SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

Bench- I:
Mr. Justice Sardar Tariq Masood, ACJ
Mr. Justice Syed Mansoor Ali Shah
Mr. Justice Athar Minallah

Crl.P.1276/2023 and Crl.P.1320/2023
(Against the orders of Islamabad High Court, Islamabad, dated 27.10.2023 passed in Crl. Misc. No.1354-B of 2023 and dated 08.11.2023 passed in Crl. Misc. No.1664-B/2023)

Imran Ahmed Khan Niazi (*In Crl. P.1276 of 2023*)
Makhdoom Shah Mahmood Qureshi (*In Crl. P.1320/2023*)

... Petitioners

Versus

The State and another (In both cases)

... Respondents

For the petitioners: Mr. Hamid Khan, Sr. ASC.
(*Through V.L. Lahore Registry*)
Mr. Salman Safdar, ASC.
Syed Mohammad Ali Bokhari, ASC.
Mr. Niazullah Khan Niazi, ASC
Mr. Qamar Inayat Raja, ASC.
Barrister Tamur, Advocate
Barrister Faiza, Advocate.
Syed Rifaqat Hussain Shah, AOR.

For the respondents: Mr. Javaid Iqbal Wains, Addl.AGP.
Raja Rizwan Abbasi, ASC
Mr. Mudassar Hussain Malik, ASC.
Syed Zulifqar Abbas Naqvi, ASC.
Mr. Shah Khawar, ASC.
Mian Sabir, I.O.

Date of Hearing: 22 December 2023

ORDER

Syed Mansoor Ali Shah, J.- Through the present petitions, the petitioners seek leave to appeal against the orders of the Islamabad High Court, dated 27.10.2023 and 08.11.2023, whereby the post-arrest bail has been declined to them in case FIR No. 06/2023 registered at Police Station, CTW/FIA, Islamabad, for the offences punishable under Sections 5 and 9 of the Official Secrets Act 1923 read with Section 34 of the Pakistan Penal Code 1860.

2. Briefly, as per the crime report (FIR), the allegation against the petitioner Imran Ahmed Khan Niazi, a former Prime Minister of Pakistan, is that he communicated the information contained in a secret classified

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document (a Cypher Telegram received from Parep Washington, USA) to unauthorized persons, i.e., the public at large, by twisting the facts to achieve his ulterior motives and personal gains in a manner prejudicial to the interests of the State security, and had also illegally retained a copy of the said document. While the petitioner Makhdoom Shah Mahmood Qureshi, a former Foreign Minister, is alleged to have abetted him in so doing. By these actions, it is alleged, the petitioners have directly/indirectly benefited the interest of foreign powers and caused loss to the State of Pakistan.

3. We have heard the arguments of the learned counsel for the parties at some length, read the cases cited by them and examined the record of the case.

4. The offences of wrongful communication of the official confidential information, etc., as defined in defined in clause (a) to (d) of Section 5(1) of the Official Secrets Act 1923 ("Act") are generally punishable, under clause (b) of Section 5(3), with imprisonment for a term which may extend to two years, or with fine, or with both, and are bailable under clause (b) of Section 12(1) of the Act. It is only when an offence is committed in contravention of clause (a) of Section 5(1) and is intended or calculated to be, directly or indirectly, in the interest or for the benefit of a foreign power, or is in relation to any of the defense installations or affairs[1], or in relation to any secret official code, that it is punishable under clause (b) of Section 5(3) of the Act, with death or with imprisonment for a term which may extend to fourteen years. Such an offence is non-bailable and also falls within the prohibitory clause of Section 497(1) of the Code of Criminal Procedure 1898 ("CrPC"). In respect of such offences, other than the provisos to Section 497(1), bail is granted under Section 497 (2), CrPC, if it appears to Court at any stage of the investigation, inquiry or trial, as the case may be, that there are not reasonable grounds for believing that the accused has committed such an offence but rather that there are sufficient grounds for further inquiry into his guilt.

5. The only question, therefore, before us in the present case is that whether there are not reasonable grounds for believing, at this stage, that the petitioners have committed the offence punishable under clause (b) of Section 5(3) of the Act but rather that there are sufficient grounds

[1] i.e., in relation to any work of defence, arsenal, naval, military or air force establishment or station, mine, mine-field, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Pakistan.

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for further inquiry into their guilt of the said offence. In this regard, we are cognizant of the one of the elementary principles of the law of bail that to answer the said question, the Court cannot indulge in the exercise of a deeper appraisal of the material available on record of the case but is to determine it only tentatively by looking at such material.

