

**IN THE PESHAWAR HIGH COURT,**  
**PESHAWAR,**  
**[Judicial Department].**

**Cr.Misc.BA No.2598-P/2018**

Mazhar Ali son of Shah Hussain,  
r/o Faqir Abad District, Peshawar.

Petitioner (s)

**Versus**

The State etc

Respondents

For Petitioner :-	<u>Mr. Shabbir Hussain Gigyani, Advocate.</u>
For State :-	<u>Mr. Arshad Ahmad, AAG.</u>
For Respondent/complt:-	<u>Syed Abdul Fayaz, Advocate.</u>

Date of hearing: **28.01.2019**

**ORDER**

**ROOH-UL-AMIN KHAN, J:-** Petitioner Mazhar Ali, seeks post arrest bail in case FIR No.1297 dated 25.08.2018, registered under sections 367-A, 377 and 511 PPC read with sections 44 and 53 of the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010, at Police Station Faqir Abad, Peshawar, wherein he is charged for an attempt to commit unnatural offence with Hamza aged about 13 years.

2. Arguments of learned counsel for the parties heard and record perused.

3. On legal premises, the Juvenile Justice System Ordinance, 2000 (XXII of 2000), has been repealed by promulgation of the Juvenile Justice System Act, 2018 (*to be referred hereinafter as the Act of 2018*). Under section 2(b) of the Act of 2018, “**Child**” has been defined as a person, who has not attained the age of eighteen years. Petitioner being below the age of 18 years, thus, falls within the definition of section 2(b) of the Act of 2018.

According to 6 (3) of the Act of 2018, a juvenile arrested or detained for commission of a minor or a major offence for the purpose this Act, shall be treated as if he was accused of commission of bailable offence. For the sake of convenience and ready reference the aforesaid section is reproduced below:-

“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.”  
(Emphasis supplied).

The “**major Offence**” and “**minor offence**” have been defined in section 2 (m) of the Act of 2018 as under:-

“**major offence**” means 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”.

“**minor offence**” means an offence for which maximum punishment under the Pakistan Penal Code, 1860 (XLV of 1860) or any other law for the time being in force is imprisonment up to three years with or without fine.”

4. Punishment provided for offence under section 44 of Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010, is rigorous imprisonment for a term which may extend to three years and a fine which may extend to fifty thousand rupees. Similarly, punishment provided for an offence under section 53 of the Act (ibid) is an imprisonment for a term which may extend to fourteen years and shall not be less than seven years as well as a fine which shall not be less than ten hundred thousand rupees. Thus

punishments provided for the aforesaid two offences falls within the definition of minor and major offences, therefore, under section 6 (3) of the Act of 2018, the petitioner shall be treated under the said offences as accused of a bailable offence.

5. As regards section 377 and 367-A PPC, admittedly, there is no specific allegation of commission of sodomy against the petitioner. In the FIR, he is only charged for an attempt to commit sodomy upon him. Complainant is not an eyewitness of the occurrence. Similarly, no one from the public/people, who allegedly attracted to the spot, has come forward to substantiate the version of complainant. Neither, any medico legal report of the alleged victim is available on file to show any bruises, scratches or signs of violence on his body nor any torn clothes of the victim has been taken into possession, so as to substantiate version of complainant in respect of forcible drag of the victim, therefore applicability of section 367-A PPC is a serious debatable question. Besides, in absence of any proof of penetration which is an essential ingredient to constitute the offence of sodomy, applicability of section 377 PPC is also a matter of further inquiry. For the sake of arguments if allegation of complainant is taken into consideration, it can be a case of an attempt to commit sodomy. As there is no specific provision under the Pakistan Penal Code which provides punishment for the offence of an attempt to commit sodomy, therefore, recourse shall be made to section 511 PPC, which caters with such like situation, according to which whoever attempts to commit an offence punishable by Pakistan Penal Code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall, where no express provision is made by the

Pakistan Penal Code for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the longest term of imprisonment provided for that offence or with such fine as is provided for the offence, or with both. The longest term of imprisonment provided for the offence under section 377 PPC, is imprisonment for life or imprisonment of either description for a term which **shall not be less than two years nor more than ten years**, and shall also be liable to fine. One half of 10 years comes to 05 years, which also falls within the definition of major offence under the Act of 2018. In this view of the matter, by use of word “**Shall**” in section 6(3) of the Act of 2018, the petitioner shall be treated as an accused of a bailable offence under the said offence.

6. Resultantly, this petition is allowed. Accused/petitioner is admitted to bail provided he furnishes bail bonds in the sum of rupees two lac with two local, reliable and resourceful sureties each in the like amount to the satisfaction of learned Illaqa Judicial Magistrate/MOD concerned.

**Announced:**  
**28.01.2019**

*Siraj Afridi P.S.*

**JUDGE**