ORDER SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

JUDICIAL DEPARTMENT.

Crl. Misc. No.722-B / 2023

Hamad

versus

The State and another

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	31.05.2023	Yasar Mehmood Khokhar, Advocate for petitioner. Syed Bilawal Kamal, State Counsel. Qamar S.I, P.S. Shams Colony, Islamabad. Complainant in person.

Through this Criminal Miscellaneous petition, the petitioner namely Hamad son of Abdul Rasheed has prayed for his post-arrest bail in case FIR No.252 / 2023 dated 05.05.2023 under sections 377-B and 506 (ii) PPC, registered at Police Station Shamas Colony, Islamabad.

2. Brief facts referred in the instant FIR lodged on complaint of Muhammad Ajmal Khan are that his minor son namely Muhammad Yaseen aged about 7/8 years was sexually abused by the petitioner on 04.05.2023 at about 06:00 p.m. in his shop. The complainant confronted this aspect to the petitioner, whereafter, he came armed with his pistol and extended life threats.

3. Learned counsel appearing on behalf of petitioner contends that petitioner is innocent and has falsely been implicated in this case; that no medical examination has been conducted nor any evidence for sexual abuse of

minor is available on record except verbal statement; that the parties have settled the matter out of the court and statement of victim has been recorded before the trial court for compounding of the matter, but despite that bail was declined.

4. Conversely, learned State Counsel has opposed the instant post-arrest bail application, on the ground that offence is neither compoundable nor bailable. The complainant in person acknowledges compounding of the matter, who contends that he has no objection on grant of post-arrest bail of the accused.

5. Arguments heard, record perused.

6. Tentative assessment of record reflects that the petitioner has been charged under sections 377-B and 506 (ii) PPC for alleged act of sexual abuse of minor son of the complainant on 04th May, 2023 in his shop. As per version during the course of investigation no medical examination of the minor boy was conducted as the allegation is only to the extent of mere an attempt. The language used in the definition of sexual abuse under section 377-A covers all kind of acts including but not limited to fondling, stroking, caressing, exhibitionism or any obscene or sexually explicit conduct or simulation of such conduct with the victim who is less than eighteen years of age, however, it provides the sentence of 20 years which could not be awarded less than 14 years and fine. Such aspect at one side gives wide discretion to trial

court to consider the allegation in the light of available evidence and to decide the case. Further, from another angle such sentence is not proportionate to the case in which any act less than attempt was *prima facie* visible, which could only be verified after recording of evidence in trial, even the investigation report discloses allegation of kissing the minor child by the petitioner, therefore, when exact language of definition of offence of sexual abuse placed in juxtaposition, a ground of further inquiry in terms of sub clause 2 of section 497 Cr.P.C. emerges on record.

7. In addition to above, at this stage the compounding statement of the complainant creates further exception in favour of petitioner. This Court is mindful of the fact that offence under section 377-B is not compoundable and entails capital sentence, but the circumstances brought on record suggests that no useful purpose would be achieved by placing the petitioner behind the bars, specially, when investigation is completed and petitioner is no more required for the purposes of investigation. The petitioner's side heavily relied upon the judgments reported as **2020 YLR (N) [Gilgit-Baltistan Chief Court] 153 (*Fida Ahmad Vs. The State*), 2010 PCr.L.J [Lahore] 1482 (*Muhammad Makki Vs. The State and another*), 2004 PCr.L.J [Peshawar] 490 (*Aziz Khan and another Vs. The State and another*), 1987 MLD [Lahore] 3096 (*Muhammad Akbar Vs. The State*), 2009 PCr.L.J**

[Islamabad] 780 ***(Syed Azmat Hussain Shah Vs. The State)*** and **1999 PCr.L.J [Lahore] 1107 (Mukhtar Ahmad and others Vs. The State),** where bail was granted by the courts in all those cases involving non-compoundable and non-bailable offences on the statement of the complainant or the victim who had forgiven the accused. Though at this stage I am not in agreement to grant bail on the basis of compromise as it is against the public policy as well as the law.