6. Having so examined the material available on record, we find that there is no sufficient incriminating material available, at this stage, which could show that the petitioner, Imran Ahmed Khan Niazi communicated the information contained in the Cypher Telegram received from Parep Washington, USA to the public at large with the intention or calculation, directly or indirectly, in the interest or for the benefit of a foreign power nor the disclosed information relates to any of the defence installations or affairs, nor did he disclose any secret official code to the public at large. We, therefore, are of the tentative opinion that there are not reasonable grounds for believing, at this stage, that the petitioners have committed the offence punishable under clause (b) of Section 5(3) of the Act but rather that there are sufficient grounds for further inquiry into their guilt of the said offence, which is to be finally decided by the learned trial court after recording of the evidence of the parties. The discretion exercised by the High Court in declining bail to the petitioners is found to have been exercised perversely, that is, against the weight of the material available on record of the case, which warrants interference by this Court.

7. For the above reasons, these petitions are converted into appeals and the same are allowed. The impugned orders are set-aside. The bail applications of the petitioners are accepted subject to their furnishing of bail bonds in the sum of one million with two sureties each in the like amount to the satisfaction of the learned trial court.

8. Needless to mention that the observations made in this order are of tentative nature which shall not in any manner influence the trial court, and that this concession of bail may be cancelled, if the petitioners misuse it in any manner, including causing delay in the expeditious conclusion of the trial.

ACJ

I agree. However, I have appended a separate note. Judge

Islamabad,
22nd December, 2023.

Approved for reporting Judge

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Athar Minallah, J. The two petitioners, Imran Ahmad Khan Niazi and Shah Mahmood Qureshi, had sought bail but it was concurrently declined by the trial court and the High Court respectively. They have now sought leave of this Court for restoring their liberty by ordering their release pursuant to grant of the concession of bail. Both the petitioners intend to contest the forthcoming elections which are scheduled to be held on February 08, 2024. The Election Commission of Pakistan, in exercise of powers conferred under the Election Act 2017 ('**Act of 2017**'), has announced and duly notified the election schedule. Mr. Imran Ahmad Khan Niazi had formed the political party, Pakistan Tehreek-e-Insaf, and was elected as the Leader of the House in the National Assembly after the last general elections held in 2018 and, pursuant thereto, he had served as the Prime Minister of the country. Mr. Shah Mahmood Qureshi is one of the most senior office bearers of the party. The questions of public importance that have arisen for the consideration of this Court are; whether, during the election period, candidates who intend to contest the elections or who are affiliated with a political party and their participation in the political process is important for the registered voters, should remain incarcerated, or, whether, in such an eventuality granting bail ought to be considered favorably as a rule and declined only in exceptional circumstances e.g when there is likelihood of abscondence or there is threat to the society because there are grounds to believe that the accused may repeat the offence. In order to answer the questions it is essential to determine the rights of stakeholders involved in such peculiar circumstances and also examine the significance of the chequered history of the electoral process during the past seven decades.

2. The Constitution of the Islamic Republic of Pakistan, 1973 ('**Constitution**') unequivocally contemplates that the authority of the government is solely premised on the will of the people. The will of the people is essentially expressed through exercising the right to participate in the political process and to vote on the day fixed for polls. Elections are the primary and exclusive mode which facilitates and enables the citizen, particularly the registered voter, to choose the person who would represent them and through whom the latter would participate in the governance of the State and exercise the authority of the government. This is one of the most fundamental

Kismat Khan Zimri

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right of every citizen recognized by the framers of the Constitution. There are other equally important rights associated with or implicit in the right of a citizen to vote and they, inter alia, include the right to meaningfully participate in the political process, freedom of expression, assembly, association and movement. The importance of the right of access to information regarding the competing political parties, their manifestos and candidates cannot be overstated. Each party and candidate must enjoy an equal and non discriminatory opportunity to effectively function without any fear or threat of intimidation. The United Nations has explicitly recognized the concept of an 'informed choice' as an integral part of 'free choice'.[1] It has been emphasized that 'if elections are to be genuine then they must demonstrably reflect the will of the people. 'Voters can neither formulate nor express that will without access to information about the candidates, the parties and the process'.[2] In order to achieve these fundamental tenets it is not enough to hold elections but to ensure that the citizens have a fair opportunity to express their will by exercising their electoral rights through 'genuine elections'. Our Constitution, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights unambiguously recognize 'genuine elections' as the only true manifestation of the expression of the will of the people.

3. The essential characteristics of a 'genuine election' have been described as a political process which would 'reveal and give effect to the freely expressed will of the people. Sham elections, designed temporarily to quell internal dissent or to distract international scrutiny obviously do not meet the international standards'.[3] Genuine elections can only be ensured if they offer an actual and free choice to an informed voter. Discrimination or intimidation on the basis of political opinions are alien to the concept of genuine elections and even such a perception would be sufficient to compromise the integrity of the electoral process and relegate it to the status of sham elections. Every candidate and political party must have an equal opportunity to reach out to the citizens and to have access to the public resources, including the print and electronic media. The

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[1] Article 87; Human Rights and Elections, a Handbook on the Legal, Technical and Human Rights Aspects of Elections; Centre for Human Rights, UN. (**Handbook)**

[2] Human Rights and Elections, A Handbook on the Legal. Technical, and Human Rights Aspects of Elections, Centre For Human Rights, United Nations.

