

**2015 S C M R 825**

**[Supreme Court of Pakistan]**

**Present: Amir Hani Muslim and Ijaz Ahmed Chaudhry, JJ**

**NASREEN BIBI---Petitioner**

**versus**

**FARRUKH SHAHZAD and another---Respondents**

Criminal Petition No. 489 of 2014, decided on 3rd March, 2015.

(On appeal against the judgment dated 11-7-2014 passed by the Peshawar High Court, Abbottabad Bench in Cr. M/BCA No. 279-A of 2014)

**(a) Criminal Procedure Code (V of 1898)---**

---S. 497(5)---Penal Code (XLV of 1860), Ss. 376, 506 & 34---Constitution of Pakistan, Art. 185(3)---Rape, criminal intimidation, common intention---Bail cancellation of---Complainant-victim was a virgin lady and according to medical evidence she was subjected to sexual intercourse---Victim had got recorded the FIR on the same day but with a delay, however, such delay was of no help to the accused as in such like cases delay in lodging the FIR was immaterial as people naturally avoided rushing to the police because of family honor---No previous enmity existed between the parties and it was against common sense that the complainant would have concocted a story which could ruin her life---Prima facie there was sufficient material available to connect the accused with the commission of the offence---Petition for leave to appeal was converted into appeal and allowed, and bail granted to accused was cancelled.

**(b) Criminal Procedure Code (V of 1898)---**

---Ss. 173, 497(5) & Sched. II, Column No. 8---Penal Code (XLV of 1860), S. 376---Rape---Post-arrest bail filed before the Judicial Magistrate---Magistrate allowing bail to accused for an offence under S. 376, P.P.C.---Legality---Offence under S. 376, P.P.C., was punishable with death or imprisonment of either description for a term which shall not be less than ten years or more than twenty-five years, and according to Schedule-II, Column No. 8, Cr.P.C., said offence was triable by a Court of Session---For such like cases, only the report under S. 173, Cr.P.C. had to be submitted before the Magistrate---Magistrate had nothing to do with the merits of the case and was not competent to grant bail or pass any other order which could be passed by the Trial Court---Only function of the Magistrate after the receipt of report under S. 173, Cr.P.C. was to transmit the challan to the Court of competent jurisdiction/Sessions Court---Bail granting order passed by the Judicial Magistrate in the present case was without jurisdiction---Appeal was allowed accordingly and bail allowed to accused was cancelled.

Khalid Rehman Qureshi, Advocate Supreme Court and Ch. Akhtar Ali, Advocate-on-Record along with Petitioner in person.

Sardar Aman Khan, Advocate Supreme Court along with Respondent No.1 in person.

Zahid Yousaf, Advocate Supreme Court on behalf of A.-G., Khyber Pakhtunkhwa.

Date of hearing: 3rd March, 2015.

## **JUDGMENT**

**IJAZ AHMED CHAUDHRY, J.**---Through this petition, petitioner seeks cancellation of bail granted to the respondent No. 1 by the learned Judicial Magistrate in a case registered vide FIR No. 289 dated 19-6-2013 under sections 376/506/34, P.P.C. at Police Station Sara-e-Saleh, Haripur, which was affirmed by the learned two courts below.

2. Brief allegation leveled against the respondent No. 1 by the petitioner is that she entered into a partnership with the respondent-accused and had also given her five tolas of gold but despite lapse of a considerable time, the respondent did not pay her profit. Despite repeatedly asking by the petitioner, the respondent evaded to pay her share in the business. On 6th of June, 2013 the respondent asked her to accompany her to Abbottabat where he was statedly opening a business. On the said date, the respondent came along with another person and picked the petitioner from Punian stop, Haripur, and thereafter on the way they committed zina-bil-jabr with her on pistol point and also made her naked pictures.

3. After the registration of case, during the investigation, the respondent No. 1 filed a petition before a learned Judge in Chamber of the Peshawar High Court under section 561-A, Cr.P.C., which was accepted by the learned High Court and the FIR was quashed. Against the said order, the petitioner approached this Court and this Court vide order dated 4-2-2014 set aside the said order of the learned Single Judge in Chamber. Respondent then applied for pre-arrest bail which was dismissed. He then applied for post arrest bail before the Judicial Magistrate which was accepted vide order dated 5-5-2014. The petitioner moved application for cancellation of bail before the Additional Sessions Judge, Haripur, which was dismissed on 5-6-2014. Being aggrieved, the petitioner filed cancellation petition before the learned High Court, which also met the same fate vide impugned order.

4. Learned counsel for the petitioner contends that the petitioner is a respectable practicing Advocate and she has been disgraced by the respondent; that the offence under section 376, P.P.C. is punishable with death or imprisonment of either description for a term which shall not be less than ten years or more than twenty-five years and the Magistrate was not competent to grant bail as the offence is triable by a Court of Session.

5. Learned counsel for the respondent No. 1, on the other hand, has contended that word 'Court' has been used in section 497, Cr.P.C., which means that Magistrate was fully competent to grant bail to the respondent.

6. We have heard learned counsel for the parties and have gone through the FIR and the other evidence collected by the Police during the investigation.

7. Petitioner was a virgin lady and according to medical evidence she was subjected to sexual intercourse. She had got recorded the FIR on the same day but with a delay. However, the delay is of no help to the respondent as it has been repeatedly held by this Court that in such like cases delay in lodging the FIR is immaterial as people naturally avoid rushing to the police because of family honour. There was no previous enmity between the parties and it is against common sense that the petitioner would have concocted a story which can ruin her life. The offence falls under section 376, P.P.C., which is punishable with death or imprisonment of either description for a term which shall not be less than ten years or more than twenty-five years and according to Schedule-II, Column No. 8 of the Criminal Procedure Code, it is triable by a Court of Session. In such like cases, only the report under section 173, Cr.P.C. has to be submitted before the Magistrate. The Magistrate has nothing to do with the merits of the case and he is not competent to grant bail or pass any other order which can be passed by the trial Court. The only function of the Magistrate after the receipt of report under section 173, Cr.P.C. is to transmit the challan to the Court of competent jurisdiction/Sessions Court. In this view of the matter, the order passed by the learned Judicial Magistrate is without jurisdiction and both the learned lower Courts below have not considered this aspect of the matter. Even otherwise, prima facie there is sufficient material available to connect the respondent with the commission of offence.

8. For what has been discussed above, this petition is converted into appeal and allowed and the impugned judgments are set aside. The bail granted to the respondent No. 1 is hereby cancelled. Respondent shall be taken into custody. However, it will be open for the respondent to approach the competent forum if any fresh ground is available to him.

MWA/N-5/SC

Bail cancelled.