

**ORDER SHEET  
IN THE HIGH COURT OF SINDH AT KARACHI**

Criminal Bail Application No. 1709 of 2023

Date	Order with signature of Judge
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For hearing of bail application

**08.09.2023**

Mr. Muhammad Rafique advocate for the applicant  
Mr. Zahoor Shah, APG alongwith complainant

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Applicant Abdul Rehman claims to be underage i.e. 14 years old as per his Birth Certificate (02.05.2008), along with his accomplices has been booked in F.I.R No.1865/2022, for offences under Section 377/34 PPC at Police Station Sachal, for committing sodomy with Muhammad Shoaib, aged about 16 years. The bail plea of the applicant has been declined by the learned Additional Sessions Judge -III (Malir) Karachi vide order dated 27.6.2023 in Cr. Bail Application No. 2251/2023 on the premise that the prosecution has collected sufficient material in the shape of Medical and DNA reports which are positive. Now the applicant seeks his admission on post-arrest bail in the aforesaid crime.

2. At the outset the complainant who is present in person has filed his affidavit and submitted that he has settled the differences with the accused due to the intervention of well-wishers and has shown consent not to press against the bail plea of the applicant, he has joined him in his quest for seeking the aforesaid relief. At this juncture, learned APG has opposed the aforesaid proposal on the premise that the alleged offense is non-compoundable and consent in such cases is against the law. Be that as it may, if the complainant party is no longer willing to prosecute the matter, then it should not be for the court to say for and against. However, the gravity of the offense allegedly committed can validly be determined by the learned trial court after recording evidence of the parties at trial.

3. Briefly stated the allegation against the applicant is that on 8.5.2023, he along with co-accused committed sodomy with Muhammad Shoaib, aged about 16 years, son of the complainant, such matter was reported to Police Station Sachal on 10.5.2023.

4. At the very outset, it has been argued by learned counsel for the applicant that the applicant has been falsely roped in this case against the facts and circumstances. He contends that the FIR was lodged after two days of the occurrence without any justification or explanation. He next contends that the applicant is a minor boy aged about 14 years as per his Birth certificate issued by NADRA on 29.06.2023 available in the police file (Page 68) who has been behind bars for the last four months and there is no visible progress in the trial, therefore, he may be released on bail in terms of section 497(1) of the Code of Criminal Procedure 1898 and Section 6(5) of the Juvenile Justice System Act, 2018. He next argued that as per the medico-legal report and the result and conclusions drawn by the office of Sindh Forensic Science DNA and Serology Laboratory, this is the case of further inquiry and that issue would be resolved by the learned Trial Court during the trial. He next submitted that the FIR was lodged after two days of the occurrence and no plausible justification has been given for the same as such the possibility cannot be ruled out that the FIR was registered with deliberation and consultation to frame the applicant. He next submitted that alleged victim Muhammad Shoaib in his belated 164 Cr.P.C statement though recorded at a belated stage i.e. after 8 days of the alleged occurrence, in which he claims to have voluntarily gone with the applicant on the alleged date and time of the incident and was not induced and returned home safely without hue and cry and remained mum for two days and then allegedly reported to his father/complainant, then the question arises whether the applicant could be saddled with the alleged crime as the applicant voluntarily accompanied with the complainant to the police station where such F.I.R was lodged and he was put behind the lockup being of minor age, such state of affairs prima-facie needs further inquiry and to be seen by the Trial Court, who would determine the guilt or otherwise of the applicant after the recording of evidence and no useful purpose would be served by keeping the applicant behind the bars for an indefinite period till the conclusion of the trial. He next submitted that the applicant has been behind bars for the last more than four months and up-till now no witness has been examined. He emphasized that this Court as well as the Supreme Court has time and again held that the liberty of a person is one of the most cherished attributes under the Constitution of the Islamic Republic of Pakistan, 1973, which cannot be taken away without exceptional foundations. He lastly submitted that the case of the applicant squarely falls within the ambit of section 497(1) of the Code of Criminal Procedure 1898 and Section 6(5) of the Juvenile Justice System Act, 2018. In support of his contentions he relied upon the case of Sohail Aslam vs. The State

**2017 MLD 4** and *Muhammad Makki vs The State* **2010 P. Cr. L.J 1482.**

He prayed for allowing this bail application.

5. Learned APG, on the other hand, has supported the impugned bail declining order passed by the learned trial court and maintained that Section 6(5) of the Act does not apply to a case involving a “heinous offense”. It has been contended that the applicant has specifically been nominated in the F.I.R. with a specific allegation of committing sodomy with the complainant's minor son. He brought on record the DNA report to contend that the anal swabs of the victim match with the DNA profile of the applicant, which makes the case of the applicant out of consideration for grant of bail, therefore, he does not deserve any leniency by this Court.

