

IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Bail Application No. 358 of 2025

Applicant : Azhar Ali son of Abdul Rasheed
Through Mr. Muhammad Kamran Mirza,
advocate

Respondent : The State
through Ms. Rubina Qadir, DPG
Duly assisted by Mr. Daniyal Muhammad
Hussain & Rana Daniyal Akram advocates.

Date of hearing : 27.03.2025

Date of order : 21.04.2025

ORDER

KHALID HUSSAIN SHAHANI, J. – Applicant Azhar Ali seeks post-arrest bail stemming out of FIR No. 22 of 2025, offence u/s 365-B PPC, read with Section 3 of the Prevention of Trafficking in Persons Act, 2018, of PS Gulshan-e-Iqbal, Karachi, The applicant's plea for bail was declined by the learned III Additional Sessions Judge, East, Karachi, vide order dated 31.01.2025.

2. As per prosecution theory, on 16.01.2025, Zehra Batool, the daughter of Complainant Darya Batool left the house at 9:00 p.m. to attend a Majlis at Imam Bargah Madina al-Ilm, Block-5, Gulshan-e-Iqbal, Karachi, but did not return. After a futile search, the complainant suspected their neighbor's guard, Azhar Ali, who was allegedly seen talking to the girl, of abducting her with the intent to seduce illicit intercourse. Consequent upon; case was registered inter alia on above facts.

3. Learned counsel contended that the applicant has been falsely implicated with mala fide intention and ulterior motives; that there is one day delay in the registration of the case, despite the proximity of the police station, which casts serious doubt on the prosecution's version; that the abductee herself recorded statements under Section 161 & 164 Cr.P.C. before the Investigating Officer and the learned Judicial Magistrate respectively, categorically denying abduction and stating that she left her home of her own volition and solemnized a free-will marriage with the applicant at Nosheroferoze; and that copies of the

free-will affidavit and Nikahnama were submitted to corroborate the same. It was further contended that no eyewitness has been cited, no recovery of objectionable material has been made, and the accused is no longer required for investigation, as he is already in judicial custody. The learned counsel argued that the alleged abductee being lawfully married to the accused disentitles the application of Section 365-B PPC. Reliance was placed on 2022 P Cr. LJ 953 (Islamabad) to argue for the grant of bail in similar factual circumstances as well as an unreported order in CP No. D-5865 of 2025 (Mst. Mehwish and another Vs. Province of Sindh & others).

4. Conversely, the learned DPG, assisted by learned counsel for the complainant, opposed the bail plea on the grounds that the abductee is a minor, aged between 15 to 16 years, as determined through the ossification test conducted by the Police Surgeon and corroborated by multiple educational records and a NADRA-issued birth certificate. It was forcefully argued that the alleged recovery of the abductee from the custody of the accused, coupled with her minority, renders any consent or free-will marriage immaterial in the eyes of law. Specific reliance was placed on PLD 1964 Dacca 225, PLD 1962 W.P. Karachi 886, 2009 MLD 1350 Quetta, 1996 MLD 822, 1986 SCMR 35, and PLD 1972 Lahore 121, to support the argument that consent of a minor is of no legal consequence in cases of abduction or kidnapping with intent to compel marriage or illicit intercourse. It was further submitted that the offence falls within the prohibitory clause and is of heinous nature.

5. Record reflects, the applicant is specifically nominated in the FIR and is alleged to have enticed away a girl whose age, as per the ossification report and documentary evidence, falls between 15 and 16 years. The plea of free-will marriage raised by the accused is of no avail at this stage, in view of the settled principle that consent of a minor is not legally valid for purposes of marriage or departure from lawful guardianship. Furthermore, the recovery of the girl from the custody of the accused strengthens the prosecution's version at this stage. The medical and documentary evidence regarding minority of the abductee shifts the case outside the purview of further inquiry. The consistent judicial view has been that in cases of abduction or kidnapping involving minor females, the consent of the abductee even if

expressed in statements before the Court is immaterial where she is below the age threshold defined under Sections 361, 363, and 366 PPC. The ratio decidendi laid down in numerous precedents supports the complainant's contention that minority of the girl is the decisive factor, and consent in such cases cannot absolve the accused of criminal liability.

