

ORDER SHEET
**IN THE HIGH COURT OF SINDH, CIRCUIT
COURT, HYDERABAD.**
Cr.B.A.No.S-698 of 2019

[Jawad Ali versus The State]

DATE	ORDER WITH SIGNATURE OF JUDGE
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For hearing of main case.

15.07.2019.

Mr. Rasool Bakhsh Solangi, Advocate for Applicant.

Mr. Sana Memon, A.P.G.

Adnan Iqbal Chaudhry, J.- The Applicant, namely Jawad Ali, who is a juvenile said to be of 10 years of age, prays for bail after arrest in Crime No.115 of 2019 for the offence alleged under section 377, 34 PPC (sodomy), registered at PS Tando Muhammad Khan on 27.05.2019. The Applicant is presently confined at the Juvenile Jail, Hyderabad.

2. The alleged incident took place on 23.05.2019. The victim of the alleged offence, namely Tameer Ali, is also a minor of 8 to 9 years of age who narrated the incident to his father who lodged the FIR.

3. Per the FIR, one Abdul Raheem, aged about 11 to 12 years came to the victim's house to fetch him to play games in a mango garden where Abdul Raheem and his brothers, namely Haider Ali Khaskheli aged about 35 years and the Applicant Jawad Ali, took hold of the victim and sodomized him. All three accused, i.e. Abdul Raheem, Haider Ali Khaskheli and Jawad Ali were arrested.

4. In support of this bail application, learned counsel for the Applicant relied upon the Provisional Medico-legal Certificate dated 28.5.2019 with regards to the Applicant which mentions his age as "About 10 years" and further reads as follows :-

“Secondary sexual characteristics:- Growth of moustache, beard, axillary hairs, chest hairs, pubic hairs has not been started. Scrotal skin is smooth and no colour changes in axillary and scrotal region is seen.

Erectile function:- He is having under developed circumcised penis, incapable of erection and semen discharge despite three consecutive masturbation trials. Two tests are normally placed in serum—However sample of blood has been collected and sent to DNA Lab LUMHS Jamshoro through SHO-PS (TMK) to co-relate with evidence from victim.

The OPINION is kept reserve for want of report from DNA Lab LUMHS Jamshoro and age determination report from LUH Hyderabad.”

5. Learned counsel for the Applicant further relied on section 10(5) of the Juvenile Justice System Ordinance, 2000 to submit that as regards the juvenile Applicant, the alleged offence is bailable. He then pointed to section 82 P.P.C. which states that nothing is an offence which is done by a child under ten years of age. In the last, learned counsel submitted that in any case since the Applicant was a minor, his case came under the ambit of the first proviso to section 497(1) Cr.P.C. On the other hand, the learned APG opposed the bail on the ground that investigation as yet to be completed.

6. Regards the reliance placed by learned counsel for the Applicant on section 10(5) of the Juvenile Justice System Ordinance, 2000, that is misplaced in that, the said Ordinance was repealed by the Juvenile Justice System Act, 2018. Section 6(3) of the latter Act provides:

“S. 6(3). Where a juvenile is arrested or detained for commission of a minor or a major offence for the purposes of this Act, he shall be treated as if he was accused of commission of a bailable offence.”

The words "major offence" and "minor offence" are defined in sections 2(m) and 2(o) respectively of Juvenile Justice System Act, 2018. "Major offence" is defined to mean an offence for which punishment under the Pakistan Penal Code, 1860 (Act XIV of 1860) or any other law for the time being in force is more than three years and up to seven years imprisonment with or without fine. On the other hand, the maximum punishment stipulated by section 377 P.P.C. is greater. Therefore, on a tentative view of the matter, I am not convinced that section 6(4) of the Juvenile Justice System Act, 2018 is attracted to the present case. As

regards section 82 P.P.C., the reliance placed on that by learned counsel for the Applicant is premature at this stage when the final medical report as to whether the Applicant was under 10 years of age at the time of the alleged offence, has yet to come.

7. However, to-date, only an interim challan is on record. On the query of the Court whether a report of the victim's medical examination as required by section 164-A Cr.P.C. is available, and whether DNA samples under section 164-B Cr.P.C. were taken from the victim and the Applicant, learned APG submitted that though DNA samples were taken, the DNA report is still awaited and that is the reason why the victim's medical examination report and the final challan have not been submitted. But at the same time, the learned APG conceded that the fee challan for the DNA test has yet to be paid, and that thereafter the process of the DNA report will take at least 2 to 3 months.

8. Thus, at present, there is no medical report to substantiate the alleged offence committed against the victim. The learned AGP is in no position to specify a date for the submission of the DNA report, the medical examination report of the victim and the final challan. In the meantime, this Court cannot leave a juvenile to remain under incarceration due to idleness of the prosecution. The only document presently available on the record is the Provisional Medico-legal Certificate dated 28.05.2019 with regards to the medical examination of the Applicant which supports the case of the Applicant as that mentions the Applicant's age as "about 10 years" and states that given his minor age, he is incapable of an erection and semen discharge. In addition, there is no eye-witness of the incident. *Prima facie*, there is a delay of 4 days in lodging the FIR. Not only does the case fall within the ambit of the first proviso to section 497(1) Cr.P.C., the circumstances also make the case one of further inquiry falling within the ambit of section 497(2) Cr.P.C. For the said reasons, I allow the instant bail application. The Applicant, Jawad Ali son of Khuda Dino is admitted to bail in Crime No.115 of 2019 registered at P.S.

Tando Muhammad Khan subject to furnishing solvent surety in the sum of Rs.35,000/= (Rupees Thirty Five Thousand only) and PR bond in like amount to the satisfaction of the trial court, whereafter he shall be released from prison forthwith if not required in any other matter.

JUDGE

Ahmed/Pa