Form No: HCJD/C-121.

ORDER SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

JUDICIAL DEPARTMENT.

Criminal Misc. No. 631-B of 2021

Mubeen Ahmed
Versus
The State & another

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	30.07.2021.	Mr. M. Inam Mughal, Advocate for the petitioner. Mr. Yasir Ali Raja, Advocate for the complainant. Mr. Shazeb Nawaz Khan, State Counsel. Mr. Muhammad Amin, ASI along with record.

Through this petition the petitioner is seeking bail after arrest in case FIR No. 215 dated 06.06.2021 wherein the petitioner has been charged for an offence under section 377B and 34 of Pakistan Penal Code, 1860 **("PPC")** registered at Police Station Shahzad Town, Islamabad.

2. Learned counsel for the petitioner contended that in the instant case the allegation is that the petitioner attempted to commit an offence and not that he committed an unnatural act with the seven years old son of the complaint. That the complainant is not an eye-witness as alleged in the FIR. The eye witness is the wife of the complainant who told the complainant that she saw her son in the shop of the petitioner with his trouser pulled down and the complainant then sought the registration of FIR after the delay of approximately 25 hours. He submitted that the medical record reflected no marks of violence or torture on the body of the child or any bruises which would have

suggested that the accused had forced himself on the child. That the petitioner recorded a statement under section 161 of Cr.P.C in which he refuted the allegation against him. The neighbourers and acquaintances of the petitioner from the area recorded statements in favour of the petitioner giving evidence of his good character. He relied on ***Suleman Vs. The State (2008 YLR 2722)*** for the proposition that where no penetration was established through medical evidence, the accused was granted bail. He also relied on ***Mazhar Ali Vs. The State and another*** *(****2019 PCr.LJ 899)****,* wherein in view of the fact that the complainant was not the eye-witness and no bruises, scratches or signs of violence were evident from the evidence collected and in the absence of proof of penetration, the accused was granted bail. The learned counsel for the petitioner contended that the complaint is tainted with *mala fide* as the complainant owed an amount of Rs.31,000/- for purchase of items from the shop of the petitioner on credit and it was on demand by the petitioner to settle the account that the complainant had implicated the petitioner in a false case. He further submitted that the co-accused had been granted bail by the learned trial court and the petitioner was entitled to the same in view of the principle of consistency.

3. Learned counsel for the complainant submitted that for purposes of section 377A an offence stands constituted upon mere attempt to engage with a child in obscene or sexually explicit conduct and such offence cannot be confused with an offence under section 376 or 377 of PPC

for which penetration might be relevant. He submitted that under section 377B, the punishment for offence of sexual abuse under section 377A was a term not less than fourteen years and the offence fell within the prohibitory clause of section 497(1) of Cr.P.C. He submitted that wife of the complainant was the eye-witness who had seen her seven years old son in the shop of the petitioner with his trouser pulled down and then her son narrated the story of sexual abuse that he suffered at the hands of the petitioner both to his mother as well as his father. He submitted that the medical report also recorded that the victim had been subjected to multiple attempts of sexual assault.

4. Learned State Counsel took the Court through the legislative history of the promulgation of section 377A of PPC. He submitted that the said provision was promulgated through the Criminal Law (Second Amendment) Act, 2016 and was given effect from 22.03.2016. That the statement of objects and reasons of the said amendment reflected that it was to implement the provisions of the United Nations' Convection on Rights of Child and to protect children from exposure to seduction, sexual abuse, cruelty, trafficking in human beings, etc. He submitted that the offence that the petitioner was charged with was non-bailable and fell within the prohibitory clause of section 497 of Cr.P.C. He relied on ***Arbab Ali Vs. Khamiso and others*** ***(1985 SCMR 195)*** and ***Shoukat Ilahi Vs. Javed Iqbal and others*** ***(2010 SCMR 966)*** to argue that where an offence falls within the prohibitory clause, bail would only be granted if the accused

made out a case of further inquiry or if the accused is either sick, infirm or a child, and that none of these conditions were attracted in the present case. He relied on **Waseem Bashir Vs. the State (2016 PCr.LJ 454)**, ***Ghulam Hussain Vs. The State (2020 YLR 1959)*** and **Sakhi Rehmat Vs. The State (2021 MLD 75)** for the argument that where the accused is implicated in the heinous offence of sexual abuse, which has not just against a minor but also against the society at large, the accused did not deserve the concession of bail. He submitted that the FIR contained specific allegations against the accused. That mere inducement to engage in sexually explicit conduct was sufficient to constitute an offence under section 377A and that consummation of intercourse is not a required ingredient of the offence that the petitioner was charged with. And consequently the medical report reflecting no signs of violence or injury had no relevance for purposes of an offence under section 377A. For this proposition he relied on **Waseem *Bashir Vs. The State and other* *(2016 PCr.LJ 454)***. He further relied on ***Sakhi Rehmat Vs. The State (2021 MLD 75)*** to argue that where the allegation is specific and witness had recorded statements under section 161 of Cr.P.C implicating the accused and the medical evidence supported the allegation, bail to the accused was denied. He further contended that while another person was also named in the FIR but as there was no role attributed to him by either the wife of the complainant or the child who suffered sexual abuse, the learned trial court had rightly

