

Present: Syed Mansoor Ali Shah and Amin-ud-Din Khan, JJ

KHAWAR KAYANI---Petitioner

Versus

The STATE and others---Respondents

Criminal Petition No.345 of 2022, decided on 20th June, 2022.

(Against the Judgment of Islamabad High Court, Islamabad dated 17.02.2022 passed in Crl. Misc. No. 113-B of 2022).

(a) Juvenile Justice System Act (XXII of 2018)---

---S. 6(5)---Criminal Procedure Code (V of 1898), S. 497---Bail---Delay in conclusion of trial---Juvenile aged more than sixteen years accused of a heinous offence and detained for a continuous period exceeding six months without conclusion of trial---Whether section 6(5) of the Juvenile Justice System Act, 2018 ('the 2018 Act') applied to such a juvenile---Held, that Section 6(5) of the 2018 Act does apply, rather solely applies, to a case involving a "heinous offence", irrespective of the age of the juvenile---Section 6(5) in effect works as a proviso to section 6(4) and appears to have no other purpose under the scheme of the 2018 Act.

(b) Criminal Procedure Code (V of 1898)---

---S. 497(1), third proviso---Bail---Delay in conclusion of trial---Period of delay in the conclusion of the trial is to be counted from the date of the detention of the accused in the case.

Nadeem Samson v. State PLD 2022 SC 112 and Shakeel Shah v. State 2022 SCMR 1 ref.

(c) Juvenile Justice System Act (XXII of 2018)---

---S. 6(5)---Juvenile accused---Bail---Delay in conclusion of trial---Juvenile accused detained for a continuous period exceeding six months without conclusion of trial---Period of six months mentioned in section 6(5) of the Juvenile Justice System Act, 2018 is to be counted from the date of arrest of the juvenile, after determination of his age and not from the date of such determination or adjudication by the Court.

Saleem Khan v. State PLD 2020 SC 356 ref.

(d) Juvenile Justice System Act (XXII of 2018)---

---S. 2(a) & Preamble---Constitution of Pakistan, Arts. 25(3) & 35---Concept of juvenile justice system explained.

The conceptual framework of juvenile justice system has been carved out of the general criminal justice system. Juvenile justice system is not retributive in character, it is primarily rehabilitative and restorative. Restorative justice is a theory of justice that emphasizes repairing the harm caused by criminal behavior. It rests on the best interest of the child and ensures fulfillment of his basic rights and needs, identity, social well-being, physical, emotional and psychological development. This therapeutic underpinning is the central theme of Juvenile Justice System. Juvenile courts, by their very nature, were designed to be more therapeutic than the adult criminal justice system as juveniles differ from adults in their development and their needs.

Restorative Justice, OFF. OF JUV. JUST. & DELINQ. PREVENTION 1 (Nov. 2010) ref.

The juvenile justice system also finds its ideological roots in the Constitution. Article 25(3) of the Constitution empowers the State to make special provisions for the protection of children even if such protection discriminates against the adults (reverse discrimination). Article 35 of the Constitution provides that the State shall protect the child. Furthermore, the State of Pakistan is a signatory to the United Nations Convention on the Rights of Child (UNCRC) and is thus under an international obligation to take special measures for the protection and rehabilitation of the juveniles who come in conflict with law. It was for the compliance of this constitutional mandate and for the fulfilment of this international obligation that the Juvenile Justice System Act, 2018 was enacted by the legislature of Pakistan. The main object of the enactment of the 2018 Act is to modify and amend the law relating to criminal justice system for juveniles by providing special focus on disposal of their cases through diversion and social integration for their rehabilitation.

Raja Rizwan Abbasi, Advocate Supreme Court and Syed Rifaqat Hussain Shah, Advocate-on-Record for Petitioner.

Agha Muhammad Ali, Advocate Supreme Court for Respondent.

Fakhar Abbas, I.O. for the State.

