

JUDGMENT SHEET
PESHAWAR HIGH COURT, PESHAWAR
JUDICIAL DEPARTMENT

Cr.M BA No.3510-P/2019

Muhammad Umair Vs the State & another

Date of hearing: **26.12.2019**

Mr. Fazle Maula, Advocate for the petitioner.

Syed Sikandar Hayat Shah, AAG, for the State.

Syed Ajmal Hussain, Advocate, for the complainant.

JUDGMENT

AHMAD ALI, J.- Through the instant bail petition, the accused-petitioner (Muhammad Umair), seeks his post-arrest bail in case FIR No.202 dated 24.06.2019, charged under Section 377-B PPC/50/53-CPA r/w 512 Cr.P.C, Police Station, Mandani (Charsadda). Same relief was, however, declined to the petitioner by the learned trial Court vide order dated 06.11.2019.

2. Brief facts of the case are that complainant charged the present accused petitioner for trying to subject his son to unnatural sexual intercourse. Accordingly, FIR ibid was registered and the accused-petitioner was taken into custody, hence the instant petition for bail.

3. Arguments heard and record perused.

4. Perusal of record reveals that the occurrence took place on 24.06.2019 and report was lodged on

27.06.2019 after delay of about 3 days without any plausible explanation.

5. No doubt, the complainant, in his report, has though charged accused for the commission of offence, but the medical report available on record suggests that no sexual act was committed with the victim. Except the solitary statement of complainant, no other incriminating evidence is available on record to *prima facie* connect the accused-petitioner with the commission of crime. Besides, no other eyewitness has been cited so as to support the version of complainant. Reliance is placed on **2019 P.Cr.L.J 899.**

6. So far as applicability of sections 50/53 of the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010 (hereinafter to be referred as the Act of 2010), is concerned, it depicts that this law was specially introduced/enacted and promulgated in the Khyber Pakhtunkhwa with particular purposes i.e. to provide for the care, protection, maintenance, welfare, training, education, rehabilitation and reintegration of 'children at risk' in the Khyber Pakhtunkhwa. For the sake of convenience and ready reference, the preamble of the Act of 2010, is reproduced below:-

"WHEREAS, it is expedient to provide for the care, protection, maintenance, welfare, training, education, rehabilitation and reintegration of children at risk in the Khyber Pakhtunkhwa".

"Child at risk" has been defined under section 2(1)(e) of the Act in the following words:-

"Child at risk" means a child in need of protection, who

- (i) is at risk, including an orphan, child with disabilities, child of migrant workers, child working and or living on the street, child in conflict with the law and child living in extreme poverty.
- (ii) is found begging; or
- (iii) is found without having any home or settled place of abode or without any ostensible meaning of subsistence; or
- (iv) has a parent or guardian who is unfit or incapacitated to exercise control over the child; or
- (v) lives in a brothel or with a prostitute or frequently visits any place being used for the purpose of prostitution or is found to associate with any prostitute or any other person who leads an immoral or depraved life; or
- (vi) is being or is likely to be abused or exploited for immoral or illegal purposes or gain; or
- (vii) is beyond the parental control; or
- (viii) is imprisoned with the mother or born in jail;
- (ix) has lost his parents or one of the parents and has no adequate source of income; or
- (x) is victim of an offence punishable under this Act or any other law for the time being in force and his parent or guardian is convicted or accused for the commission of such offence; **Or**
- (xi) is left abandoned by his parent or parents as the case may be, which will include a child born out of wedlock and left abandoned by his parent;

7. Keeping the Preamble of the Act in juxtaposition with the definition of the "Child at risk" as contemplated under section 2(1)(e) of the Act coupled with the facts and circumstances of the instant case it could not be ascertained as to whether the alleged victim, falls under the definition of "child at risk" or otherwise. In such an eventuality, the applicability of sections 50/53 of the Act of 2010, to

the case of petitioner is yet a begging question. Wisdom can be derived from case law reported in **2016 SCMR 1523, 2014 MLD 190 & 2018 YLR**

Note 114.

8. In such eventuality, when the child did not fall under the definition of “*child at risk*” as provided under Section 53, Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010; and when except the solitary statement of complainant without any medical support, no other incriminating evidence is available on record to show any nexus of the accused-petitioner with the commission of crime, this Court could not withhold the concession of bail, at least, at this stage.

9. Moreover, in the instant case, no compliance with the provision of Section 164-B Cr.P.C has been made because no samples for DNA test 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 victim as well as the accused.

10. Investigation in the case is complete and accused-petitioner is no more required to the prosecution for the very purpose. The accused-petitioner is a minor and in view of the above stated facts, his case calls for further inquiry under Sub-Section (2) of Section 497 Cr.P.C as well, therefore, the situation tilts the scales of justice towards bail rather than jail.

11. 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”**.

12. 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.

13. For what has been discussed above, this bail application is allowed and accused-petitioner, named above, is admitted to bail provided he furnishes bail

bonds in the sum of Rs.100,000/- (one lac), 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.

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

Announced;
26.12.2019

J U D G E

Amjad, PS SB

Mr. Justice Ahmad Ali