

ORDER SHEET  
IN THE HIGH COURT OF SINDH KARACHI

Cr. Bail Application No. 2372 of 2021

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DATE	ORDER WITH SIGNATURE OF JUDGES
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For hearing of bail application.

Date of hearing 14<sup>th</sup> June, 2022

Raja Rashid Ali, Advocate a/w applicant (Muhammad Rafique (a Babu).  
Ms. Amna Usman, Advocate for complainant.  
Mr. Talib Ali Memon, APG a/w SIP Ghazanfar Ali, I.O. of the case.

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**Omar Sial, J.:** On 26.09.2021, Rahima Bengali went to the Docks Police Station in Karachi and provided information of an incident that had occurred the previous day. Rahima recorded that on 25.09.2021 she had taken both her husband and son to the Civil Hospital as they were unwell. Her daughter Zara, aged about 12 or 13 years, remained alone at home. When Rahima returned from the hospital she saw that the door of the house was open and Zara was not at home. She suspected that Abdullah, son of Noor Alam, Ilyas, son of Abdul Qalam and the applicant, Muhammad Rafique alia Babu had kidnapped Zara with the intention to commit zina. Upon the information provided by Rahima, F.I.R. No. 767 of 2021 was registered under sections 365-B and 34 P.P.C. at Docks police station.

2. It appears that at some stage, the date of which is unclear from the record, Zara herself returned home. What is clear, however, is that she had returned home before 30.09.2021, as that is the date when she recorded a statement under section 164 Cr.P.C. before the learned 25<sup>th</sup> Civil Judge and Judicial Magistrate, Karachi West. It is pertinent to mention that the statement recorded by Zara refers to a letter dated 21.09.2021 written by the District and Sessions Judge, Karachi West, which directs the learned Magistrate to record her statement. What is unexplained is that though the photograph on the statement is ostensibly that of Zara her name annexed on the note by the learned Magistrate refers to an "Iqra". This is an aspect which the learned Magistrate will have to clarify at trial as neither is the victim's name Iqra nor do the facts of the case reflect that she had returned home prior to 21.09.2021. In the event it is an error on the part of the learned Magistrate, the learned Magistrate shall ensure that no such error occurs again as the recording of a section 164 Cr.P.C. statement negligently can have grave consequences for the litigant. Be that as it may what has been narrated in her statement (which ostensibly has been recorded in the handwriting of the learned Magistrate and

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which statement forms the basis of the nomination of the three accused) records that it was 23.09.2021 (although the complainant in the F.I.R. has recorded her date of disappearance as 25.09.2021) that Zara was on her way to her maternal grandmother's house when accused Ilyas, driving a rickshaw followed her. Ilyas asked her to sit in his rickshaw and upon her declining to do so showed her a pistol and forcibly made her sit in his rickshaw. Ilyas took her to his sister-in-law's house which was empty. There he raped Zara. Ilyas then phoned accused Abdullah and asked him to come to the same house. Once Abdullah reached the house, Ilyas left. Abdullah then took her in Ilyas's rickshaw to one of his friend's house where he also raped her. She was then locked up in the house for the night. Abdullah also spent the night there. The next day Abdullah called the applicant who also arrived at the house and took her in the same rickshaw to a farm house where he also raped her. While she was with the applicant someone (who the applicant referred to as "Bhabhi") phoned him. After he had hung up he told Zara that the police had arrested Abdullah. He then asked her to sit in his rickshaw so that he could drop her home. Rafique dropped her off close to her house. As she was crossing Abdullah's house, she saw that the door was open and his older sister came out crying and asked Zara to come in. Inside the house Abdullah's mother was also present who started pleading with Zara to forgive her son. Abdullah's brother then brought Zara to the police station.

4. Abdullah and Ilyas were subsequently apprehended and produced before the police by Rahima and her brother, Bilal. The applicant was arrested later upon Rahima's statement.

5. I have heard the learned counsels for the applicant, the complainant as well as the learned APG and with their assistance have gone through the record. My observations are as follows.

6. Learned counsel for the applicant has argued that on 27.09.2021, Zara was medically examined when vaginal swabs were taken and sent for DNA. Her clothes which she was wearing when she was raped three times were also sent for DNA analysis. The Sindh Forensic and Serology Laboratory in its report dated 26.9.2021 concluded that no semen remains were either found from the vaginal swabs or from the clothes. The medical certificate issued by the MLO evidences that the doctor found no marks of sexual assault on either her body or vagina. No swelling, bleeding or tenderness was found on her vagina. Neither were any marks seen on the body. The medical report also showed that the clothes she had worn to the doctor were the same clothes that she was wearing at the time of the incident. According to learned counsel, no marks of violence

were seen on Zara's body and that even her vaginal examination did not indicate that she was raped. And therefore the medical reports do not reconcile with her ocular version. The police in its investigation had also concluded that FIR should be disposed of in C class. He further argued that Zara's mother had reported in the FIR that Zara had gone missing on the 25.09.2021 whereas according to Zara she had been kidnapped on the 23.09.2021.

7. The above grounds taken by the learned counsel for the applicant appear to be prima facie correct. I am cognizant, however that this is a rape case and there could be aspects of trafficking involved in it as well. The discrepancies in the dates pointed out by the learned counsel could also have occurred as a consequence of the stigma involved with the incident and incorrect guidance by the police, which in many cases has not shown the expertise required for investigation in similar cases especially when the survivor belongs to the under privileged section of society. The standard and expertise of medical legal officers in cases of rape is far from satisfactory. Though the findings of the medical legal officer with respect to no tenderness or swelling on the vagina of the survivor does not upon a tentative assessment reconcile with the prosecution case, it must be kept in mind that the definition of "rape" in section 375 P.P.C has been greatly expanded by the Criminal Law (Amendment) Act, 2021. The learned magistrate while recording the section 164 Cr.P.C. statement has used the word "ziadti". In my view it appears that the language used by the learned magistrate may not necessarily be what Zara actually recorded as any act of a sexual nature may incorrectly have been brought within the ambit of the word "ziadti" and thus, what is thought of as solely vaginal rape. As mentioned above, even if "ziadti" is equated to rape, even then keeping in view the expanded definition of the word "rape", it may not be necessary that a survivor has tell-tale signs on her vagina of what she has been through. These are all aspects which the learned trial court will decide once it has had the opportunity to analyze the evidence presented before it.

8. This is an application seeking pre-arrest bail. One ingredient necessary in such cases is the presence of malafide on behalf of the complainant or the police. No such ground has been raised or argued by the learned counsel and no evidence has been produced from which malafide could be inferred. No attempt has been made to justify as to why a 12 year old would falsely accuse the applicant and the other accused. Upon a tentative assessment and keeping the observations made in the preceding paragraph, it also does not appear to be a case where, if it was a post arrest bail application, the application would almost certainly be allowed.

9. In view of the above reasons, the bail application stands dismissed. The learned trial court shall ensure that the provisions of the Anti-Rape (Investigation & Trial) Act 2021, which I have been made to understand, have come into force, as well the pre-cautions to be taken by a Court in gender based violence cases are strictly complied with. The learned District & Sessions Judge, Malir, shall also oversee that compliance is made. In view of the observations made above, the learned trial court shall further ensure that the trial is concluded in 3 months. Monthly report of the progress in trial should be submitted through the learned M.I.T. of this Court. A copy of this order, apart from the learned trial court, should also be sent to the learned District & Sessions Judge, Malir and the learned 25th Civil Judge and Judicial Magistrate, Karachi West, for information and compliance.