Date of hearing: 20th June, 2022.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---Petitioner seeks leave to appeal against the order dated 17.02.2022 ("impugned order") whereby post-arrest bail was denied to the petitioner by the High Court in case FIR No. 12 of 2021, registered at P.S. Nilore, Islamabad, for the commission of offence of Qatl-i-amd punishable under Section 302/34 of the Pakistan Penal Code, 1860 ("P.P.C.").

2. Briefly, the allegation against the petitioner in the crime report is that he and his co-accused fired at the brother of the complainant and caused his death. In this background, the petitioner was arrested by the Police on 18.03.2021, he remained in police custody on physical remand till 24.03.2021 and after that he was remanded to judicial custody.

3. The petitioner, who was adjudged to be a juvenile by the trial court vide its order dated 15.11.2021, applied for post arrest bail on merits, as well as, on the ground of delay in conclusion of the trial, but both the trial court and the High Court dismissed his applications. Before us, the learned counsel for the petitioner has pressed only the ground of delay. He contended that the petitioner, a juvenile, is to be released on bail, as of right, under Section 6(5) of the Juvenile Justice System Act, 2018 ("Act") as he has been detained for a continuous period exceeding six months without the trial having been completed and the delay in completion of the trial has not been occasioned by an act or omission of the petitioner or any other person acting on his behalf. Learned State counsel, on the other hand, maintained that Section 6(5) of the Act is not applicable to a case involving a "heinous offence".

4. We have heard the learned counsel for the parties and examined the record of the case. The question of law involved in the present case is whether Section 6(5) of the Act is applicable to a case where the juvenile, including a juvenile over sixteen years of age, is involved in a "heinous offence." Under the Act, offences have been categorized into (i) minor offences,¹ (ii) major offences² and (iii) heinous offences.³ The offence of Qatl-i-amd involved in the present case, being serious in character and punishable with death or imprisonment for life under Section 302, P.P.C., is admittedly a "heinous offence" as defined in Section 2(g) of the Act. Section 6 of the Act, for ease of reference, is reproduced as follows:

6. Release of a 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, 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 subsection (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 his 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.

Section 6 of the Act deals with the release of a juvenile on bail falling under different categories of offences. Section 6(3) provides for treating the "minor offences" and "major offences" as bailable, while the provisions for release on bail of a juvenile accused of bailable offences are contained in subsection (1) thereof. These provisions though provide for placing a juvenile accused of a bailable offence under the custody of a suitable person or Juvenile Rehabilitation Centre under the supervision of probation officer if 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, but categorically prohibit his detention in a police station under police custody or in a jail. Therefore, a juvenile cannot be detained in a police station or a jail in bailable offences, which include minor offences and major offences as defined under the Act.

5. Section 6(4) of the Act provides that where a juvenile is more than sixteen years of age and 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. While Section 6(4) deals with the bail of juveniles under a heinous offence on merits, a separate provision provides for bail to the same juveniles where they have been detained for a continuous period exceeding six months and whose trial has not been completed. Under the Act, only in a case involving "heinous offence" can a juvenile be detained in a police station or a jail. Thus, it can safely be concluded that Section 6(5) of the Act does apply, rather solely applies, to a case involving a "heinous offence", irrespective of the age of the juvenile. Section 6(5) in effect works as a proviso to Section 6(4) and appears to have no other purpose under the scheme of the Act. The approach of the trial court, in the present case, to decline benefit of Section 6(5) of the Act to the petitioner merely by observing that the offence is "heinous" is not legally correct; this subsection is meant for, and only applies to, a case involving "heinous offence". To hold otherwise will render Section 6(5) redundant and unnecessary.

6. In the present case, the petitioner was arrested on 18.03.2021 and he had been detained for a continuous period exceeding six months since his detention and his trial had not been completed when he applied for the relief of bail before the trial court and the High Court. The trial court declined the relief of bail to the petitioner without discussing the fact who was at fault for the delay in completion of the trial. While the High Court noted that the delay occurred due to failure of the Investigating Officer in timely submission of the final report under Section 173 of the Code of Criminal Procedure 1898. In the latest report submitted by the trial court, dated 25.05.2022, on requisition of this Court, it has been reported that the delay has occurred due to filing of a private complaint by the complainant. The delay in completion of the trial is thus not attributable to any act or omission of the petitioner or any other person acting on his behalf, and the petitioner is therefore entitled to be released on bail, as of right, under Section 6(5) of the Act.

