

Form No: HCJD/C-121
ORDER SHEET
IN THE LAHORE HIGH COURT,
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

Crl. Misc. No.4603/B/2020

[REDACTED]

Vs.

The State etc.

S.No. of order/ proceeding	Date of order/ Proceeding	Order with signature of Judge, and that of parties or counsel, where necessary
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11.02.2021

Malik Muhammad Saleem & Malik Sheraz Arshad,
Advocates, for the Petitioner.

Mr. Adnan Latif Sheikh, Deputy Prosecutor General
with Ali Abbas SI.

Syed Fayyaz Ahmad Shah Bukhari & Sardar
Inayatullah Khan Bhutta, Advocates, for the
Complainant.

“The right to a fair trial is realized in the process of moving a case from arrest to final resolution and sentence. When courts, prosecutors, public defenders, and the justice system as a whole fail to effectively process cases, this right is jeopardized. Children detained awaiting trial are the most at risk when this process breaks down.”¹

Tariq Saleem Sheikh, J. – Through this application the Petitioner seeks post-arrest bail in case FIR No. 172/2019 dated 29.06.2019 registered at Police Station Shah Saddar Din, District Dera Ghazi Khan, for offences under sections 302, 324, 337-F(iii), 34 PPC.

2. According to the crime report, the prosecution case is that on 29.06.2019 at about 10.00 a.m. the Complainant and his companions (which included his father [REDACTED] and son [REDACTED]) were going to Darbar Pir Adil when the Petitioner and his co-accused,

¹ *Children in Pretrial Detention: Promoting Stronger International Time Limits*, a report jointly prepared by the Clinical Program of the American University Washington College of Law, the University of Minnesota Human Rights Centre, and Juvenile Justice Advocates International, available at <https://www.wcl.american.edu/index.efm?LinkServID=336BF47E-F500-5734-BF73571825FE45B>

who were armed with different weapons, intercepted them in furtherance of common intention. The Petitioner called out that they would teach [REDACTED] a lesson for fighting with [REDACTED] a day earlier and shot at him with a repeater. [REDACTED] fired at [REDACTED] with his gun. As a result, both of them were wounded. They were rushed to the hospital where [REDACTED] succumbed to his injuries next day.

3. The Petitioner was arrested and he applied for bail but his application was dismissed by the Additional Sessions Judge, Dera Ghazi Khan, on merits. Since he is a juvenile in terms of the Juvenile Justice System Act, 2018 (“Juvenile Act”), on 14.7.2020 he moved second bail application before that court on the statutory ground that he had been detained for a continuous period exceeding six months but his trial had not concluded. The court dismissed his application vide order dated 25.07.2020.

4. The learned counsel for the Petitioner, Malik Muhammad Saleem, Advocate, contended that the Petitioner was languishing in jail since 6.7.2019 but his case had not been decided. He diligently participated in the trial and was not responsible for the delay. He had thus earned a statutory right to bail.

5. The Deputy Prosecutor General assisted by the counsel for the Complainant vehemently opposed this application. He contended that the Petitioner was involved in a heinous offence within the meaning of clause (g) of section 2 of the Juvenile Act. There was ample incriminating evidence against him so he could not be enlarged on bail. The trial was delayed because a lot of time was consumed in determining whether the Petitioner was a juvenile. The said time would not be counted against the prosecution as the Petitioner himself moved the application for that determination.

6. Arguments heard. Record perused.

7. Detention deprives a person of his liberty. Inasmuch as an accused is presumed to be innocent unless proved guilty, the decision

whether he should be detained during the pendency of his trial is always important. It is more so in cases involving juveniles. In *Re William M.*, 3 Cal. 3d 16, 473 P.2d 737, 89 Cal. Rptr. 33 (1970), the court quoted with approval the following excerpt from the *amicus* brief:

“It is difficult for an adult who has not been through the experience to realize the terror that engulfs a youngster the first time he loses his liberty and has to spend the night or several days or weeks in a cold, impersonal cell or room away from home or family ... The experience tells the youngster that he is ‘no good’ and that society has rejected him. So he responds to society’s expectation, sees himself as a delinquent, and acts like one.”