[3] Article 77 of the Handbook.

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framework of the Constitution has created and guarantees a political right in favor of every citizen to govern the State and exercise the authority of the government through their chosen representatives. Implicit in this fundamental right is the expression of the will of the people. 'The ultimate indication of whether elections are free is the extent to which they facilitate the free expression of the political will of the people concerned. It is, after all, this will which, according to the Universal Declaration (art 21, para 3), is the very basis of legitimate government authority'.[4] The concept of facilitating the effective and meaningful expression of the political will of the people through 'genuine elections' is thus embedded in the scheme of the Constitution and the edifice of the fundamental rights is built upon it. The test of 'genuine elections' is the ability of the voter, political worker, candidate and political party to effectively exercise and enjoy the aforementioned rights without discrimination or any threat of intimidation, direct or indirect. The concept of genuine election is the key to leveling the playing field for all the stakeholders. When all the political competitors do not enjoy the same advantages and disadvantages during the election period, then the fundamental rights of the citizens are breached and, simultaneously, the Constitution is gravely violated. It is, therefore, inevitable to ensure that every political competitor is treated equally without discrimination and everyone has the same chance to succeed. Incarceration of a political competitor during the period of elections, except when it is necessary due to exceptional circumstances, gravely affects the fundamental rights of the voters and prejudices the genuineness and integrity of the elections. As far as the question is concerned as to why political leaders and political workers should be extended preferential treatment, the answer, as already discussed, is that there is a higher and greater interest of the people at large involved which is always given preference over other interests. Moreover, unnecessary incarceration, which would not serve any useful purpose in itself, becomes a ground for releasing an ordinary accused on bail unless the offence alleged to have been committed is heinous or there are exceptional circumstances for refusing extension of bail. There cannot be a greater public interest than ensuring genuine elections and if the incarcerated person intends to contest elections or the standing of a political party is dependent upon the

[4] Article 62 of the Handbook

Kismat Khan Zimri

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latter then in my opinion this ought to be considered a ground for the grant of bail during the election period. The concession of bail in such an eventuality should be considered favorably as a rule and declined in exceptional circumstances. The strict application of this principle is also essential keeping in view the chequered electoral history during the past seven decades.

4. The process of democratization and democracy itself were gravely undermined from the very inception of Pakistan as an independent sovereign State. The undemocratic elite had struck for the first time when the Constituent Assembly was dissolved and later the unconstitutionality was legitimized by the Federal Court by contriving the doctrine of necessity. It laid the foundations for repression against political opponents. Almost all the elected Prime Ministers remained incarcerated after being prematurely removed from office. Prime Ministers were disqualified and political opponents were persecuted for dissent and prevented from competing in elections by denying a level playing field. The last general elections held in 2018 was an example of denying equal treatment to a particular political party. One of the Prime Ministers was even sent to the gallows and people were later restrained from attending his funeral. Half of the nation's life has been spent under military dictators who did not face a days incarceration for abrogating the Constitution, toppling elected Prime Ministers and subjecting political workers to the worst form of oppression. In stark contrast, the elected Prime Ministers and chosen representatives were prevented from participating in the electoral process by keeping them incarcerated or forcing them into exile. The incarceration of political leadership belonging to Baluchistan, the then North West Frontier Province or Sindh for their political dissent and opinions cannot be erased from history books. The notion of 'genuine election' has remained illusory in the past seven decades and it definitely has profound consequences for the democratic process and the rights of the people. It is the duty of the Election Commission and the respective Governments to ensure that the people are facilitated in expressing their will through 'genuine election'. It is also their duty to ensure that there is no perception of oppression or repressive actions against one political party while others are treated favourably. The unflattering electoral history and oppressive treatment of political

Kismat Khan Zimri

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dissidents during the period of elections necessitates considering the grant of bail favorably as a rule.

5. The petitioners are alleged to be involved in an offence which does not fall under the category of offences that threaten the society such as rape, child abuse, homicide etc. The investigation has been completed and trial is in progress. The trial is entirely dependent on documentary evidence. The incarceration of the petitioners will not serve any useful purpose. Moreover, their release on bail during the period of elections would ensure 'genuine elections' and thus enable the people to exercise the right to express their will effectively and meaningfully. There are no exceptional circumstances to decline the concession of bail.

(Athar Minallah, J.)

Approved for reporting.

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