

ORDER SHEET

LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Crl. Misc. No. 56457/B/2024

Zain Tariq Vs The State etc.

S.No. of Order/ Proceeding	Date of order/ proceeding	Order with the signature of the Judge and that of parties or counsel where necessary
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31.12.2024 Barrister Momin Malik with the Petitioner.
 Mr. Muhammad Mustafa Chaudhry, Deputy Prosecutor General, with Hina Imdad/SI.
 Mr. Ali Hussain Mohsin, Advocate, for the Complainant.

Tariq Saleem Sheikh, J. – Through this application, the Petitioner seeks pre-arrest bail in case FIR No.1546/2024 dated 3.7.2024 registered at Police Station Peoples Colony, Faisalabad, for an offence under section 376 of the Pakistan Penal Code 1860 (PPC).

2. According to the FIR, the prosecution's case is that the Petitioner owns a fabric shop in Tata Bazar near the ice factory in Faisalabad. He became acquainted with the Complainant through her frequent visits to purchase cloth. Over time, they developed a rapport, and the Complainant occasionally shared her domestic issues with him. The Complainant alleged that the Petitioner proposed that she run a boutique from her home. He offered to provide fabric worth Rs. 500,000/- on loan, with the agreement that she would repay Rs. 100,000/- every 15 days. He suggested that the arrangement would mutually benefit both parties.

3. The Complainant asserted that on 2.7.2024, around 11:00 a.m., the Petitioner invited her to Chen-One Road to visit a cloth warehouse. The Petitioner and an unknown person were already present when she reached there. The Complainant claimed that the Petitioner inappropriately touched her while the co-accused pointed a pistol at her, and then the Petitioner raped her. She further alleged that certain objectionable pictures and videos were taken, and the

Petitioner and his co-accused threatened to leak the material if she disclosed the incident.

4. The Complainant told Muhammad Ashfaq and Sarfraz Ali about the occurrence, who supported her in obtaining a medical examination through court orders. Subsequently, FIR No. 1546/2024 was registered.

5. The Petitioner applied for pre-arrest bail in the Sessions Court which was declined. He has now approached this Court seeking the same relief.

6. The Petitioner's counsel, Barrister Momin Malik, contended that the Complainant has falsely implicated the Petitioner with ulterior motives. He argued that the prosecution's narrative, particularly the alleged financial arrangement, is inherently implausible. Mr. Malik further contended that the Complainant acted in collusion with her counsel's clerk, Muhammad Ashfaq, who is a key prosecution witness. Additionally, he pointed out discrepancies in the medical examination record and the variance between the Complainant's FIR and her statement under section 164 Cr.P.C., arguing these inconsistencies warrant further inquiry. Mr. Malik submitted that the Petitioner is entitled to pre-arrest bail in the given circumstances.

7. The Deputy Prosecutor General, assisted by the Complainant's counsel, vehemently opposed this application. He contended that the Petitioner was nominated in the FIR with a specific allegation. The Complainant has recorded her statement under section 164 Cr.P.C., implicating the Petitioner in the case, and her account is corroborated by medical evidence and a positive forensic report. The Deputy Prosecutor General refuted the claim of any discrepancy between the FIR and the Complainant's statement under section 164 Cr.P.C., adding that even if such a discrepancy existed, it was trivial and inconsequential. He, therefore, prayed for the dismissal of this application.

8. Hina Imdad/SI investigated this case. She concluded that the incident involved fornication rather than rape. Her findings were primarily based on CCTV footage, photographs, and WhatsApp messages exchanged between the Petitioner and the Complainant.

9. Encouraged by the Investigating Officer's findings, Mr. Malik raised an alternative plea that the alleged offence falls under section 496-B PPC rather than section 376 PPC. He pointed out that section 203-C Cr.P.C. prescribes a special procedure for prosecuting an offence under section 496-B PPC, and an action can only be initiated through a complaint filed in a court of competent jurisdiction. He argued that the offence under section 496-B PPC is non-cognizable so an FIR could not be registered. Furthermore, the said offence is bailable.