8. Detention, particularly pre-trial detention, has serious impact on the well-being of children and the society. According to the UN Special Rapporteur on Torture (2010-2016), Juan E. Mendez,² they are at a heightened risk of torture or inhumane, cruel and degrading treatment. “Even in the best possible detention conditions each day of detention harms a child emotionally and psychologically, putting him or her at higher risk of depression, self-harm, or suicide. Alienation from families, communities, schools, and support systems hurt a child’s chance of social and economic success, affecting his or her future and that of the whole community.” Another publication observes:³

“Children who break the law do not do so of their own free will, but rather as a result of restricted opportunities available for their development. Such opportunities become even more restricted once they enter the criminal justice system. Juveniles from risk groups that could get in conflict with the law are often victims of abuse and neglect, negligent and poor parenting and economic difficulties. Juvenile delinquency is not a success story, but evidence of the society failing to ensure protective environment for its children. Labelling such children results in exclusion from society rather than assistance in their rehabilitation. If juvenile offenders continue being criminalized while at the same time being denied a ‘second chance’ that they deserve, their ‘chances’ will lead to nothing but their reoffending when they grow up.”

9. Research shows that children’s sense of time is significantly different from that of adults. Consequently, even short period of

² Preface to *Children in Pretrial Detention: Promoting Stronger International Time Limits* (ibid)

³ See note 3.

detention is harmful.⁴ Hence, the juvenile offenders must be treated differently from adult delinquents. Some scholars suggest that even the terminology used to describe them and/or their non-adapted behaviour should be carefully used to reduce stigmatization. “In recent years, the prevailing opinion has been that the term juvenile offending is the most acceptable one and politically most appropriate if we are to reduce stigmatization of these persons through the language we use. Juvenile offending can be viewed in its narrow and broad sense. In the narrow sense, it stands for the breach of legal norms, i.e. committing of crimes by a juvenile. In its broader sense, in addition to committing of crimes it also includes the violation of ethical norms, commission of minor offences as well as anti-social behaviour.”⁵

10. In 1985, the UN General Assembly adopted the “*Standard Minimum Rules for the Administration of Juvenile Justice*” commonly known as the Beijing Rules which has set international parameters for pre-trial detention of children. Article 13.1 of the Beijing Rules states:

“Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.”

11. The UN Convention on the Rights of the Child (1989) (“CRC”), which is a comprehensive human rights treaty for protection of children’s rights, also proclaims that childhood is entitled to special care and assistance. The following two Articles of the Convention are significant for our present purpose:

Article 37 – Torture and Deprivation of Liberty

States Parties shall ensure that:

- (a) No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age;

⁴ David E. Arredondo, *Child Development, Children’s Mental Health and the Juvenile Justice System: Principles for Effective Decision-Making*, 14 STAN. L. & Pol’y Rev. 13, 18-19 (2003), cited in *Children in Pretrial Detention: Promoting Stronger International Time Limits* (supra).

⁵ The Rights of Children in Conflict with Law (Podgorica, 2007). Available at: <https://www.unicef.org/montenegro/media/7931/file/MNE-media-MNEpublication391.pdf>

(b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time;

(c) Every child deprived of liberty shall be treated with humanity and respect for the inherent dignity of the human person, and in a manner which takes into account the needs of persons of his or her age. In particular every child deprived of liberty shall be separated from adults unless it is considered in the child's best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances;

(d) Every child deprived of his or her liberty shall have the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action.

Article 40 – Administration of Juvenile Justice

1. States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child's sense of dignity and worth, which reinforces the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting the child's reintegration and the child's assuming a constructive role in society.

2. To this end, and having regard to the relevant provisions of international instruments, States Parties shall, in particular, ensure that:

a) No child shall be alleged as, be accused of, or recognized as having infringed the penal law by reason of acts or omissions that were not prohibited by national or international law at the time they were committed;

b) Every child alleged as or accused of having infringed the penal law has at least the following guarantees:

i) To be presumed innocent until proven guilty according to law;

ii) To be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defence;

iii) To have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing

according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians;

- iv) Not to be compelled to give testimony or to confess guilt; to examine or have examined adverse witnesses and to obtain the participation and examination of witnesses on his or her behalf under conditions of equality;
- v) If considered to have infringed the penal law, to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law;
- vi) To have the free assistance of an interpreter if the child cannot understand or speak the language used;
- vii) To have his or her privacy fully respected at all stages of the proceedings.