6. I have heard learned counsel for the parties and have perused the material available on record and case law cited at the bar.

7. As per the contents of the crime report, the allegation against the applicant is that he committed sodomy with the minor son of the complainant. However, on 16.5.2023, after 8 days of the lodging of the FIR, the victim recorded his statement under section 164, Cr.P.C. in which he suspected the applicant and others to be the culprit. This is now a well-settled proposition of law that any statement of the prosecution witnesses if recorded at a belated stage, loses its sanctity. Reliance is placed on the judgments of the Supreme Court in the cases of *Abdul Khaliq v. The State* (1996 SCMR 1553), *Noor Muhammad v. The State* (2020 SCMR 1049), and *Salman Zahid Vs. The State* 2023 SCMR 1140. However, according to the medical report dated 10.5.2023, which was done promptly after the occurrence, there was no injury mark found around the anus; anal bone was normal, an excerpt of the MLO report dated 10.5.2023 is reproduced as under:-

“Cloths changed Bath taken, Penis washed, stool & Urine passed.  
On knee elbow examination, the Separation of Buttocks are not painful, with No tear, No Abrasion or Laceration, and No congestion is seen on and around the anal region. Anal bone normal. As per surgical opinion from Surgical Unit III of Civil Hospital Karachi. No visible abrasion. No wound on Peri anal region.  
DRE-un remarkable.

OPINION:- Reserved for reports from Chemical & DNA, Blood sample taken, sealed, handed over to I.O for Chemical Examination & DNA test.”

8. It appears from the record the MLO reserved the opinion and waited for the DNA report and after getting such a report formed another opinion vide report dated 19.06.2023, which is as under:-

“ The DNA profile obtained from the performance of anal ----of anal swab(for chemical analysis) of (Muhammad Shoib item No.1) is a mixture of at least three individuals Abdul Rehman s/o Salamat ( item No.1) cannot be excluded as a possible contributor to this mixed DNA sample. M. Farooque s/o M. Ramzan (item No.2) and M. Faheem @ Mama son of Liaquat (item No.3) can be excluded as possible contributors to the mixed DNA sample.

Keeping in view of the above findings the boy has been subjected to the acts of sodomy.”

9. Prima facie both the reports are at variance. The perusal of the DNA report, which was received on 13.6.2023, shows that sperm fractions of item No. 1 match with the DNA profile of the applicant. An excerpt of the DNA report is reproduced as under:-

“The DNA profile obtained from the sperm fraction of the anal swab(for chemical analysis) of Muhammad Shoib s/o Sajjad Haider ( item#1) is a mixture of at least three individuals. Abdul Rehman s/o Salamat (item#S1) cannot be excluded as a possible contributor to this mixed DNA sample. The probability of selecting an unrelated individual in the population being a contributor to this mixed DNA sample is approximately 1 in 888,554 in the Asian population. Muhammad Farooque s/o Muhammad Ramzan (item#S2) and Muhammad Faheem @ Mama s/o Liaquat (item#S3) can be excluded as possible contributors to this mixed DNA sample. Loci D16S539, CSFIPO, D22S1045, D13S317, D12S391, DYS391, Y-Indel, and Amelogenin were not used for frequency calculations.

No seminal material was identified on the anal swab (for DNA) of Muhammad Shoib s/o Sajjad Haider ( item#1). Therefore, no further DNA analysis (STR analysis) was conducted on item#2. Allele frequencies from the Asian population database of unrelated individuals were used for calculation.”

10. Keeping in view the two versions of the expert, the applicant has made an arguable case for bail at this stage, and this aspect of the matter would be resolved by the learned Trial Court during the trial. On the aforesaid proposition, I am guided by the decision of the Supreme Court in the case of Shoaib Akhtar Vs. The State 2022 SCMR 1447, an excerpt of the judgment is reproduced as under:-

