JUDGMENT SHEET

PESHAWAR HIGH COURT, ABBOTTABAD BENCH

JUDICIAL DEPARTMENT

Cr.Misc.B.A.No.398-A/2020

JUDGMENT

Date of hearing……18-05-2020……

Petitioner (s)… *(Umair Shoukat) by Mr. Masood Azhar, Advocate……*

Respondent (s)….. *(The State etc) by Sardar Muhammad Asif, AAG …….*

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AHMAD ALI, J.- Accused/petitioner, Umair Shoukat, seeks his post arrest bail in case F.I.R No.1002 dated 31.12.2019 under section 377 of Pakistan Penal Code, 1860, read with section 53 of Child Protection and Welfare Act, 2010, registered at Police Station Sarai Saleh, District Haripur.

2. Brief facts of the case, as narrated in the F.I.R. lodged by Muhammad Rafique son of Muhammad Farid to the police on 31.12.2019 at 19.20 hours alongwith his son/victim, Waqas, aged about 10/11 years, which was recorded in shape of '*Murasila*', are that when he came back home, he found his son Waqas weeping. On query, he told that at about '*Namashan Wella*', Umair son of

Shoukat took him to '*Kassi*' and committed sodomy with him. Consequently, the above mentioned F.I.R was registered against the accused, who was arrested in the instant case on 31.12.2019.

3. Arguments heard. Record perused.

4. Perusal of record reveals that the accused-petitioner has been directly charged in the F.I.R. However, the Medical Officer observed that there was no clear sign of penetration of penis. However, the FSL report qua human semen on the '*shalwar'* and '*Qameez'* of the victim are in negative, while that of '*shalwar'* and '*Qameez'* of accused/petitioner are in positive. The Honourable Supreme Court of Pakistan in the case of '***Kashmir Khan Vs. The State***' (**Criminal Petition No.302 of 2020**) decided on 09.04.2020 has observed that:-

> ***"To establish the offence of sodomy, the carnal intercourse is essential ingredient which is not spelled out in the instant case as there is sufficient room to conclude that perhaps the carnal intercourse was not established during the curse of investigation as the medical report is not supportive in nature, by this Court qua the culpability of the petitioner in the aforesaid crime and that would be resolved by the learned trial Court after recording of evidence. From the perusal of record and the law on the subject, we are of the opinion that the petitioner has***

> ***squarely made out a case falling under section 497(2) Cr.P.C. the question regarding applicability of other offence in the said crime would be resolved by the learned trial Court before it. "***

Record shows that the date of birth as per '*Bay'* Form of the accused/petitioner is 30.08.2002, as such, he is to be considered and treated as a juvenile offender being under the age of 18 years. The definition of '*child'* is provided in section 2 (b) of the Juvenile Justice System Ordinance, 2000, which reads:

> **'Child'** means a person who at the time of commission of an offence has not attained the age of eighteen years.'

The case was registered against the accused/petitioner on 31.12.2019, thus, his age on the day of registration of case was 17 years, 4 months, as such, he was under the age of 18 years thus, the provisions of Juvenile Justice System Ordinance, 2000 shall be attracted to the case of accused/petitioner. The offence under section 377 PPC is punishable with imprisonment for life or with imprisonment of either description for a term which shall not be less than 02 years nor more than 10 years and also liable to fine and similarly under section 53 of Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010, the maximum

punishment extendable to 14 years is provided. Thus, the lesser of two punishments is to be taken into consideration at bail stage.

5. This Court, in the interest of justice, finds it necessary to have a look at the provision of 164-B Cr.P.C, which reads 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 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.
> (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.

6. Pertinent to mention here that the accused-petitioner is minor/juvenile and is behind the bars since his arrest. The purpose of the Juvenile Justice System Ordinance, 2000 read with amended Act, appears to be that accused of tender age saved from humiliation of jail who being at the age of learning can also not be mixed up with other criminals in jail and they can be made useful citizen of the country in their future life. This court is forfeited to seek guidance from case law laid down in **2004 YLR 2879.** Sages down the ages have generally perceived an accused person, before establishing of his guilt beyond reasonable doubt as the darling of a Criminal Court, and if such an accused person happens to be a child, then the romance about him usually receives a further sympathetic boost. Moreover, investigation in the case is complete and accused-petitioner is no more required to the prosecution for the very purpose, therefore, his further incarceration in jail will serve no useful purpose.

7. So far as the confessional statement of accused/petitioner is concerned, the confession could not be recorded in the manner as ordained by

the august Apex Court in '***Hashim Qaism's case***' (**2017 SCMR 986**) and relied upon in (**2018 P.Cr.L.J 1465**), thus, the veracity of the confessional statement of the accused/petitioner would be seen by the learned trial Court after recording evidence of the prosecution.

8. Apart from the above, it has been held time and again by the august Supreme Court that bail does not mean acquittal of an accused but only a 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".***

9. 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 the trial Court, which is free to appraise the evidence strictly in accordance with the law and the merits of the case.

10. Consequently, this bail application is allowed and accused-petitioner, Umair Shoukat, is admitted to bail provided he furnishes bail bonds in the sum of Rs.200,000/- (Two lacs), with two sureties each in the like amount to the satisfaction of *Illaqa*/Duty Judicial Magistrate, concerned, who shall ensure that the sureties are local, reliable and men of means.

Dt. 18-05-2020.

J U D G E

M.Saleem/*

(SB) Mr. Justice Ahmad Ali