granted such accused the benefit of doubt. However, the role of the petitioner and the co-accused was completely different according to the FIR, and thus the principle of consistency would not be applicable. He further submitted that the general character and statements provided by the acquaintances of the petitioner were of no value as none of them were present at the place of occurrence as is often the case in incidents of sexual abuse, which often involve by someone known to the victim. He further argued that in a case of sexual abuse it is hard to find independent witnesses and the motive being attributed by the petitioner to the complainant and his wife is almost inconceivable as no parent can be expected to stoop so low so as to expose their seven year old child to allegations of sexual abuse in order to settle an account of Rs.31,000/-.

5. Sections 377A and 377B state the following:

> ***377A. Sexual abuse.*** *Whoever employs, uses, forces, persuades, induces, entices, or coerces any person to engage in, or assist any other person to engage in fondling, stroking, caressing, exhibitionism, voyeurism or any obscene or sexually explicit conduct or simulation of such conduct either independently or in conjunction with other acts, with or without consent where age of person is less than eighteen years, is said to commit the offence of sexual abuse.*
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> ***377B. Punishment.*** *Whoever commits the offence of sexual abuse shall be punished with imprisonment of either description for a term which shall not be less than fourteen years and may extend up to twenty years and with fine which shall not be less than one million rupees.*

6. The said provisions were incorporated pursuant to the Criminal Law (Second Amendment) Act, 2016 in order to ensure that Pakistan discharges its obligations under the United Nations' Convention on Rights of Child which was ratified in 1990. An explicit object of the Act as reflected from the statements of objects and reasons was to criminalize the act to exposing children to obscene and sexually explicit conduct. Section 377 as originally promulgated carried a punishment of upto seven years imprisonment, read together with fine. The said provision was amended by the Act No. XXVII of 2018 with effect from 22.05.2018 and the punishment was enhanced to a minimum of fourteen years and upto a maximum of twenty years and fine of upto one million Rupees.

7. The United Nations' Convention on Rights of Child includes the following:

> ***Article 19***
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> *1. States Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.*
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> *2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow-up of instances of child*

maltreatment described heretofore, and, as appropriate, for judicial involvement.

Article 34

States Parties undertake to protect the child from all forms of sexual exploitation and sexual abuse. For these purposes, States Parties shall in particular take all appropriate national, bilateral and multilateral measures to prevent:

(a) The inducement or coercion of a child to engage in any unlawful sexual activity;

(b) The exploitative use of children in prostitution or other unlawful sexual practices;

(c) The exploitative use of children in pornographic performances and materials.

8. Article 34 of the United Nations' Convention on Rights of Child that had inspired the creation of the offence of sexual abuse in Pakistan. The object of introducing section 377A of PPC is to protect children who form a vulnerable segment of the society and are unable to guard against and comprehend the consequences of actions of others (and the consequences of even their own actions). It is for this purpose that through promulgation of section 377A, the State has assumed the obligation to protect children from any form of sexual abuse.

9. Section 377A does not require the consummation of sexual intercourse of any sort. Mere persuasion, inducement or enticement to engage a minor less than eighteen years of age in fondling, stroking, caressing, exhibitionism, voyeurism or any obscene or sexually explicit conduct or stimulation of such conduct constitutes the offence of sexual abuse. Thus, merely fondling a child, which would inflict no

marks of violence or hurt on the body of such child, would constitute sexual abuse. The manner in which ingredients of the offence have been defined in section 377A and the punishment prescribed in section 377B, as amended and enhanced in 2018, makes the legislative intent unequivocal.

10. The law on bail is now well settled. In cases where the offence falls outside the non-prohibitory clause of section 497(1) of Cr.P.C., bail is to be granted as a matter of course and rejection of the same is an exception. Where, however, an offence falls within the prohibitory clause, bail can only be granted if the court comes to the conclusion that there is no reasonable ground for believing that the accused has committed a non-bailable offence or where an accused makes out a case of further inquiry into a guilt of the accused or in case the accused is under the age of 16 years or is sick or infirm. Due to the punishment prescribed in section 377B as originally promulgated the offence under section 377A did not fall in the prohibitory clause of section 497(1) of Cr.P.C. The legislature then amended section 377B in order to enhance the punishment, rendering the offence under section 337A non-bailable and one that falls within the prohibitory clause of section 497(1) Cr.P.C. The legislative intent behind the amendment is obvious. In view of the law as already settled by the august Supreme Court, the legislature wished to ensure that a person accused of an offence of child abuse is not let loose on bail pending trial for the charge against him.

