

IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:

MR. JUSTICE JAMAL KHAN MANDOKHAIL
MR. JUSTICE MUHAMMAD ALI MAZHAR

CRIMINAL PETITIONS NO. 1121 & 1128 OF 2023

(On appeal from the Orders dated 18.09.2023 passed by the
Lahore High Court, Lahore in CrI.Misc.No.45685-B &
CrI.Misc.No.52486-B/2023)

Salman Mushtaq and another (for pre-arrest bail) (In CrI.P.No.1121/2023)
Ahmar Ali (for post-arrest bail) (In CrI.P.No.1128/2023)
...Petitioners

VERSUS

The State through PG Punjab and another ...Respondents
(In both cases)

For the Petitioners: Mr. Mushtaq Ahmad Mohal, ASC
Salman Mushtaq (in-person)
Naheed Akhtar (in-person)

For the State: Mr. Irfan Zia, DPG, Punjab
Fiaz, SI

For Complainant: Mahmooda Bano (in-person)

Date of Hearing: 08.11.2023

JUDGMENT

Muhammad Ali Mazhar, J:- This Criminal Petition for leave to appeal is directed against the separate Orders dated 18.09.2023 passed by the Lahore High Court ("**High Court**") in CrI.Misc.No.45685-B/2023 and CrI.Misc.No.52486-B/23023 whereby the bail applications moved by the petitioners were dismissed.

2. According to FIR No.1358/2023 dated 06.04.2023, lodged under Section 365-B of the Pakistan Penal Code, 1860 ("**PPC**") at Police Station North Cantt., District Lahore, the complainant reported the abduction of her daughter Iqra Bibi and, according to her version, accused Salman Mushtaq and Naheed Akhtar (petitioners in CrI.P No.1121/2023), along with two unknown persons, abducted Mst. Iqra Bibi for committing rape. Ahmar Ali (petitioner in CrI.P.No.1128/2023), who is none other than the real brother of the

abductee, was not nominated in the FIR, but was implicated on the basis of the statement of the alleged abductee recorded under Section 164 of the Code of Criminal Procedure, 1898 ("**Cr.P.C**").

3. The learned counsel for the petitioners argued that, while rejecting the bail applications of the present petitioners, the lower Courts failed to consider that the alleged abductee is *sui juris* and had contracted a marriage with the petitioner Salman Mushtaq on 05.04.2023 of her own volition, and without any coercion. It is further submitted that the nikah of the alleged abductee with the aforesaid petitioner was solemnized by a Nikah Khawan and Nikah Registrar, and the nikah nama was duly registered by the Nikah Registrar of Chak No.62-D, Chak Baidi, Tehsil and District Pakpattan which was also registered in NADRA and, as a consequence thereof, a Marriage Registration Certificate was also issued by the Secretary Union Council, Chak Baidi, District Pakpattan on 18.04.2023. It was further argued that Ahmar Ali (petitioner in Crl.P.No.1128/2023), the real brother of the alleged abductee, was present and also witnessed the nikah. It was further averred that the FIR was lodged with *mala fide* intention to blackmail the petitioners and extort money from them. It was further contended that the Courts below failed to consider the fact that there was no medical report/certificate of the alleged victim; on the contrary, the petitioner, Salman Mushtaq had filed a suit for restitution of conjugal rights against the alleged abductee before the Family Court and, *vide* judgment and decree dated 19.07.2023, his suit was decreed, whereas Iqra Bibi has also filed a suit for jactitation of marriage which is pending adjudication. It was further contended that during the investigation, the co-accused Parvaiz Akhtar, Sanwal and Saima have been found to be innocent by the Investigating Officer.

4. The learned Deputy Prosecutor General, Punjab ("**DPG**") argued that the suit for restitution of conjugal rights was decreed and the suit filed by the alleged abductee for jactitation of marriage is already pending. He further argued that at this stage, as the family suit is still pending, it cannot be ascertained whether it was a case of forceful marriage or rape as alleged by the abductee. He further argued that it is to be seen by the Trial Court whether the real brother, Ahmar Ali, who was also witness to the nikah, was really involved in the abduction.

