

Judgment Sheet

**IN THE PESHAWAR HIGH COURT,
PESHAWAR**

(Judicial Department)

Cr.M BA No.11-P/2020

Kashif Vs The State & another

Date of hearing: 31.01.2020

Mr. Niaz Ali Khan Jhagra, Advocate, for the petitioner.

Mr. Fawad Faisal, Advocate/Standing Counsel, for the State.

Mr. Arif Ullah, Advocate along with complainant.

JUDGMENT

AHMAD ALI, J. Through the instant petition, the petitioner (**Kashif**), seeks his post arrest bail in case FIR No.752 dated 04.12.2019 under sections 365-B/376-PPC, PS SI Abdul Hameed Shaheed Shabqadar (District Charsadda). Same relief was however, declined to him by the learned Trial Court, vide order dated 20.12.2019.

2. Brief facts of the case are that, initially, the complainant, vide DD No. 17 dated 26.11.2019, reported to the local police that on 25.11.219 at about 1:00 hrs his daughter namely Zuhra (aged about 17/18 years) went out of the house, on her return to house, she was inquired who told that she had gone to the house of one Kashif; On 26.11.2019, she again left her house and took away with her one tola gold. She was searched but in vain. Upon her recovery, the complainant and victim recorded their statements u/s 164 Cr.P.C on 04.12.2019, wherein they charged the present

accused for inducing her and committing zina with her. Accordingly, FIR ibid was registered against the accused, hence the instant petition for bail.

3. Arguments of learned counsel for the parties heard and record gone through with their able assistance.

4. Perusal of record reveals that the victim twice left her house on 25th & 26th November, 2019, but the present accused-petitioner was not charged by the complainant in his initial report rather he was charged by the abductee vide her statement recorded under section 164 Cr.PC, on 04.02.2019, when she was brought from Dar-ul-Aman at Punjab. Medical examination of the victim was also conducted on the same day, wherein no sign of recent intercourse was found on the private parts of the body of the victim.

5. Except the solitary statement of abductee, no other incriminating evidence is available on record to *prima facie* connect the present accused-petitioner with the commission of crime. Likewise, no other eyewitness has been cited so as to support her version or the version of complainant coupled with the fact that FSL report regarding the swab is negative.

6. The main ingredient of section 365-B is also missing in the instant case because it has not been mentioned by the abductee that through what means she was abducted. Moreso, the accused has not confessed his guilt yet.

7. In view of the above facts and circumstances, case of the petitioner squarely falls within the ambit of Sub-Section (2) of Section 497 Cr.P.C. calling for further inquiry in the matter; and in such like cases grant of bail is to be considered as a matter of right and not as a matter of grace or concession.

8. Besides provision of 164-B Cr.P.C, provides as under:-

[164-B DNA Test.-(1) Where an offence under section 376, section 377 or section 377-B of the Pakistan Penal Code, 1860 (Act SLV of 1860) is committed or attempted to have been committed or is alleged to have been committed, Deoxyribo Nucleic Acid (DNA) samples, where practicable, shall be collected f

rom the victim with his or her consent or with the consent of his or her natural or legal guardian and the accused during the medical examinations conducted under section 164-A within optimal time period of receiving information relating to commission of such offence.

(2) The DNA samples collected under sub-section (1) shall at the earliest be sent for investigation to a forensic laboratory where these shall be properly examined and preserved:

Provided that confidentiality of such examination shall at all time be observed.]

Apparently, no compliance with the above provision of law has been made because no samples for DNA tests have been obtained either from the accused-petitioner or victim despite the fact that the word “shall” is used in the said provision, making its applicability mandatory. The prosecution must keep in mind this aspect while dealing with such like offences in the best interest of the accused as well as the victim. In view of the negative FSL report, nothing left with the prosecution except to comply with the above provision in support of its version.

9. Moreover, investigation in the case is complete and accused-petitioner is no more required to the prosecution for the very purpose. He is behind the bars since his arrest, therefore, his further incarceration in jail will serve no useful purpose.

10. Apart from the above, it has been held time and again by the august Supreme Court that bail does not mean acquittal of accused but only change of custody from Government agencies to the sureties, who on furnishing bonds take responsibility to produce the accused whenever and wherever required to be produced. Reliance could be placed on case reported in 2008 SCMR 807 “Haji Muhammad Nazir Vs State”.

11. Before parting with this order, this court finds it necessary to mention that all the observations recorded above are tentative assessment just for the disposal of bail petition and not intended to influence the mind of trial Court, which is free to appraise the evidence strictly in accordance with law and merits of the case.

12. For what has been discussed above and on tentative assessment of material available on record, a case arguable for the grant of bail is made out, consequently, this bail petition is allowed and accused-petitioner, named above, is admitted to bail provided he furnishes bail bonds in the sum

of Rs.200,000/- with two sureties each in the like amount to the satisfaction of learned Illaqa/Duty Judicial Magistrate, who shall ensure that the sureties are local, reliable and men of means.

13. Above are the reasons of short order of even date.

Announced:
31.01.2020

J U D G E

Amjad, PS SB

Hon'ble Mr. Justice Ahmad Ali