3. States Parties shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular:

- a) The establishment of a minimum age below which children shall be presumed not to have the capacity to infringe the penal law;
- b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected.

4. A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence.

12. The UN Committee on the Rights of the Child, which has the mandate to interpret the CRC has recommended in General Comment No. 10 (2007)⁶ that the children who are detained should be indicted within 30 days and the court should finally decide the case

⁶ UN Committee on the Rights of the Child (CRC), General Comment No.10 (2007): Children's Rights on Juvenile Justice, 25 April 2007, CRC/C/GC/10, available at: <https://www.refworld.org/docid/4670fca12.html>

within six months. It is sometimes argued that the CRC Committee has set a standard of limiting child pre-trial detention to six months.⁷

13. The other instruments which deal with this subject include:

- i) UN Guidelines for the Prevention of Juvenile Delinquency
- ii) European Convention for the Protection of Human Rights and Fundamental Freedoms (1953)
 - Council of Europe Social Reaction to Juvenile Delinquency, 1987 (CER(87)20)
 - European Rules on Social Sanctions and Measures (1992), (CER(92)16)
 - Council of Europe Social Reaction to Juvenile Delinquency of Juveniles from Migrant Families, 1989 (CER(88)6).
- iii) International Covenant on Civil and Political Rights – ICCPR (1966)
- iv) American Convention on Human Rights (1969)
- v) African Charter on Human and Peoples Rights (1981)
- vi) African Charter on the Rights and Welfare of the Child.
- vii) Riyadh Guidelines (1990)
- viii) UN Rules on the Protection of Juveniles in Custody (1990)
- ix) Guidelines for the Treatment of Juveniles within Juvenile Justice – Vienna Guidelines (1997)
- x) UN Standard Minimum Rules for Non-custodial Measures – Tokyo Rules (1990).

14. Pakistan has ratified the CRC and the ICCPR. In order to discharge her international obligations she enacted the Juvenile Justice System Ordinance, 2000, which was subsequently replaced with the Juvenile Justice System Act, 2018. Section 6 of the said Act is relevant and is reproduced hereunder:

⁷ See note 1

6. Release of juvenile on bail.—(1) Notwithstanding anything contained in the Code, a juvenile accused of bailable offence shall, if already not released under Section 496 of the Code [of Criminal Procedure, 1898], be released by the Juvenile Court on bail with or without surety unless it appears that there are reasonable grounds for believing that the release of such juvenile may bring him in association with criminals or expose him to any other danger. In this situation the juvenile shall be placed under the custody of a suitable person or Juvenile Rehabilitation Centre under the supervision of probation officer. The juvenile shall not under any circumstances be kept in a police station under police custody or jail in such cases.

(2) The Juvenile Court shall, in a case where a juvenile is not released under sub-section (1), direct the police for tracing guardian of such juvenile and where guardian of such juvenile is traced out, the Juvenile Court may immediately handover custody of the juvenile to this guardian.

(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.

(4) Where a juvenile of more than sixteen years of age is arrested or detained for a heinous offence, he may not be released on bail if the Juvenile Court is of the opinion that there are reasonable grounds to believe that such juvenile is involved in commission of a heinous offence.

(5) Where the Juvenile Court is of the opinion that the delay in the trial of a juvenile has not been occasioned by an act or omission of such juvenile or any other person acting on his behalf or in exercise of any right or privilege under any law for the time being in force, such juvenile shall be released on bail if he has been detained for a continuous period exceeding six months and whose trial has not been completed.

15. Some countries impose blanket limit on the time for which the children may be kept in pre-trial detention. They apply to all youth. On the other hand, there are States that prescribe crime-based limits depending on the type or gravity of the offence or the sentence likely to be handed down. Section 6 of the Juvenile Act follows the latter model. However, the policy that “pre-trial detention is only permitted as a measure of last resort and for the shortest appropriate period of time” permeates the section.

16. In the instant case, the Petitioner is accused of killing Zafar Hussain and said to be vicariously liable for the murderous assault on Muhammad Jamal. He was arrested on 6.7.2019 and is incarcerated

since then but his trial has not been concluded. But is he responsible for the delay?

