

IN THE PESHAWAR HIGH COURT,
PESHAWAR,
[Judicial Department].

Cr.Misc.BA No.2648-P/2017

*Umar Taj s/o Ameer Gulab,
r/o Gulyari Gumbat Shah Baba,
District Mardan.*

Petitioner (s)

Versus

The State etc

Respondents

For Petitioner :- Mr. Shabbir Hussain Gigyani, Advocate.
State :- Mr. Rab Nawaz Khan, AAG.
For Respondent :- Mr. Alamsher Khan Afridi, Advocate.

Date of hearing: 18.12.2017.

ORDER

ROOH-UL-AMIN KHAN, J:- Petitioner Umar Taj son of Ameer Gulab, seeks bail in case FIR # 778 dated 01.11.2017, registered U/Ss 496-A/496-B/376 PPC, in Police Station Pabbi, District Nowshera.

2. As per contents of FIR, on 01.11.2017 at 18.10 hours, Inayat Ullah, in company of his father Yousaf Khan, reported in Police Station Pabbi, to the effect that on 25.10.2017 at 07.00 hours, on telephonic request of his wife, namely, Mst. Bushra, he allowed her to visit her parents' house with his father. At 16.00 hours, Yousaf Khan, his father informed him on cell phone to immediately reach home. No sooner, complainant arrived at home, his father told him that Mst. Bushra, has left her parents' house and has taken away alongwith with her a

sum of rupees one lac and two thousand. During search, the complainant came to know that his wife had left the house of her parents with her paramour, namely, Umar Taj (the petitioner), despite the fact that she was already in the Nikah of the complainant.

3. On 06.11.2017, petitioner along with Mst. Bushra was arrested and on 07.11.2017, statement of Mst. Bushra was got recorded u/s 164 Cr.P.C. before the learned Judicial Magistrate, wherein, she charged the petitioner for abduction, keeping her in illegal confinement and committing "Zina bel-Jabbar" with her, hence, this case.

4. Having heard the arguments of learned counsel for the parties, three different Nikah-nama of various dates, regarding marriage of Mst. Bushra are available on record. According to one Nikah-nama, she has entered into marriage contract with the petitioner Umar Taj on 31.08.2017. As per second Nikah Nama, she is the legally wedded wife of petitioner, in consequence of marriage solemnized on 25.10.2017, while as per the third Nikah nama, she has contracted Nikah with Inayat Ullah (the complainant) on 07.09.2017. In this view of the matter, which out of the three Nikah-namas is genuine, is yet to be determined during trial after recording evidence, however, at this stage makes the case of petitioner arguable for the purpose of bail.

5. So far as statement of Mst. Bushra recorded u/s section 164 Cr.P.C., is concerned, though she has directly charged the petitioner for abduction, illegal confinement and forcible sexual intercourse with her, but in presence of her alleged Nikah Nama with the petitioner coupled with the stance of her husband-complainant qua leaving her parents' house with the petitioner at her own sweet will, is another begging question to be determined during trial. At the moment, if the allegations of the alleged abductee, are considered, at the most, these will attract the provisions of section 496-A Cr.P.C., punishment of which does not fall within the Prohibitory Clause of Section 497 Cr.P.C. and in such like cases grant of bail is a rule and refusal thereof an exception.

6. As regards the applicability of section 496-B PPC, which deals with the offence of fornication. For application of this section of law, a proper mechanism by way of filing complaint has been provided under section 203-C Cr.P.C.. For the sake of convenience and ready reference section 203-C Cr.P.C., is reproduced below:-

“S.203-C Cr.P.C. Complaint in case of fornication:- No Court shall take cognizance of an offence under section 496-B of the Pakistan Penal Code, except on a complaint lodged in a Court of competent jurisdiction.

(2) The Presiding Officer of a Court taking cognizance of an offence shall at once examine

on oath the complainant and at least two eye-witnesses to the act of fornication.

(3) The substance of the examination of the complainant and the witnesses shall be reduced to writing and shall be signed by the complainant, and the witnesses, as the case may be and also by the Presiding Officer of the Court.

(4) If in the opinion of the Presiding Officer of a Court, there is sufficient ground for proceeding, the Court shall issue summons for the personal attendance of the accused.

(5).....

(6).....

It appears from the record that in the instant case the mandatory provisions as required under section 203-C Cr.P.C., have not been complied with, hence, in the given scenario, applicability and relevancy of section 496-B PPC, shall be looked into by the prosecution or trial Court at the time of submission of complete challan or taking cognizance of the case, respectively.

7. Coming to applicability of section 376 PPC, needless to say that it provides punishment of death or imprisonment of either description for a term which shall not be less than ten years or more than twenty-five years and fine for an accused proved guilty of the offence of rape, however, section 164-B Cr.P.C. provides that where an offence under sections 376 or 377 or 377-B of the Pakistan Penal Code, 1860, is committed or attempted to

have been committed or is alleged to have been committed, the Investigating Officer (I.O.), *shall* proceed for collecting Deoxyribo Nucleic Acid (DNA) samples, where practicable, from 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. It further provides that the DNA samples collected shall be sent at earliest for the purpose of investigation to a Forensic Laboratory, where the same shall be properly examined and preserved. By use of word “Shall” in section 164-B Cr.P.C., its application has been made mandatory in offence under section 376 PPC. In the instant case, apparently, the provision of section 164-B Cr.P.C. has not been complied with, as a sample for DNA, has not been obtained from the alleged victim. There is yet another crucial aspect of the case that as per medico legal report of Mst. Bushra, no bruises or marks of physical assault were found on her body by the Medical Officer coupled with the fact that her pregnancy test is also in the negative. In this view of the matter, applicability of section 376 PPC is also a matter of further probe.

8. For what has been discussed above, on tentative assessment of the material available on file, the case of the petitioner is arguable for the purpose of bail. Resultantly,

the application is allowed. Accused/petitioner is admitted to bail provided he furnishes bail bonds in the sum of rupees two lac with two local, reliable and resourceful sureties each in the like amount to the satisfaction of learned Illaqa Judicial Magistrate/MOD concerned.

Announced:
18.12.2017

Siraj Afridi P.S.

JUDGE

SB of Mr. Justice Rooh-ul-Amin Khan.