“As per the contents of the crime report, the allegation against the petitioner is that he committed sodomy with the minor son of the complainant. However, according to the medical report, which was done promptly after the occurrence, there was no injury mark found around anus; anal bone was normal and was admitting one finger, which seems to be normal. The perusal of the DNA report, which was received on 26.01.2021, shows that sperm fractions of item Nos. 1, 3.1, 3.2, 3.3, 3.4 and 3.5 match with the DNA profile of the petitioner. It further states that the probability of finding an unrelated individual at random in the, population as being a source of the DNA obtained

from sperm fractions of item Nos. 3.1, 3.2, 3.3, 3.4 and 3.5 is approximately one in 63 octillion in Caucasians. We have carefully gone through the medico legal report and -the result and conclusions drawn by the office of Punjab Forensic Science Agency regarding DNA profile. *The approximate ratio regarding the positivity of DNA report, clearly; reflects that it cannot override the Medico-legal report stricto sensu, which was prepared promptly. Keeping in view the medico legal and the DNA reports, as an abundant caution we are of the view that the petitioner has made out a case at this stage and this aspect of the matter would be resolved by the learned Trial Court during trial. The FIR was lodged after two days of the occurrence and no plausible justification has been given for the same. The possibility cannot be ruled out that the FIR was registered with deliberation and consultation in order to frame the petitioner in the picture.* However, at this stage, we do not want to comment on this aspect of the matter, lest it may prejudice the case of either of the parties. It is the Trial Court, who would determine the guilt or otherwise of the petitioner after recording of evidence. The petitioner is behind the bars for the last more than seventeen months. We have been informed that until now no witness has been recorded. This Court has time and again held that liberty of a person is one of the most cherished attributes under the Constitution of Islamic Republic of Pakistan, 1973, which cannot be taken away without exceptional foundations. Keeping in view the peculiar facts and circumstances of the present case, no useful purpose would be served by keeping the petitioner behind the bars for an indefinite period till the conclusion of the trial. Taking consideration all the facts and circumstances stated above, we are of the view that the case of the petitioner squarely falls within the ambit of section 497(2), Cr.P.C. entitling for further, inquiry into his guilt.

6. For what has been discussed above, we convert this petition into appeal, allow it and set aside the impugned order dated 23.02.2022. The petitioner is admitted to bail subject to his furnishing bail bonds in the sum of Rs.200,000/- with one surety in the like amount to the satisfaction of learned Trial Court.” (*Emphasis added*).

11. Applicant claims to be a juvenile aged about 15 years, the Supreme Court in the case of *Khawar Kayani Vs. The State* (PLD 2022 SC 551) has interpreted Section 6(5) of the Juvenile Justice System Act, 2018. The question of whether the case of the applicant, being a child of 15 years, falls within the exception contained in section 83 P.P.C., for ease of reference, is hereby reproduced infra:-

“Act of a child above [ten] and under [fourteen] of immature understanding.- Nothing is an offence which is done by a child above [ten] years of age and under [fourteen], who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.”

12. In the present case, the applicant was brought to the police station by complaint on 10.08.2023 and he has been detained for a continuous period exceeding four months since his detention and their trial has not yet been commenced when he applied for the relief of bail before the trial Court. The trial Court declined the relief of bail to the applicant on the aforesaid analogy. Prima facie the trial court ought to have considered the case of the applicant in terms of the principles laid down by the Supreme

Court in the cases of Khawar Kayani Vs. The State (PLD 2022 SC 551) and Tahira Batoool v. State (PLD 2022 SC 764).

13. In principle bail does not mean acquittal of the accused but only change of custody from police to the sureties, who on furnishing bonds take responsibility to produce the accused whenever and wherever required to be produced. On the aforesaid proposition, I am fortified with the decision of the Supreme Court on the case of Haji Muhammad Nazir v. The State (2008 SCMR 807).

14. It is now well-settled that in a case where the accused is either a minor under the age of sixteen years, or woman, or a sick or infirm person, even in a non-bailable offense of prohibitory clause, in the same manner as bail is granted or refused in offenses of non-prohibitory clause of Section 497(1) Cr. P.C.

15. It is a settled principle of law that the benefit of the doubt can be even extended at the bail stage. Reliance is placed on Muhammad Ejaz v. The State (2022 SCMR 1271), Muhammad Arshad v. The State (2022 SCMR 1555), and Fahad Hussain v. The State (2023 SCMR 364).

16. Because of the above factual and legal position as set forth by the Supreme Court in the cases of Khawar Kayani Vs. The State (PLD 2022 SC 551) and Tahira Batoool v. State (PLD 2022 SC 764). The applicant is found entitled to the relief of bail under the first proviso to Section 497(1) Cr.PC, and this bail application is accepted, subject to his furnishing solvent surety in the sum of Rs.200,000/- and PR Bond in the like amount to the satisfaction of the trial Court, However, the learned trial Court is directed to proceed with and conclude the trial expeditiously.

17. The observation recorded hereinabove is tentative and shall not prejudice the case of either party at the trial.

JUDGE

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