

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
D.I.KHAN BENCH**

(Judicial Department)

Cr.MBA.No.237-D/2024

Hizbullah and another

Versus

The State and another

JUDGMENT

For petitioners: Sheikh Iftikhar-ul-Haq,
Advocate.

For respondents: Mr. Inamullah Khan Kundi,
Asstt: A.G. for State.

Mr. Jamal Abdul Nasir Awan,
Advocate for respondent No.2.

Date of hearing: 23.5.2024.

Dr. Khurshid Iqbal, J.-

1. The petitioners Hizbullah son of Haji Abdullah and Suleman alias Nikka son of Maqbool Khan seek post arrest bail in case FIR No.236, dated 29.4.2024 (the year mistakenly written in the memo of bail petition as 29.4.2023), under Sections 377 (mentioned as 376, PPC)/34, PPC read with Section 15 AA, of Police Station Saddar, D.I. Khan.

2. Both the petitioners were booked on the complaint of Muhammad Awais (victim) who rushed to the local police station alongwith his father Muhammad Sharif. The story of the incident the victim told to the police is that on 23.4.2024 at 09:00 p.m., he was present in a thoroughfare in front of his house. In the meantime, the petitioners equipped with pistols arrived there on a motorcycle. They sat him on the motorcycle. They took him in the sugarcane field crop near a

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place called Kokar-T, and committed sodomy with him on gunpoint. Thereafter, they dropped him to his house and threatened not to disclose the event to anyone otherwise they will kill him.

3. Learned counsel for the petitioners argued for grant of bail on the grounds of 02-days delay in lodging the report; unclear medical report of the victim and non-receipt of the FSL report of the swabs taken from the victim.

4. The learned A.A.G., opposed the grant of bail for the reasons that the petitioners are directly charged with no question of their identification, for a heinous offence involving moral turpitude; and supportive medical report of the victim. The record was perused with the assistance of the learned counsels.

5. Undeniably, the petitioners have been directly charged for the offence of sodomy upon the victim. The medical report of the victim is clear inasmuch as it shows a wedge sloped tear on anterior wall of anal canal. This prima facie indicates that penetration has taken place, which is enough for the commission of the offence. The mere fact that the FSL report of the swabs is awaited is not sufficient to help create a scope of further inquiry. Delay in such like cases doesn't matter much for the simple reason that the honour of the victim and his family is involved. No one would ordinarily falsely level the charge of such an offence to invite social stigma such an offence tends to carry. An additional ground is the putting of the victim in fear of instant death through the use of the pistol by the petitioners. Thus, on merit, there exists a prima facie case against both the petitioners, therefore, they are not entitled to the concession of bail.

6. The petitioners raised the plea of juvenility as well. The medical report of the petitioner Suleman alias Nikka

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reflects his age about 17 years. While the medical report of petitioner Hizbullah reveals that he is about 16. Thus, both the petitioners are juveniles, as defined in section 2 of the Juvenile Justice System Act, 2018 (the Act). However, no effort under section 8 of the Act, including by the Judicial Magistrate before whom the petitioners were produced under section 167, Cr.P.C., was made for determination of their juvenility. In the cards of arrest, the petitioner Hizbullah is shown as 15/16, and the petitioner Suleman alias Nikka as 16/17 years old. This Court, thus, has to consider the cards of arrest and the medical reports as available material for the purpose of tentative assessment.

7. Under subsection (3) of section 6 of the Act, for the minor and major offences a juvenile offender shall be treated as if accused of committing a bailable offence. However, subsection (4) of the same provision, in the case of a heinous offence (carrying capital punishment), a juvenile over sixteen years of age may not be granted bail if there are reasonable grounds establishing prima facie connection with the alleged offence. It follows that the case of a juvenile offender of 16 years or below would be covered by subsection (3) of section 6 of the Act. Reliance is placed on Sahib Ullah v. The State through A.G. Khyber Pakhtunkhwa and another (2022 SCMR 1806). For this reason, the petitioner Hizbullah being 16 years old, stands entitled to bail on the ground of juvenility. The petitioner Suleman being 17, as such, above 16, could be refused bail being charge for major offence.

Sahib Ullah

8. For what has been stated above, this petition is partially allowed. The petitioner Hizbullah is admitted to bail on furnishing bail bonds in the sum of Rs. 200,000/- (Rupees two hundred thousand) with two sureties, each in the like amount, to the satisfaction of Illaqa/Duty Judicial

Magistrate. While the bail is declined to the petitioner Suleman alias Nikka.