11. The law on bail attempts to strike a balance between the individual rights of the accused and the collective rights of the society that are seemingly in conflict. An individual has the right to liberty, to be presumed innocent until proven guilty and not to be subjected to pretrial punishment. The society, on the other, has a collective interest in maintaining safety, affording citizens protection against crime and violence and to ensure that no one is allowed to obstruct justice. These can seem contradictory rights. Bail is denied in cases where the accused is a flight risk or is likely to engage in obstruction of justice if released on bail or is accused of an offence of such nature that his release creates a risk that he might engage in a repetition of the offence charged or that his conduct is such that releasing him into the society would subject other individuals within the society to the possibility of harm.

12. In view of competing rights and interests of an individual and the society in relation to an offence under section 377A, the legislature by amending section 377B made the policy choice of categorizing the offence of sexual abuse as a non-bailable offence falling within the prohibitory clause of section 497(1) Cr.P.C. It appears to the legislature’s expressed intent that releasing an alleged child molester on bail during trial could jeopardize the safety and interest of children who form a vulnerable part of the society and that the State is under an obligation to protect.

13. In relation to section 377A the criminal justice system must make allowance for the child victim's inability to comprehend the inappropriateness of sexual abuse that he/she suffers and the fear factor that may lead to non-disclosure of the abuse suffered or delayed disclosure of such abuse or self-blame due to the fear of being disbelieved by parents or family members or out of fear of being hurt by molester. When it comes to children as victims of sexual abuse, the ordinary rules regarding the need for the victim of an offence reporting a crime to the police without delay cannot be applied in a straightjacket manner. The argument of the learned counsel for the petitioner that the complaint was filed after a delay of 24 hours is of no consequence for purposes of grant of bail. The child in this case has recorded his statement with the police and stated therein that he has been subjected to repeat incidences of sexual abuse by the petitioner and that it was out of fear of his parents as well as out of fear of the petitioner that he did not previously disclose the abuse he suffered. It was only after his mother herself witnessed that his trouser was pulled down in the shop of the petitioner that he revealed the whole story to his mother and subsequently to his father.

14. The argument of the learned counsel for the petitioner that there is no independent witness to connect the petitioner with the offence that he has been charged with is also without force. The mother of the child is an eye-witness who has recorded her statement under section 161 of Cr.P.C and stated that she found her seven years old son

behind the counter in the petitioner's shop with his trouser pulled down and there was no one else present in the shop of the petitioner except the petitioner himself and the child. Even in the absence of the mother's statement, the child's own statement is also admissible in evidence. It was held by the august Supreme Court in ***State Vs. Abdul Khaliq*** ***(PLD 2011 SC 554)*** that depending upon the facts and circumstances of a case, the testimony of the victim himself that could be believed in cases where there was no background of any grudge between the parties. The august Supreme Court has clarified the law on the admissibility of testimony of a child in ***Raja Khurram Ali Khan Vs. Tayyaba Bibi*** ***(PLD 2020 SC 146)***, wherein it has been held that subject to passing the 'rationality test' (i.e. whether the child or the person has the capacity and intelligence to understand the questions put to him, and is able to rationally respond to them) the testimony of a child is admissible. In the said case the august Supreme Court even hinted that the statement of a child could possibly be taken into account as an exception to the rule on hearsay in the event that the child is not just a witness but also a victim.

15. In the instant case, the child is the victim of sexual abuse has recorded a statement before the police under section 161 of Cr.P.C implicating the petitioner that he repeated acts of sexual abuse and for threatening to inflict harm on him due to which he did not reveal the fact of such sexual abuse to anyone. And further, the mother of the child

has also recorded a statement under section 161 of Cr.P.C stating that she found her child alone with the accused with the child's trouser pulled down. There is sufficient material available on record connecting the petitioner with the offence that he has been charged with under section 377A of PPC. As already mentioned, in a case of sexual abuse the offence does not involve intercourse and further a seven years old child cannot be expected to vigorously protest unwanted actions of a sexual predator (due to fear or shock) that would result into a physical struggle resulting in marks of violence in each such case. Thus, the argument of the learned counsel for the petitioner that the medical report reflecting no bruises on the body of the child is evidence of lack of an offence under section 377A having been committed is without force.

16. Given that the offence in question falls within the prohibitory clause of section 497(1) of Cr.P.C, the judgment cited by the learned counsel for the petitioner ***Suleman Vs. The State (2008 YLR 2722)*** does not relate to section 377A and consequently is of no use to the petitioner. With all due respect, I am not inclined to follow the precedent laid down by the learned Peshawar High Court in ***Mazhar Ali Vs. The State (2019 PCr.LJ 899)*** as it appears that the learned counsel for the parties appearing before the Court failed to bring sections 377A and 377B of PPC to the attention of the Court.

17. For the aforesaid reasons, this Court feels, as a *prima facie* matter, that sufficient material is available on record to connect the petitioner with the offence that he has been charged with and consequently he is not entitled to be admitted to bail. The instant petition is **dismissed**.

18. Needless to mention that the observations recorded in the instant petition are based on tentative assessment, which ought not prejudice the proceedings before the learned trial court.

(BABAR SATTAR)
JUDGE

Approved for reporting

*Saeed**