6. The case laws relied by the learned advocate for complainant is well appreciated. As such in the case of Mahiuddin Ahmed v. Nabin Muhammad & others (PLD 1964 Dacca 225), the Court underscored the foundational importance of age in such prosecutions, holding that:

Age of a girl in a prosecution under section 363 or section 366 of the Pakistan Penal Code is of fundamental importance and it seems to me that the learned Magistrate has relied on the statement made by the girl to the effect that she is major. The learned Magistrate ought to have made an enquiry about the age in a case of this nature.

7. In the case of Kamala Prosad Bhartaharjee and another v. Emperor (A.I.R. 1941 Cal. 315), it was held that in order to prove the charge of kidnapping, the prosecution must prove that the person kidnapped was under 16 years of age. It is true that the burden of proof lies on the prosecution but it is also a duty of the Magistrate to give adequate opportunity of proving the age.

8. Similarly, in Abdul Hamid v. The State (PLD 1962 (W.P.) Karachi 886), the Court clarified the application of Sections 361 and 366 PPC in the context of a minor voluntarily accompanying the accused, holding that:

In my view, on the evidence of the girl herself, the appellant did take her away with himself. Mst. Rubab was still under the guardianship of her parents when she was sent to the hotel where she met the appellant. Although the appellant did not induce her or tell her to go with him and although the girl says that she went with the appellant herself and that she told him to take her away; still the appellant did take her to Korangi in consequence. The appellant, therefore, is liable as he took the girl away to Korangi. It is immaterial that he did so after the girl had requested him to do so. The offence lies in taking a minor from lawful guardianship. It would be still an offence if a person takes a minor at the minor's request as long as the minor is taken while she is yet in the keeping or custody of a lawful guardian. The nearest parallel case reported is In re, Khalandar Saheb (A I R 1955 Andhra 59). There we find the following remarks:-

It is next to be considered whether the accused took the minor or enticed her to go with him. It is contended that the accused did not take her or entice her, but she voluntarily went with him. There is an essential distinction between the two words 'take' and 'entice'. The mental attitude of the minor is not of relevance in the case of taking. 'The word 'take' means to cause to go, to escort, or to get into possession. When the accused took the minor with him, whether she was willing or not, the fact of taking was complete and the condition was satisfied. The word 'entice' involves an idea of inducement by exciting hope or desire in the other. One does not entice another unless -the latter attempted to do a thing which she or he would not otherwise do. The juxtaposition of these two words makes it clear that the act of taking is complete (sic) when the accused takes her with him or accompanies her in the ordinary sense of the term, irrespective of her mental attitude. So, it is clear that, when the accused took the girl along with him, he was 'taking' her out of the father's custody within the meaning of the section.

I am in respectful agreement with the observations made above and I find that the appellant was rightly convicted for an offence under section 366, P. P. C.

9. In Fozia Petrik v. The State (2009 MLD 1350), the Court reiterated that:

Plea of accused that alleged abductee had gone with her own consent with him, was of no consequence in view of minority of abductee... she was minor within the meaning of S.361, P.P.C... if any female under the age of 16 years is taken away from the lawful guardian without consent of such guardian amounts to kidnapping... no matter whether she has consented to such kidnapping or not...

10. In Noor Dad v. The State (1996 MLD 822), it was held that:

Discretion of abductee to elope and her consent to a marriage with accused and eventually to sexual intercourse might not entail legal consequences suitable to accused... her age is only 15 years and thus under Ordinance VII of 1979 she having not attained the age of 16 is not an adult.

11. Similarly, in Abdul Khaliq v. The State (1986 SCMR 35), the Supreme Court held:

...The petitioner was charged with the abduction of Shamshad Kausar a minor girl about 12 years of age and thereafter commission of Zina-bil Jabr with her which are punishable under sections 11 and 10(3) of the Ordinance. The petitioner had in reality kidnapped Mst. Shamshad Kausar from a lawful guardianship she being a minor and was taken away to Murree Hills. She was also subjected to Zina-bil-Jabr.

The arguments with regard to consent would not be of any avail to the petitioner as the victim of the crime was of age specified in the definition of "kidnapping from lawful guardianship" in section 361, P.P.C. namely,

sixteen years and the said section according to the law is to be read for discovering the definition of kidnapping for purpose of section 11 of the Ordinance...