Discussion

10. Rape is universally recognized as one of the most heinous crimes, representing a profound violation of personal dignity, bodily autonomy, and fundamental human rights. It is not merely a physical assault but an act of violence and domination that strikes at the very core of a person's sense of self. Beyond its immediate physical impact, rape is an extremely traumatic event with lasting emotional, psychological, and social consequences. A murderer destroys the physical body of his victim, while a rapist degrades their very soul.¹

11. Legal systems worldwide criminalize rape, with varying definitions and evidentiary requirements. However, the fundamental principle remains the same: it is a crime of violence, coercion, and domination. It is not merely an offence against an individual but against the entire society.

12. Article 14 of our Constitution mandates that dignity shall be inviolable. This is an absolute right and is not subject to law. "Dignity means human worth: simply put, every person matters. No life is dispensable, disposable, or demeanable. Every person has a

¹ *State of Punjab v. Gurmit Singh and others*, AIR 1996 SC 1393: (1996) 2 SCC 384, *State of Karnataka v. Krishnappa*, (2000) 4 SCC 75 : AIR 2000 SC 1470.

right to live, and the right to live means right to live with dignity.”² Our courts have consistently held that a woman, regardless of her sexual character or reputation, is entitled to equal protection of the law. No one has the right to invade her person or violate her privacy based on her alleged immoral character. In rape cases, the victim’s prior sexual history and character is irrelevant; the critical issue is whether the accused committed the act.³

13. The Pakistan Penal Code criminalizes rape under section 375. It defines the offence comprehensively, encompassing acts beyond traditional notions of penile penetration, such as the insertion of any object or body part (other than the penis) into the vagina, urethra, or anus and oral acts performed on or by the victim. The definition also covers situations where a perpetrator manipulates any part of the victim’s body to cause penetration into the vagina, urethra, anus, or any other part of the victim’s body or compels the victim to perform such acts with the accused or another person. Section 376 PPC prescribes the punishment for rape, while section 375A PPC specifically addresses gang rape, imposing severe penalties for such crimes.

14. Rape must be distinguished from fornication. Rape is a non-consensual act and, as adumbrated, rooted in violence, coercion, and domination, where the perpetrator disregards the victim’s autonomy and consent. In contrast, fornication refers to consensual sexual relations between individuals who are not married to each other. The Pakistan Penal Code addresses fornication in section 496-B. It is punishable as a *Ta’zir* by up to five years’ imprisonment and a fine not exceeding ten thousand rupees.

15. Section 203-C Cr.P.C. prescribes a special procedure for prosecuting the offence of fornication. Most importantly, it mandates that no court shall take cognizance of such an offence except upon a complaint filed in a court of competent jurisdiction.

² *Atif Zareef and others v. The State* (PLD 2021 SC 550).

³ *ibid.*

16. Since consent is pivotal in determining the offence of rape, we need to examine it in more detail. Section 375 PPC outlines seven specific circumstances under which the law deems there is no consent if a perpetrator commits any of the acts specified in clauses (a) to (d) of the section. These include, firstly, when these acts are committed against the victim's will and, secondly, when they are done without the victim's consent.

17. In *Muhammad Ashraf v. The State* (1997 PCr.LJ 1351), the Federal Shariat Court, while interpreting section 6 of the Offence of Zina (Enforcement of Hadoood) Ordinance 1979, clarified the distinction between “against the will” and “without consent,” holding that both scenarios constitute *Zina-bil-Jabar* (rape). The Court referred to *Chambers Twentieth Century Dictionary*, and noted that the term “will,” refers to the “power or faculty of choosing or determining, act of using this power; volition, choice; determination.” In contrast, “consent” signifies “to be of the same mind; to agree to give assent; to yield; to comply.” The Court explained that consent necessarily implies agreement as a free agent, with the presence of a free mind and free will. Therefore, when an individual (victim) is subjected to an act that they would not have consented to or permitted had they been free to make a genuine choice, such an act is deemed to have been done against their will. In other words, the key question is whether the individual would have acted in the same manner if they had a real choice to act differently. If the availability of choice was illusory or rendered redundant by the circumstances, the act in question is considered to have been carried out against the individual's will. The Court further stated that the absence of a genuine choice or the ability to exercise free will may arise from various factors, such as the position of dominance or authority held by the perpetrator, fiduciary obligations, supervisory control, or the victim's dependence on the perpetrator. The Court observed that Muslim jurists have discussed the subject of *Jabar* under the head of *Ikrah* and referring to the celebrated treatise of Dr. Abdul Karim

Zaidan, Professor of Fiqah Islami, University of Baghdad, Iraq, concluded:

“ ‘Ikrah’ may be inferred from the very situation in which a victim may find herself unable to protest or where the faculty to determine her course of action is so affected that she had no control over the action or the event or she would not have acted that way if left to make a choice. The very force of circumstances may constitute *Jabr* (*Ikrah*).

