivialization of child abuse. Stereotyping and gender bias coupled with immense insensitivity towards a child survivor, which was demonstrated by the counsel for the applicant, is highly condemned and disapproved by this Court. The learned APG has strongly supported the bail dismissal order and has further argued that the applicant saying that a false accusation had been made because the mother wanted *khulla*, was a ridiculous argument as obtaining *khulla* was not contingent on making serious accusations such as the current one.

4. I have heard the counsel for the applicant and the learned APG, who was assisted by the counsel for the complainant. The complainant and the survivor were also both present. My observations and findings are as follows.

5. It is law well settled that at the bail stage a tentative assessment of a case is required. A court is not supposed to make observations which may impact trial as the accused deserves a fair trial and is indeed the blue eyed boy of the law. Article 10-A is often cited by counsels in their arguments. One wonders however whether, in the particular circumstances of the present case, a Court can restrain itself and whether it should restrain itself from expressing complete disgust at the conduct of the applicant. Soft words cannot be used for him even at this stage keeping in mind the trauma on the little survivors face when this Court asked her only one question i.e. whether what she said was true?, and she nodded her confirmation. The solitary statement of the survivor was enough evidence for this Court, to be prima facie satisfied with the truth of what she says. Counsel wants the fundamental rights of his client to be upheld but has conveniently forgotten the life-long trauma the child has been subjected to. A survivor's statement to the Truth Project encompasses it all – *“Because when I talk about it I can see it, feel it, hear it and taste it...I try to say the words. I feel dirty inside. I feel more dirty telling you about it because it*

hurts me inside, it really hurts.” The outside chance that it is a false allegation will most certainly be caught out by the learned trial court when it has had an opportunity to evaluate the evidence. At this stage it would however not be safe to let the applicant loose in society. He has all ability and prima facie intent to pressurise and threaten the survivor and her mother in addition to repeat the offence with another child. The applicant attempting to escape from the Court premises after the short order dismissing his bail was announced, also does not reflect well on his bonafide and suggests that he is also quite capable of becoming an absconder.

6. Reverting to the counsel’s argument that the allegation cannot be categorised as rape as there was no evidence of penetration or semen; the argument is completely misconceived. Criminal Law (Amendment) Act, 2021 introduced a much expanded definition of rape by amending section 375 P.P.C. Section 375(d) now brings oral sex within the definition of rape. The acts of the applicant may very well fall within the ambit of section 375 P.P.C. What constitutes rape is no longer hostage to penetration and semen. I have no doubt that the learned trial court will keep this into account while evaluating the case.

7. The bus ticket shown to me for alibi is meaningless as is counsel’s completely misconceived argument that the survivor has faltered on the date of abuse. Counsel’s argument only reflects his ignorance of child sexual abuse. It does not deserve an observation. The ticket shown to me is dubious to say the least. I also find it extraordinary that the applicant has preserved a tickets that he had purchased 10 months ago. Upon a tentative assessment it seems that the applicant has created false evidence to show that he was not at home when the survivor says that he had tried to rape her. Be that as it may, whether or not the ticket is genuine will have to be proved by the applicant at trial. Even if the ticket is of a particular date, the crime complained of is such that has continued for 4 years.

8. The counsel's argument that a Board of Inquiry set up by the Pakistan Air Force to look into the conduct of the applicant gave him a clean chit, is a misconceived argument and appears to be a misrepresentation made by the counsel. The Findings of the Board are on record and they do not reflect any such conclusion such as the one the counsel submits.

9. I whole heartedly agree with the learned APG that had the mother wanted *khulla*, there were a lot of easier ways to do so. The misogynistic arguments of counsel for the applicant in this regard are strongly disapproved of. Malafide, a pre-requisite for the grant of pre-arrest bail, upon a tentative assessment, does not exist.

10. The bail application of the applicant was dismissed vide a short order dated 12.04.2023 and above are the reasons for it.

11. This is a case registered at the Zaman Town police station and thus the learned 7th Additional Sessions Judge, Karachi East is seized of the matter. The Malir Courts have an infrastructure to conduct trials when a victim in a case is a minor. It is my understanding that such a facility does not exist in the Courts of Karachi East. It would therefore be appropriate in the present case, that the case be transferred from the Court of the learned 7th Additional Sessions Judge, Karachi East to the learned Sessions Judge, Malir, Karachi, so that the trial can take place in the Juvenile Court set up there. The learned trial court shall ensure protection of the privacy of the survivor and not at any stage have her exposed directly to the applicant. The learned trial court shall also ensure that no inappropriate question is asked by any counsel from the survivor. She should not live out her trauma again through the questions asked of her or her mother at trial. As the offences complained of may entail applicability of the Anti-Rape (Investigation and Trial) Act, 2021, the learned Sessions Judge, Malir shall remain aware of the provisions of the Act of 2021. The trial being conducted in the Juvenile Court will not impact the present case as the proviso to section 3 of the Act of 2021 states that where juvenile courts

have already been designated, they shall be deemed to be Special Courts under the Act of 2021.

12. I.G. Sindh is directed to ensure safety of the survivor and her mother till the conclusion of the trial. Under no circumstances should the applicant, directly or indirectly approach the survivor's family.

13. Pannah Shelter Home is requested to reach out to the survivor and her mother and see if there is anything that the Shelter can do to assist them at this time. Particularly in the provision of temporary shelter and trauma treatment of the survivor.

14. Let a copy of this order be sent to:

(i) The learned Sessions Judge, Malir, the learned Sessions Judge Karachi, East as well as the learned 7th Additional Sessions Judge, Karachi East.

(ii) The I.G. Sindh (office to ensure that the requisite details of the survivor are sent to facilitate).

(iii) Manager, Pannah Shelter Home (office to ensure that the requisite details of the survivor are sent to facilitate).

JUDGE