PESHAWAR HIGH COURT ABBOTTABAD BENCH

JUDICIAL DEPARTMENT

JUDGMENT SHEET

Cr. M (Bail) No. 762-A/2020.

Date of hearing 17.09.2020.

Petitioner/s(Muhammad Rahat) by Mr. Sajid Iqbal, Advocate.

Respondent/s (The State) by Raja Muhammad Zubair, AAG and (complainant) by Ghulam Mustafa Awan, Advocate.

MOHAMMAD IBRAHIM KHAN, J.

Petitioner ***Muhammad Rahat*** through the instant petition seeks his post-arrest bail in case FIR No. 933 dated 11.08.2020 under sections 377/34 PPC read with section 53Child Protection Act registered at Police Station, *Havelian*, District, *Abbottabad*. Same relief was, however, declined to them by the learned lower forum.

2. Complainant through the present FIR has charged the present accused/ petitioner for committing carnal intercourse against the order of nature with his minor son Abdul Mohiz.

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. Scrupulous perusal of record reveals that the occurrence took place on 11.08.2020 at 12:00 PM, while the same was reported at 17:30 hours (*with delay of about seven hours*), which is not explained by the complainant in the Murasila/FIR despite the fact that on the day of occurrence, he returned home at 1:30 hours.

5. No doubt, the complainant, in his report, has charged the accused/petitioner for the commission of sodomy with his minor son but contrary to that the medical report of accused/petitioner dated: 12.08.2020 available on file reveals as under:-

> *Rahat Fareed son of M. Fareed is medically examined, no pubic hair nor axillary hair are seen. No ejacuation is seen.*

6. It is a daylight occurrence and except the solitary statement of

complainant, no other eyewitness has been cited so as to support his version.

7. Apart from the above, the accused/petitioner is admittedly minor having age about 13 / 14 years. As per report of Forensic Science Laboratory, *Semen of human origin was not detected on the articles in P. No. 1 & 2,* which also goes in favour of accused/petitioner.

8. 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;

9. 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 342 & 511 PPC would also require debate during trial.

10. 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 at the moment, except the solitary statement of complainant, 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.

11. 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.

12. Investigation in the case is complete and accused/petitioners 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.

13. 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".***

14. 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 is admitted to bail provided he furnishes bail bonds in the sum of Rs. 200,000/- (two lakh) 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.

15. 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.

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

Announced.
17.09.2020.
Tahir P/Secretary.

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