

**JUDGMENT SHEET
PESHAWAR HIGH COURT,
ABBOTTABAD BENCH.
JUDICIAL DEPARTMENT**

**Cr.MBA No. 39-A/2020
Abdul Mateen Vs the State.**

Date of hearing: 21.02.2020

Petitioner (Abdul Mateen) by: Mr. KhursheedAzhar, Advocate.

State by: Sardar Muhammad Asif, AAG.

Complainant in person.

JUDGMENT

AHMAD ALI, J. Through the instant petition, petitioner Abdul Mateen S/o Pastak seekshis post-arrestbail case FIR No.928 dated 07.12.2019 under sections 377/355/34 PPC read with Section 53 of the Khyber Pakhtunkhwa Child Protection & Welfare Act, 2010, Police Station Sarai Saleh, (Haripur), Same relief was, however, declined to him by the learned trial Court vide order dated 13.01.2020.

2. Brief facts of the case are thatcomplainant NaimatUllah reported the matter to the local police that his nephew SajjadAlam is student of 6th class. Two months prior, their relative Abdul Latif enticed away SajjadAlam and in the

orchards near bypass of Garr Sarai Saleh, he committed sodomy with the victim and recorded his video. He threatened the victim that in case he disclosed the occurrence to anyone, he would kill him. Thereafter, with the consent of Abdul Latif, Abdul Mateen also committed sodomy with the victim several times. The complainant came to know about the occurrence through his relatives and he asked from his nephew, who disclosed entire facts to him. On the basis of said report, FIR was lodged against the accused/petitioner.

3. I have given my anxious thought to the blue streak arguments of learned counsel for the parties and gone through the record with their able assistance.

4. Perusal of record reveals that the occurrence took place two months prior and report was lodged on 02.12.2019 without any plausible explanation. Moreover, the complainant failed to disclose that who out of his relatives disclosed the occurrence to him.

5. No doubt, the complainant, in his report, has though charged accused for the commission of offence, but the medical report available on records suggests that no sexual act was done with the victim. Similarly, the report of FSL also does not support the prosecution version. 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.

6. So far as applicability of sections 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 53 of the Act of 2010, to the case of

petitioners is yet a begging question. Wisdom can be derived from case law reported in **2016 SCMR 1523, 2014 MLD 190 & 2018 YLR Note 114**. In the given scenario, applicability of sections 355 PPC would also require debate during trial.

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, at least at this stage, the case against accused/petitioner squarely falls within the ambit of further inquiry.

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-petitioners 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. Even otherwise, in view of the above stated facts, the case calls for further inquiry under Sub-Section (2) of Section 497 Cr.P.C, therefore, further retention of the petitioner in jail will serve no useful purpose.

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. So, by cutting the cackle, on tentative assessment of material available on file, a case for the grant of bail is made out. Consequently, 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 Illaqa/Duty Judicial Magistrate, concerned, 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:
21.02.2020

J U D G E

Tufail. SB Mr. Justice Ahmad Ali