18. The third situation is where the victim’s consent is obtained by putting them or any person in whom they are interested in fear of death or hurt. The fourth circumstance pertains to consent obtained through deception. If the perpetrator deceives the victim into believing they are lawfully married when they are not, and the victim consents based on this belief, the law considers such consent invalid. The fifth circumstance is when the victim is unable to understand the nature and consequences of the act due to unsoundness of mind, intoxication, or the administration of stupefying substances. Consent given under these conditions is considered invalid, as the victim lacks the capacity to make an informed decision. The sixth circumstance involves victims under the age of sixteen. The law categorically states that any sexual act involving a minor, whether or not consent is given, constitutes rape. This provision protects minors, recognizing their inability to provide valid consent due to their immaturity. The seventh circumstance arises when the victim is unable to communicate consent. This includes situations where the victim is unconscious, paralyzed, or otherwise physically or mentally incapacitated, leaving them unable to express agreement. The inability to communicate consent negates any presumption of its presence, ensuring that vulnerable individuals are safeguarded under the law.

19. Section 375 PPC includes several explanations that provide further clarity. Explanation 1 expands the definition of the term “vagina” to include the labia majora, ensuring comprehensive anatomical coverage. Explanation 2 elaborates on the concept of consent, emphasizing that it must be an unequivocal voluntary agreement to participate in a specific sexual act. Explanation 3 broadens the scope of the law by defining a “person” to include males,

females, and transgender individuals, ensuring inclusivity in its application. Explanation 4 explicitly excludes *bonafide* medical procedures or interventions from the definition of rape, preventing the misuse of the provision.

20. The principles underlying section 375 PPC are further reinforced by section 90 PPC, which provides a general framework for determining the validity of consent in the broader context of criminal law.⁴

21. The expressions “unequivocal voluntary agreement” and “specific sexual act” in Explanation 2 of section 375 PPC are significant. Consent must be an affirmative and conscious decision, clearly communicated through words, gestures, or other verbal or non-verbal forms of expression. It must be given freely, without pressure or coercion. Silence, passivity, or lack of resistance cannot be deemed consent. Moreover, consent is not a blanket authorization but is confined to what is explicitly agreed. If a victim initially consents to a particular act but later withdraws that consent, or if the accused continues the act despite the withdrawal or engages in a different act for which consent was not given, the law unequivocally classifies the act as non-consensual, thereby constituting rape.⁵

22. The determination of consent in rape cases is often complex and fact-specific.⁶ The burden of proving the absence of consent initially lies with the prosecution, which can be discharged by presenting credible evidence, typically including the victim’s testimony, medical examination reports, and forensic evidence. Since the offence of rape generally occurs in private, finding independent

⁴ Section 90 PPC reads as follows:

90. Consent known to be given under fear or misconception.—A consent is not such a consent as is intended by any section 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; or

Consent of insane person.—if the consent is given by a person who, from unsoundness of mind, or intoxication, is unable to understand the nature and consequence of that to which he gives his consent; or

Consent of child.—Unless the contrary appears from the context, if the consent is given by a person who is under twelve years of age.

⁵ See: *R v. Kirkpatrick* (2022 SCC 33) (Supreme Court of Canada).

⁶ *Uday v. State of Karnataka* (AIR 2003 SC 1639).

witnesses is challenging. Consequently, the victim's solitary statement can suffice to secure a conviction in a rape case, provided that it is trustworthy, consistent, and reliable.⁷

23. In cases where direct evidence is unavailable, circumstantial evidence plays a pivotal role in guiding judicial reasoning and determining the presence of consent. This includes factors such as the victim's physical condition, injuries suggesting resistance, forensic findings like DNA evidence linking the accused to the crime, the timing and sequence of events, or communication records such as messages or calls between the parties. However, it is essential to emphasize that the absence of injuries on the victim's body or signs of physical resistance does not automatically indicate consent. As discussed, Explanation 2 of section 375 PPC explicitly provides that physical resistance is not a prerequisite for establishing non-consensual intercourse.

