

JUDGEMENT SHEET

IN THE PESHAWAR HIGH COURT,

Bannu BENCH

(Judicial Department)

Cr.Misc:/BA No.90 -B of 2015.

JUDGEMENT

Date of hearing_____ 21.04.2015 _____.

Appellant-Petitioner: Khadim Ali Shah by Mr. M. Sadiq Khan, Advocate.

Respondent: Mr. Shaukat Khan, Advocate for Respondent.

Mr. Qudrat Ullah Khan, Asstt: AG for the State.

MUHAMMAD YOUNIS THAHEEM, J--- Having

remained unsuccessful in obtaining bail from the two courts below, vide orders dated 11.03.2015 and 08.04.2015 passed by the learned Judicial magistrate-II, and learned Additional Sessions Judge-III, Bannu, respectively, the accused/ petitioners Khadim Ali Shah and Farmanullah alias Parveen involved in case FIR No. 219 dated 28.02.2015 under sections 376/363/337-J/34 PPC, Police Station City, Bannu have now come up to

this court for the same relief through the application in hand.

2. According to the FIR lodged at the behest of complainant Faizullah, the allegations against the accused/petitioners are that they on 28.02.2015 at morning time, Mst. Muskan Bibi, aged about 9/10 years, student of Class second was going towards Govt. Girls Primary School, Gardanali, Bannu City, and when reached at chowk Bazar, Bannu city, she was caught hold of forcibly by two unknown persons, who intoxicated her through nose due to which she became un-conscious. On coming conscious she was lying on roadside, whereafter she returned home. Thus it came to surface that rape has been committed with her. Initially the report was lodged against unknown persons, but subsequently the accused/ petitioners were nominated, when her statement was recorded under section 161 Cr.PC before the local police on 02.03.2015.

3. At the very outset, learned counsel for the petitioners contended that compromise has been effected between the parties and thus the complainant /father of the alleged victim Mst. Muskan Bibi, has no objection over release of petitioners on bail.

Learned counsel for the complainant/ respondent has also stated that he has no objection if the accused/petitioners are released on bail.

However, the learned Asstt: Attorney General strongly refuted the arguments of both the learned counsel for petitioners and complainant mainly on the grounds that the present offences are not compoundable, that the same offences are categorized as high moral turpitude one and are heinous in nature so that State is not bound by the act of the father of victim of effecting compromise with the accused /petitioner.

4. On merits, it was the contention of learned counsel for the petitioners that if the statement of victim is taken into consideration, even then the case under

section 376 PPC is not made out against the petitioners, as the victim was a consenting party. He, therefore, argued that the petitioners/ accused are charged for ulterior motive.

5. I have thoroughly gone through record of the case and anxiously considered the argument addressed at the bar by learned counsel for the parties.

6. Perusal of record reveals that both the accused/ petitioners are directly charged by name by the victim/minor girl, aged about 9/10 years, in her statement recorded under section 161 Cr.PC for committing rape upon her by making her unconscious with some intoxicant.

7. The contention of learned counsel for the petitioners that the victim being a consenting party, the provision of section 376 PPC are not attracted is misconceived, because according to section 375 PPC, a man is said to commit rape, who has sexual intercourse with a women, with or without her consent when she is under sixteen years of age, while in the instant case the

victim is aged about 9/10 years and was subjected to intoxication before committing rape with a minor girl.

8. Similarly, the contention that the accused/ petitioners have been charged falsely with ulterior motive is also misconceived, because it is not possible for a girl of 9/10 years to falsely implicate the accused/ petitioners in such an offence especially in the absence of any motive, which could remain a stigma not only for her life, but also for the whole family.

9. It is a case of commission of rape with a minor girl by first making her unconscious. In this respect the medical report shows that the hymen of minor girl was absent which is sufficient to assess that she was subjected to rap. Furthermore, two vaginal swabs and sample of blood have been sent to FSL and DNA test, for verification and report in this regard are still awaited and nonavailability of such report does not entitle the petitioners for the concession of bail. Report may be relevant but not the sole criteria for the grant of bail and in a case titled **“Muhammad Naveed Vs State” (2000**

SCMR 150) in same circumstance the apex Court refused leave to appeal against the bail dismissal order passed by the Lahore High Court in Criminal Misc: No.3994-B/99.

10. The offence is of moral turpitude which can destroy the entire psychology of a girl under 10 years of age by putting her and the family to public shame. It is a stigma with which her whole family has to face with and is the most hatred crime. The plea of counsel representing the father of victim that complainant has no objection if the accused/petitioners are released on bail is not tenable, because the State is responsible to save the life, honour and dignity of every citizen specially women and children. In the instant case a minor girl has been subjected to rape in a very cruel manner. The argument of learned Asstt; Advocate General representing the State that forgiving the accused by father of victim in lieu of Rs.600000/- amounts to giving justice in the private hands, which is against the principle of modern jurisprudence and law so the grant of bail in such like

cases on the basis of compromise is not permissible as the offence is non-compoundable. The same view has been taken in case titled “Muhammad Usman Vs the State” (2005 PCr.LJ 1181), wherein it has been held:

“It is correct that the complainant has endorsed the contention of the learned counsel for the petitioner that a compromise has been effected between the parties, but the contention of the learned counsel for the State cannot be brushed aside that compromise in such-like cases is not permitted under section 345 Cr.PC, as offence of Zina is offence not against the individual only but it is also against the good conscience of the society. Probably that is the reason that it has not been included in the list of offences which are compoundable.”

11. For the reasons discussed above I am not inclined to admit the petitioners to bail and their prayer for bail is accordingly declined.

Announced.
Dt:21.04.2015
Azam P.S/

J U D G E