8. Keeping in view above position the petitioner has made out his case for grant of post-arrest bail, but it is duty of the court that while granting bail certain protection orders for victims of child sexual abuse should have been passed based upon the principles set out in Child Rights Convention (CRC) as well as under Convention on the Elimination of All Forms of Discrimination against Women, 1979, (CEDAW), whereby, committee constituted under these two international conventions have given recommendations on Harmful Practices, which should have been considered, whereby, recommendation was given to the state parties to take effective measures in order to counter and address the practices against the child and women who are victims of sexual violence. In this regard it was recommended that *"legislation includes mandatory restraining or protection orders to safeguard those at risk of harmful practices and provides for their safety and measures to*

protect victims from retribution". This aspect is to be treated in terms of United Nations conviction on the Rights of the Child (CRC) which was ratified on 12.11.1990 with few reservations, though reservations were later on withdrawn in the year 1997. In Rights of Child (CRC) state parties under took to protect the children from all form of sexual exploitation and sexual abuse, whereby they were bound to take appropriate efforts at national level. This court has been guided with the legislation enacted by United Kingdom known as Sexual Offences Act 2003, and Sexual Offence Prevention Order (SOPO) which has been passed under section 103 of the Sexual Offences Act, 2003, of United Kingdom, which includes the prohibitory activities, residence restrictions, reporting obligations, treatment or supervision requirements and exclusion zones with monitoring and electronic tagging systems. These specific measures have been explained as under:

> *"i.* ***Prohibited activities****: The order may prohibit the individual from engaging in specific activities, such as contacting certain individuals, frequenting certain areas or using the internet or social media platforms.*
>
> *ii.* ***Residence Restrictions****: The order may impose restrictions on where the individual can live or require them to notify authorities of any changes in their address.*
>
> *iii.* ***Reporting Obligations****: The individual may be required to regularly report to the police, probation officers, or other specified authorities.*

iv. ***Treatment or supervision requirements****: The order may requires the individual to undergo counseling, therapy, or other treatment program to address their offending behavior.*

v. ***Exclusion Zones****: The order may establish exclusion Zones, restricting the individual from entering certain areas where potential victims may be present, such as schools or playgrounds.*

vi. ***Monitoring and electronic tagging****: In some cases, the order may require the individual to be subject to electronic monitoring or wear an electronic tag to ensure compliance."*

The above mentioned specific concepts though not included in our legislative instruments, but there is no bar upon the court to pass such effective measures under different provisions of Anti-Rape (Investigation & Trial) Act, 2021. The purpose of Sexual Offence Prevention Order (SOPO) is to protect the public, prevent further sexual offenses, and support the rehabilitation and management of sexual offenders. It aims to strike a balance between safeguarding potential victims and respecting the rights of the individual subject to the order. In the case **(*R V. Smith and Others* [2-11] EWCA Crime 177)**, the accused was convicted in a crime involving keeping indecent images of small children. The court imposed SOPOs and prohibited him from using any computer in any public facility, taking any photographs or video images of children or young people under the age of 18 and from entering any park

or playground that had recreational equipment for the use of children or young people.

9. For what has been discussed above, instant post-arrest bail application is **ALLOWED** and the petitioner is admitted to post-arrest bail subject to furnishing of bail bonds in the sum of Rs.100,000/- (Rupees One Hundred Thousand Only) with one surety in the like amount to the satisfaction of learned trial Court with further conditions that petitioner's parents shall submit under taking to the trial court that he shall maintain distance from the victim's family as well as from the victim in all manner and shall not approach the victim in any manner. In case of violation of said undertaking the trial court shall have the authority to recall instant bail order. SHO / I.O is directed to provide protection to the victim and his family members and adopt all such measures as may be necessary in terms of clause (viii) of sub section 1 of section 8 of Anti-Rape (Investigation and Trial) Act, 2021 including passing of prohibitory order to restrain present petitioner from dealing with any child or maintain distance from victim as well as his family. SHO of the concerned Police Station is empowered to take such preventive actions in terms of section 21 of the Anti-Rape (Investigation and Trial) Act, 2021, so that confidence of victim's family be restored and threat of the petitioner in the entire community stands eliminated. The SHO shall also take surety bond for all the

conditions imposed by him against the petitioner under the law which are necessary to save children of the community from any sexual exploitation or abuse in future. Before parting with this order it is necessary to pass direction to Ministry of Law and Justice to prescribe rules in terms of section 19 of Anti-Rape (Investigation & Trial) Act, 2021, for prevention, protection and rehabilitation of victims.

(MOHSIN AKHTAR KAYANI)
JUDGE

Approved for reporting.

A.Waheed.