12, In *Alfat Bibi & another v. The State* (PLD 1972 Lahore 121), the Court opined:

...If the statement of the abductee of 15 years of age exonerating the accused on the basis of her marriage after kidnap ping/abduction, is allowed to be used for quashment of prosecution under section 363/366, P. P. C. it may mean a general license for kidnapping girls approaching their 15th year of age. In other words, it will mean an indirect amendment in at least half a dozen punishing provisions in the penal law of Pakistan and also in other laws.

Even if the marriage is proved it does not absolve the so called husband (and others) of the offence committed by him qua his alleged wife and the marriage, for example the consent to marriage (which may or may not be valid under Muslim law) in these circumstances does not absolve the kidnapper of an offence under section 363, P. P. C. The consent, as to marriage of an abductee also, would be open to so many factual and legal questions involving mental and physical faculties.

It is to be noticed that the consent of a minor female in matter of her abduction is no defence in a prosecution for offence under section 366, P. P. C.

The fact, that the alleged abductees have been allowed to go with their abductors in collateral proceedings in the nature of habeas corpus, cannot and does not prove that the accused persons have not committed any offence either qua the kidnapping and/or abduction of, and qua the marriage with, the female minors...

13. In *Mujahid Khan v. The State* (2021 MLD 1683), a comprehensive discussion of rape, kidnapping, and minority concluded with findings based on the medical and NADRA records indicating the victim was fourteen years old, thus rendering her consent to sexual relations and marriage irrelevant. The Court stated:

Even otherwise the issue of consent would become marginalized if the victim was underage... reasonable grounds have been shown linking the applicant with the cited offence/s punishable with imprisonment of ten years or more, in respect whereof the law disapproves of the concession of bail.

14. I would also like to concur the case of *Muhammad Azam Vs. Muhammad Iqbal & others* (PLD 1984 Supreme Court 95) Shariat Court, wherein the Honorable Shariat Court was pleased to held that;

...Legal implications-Previous admissions of prosecutrix in favour of valid marriage if proved as voluntarily made particularly when before a Court of law but in proceedings which were normal and genuine, held, will

have important bearing-False evidence of previous admissions created by accused in farcical proceedings, if proved, held further, might .be used against accused in negation of plea of valid marriage as permissible under S. 8, Evidence Act, 1872-Trial Court to examine (in circumstances of each case) as to why effort was made to solemnise marriage in secrecy, at odd place in presence of outsiders to exclusion of near ones particularly in cases of "minor" girl of such' tender age that child Marriage Restraint Act, 1929 provided as crime-Laws on various levels of age for marriage and exercise of option of puberty desired to be examined by Court.

15. These judicial pronouncements collectively affirm the settled legal principle that where the abductee is a minor, her consent is of no legal consequence. Statements under Sections 161 or 164 Cr.P.C., a Nikahnama, or an affidavit, howsoever voluntarily made, cannot override the statutory protection accorded to minors, nor can such documents be used as a defence to vitiate the allegations of kidnapping, particularly where recovery is made from the custody of the accused and age is medically and officially shown to be below the legal threshold. Prima facie, the provisions of Sections 365-B PPC and Section 3 of the Prevention of Trafficking in Persons Act, 2018 appear to be attracted. The contention that the girl contracted marriage out of her own free will may carry weight at trial, however, at this stage, her minority makes her alleged consent legally immaterial in light of the precedents cited above, especially when the offence falls within the prohibitory clause. The unreported order relied by the learned advocate for accused vide C.P No. D-5865 of 2024, though relevant, was rendered in a different context involving protective relief under constitutional jurisdiction and does not per se undermine the implications of the penal provisions invoked in this case.

16. In view of the foregoing and keeping in mind the tentative nature of bail proceedings, I am of the candid opinion that the applicant has not made out a case for further inquiry as envisaged under Section 497(II) Cr.P.C. Accordingly, the bail application stands dismissed. However, the learned trial court is directed to conclude the trial preferably within a span of 90 (Ninety) days. Needless to mention, the observations made hereinabove are tentative in nature and shall not prejudice either party during the course of trial.

J U D G E