

**Imran Ahmed Khan Niazi and Makhdoom Shah Mahmood v. The State and another**

2023 SCP 398

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A three-member bench, comprising Justices Athar Minallah, Syed Mansoor Ali Shah and the then Acting Chief Justice of the Supreme Court Sardar Tariq Masood, granted bail to Imran Ahmed Khan Niazi and Makhdoom Shah Mahmood Qureshi — Pakistan’s former Prime Minister and former Foreign Minister, respectively — in the cypher case. Khan was alleged to have exposed confidential official information and failed to return a diplomatic document that purportedly included a warning from the United States to remove him as the Prime Minister, with Qureshi alleged to have abetted him.<sup>1</sup> Khan and Qureshi had sought bail which was concurrently declined by the trial Court and the Islamabad High Court. They then sought leave of the Supreme Court for grant of bail. Both petitioners intended to contest the forthcoming General Elections, which had been scheduled for February 8, 2024.

In his majority opinion, Justice Shah begins by noting that the offence of wrongful communication of confidential information as defined in clauses (a) to (d) of Section 5(1) of the Official Secrets Act, 1923 (the “OSA 1923”) is generally punishable under clause (b) of Section 5(3), with imprisonment for a term which may extend to two years.<sup>2</sup> Such an offence is bailable under clause (b) of Section 12(1) of the OSA 1923. Justice Shah notes that it is only when an offence is committed in contravention of clause (a) of Section 5(1) *and* is intended or calculated — directly or indirectly — to be in the interest or for the benefit of a foreign power, is in relation to any of the defence installations or affairs, or is in relation to any secret official code that it is punishable with death or life imprisonment under clause (b) of Section 5(3) of the OSA 1923. Such an offence is non-bailable and falls within the prohibitory clause of Section 497(1) of the Code of Criminal Procedure, 1898 (the “CrPC”). In respect of such offences, Justice Shah observes that bail is granted under Section 497(2) of the CrPC if it appears to the court at any stage of the investigation, inquiry, or trial that there are not reasonable grounds for

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<sup>1</sup> *Imran Ahmed Khan Niazi and Makhdoom Shah Mahmood v. The State and another* 2023 SCP 398 [2].

<sup>2</sup> *Ibid* [4].

believing that the accused has committed such an offence, but rather that there are sufficient grounds for further inquiry into the accused's guilt.<sup>3</sup>

Justice Shah goes on to note that the only question before the Court was whether, at the stage of the trial, there were reasonable grounds for believing that the petitioners had committed the offence punishable under Section 5(3)(b) of the OSA 1923. Justice Shah recognises that in answering the said question, the Court had to be cognizant of one of the elementary principles of law of bail — that it cannot indulge in the exercise of a deep appraisal of the material available on record but is to determine it only tentatively.<sup>4</sup> Having so examined the material available on record, the Court found that there was no sufficient incriminating material available, at that stage, which could show petitioners' culpability. However, there were sufficient grounds, the Court held, for further inquiry into their guilt, which had to be finally decided by the trial Court after recording the evidence of the parties.<sup>5</sup> Resultantly, the discretion exercised by the Islamabad High Court in declining bail to the petitioners was found to have been exercised perversely, that is, against the weight of the material available on record of the case.<sup>6</sup>

In his concurring opinion, Justice Minallah reflects on the chequered political history of Pakistan and proposes an alternative approach of dealing with bail matters of political leaders, particularly during the period of elections. He underlines the significance of fair and transparent elections as a bedrock of democracy.<sup>7</sup> Justice Minallah argues that sabotaging the will of the people diminishes the legitimacy of elections and threatens the democratic process. He objects to the detaining of political leaders just before elections, contending that it leads to an uneven playing field and adversely affects the fairness of the electoral process. Reflecting on Pakistan's political and judicial past, Justice Minallah condemns undemocratic acts such as the dissolution of the Constituent Assembly and its subsequent legitimisation by the Federal Court, which considerably weakened the democratic process.<sup>8</sup> He expresses concern over frequent dismissals and subsequent detentions of prime ministers, and laments the treatment meted out to a certain political party in the lead up to the 2018 general elections. Presenting a legal alternative, Justice Minallah recommends that political leaders be permitted bail during

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<sup>3</sup> Ibid [4].

<sup>4</sup> Ibid [5].

<sup>5</sup> Ibid [6].

<sup>6</sup> Ibid [7].

<sup>7</sup> *Imran* (n 1), Dissenting Opinion of Justice Minallah [2]-[3].

<sup>8</sup> Ibid [4].

elections as a rule, except in extraordinary circumstances.<sup>9</sup> He argues that ensuring fair and credible elections is in the greater public interest, and political leaders ought to be permitted to partake freely to safeguard democracy. He warns that failure to do so would compromise the integrity of the whole electoral system.

Justice Shah's majority opinion is of great significance since he rightly reduces the entire issue to the question of whether there existed reasonable grounds for believing that the petitioners had committed the offence punishable under Section 5(3)(b) of the OSA 1923. However, while he notes that the Court "examined the material available on record," the details of such material are not stated. A description of the material available on record and its propensity towards insufficient evidence would have furthered his opinion.

As regards Justice Minallah's concurring opinion, it is an innovative approach towards the law of bail. However, interestingly, Justice Minallah does not indulge in a textual analysis of Section 497 of the CrPC. Such an approach, while more yielding, may not strictly be in accordance with the rules of interpretation. Besides, there is also lack of a clear definition of what he calls the "election period." Additionally, Justice Minallah creates an exception to his own rule in that incarcerated politicians accused of committing offences deemed to threaten the society — including offence like "rape, child abuse, [and] homicide" — ought not to be granted bail as a matter of principle. His categorization of such society-threatening offences appears too vague, and it is unclear why exposing confidential official information does not form part of this category. Moreover, while Justice Minallah's approach is imaginative, it fails to take into account that such frequent grants of bail to persons, while significant in safeguarding their rights, may likewise endanger state security. In the absence of adequate safeguards, granting bail to persons accused of disclosing classified information may subvert national security interests.

Despite some of its gaps, Justice Minallah's opinion carries significant weight, underlining the importance of genuine and free elections and linking such elections to the constitutionally guaranteed fundamental rights of citizens. It stresses the importance of creating a level playing field for all political parties and candidates, while unequivocally denouncing any form of discrimination or coercion based on political affiliation.

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<sup>9</sup> Ibid.