9. In a number of cases, the higher courts have observed that the subordinate courts and police officials are not paying proper attention to the issue of juvenility. Needless to say, it is mandatory as per Section 8 of the Act that they must pay due attention to this issue. For the sake of ready reference, the provision is reproduced below:

8. Determination of age. ---(1) Where a person alleged to have committed an offence physically appears or claims to be a juvenile for the purpose of this Act, the officer-in-charge of the police station or the investigation officer shall make an inquiry to determine the age of such person on the basis of his birth certificate, educational certificates or any other pertinent documents. In absence of such documents, age of such accused person may be determined on the basis of a medical examination report by a medical officer.

(2) When an accused person who physically appears to be a juvenile for the purpose of this Act is brought before a Court under Section 167 of the Code, the Court before granting further detention shall record its findings regarding age on the basis of available record including the report submitted by the police or medical examination report by a medical officer.

(Underlines are mine for emphasis)

10. A plain reading of the aforesaid provisions reveals that according to the first part, when an accused appears from his physical condition or claims to be a juvenile, it would be the duty of the officer-in-charge or the investigating officer to conduct an inquiry into his age. The phrase "physically appears" is significant as it imposes a duty on the officer-in-charge and/or the investigating officer to inquire into the age of the accused, regardless of whether the accused has made any plea of juvenility or not. For this purpose, they have to examine documents such as the birth certificate, educational certificates, and any other relevant documents. In the absence of such documents, they are required to conduct a medical examination of the accused through an authorized Medical Officer.

11. The second part imposes a duty on the Court, before which an accused who "physically appears to be a juvenile" is brought under section 167 of the Criminal Procedure Code, 1898, to record its findings regarding his age. For this purpose, the Court must consider the record before it, including the police report concerning the age of the accused as determined in accordance with the first part. In the absence of such a report, the Court should examine the report of the Medical Officer as aforesaid.

12. It may also be helpful to observe that the issue of determination of age of juvenile offenders has been comprehensively dealt with by the higher courts while the repealed Juvenile Justice System Ordinance, 2000 was in vogue. An important case is of Sultan Ahmad v. Additional Sessions Judge-I, Mianwali and two others (PLD 2004 SC 758). In this case, the Supreme Court of Pakistan ruled:

Therefore, whenever a Court is confronted with the question of the age of an accused person, it is incumbent upon it to hold an inquiry and the learned Presiding Officers should always feel free to requisition the original record; to summon and examine the authors and the custodians of such record and documents to determine the genuineness of the same; to summon persons, if need be, who on account of some special knowledge, could depose about the age of the concerned accused person and to take such other and further steps which could help the court in reaching the just conclusion about the said matter. As has been mentioned above, the issue about the age of an accused person at trial which could result in punishment of death, was now of vital significance and the learned presiding officer should never hasten to decide the said issue in a summery or a slipshod manner.

25. Medical report about the age of an accused person was a further aid placed at the disposal of a court of law for the purpose of determining the age of an accused person. The opinion of medical experts could offer a valuable guide to a learned Presiding Officer in resolving the controversy in issue. The impression that an ossification test could be ordered only as a last resort was not correct and was thus not legally tenable. The reluctance of the Courts to benefit from such a mandated material was not understandable. Therefore, whenever, question of age of an accused person is raised or arises he must be subjected to a medical test unless strong reasons existed or could be offered for not doing so. Such is the only course which is in accord with the provisions of Section 7 of Ordinance XXII of 2000

which commands that "such inquiry shall include a medical report for determination of the age."

13. Reference may also be made to Babar Ali v. The State (PLD 2007 Lahore 650). In this case, the question of juvenility was extensively discussed and new means of solution were explored by resorting to what the Court called "judicial engineering". The Court issued the following guidelines to the subordinate courts and the police investigators:

First, soon after the arrest of a young person on a criminal accusation, the arresting police officer must make a tentative assessment as to whether the arrested young person is a "child" for the purpose of the [JJSO] 2000 or not and, thus, can he/[she] be handcuffed, etc. or not.

Second, the concerned police officer should inquire from the accused about his/her age and also make an appropriate inquiry to find out whether the arrested young person is a child under the JJSO. In doing so, the concerned police investigator should collect or consult all possible material. Such material may include the record of hospital, the record pertaining to entry of birth maintained at the relevant Union Council, the record of educational institution, the record maintained by the National Database Registering Authority (NADRA), Electoral Roll and the marriage (Nikah) Registrar and a medical opinion about his/her age, if necessary.

Third, the concerned police officer should record his tentative opinion about the age of the young accused person in his report under section 173 Cr.P.C to be forwarded to the concerned Magistrate.