17. Section 8(1) of the Juvenile Act mandates that where an accused appears or claims to be a juvenile the police are bound to ask him to produce his birth certificate, educational certificates and other relevant documents and determine his age in their light. However, where such documents are not available they should get him medically examined and use the report of the medical officer for that purpose. Section 8(2) stipulates that where an accused who physically appears to be a juvenile is brought before a court under section 167 Cr.P.C., the court shall, before granting further detention, record its findings regarding his age on the basis of the available record, including the police report or the medical report. In the instant case, neither the police nor the court performed their statutory duty. Therefore, on 14.10.2019 the Petitioner moved an application before the Additional Sessions Judge for determination of his age. A medical board was constituted which opined that his age was 17-19 years. The court vide order dated 21.2.2020 ruled that the Petitioner must be held to be less than 18 years old at the time of occurrence and declared him a juvenile. The Complainant moved an application for his re-examination by the Provincial Standing Medical Board which concurred with the opinion of the District Board. Thereafter the court directed its office to prepare separate file for the Petitioner's case. On somewhat similar facts the Hon'ble Supreme Court of Pakistan held in *Saleem Khan v. The State and others* (PLD 2020 SC 356) that the time spent by the accused in obtaining a declaration that he was a juvenile could not be counted to his disadvantage. Relevant excerpt is reproduced hereunder:

“6. Determination of age of an accused who appears or claims to be a juvenile is, therefore, initially the statutory responsibility of the police, in the absence of which, the court of general jurisdiction enjoys the power to determine the age of the accused, and if declared to be a juvenile, transfer the case to the concerned Juvenile Court. In the instant case, the police had not carried out any such exercise and therefore the court on the application of the petitioner issued the required declaration. The determination of age by the court is also a

statutory obligation, hence the time spent in obtaining the said finding or declaration by the court cannot possibly be termed as delay caused in the trial by the accused, so as to deprive him of his right to bail on the ground of statutory delay. Any such determination of age by the court is a statutory requirement and forms part of the trial.”

18. The Petitioner’s case squarely falls within the ambit of section 6(5) of the Juvenile Act. He has been detained for a continuous period exceeding six months, the trial has not been concluded and the delay is not attributable to him. Hence, this application is accepted and he is admitted to post-arrest bail subject to his furnishing bail bonds in the sum of Rs.500,000/- (Rupees five hundred thousands) with two sureties in the like amount to the satisfaction of the trial court.

19. Before parting with this order I want to make an additional note. The international human rights regime seeks to protect the children in conflict with law. Pakistan has enacted the Juvenile Act to provide for criminal justice system for juveniles with a special focus on disposal of cases through diversion and social reintegration of the juvenile offenders. It also shares the thought of the international community that “children should be detained when absolutely necessary and for the shortest period of time possible. That the unique vulnerability of children deprived of their liberty requires higher standards and broader safeguards to minimize the use of detention and prevent ill-treatment while they are in custody.”⁸ In order to realize some of the aims and objects of the Juvenile Act it is necessary to make the following directions:

- a) The Inspector General of Police, Punjab, shall ensure that all cases involving juveniles are processed swiftly in accordance with law and the challan is submitted within 14 days. If it is not possible to submit final challan, at least interim challan in terms of the proviso to section 173 Cr.P.C. shall be submitted.
- b) The Prosecutor General Punjab shall ensure that no delay in meeting the aforementioned

⁸ Juan E. Mendez, *supra*

timeline is occasioned by the Prosecution Department.

- c) The Inspector General of Police and the Prosecutor General shall immediately nominate designated officers who shall monitor submission of challans in cases involving juveniles on monthly basis. Disciplinary action shall be taken against those responsible for causing delay.
- d) Henceforth juvenile cases shall be on the agenda of every meeting of the Criminal Justice Coordination Committees constituted under Chapter XI of the Police Order, 2002. The said committees shall review the progress of the said cases and issue such directions and take such steps as may be necessary for implementation of this order.
- e) All the trial courts shall decide the cases involving juveniles expeditiously. They shall proceed with them on day-to-day basis and would not grant unnecessary adjournments. In any event, every trial must be concluded within six months. Compliance report shall be submitted to this Court in every case through the Deputy Registrar (Judicial) concerned.

20. The Additional Registrar (Judicial) shall send copies of this order to all concerned, including the District & Sessions Judges of the Punjab.

(Tariq Saleem Sheikh)
Judge

Approved for reporting

Judge

Naeem