24. In **Muhammad Imran v. The State and another** (Criminal Petition No. 725/2023, decided on 26.06.2024),⁸ Justice Ayesha A. Malik stated that there is no assumption, either in law or practice, that a woman gave her consent simply because there are no marks of resistance. She observed that the offence of rape deeply affects the victim, both physically and psychologically. According to expert psychiatrists, victims of trauma, particularly sexual violence, may exhibit "fight, flight, or freeze" responses, with the freeze response often rendering them incapable of taking protective action. This reflexive reaction to fear or threat is highly subjective and varies from individual to individual. Moreover, the use of force, intimidation, and the trauma of the act itself can result in responses that are unpredictable and unique to each victim. Consequently, there is no universal or predictable behaviour for victims of rape, nor can their response – or lack thereof – be used as conclusive evidence against them.

⁷ *Shakeel and others v. The State* (PLD 2010 SC 47), *Habibullah v. The State* (2011 SCMR 1665), *Atif Zareef and others v. The State* (PLD 2021 SC 550), *Muhammad Imran v. The State and another* (Criminal Petition No.725/2023 decided on 26.06.2024, per Ayesha A. Malik, J.), *State of Punjab v. Gurmit Singh and others* (AIR 1996 SC 1393).

⁸ https://www.supremecourt.gov.pk/downloads_judgements/crl.p_725_2023.pdf

25. Once the prosecution has discharged its initial burden, the burden of proof shifts to the accused to substantiate claims of consent. Under Articles 117 and 119 of the Qanun-e-Shahadat, 1984, the accused bears the onus to provide credible evidence of consent. This may include evidence of a pre-existing consensual relationship, communications suggesting mutual agreement, or an alternative explanation for the prosecution's evidence. The accused is not required to prove consent beyond a reasonable doubt but must raise a credible and plausible defence sufficient to create reasonable doubt in the prosecution's case. Failure to do so can result in a finding of guilt.

26. The court's role is critical in balancing these shifting burdens. It must rigorously scrutinize the prosecution's evidence to ensure it meets the high threshold of proving the absence of consent beyond a reasonable doubt. At the same time, the court must evaluate the accused's evidence or defence to assess its plausibility and credibility.

27. Let's now turn to the case at hand. The Complainant has nominated the Petitioner in the FIR, alleging that he exploited their interactions and raped her. She has also accused him of threatening her and taking objectionable pictures to coerce her into silence. She reiterated these allegations in her statement recorded under section 164 Cr.P.C. Medical and forensic evidence confirm that sexual intercourse occurred on the relevant day.

28. During the investigation, the police concluded that the case involved fornication rather than rape. These findings are essentially based on CCTV footage, pictures, and WhatsApp messages exchanged between the parties. While this evidence suggests a close relationship, possibly closer than the Complainant acknowledges, it does not definitively establish whether the act was consensual. This critical determination requires thorough scrutiny of all the evidence during the trial.

29. As previously discussed, under section 375 PPC, threats, intimidation, or coercion invalidate consent. Therefore, if proven, the

allegations of pointing a pistol and threatening to release objectionable content would render any apparent consent irrelevant. The trial court is the appropriate forum to evaluate the evidence, including the CCTV footage, WhatsApp messages, and other material, to determine the nature of the offence.

30. Pre-arrest bail is an extraordinary remedy reserved for cases where the accused can demonstrate that the FIR was lodged with *mala fide* intent, personal animosity, or the like. The Petitioner has failed to satisfy this requirement. Claims of inconsistencies in the prosecution's evidence, such as discrepancies between the FIR and the Complainant's statement under section 164 Cr.P.C., necessitate detailed scrutiny alongside other evidence. Such an evaluation is beyond the purview of a pre-arrest bail application.

31. Considering the seriousness of the allegations and the absence of any exceptional circumstances justifying pre-arrest bail, this application is **dismissed**.

(Tariq Saleem Sheikh)
Judge

Ahsan

Approved for reporting

Judge