

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

**Cr.Misc.BA No.1797-P/2017**

Mursaleen s/o Kamal ud Din,  
r/o Pirsadi Takht Bhai District  
Mardan.

Petitioner (s)

**Versus**

The State etc

Respondents

For Petitioner :-	Mr. Yasir Yousafzai, Advocate.
State :-	Mr. Muhammad sohail, AAG.
For Respondent :-	Mr. Sohail Akhtar, Advocate.
Date of hearing:	<b><u>28.09.2017.</u></b>

**ORDER**

**ROOH-UL-AMIN KHAN, J:-** Petitioner Mursaleen, seeks bail in case FIR No.651 dated 09.07.2017, registered under sections 377 PPC and Section 53 of the Khyber Pakhtunkhwa Child Protection & Welfare Act, 2010, in Police Station Sher Garh, District Mardan.

2. As per contents of FIR, allegations against the petitioner are that on 09.07.2017 at 9.00 hours, he caught hold minor Usman aged 8/9 years near his house, when the latter was on his way to home from his neighbor's house, took him to his house and committed sodomy upon him. The incident was narrated by the minor to his uncle Irshad

(complainant) on his reaching home, who further reported the same in Police Station, hence, this case.

3. Having heard the arguments of learned counsel for the parties, it appears from the record that the victim was medically examined on the day of occurrence but as per his medico legal report neither any blood, semen, mud nor any marks of violence, (bruises, and abrasion) were found on his body by the Medical Officer. Similarly, no foreign bodies i.e. semen, blood was noticed on his anal region. Though, the anal swab taken from the victim has been sent to the FSL, but no report in this regard is available on file till date. Similarly, on the same day, the petitioner had been arrested and was medically examined but no sign of semen on his clothes, skin or pubic area were found. In medical report of the victim the doctor has not opined the commission of sodomy with the victim. Similarly, from the medico legal report of the petitioner it is not describable that he has performed the act of sexual intercourse. No other evidence either direct or circumstantial at the moment is available on file to prima facie show connectivity of the petitioner with the commission of offence, who otherwise, being a student of 9<sup>th</sup> class as per school record and below the age of 18 years does fall within the definition of child under the Juvenile Justice System Ordinance.

4. So far as applicability of section 53 of the Khyber Pakhtunkhwa Child Protection & Welfare Act, 2010

(hereinafter to be referred as the Act of 2010), is concerned, it depicts that this law was specially introduced/enacted and promulgated in the Khyber Pakhtunkhwa with particular purposes i.e. to provide for the care, protection, maintenance, welfare, training, education, rehabilitation and reintegration of ‘children at risk’ in the Khyber Pakhtunkhwa. For the sake of convenience and ready reference, the preamble of the Act of 2010, is reproduced below:-

“**WHEREAS**, it is expedient to provide for the care, protection, maintenance, welfare, training, education, rehabilitation and reintegration of children at risk in the Khyber Pakhtunkhwa”.

“**Child at risk**” has been defined under section 2(1)(e) of the Act in the following words:-

- “**Child at risk**” means a child in need of protection, who
- (i) is at risk, including an orphan, child with disabilities, child of migrant workers, child working and or living on the street, child in conflict with the law and child living in extreme poverty.
  - (ii) Is found begging; or
  - (iii) Is found without having any home or settled place of abode or without any ostensible meaning of subsistence; or
  - (iv) Has a parent or guardian who is unfit or incapacitated to exercise control over the child; or
  - (v) Lives in a brothel or with a prostitute or frequently visits any place being used for the purpose of prostitution or is found to associate with any prostitute or any other person who leads an immoral or depraved life; or
  - (vi) Is being or is likely to be abused or exploited for immoral or illegal purposes or gain; or
  - (vii) Is beyond the parental control; or
  - (viii) Is imprisoned with the mother or born in jail;
  - (ix) Has lost his parents or one of the parents and has no adequate source of income; or

- (x) Is victim of an offence punishable under this Act or any other law for the time being in force and his parent or guardian is convicted or accused for the commission of such offence; or
- (xi) Is left abandoned by his parent or parents as the case may be, which will include a child born out of wedlock and left abandoned by his parent;

Keeping in the Preamble of the Act in juxtaposition with the definition of the “Child at risk” as contemplated under section 2 (1) (e) of the Act coupled with the facts and circumstances of the instant case it could not be ascertained as to whether the alleged victim, namely, Usman fall under the definition of “child at risk” or otherwise. In such an eventuality, the applicability of section 53 of the Act of 2010, to the case of petitioner is yet a begging question.

4. The tentative assessment of the material available on record and the circumstances discussed above, makes the case of the petitioner arguable for the purpose of bail, hence, this application is allowed and the 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:**  
**28.09.2017**

*Siraj Afridi P.S.*

**JUDGE**

*Mr. Justice Rooh-ul-Amin Khan.*