7. What is more disquieting is that the High Court has declined the relief under Section 6(5) of the Act to the petitioner, by holding in the impugned order that period of six months is to be counted from 15.11.2021 when the petitioner was determined by the trial court to be a juvenile and not from 18.03.2021 when he was arrested. We think that attention of the High Court was not invited to the judgments of this Court delivered in the cases of Nadeem Samson,⁴ and Shakeel Shah⁵ relating to 3rd proviso to Section 497(1) Cr.P.C., which contains similar provisions, and of Saleem Khan⁶ relating to Section 6(5) of the Act; this Court has held in these cases that the period of delay in the conclusion of the trial is to be counted from the date of the detention of the accused in the case. The period of six months mentioned in Section 6(5) of the Act is therefore to be counted from the date of arrest of the juvenile, after determination of his age and not from the date of such determination or adjudication by the Court.

8. It is important to keep in mind the conceptual framework of juvenile justice system which has been carved out of the general criminal justice system. Juvenile justice system is not retributive in character, it is primarily rehabilitative and restorative⁷. Restorative justice is "a theory of justice that emphasizes repairing the harm caused by criminal behavior."⁸ It rests on the "best interest of the child"⁹ and ensures

fulfillment of his basic rights and needs, identity, social well-being, physical, emotional and psychological development. This therapeutic underpinning is the central theme of Juvenile Justice System. Juvenile courts, by their very nature, were designed to be more therapeutic than the adult criminal justice system as juveniles differ from adults in their development and their needs.

9. The juvenile justice system also finds its ideological roots in the Constitution of the Islamic Republic of Pakistan 1973 ("Constitution"). Article 25(3) empowers the State to make special provisions for the protection of children even if such protection discriminates against the adults (reverse discrimination¹⁰). Article 35 of the Constitution provides that the State shall protect the child. Furthermore, the State of Pakistan is a signatory to the United Nations Convention on the Rights of the Child ("UNCRC") and is thus under an international obligation to take special measures for the protection and rehabilitation of the juveniles who come in conflict with law. It was for the compliance of this constitutional mandate and for the fulfilment of this international obligation that the Act was enacted by the legislature of Pakistan. The main object of the enactment of the Act is to modify and amend the law relating to criminal justice system for juveniles by providing special focus on disposal of their cases through diversion and social integration for their rehabilitation.¹¹

10. Article 37(b) of the UNCRC provides that the process of arrest, detention or imprisonment of a juvenile is to be used only as a measure of last resort and for the shortest appropriate period of time, while para 28 of the General Comments of the Committee on the Rights of the Child (CRC)¹², which interprets Article 37(b), says that the use of deprivation of liberty, and in particular pre-trial detention, is to be strictly limited. Section 6 of the Act that deals with release of juvenile on bail pending his trial actualizes Article 37 (b) of the UNCRC.

11. In the present case, the courts below have failed to appreciate the scheme of the Act and in particular that of Section 6(5) of the Act, which has been enacted to counter the negative effects of long term detention of the juveniles in jail. The courts below have thus committed a patent error of law by not allowing the benefit of Section 6(5) of the Act to the petitioner, when the delay in completion of the trial was not attributable to any act or omission or of any other person acting on his behalf. The petition is therefore converted into appeal and the same is allowed. The impugned order is set aside and the application for post arrest bail of the petitioner is accepted under Section 6(5) of the Act on the ground of delay in completion of the trial exceeding a period of six months since the date of his arrest in the case. The petitioner is admitted to post arrest bail subject to his furnishing bail bond in the sum of Rs.500,000/- with two sureties in the like amount to the satisfaction of the trial court. The trial court shall conclude the trial of the petitioner expeditiously as undertaken by it in the report submitted to this Court.

MWA/K-13/SC Bail granted.