Fourth, the police report under section 173 Cr.P.C must mention the plea of juvenility if set up by the young accused person and the material collected for the tentative assessment of age.

Fifth, on receipt of a report under Section 173 Cr.P.C, a Magistrate must examine the entire record of the investigation, make his/[her] own assessment of the material relevant to the question of juvenility. If the Magistrate finds the inquiry deficient, then he/she may hold an inquiry of his/her own to assess the age of the young accused person. If the Magistrate finds the young accused person as a juvenile within the meaning of the JJSO, then if he/she is not empowered as a Juvenile Court, shall take cognizance of the offence and forward the case to the concerned Juvenile Court.

Sixth, if the question of juvenility is raised before a competent Juvenile Court, such Court must decide that question according to the provisions of Section 7 of the JJSO.

Seven, if the question of juvenility is raised before an ordinary court, to which a case has been sent for trial, the ordinary Court shall decide the issue „under subsection (2) of section 5 of the [JJSO], 2000 through an inquiry akin to that contemplated by section 7 of the said Ordinance.

Eight, all Magistrates and trial courts must pay special attention to the age of the accused person before them and must record his age in the relevant record, charge sheets and final judgments as the matter of age is important to issues pertaining to the forum of trial, sentence and custody, etc.

Nine, an adverse inference may be drawn in case the plea of juvenility is raised at a belated stage of the judicial proceedings.

14. As noted above, the petitioners, being juvenile, should have had their age determined by the officer-in-charge and/or the investigating officer, regardless of his plea, in accordance with sub-section (1) of section 8 of the Act, considering his physical appearance as a juvenile. However, they failed to fulfill this statutory obligation. Similarly, when the petitioner was produced before the Judicial Magistrate in terms of section 167 Cr.P.C, the Magistrate did not adhere to the mandate of sub-section (2) of section 8 of the Act. It appears that neither the subordinate Courts, nor the police officers comply with the requirements of section 8 of the Act. It is, therefore, imperative to direct that the subordinate Courts and the concerned police officers shall determine the age of persons accused of an offence who “physically appear” or “claim” to be juveniles, strictly in accordance with section 8 of the Act.

15. Another relevant aspect is the lack of non-fulfilment of the condition of conducting DNA test in compliance with article 164-B, Cr.P.C. The provision reads as:

Section 164B. DNA test.—(1) Where an offence under section 376, section 377 B of the Pakistan Penal Code is committed or attempted to have been committed or is alleged to have been committed Deoxyribonucleic 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

their medical examination conducted under section 164 A, within optimal time period of receiving information relating to the 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 at these shall be properly examined and preserved:

Provided that the confidentiality of such examination shall at all times be observed;

16. This aspect has been emphasized in greater detail by the Lahore High Court in a bail matter in the case of *Muhammad Ayaz Shamas v. The State and another* (2020 PCr.L.J 914 [Lahore] in which the necessity of such evidence is underlined, not only in itself, but also with reference to the Supreme Court verdict in *Salman Akran Raja and another v. Government of Punjab through Chief Secretary, and others* 2013 SCMR 203. The Court moved a step further, stating that the Punjab Forensic Agency (PFSA), a state-of-art forensic facility has

designed special Sexual Assault Evidence Collection Kits (SPECKs) in accordance with internationally acclaimed protocols and has supplied them to the Medical Officer throughout the Punjab with guidelines for collection of forensic evidence and its preservation and transportation.

17. This Court is of the view that the establishment of a similar forensic facility in our province is direly need. The learned A.A.G. is advised to take up this issue with the officials concerned of the provincial government for appropriate action as soon as possible.

18. This Court would take an opportunity to sensitize the investigators, prosecutors and judges of the District Judiciary to the Criminal Law (Amendment) (Offences Relating to Rape) Act, 2016, by which amendments have been introduced in various provisions of the Pakistan Penal Code, 1860 (Act XLV of 1860), the Code of Criminal Procedure, 1989 (Act V

of 1898), and the Qanun-e-Shahadat, 1984 (P.O. No. 10 of 1984) for the purpose of offences relating to rape. The Sessions Judges are directed to conduct sensitization sessions in the monthly meetings of the judges and District Criminal Justice Co-ordination Committees, to ensure that application of the newly introduced law is no more ignored in the larger interest of justice and fair trial.

19. Above are the detailed reasons of my short order of even date.

Office
06/06/2024.

Announced.
Dt: 23.5.2024.
Imran*

JUDGE

(S.B)
Hon'ble Mr. Justice Dr. Khurshid Iqbal