5. Heard the arguments. According to the prosecution case, the victim, Iqra Bibi, was abducted. However, according to the petitioners, Iqra Bibi, being *sui juris*, contracted a marriage with the accused Salman Mushtaq of her own free will and volition, and the marriage was duly registered. One of the petitioners, Ahmar Ali, who is now seeking post-arrest bail, is the real brother of the abductee. It is also a matter of record that Salman Mushtaq filed a suit for restitution of conjugal rights before the Family Court which was decreed in his favour, whereas the alleged abductee has also filed a suit for jactitation of marriage. Both the lower Courts rejected the bail petition without advertting to the family suits filed for the restitution of conjugal rights and the jactitation of marriage. The learned Additional Sessions Judge observed that it was unlikely that a real mother would lodge a false FIR against her own son for the abduction of his sister. Quite the reverse, it is also a matter of further inquiry to ascertain whether the alleged abductee's real brother was in actuality involved in the abduction and whether he aided or facilitated the commission of the heinous crime of rape against his real sister. Even in the suit for jactitation of marriage, the alleged abductee admitted that the marriage was solemnized, but under fear and threat. She also prayed to the Family Court for declaring the nikah nama dated 05.04.2023 illegal and unlawful, whereas the petitioners asserted that the alleged abductee contracted the marriage of her own free will. Another important aspect we cannot lose sight of is that, if the brother of the alleged abductee was involved in the abduction then why was he not nominated in the FIR, and why was he only implicated subsequently on the basis of the statement of the alleged abductee recorded under Section 164, Cr.P.C.? Moreover, according to the petitioners counsel, no medical examination of the alleged victim was conducted for recovering DNA (Deoxyribonucleic acid) despite the serious allegation of rape, and this factual line of argument was not belied by the complainant or the learned DPG. Considering that the offence of rape was suspected and reported to the police, the medical examination should have been conducted immediately and without any delay in order to draw DNA samples. No explanation was offered for this clear negligence on the part of prosecution, which is also violation of the judgment rendered by this Court in the case of Salman Akram Raja and another vs. Government

of Punjab through Chief Secretary and others (PLJ 2013 SC 107) wherein it was *inter alia* directed in paragraph 16 that in rape cases, the administration of DNA tests and preservation of DNA evidence should be made mandatory.

6. The paramount factors which require consideration while granting pre-arrest bail are whether the arrest will cause humiliation and/or unwarranted persecution or harassment to the applicant for some ulterior motives; or that the prosecution is motivated by malice to perpetrate irreparable injury to the reputation and liberty of the accused. While considering the grounds agitated for enlargement on bail, whether pre-arrest or post-arrest, the atrociousness, viciousness and/or gravity of the offence are not, by themselves, sufficient for the rejection of bail where the nature of the evidence produced in support of the indictment creates some doubt as to the veracity of the prosecution case. Therefore, where, on a tentative assessment, there is no reasonable ground to believe that the accused has committed the offence, and the prosecution case appears to require further inquiry, then in such circumstances the benefit of bail may not be withheld as a punishment to the accused. The Court must dwell on all interconnected rudiments, including the gravity of the offence and the degree of involvement of the applicant/accused for bail in the commission of offence, together with the likelihood of absconding or repeating the offence and/or obstructing or hindering the course of justice, or any reasonable apprehension of extending threats to the complainant or witnesses or winning over the prosecution witnesses.

7. The doctrine of 'further inquiry' refers to a notional and exploratory assessment that may create doubt regarding the involvement of the accused in the crime. The expression "reasonable grounds" as contained under Section 497, Cr.P.C., obligates the prosecution to unveil sufficient material or evidence to divulge that the accused has committed an offence falling within the prohibitory clause of Section 497, Cr.P.C. However, for seeking the concession of bail, the accused person has to show that the evidence collected against him during the investigation gives rise to clear-headed suspicions regarding his involvement. While deciding bail applications, it is the elementary duty of the courts to apply a judicious mind tentatively to reach a just and proper conclusion on whether reasonable grounds are made out to

enlarge the accused on bail. The axiom 'reasonable grounds' connotes and associates those grounds that are legally acceptable and based on reasons that attract the judicial mind, as opposed to being imaginative, fallacious and/or presumptuous. In the aforesaid situation, the possibility of *mala fide* intention in lodging the FIR cannot be ruled out, and, at this stage, there are no reasonable grounds for believing that the accused are involved; rather, there are sufficient grounds for further inquiry to prove the guilt of the accused persons.

8. These Criminal Petitions for leave to appeal were converted into appeals and allowed *vide* our short order dated 08.11.2023, whereby the ad-interim pre-arrest bail granted to the petitioners *vide* Order dated 12.10.2023 in Criminal Petition No. 1121/2023 was confirmed on the same terms, while the petitioner in Criminal Petition No. 1128/2023 was also granted post-arrest bail subject to his furnishing surety bond in the sum of Rs.1,00,000/- with one surety in the like amount to the satisfaction of the Trial Court.

9. Above are the reasons assigned in support of our short order. The petitioners shall join the investigation and regularly appear before the Trial Court, failing which the complainant may move an application for cancellation of bail in the trial Court. The findings recorded herein above are tentative in nature and shall not prejudice the case of either party.

Judge

Judge

Islamabad the
8th November, 2023
Khalid
Approved for reporting.