

JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT,
ISLAMABAD

CASE NO. : CRL.MISC. NO.1354-B-2023

Imran Ahmed Khan Niazi

Vs.

The State, etc.

CASE NO. : W.P. NO.2448/2023

Imran Ahmed Khan Niazi

Vs.

Federation of Pakistan, etc.

- Petitioner by** : Sardar Latif Khan Khosa, Barrister Salman Safdar, Mr. Abu Zar Salman Khan Niazi, Mr. Niaz Ullah Khan Niazi, Mr. Umair Khan Niazi, Syed Muhammad Ali Bukhari, Mr. M. Shoaib Shaheen, Mr. Naeem Haider Panjutha, Syed Mahmood-ul-Hassan Gillani, Malik Nasim Abbas Nasir, Mr. Intizar Hussain Panjutha, Ch. Khalid Yousaf, Mr. Sheraz Ahmad Ranjah, Ms. Shaheena Shahab-ud-Din, Mr. Zahid Bashir Dar, Mr. Mirza Asim Baig, Mr. Shoaib Ilyas, Rai Ashfaq Ahmed Kharal & Raja Haroon-ur-Rashid, Advocate for petitioner.
- Respondents by** : Raja Rizwan Abbasi & Mr. Shah Khawar, Special Public Prosecutors for FIA with Mian Sabir Hussain, AD/IO & Khushnood Ahmed, DD (Legal), FIA.
- Date of Hearing** : 16.10.2023.

AAMER FAROOQ C.J. This judgment shall decide the captioned matters, as common questions of law are involved.

2. In Crl. Misc. No.1354-B-2023, the petitioner, Imran Ahmad Khan Niazi, seeks bail after arrest in case FIR No.06 dated 15.08.2023 under sections 5/9 Official Secrets Act, 1923 read with section 34 PPC registered with Police Station Counter-Terrorism Wing/FIA, Islamabad (the case).

3. In W.P. No.2448-2023, the petitioner seeks quashing of referred case.

4. The case of the prosecution, against the petitioner, is that on the complaint of Yousaf Naseem Khokhar, Secretary, Ministry of Interior, Government of Pakistan, the above case was registered against the petitioner, wherein it was alleged that the

petitioner, along with other persons, is involved in communication of secret classified document (cypher) received from Washington. It was alleged that the referred communication was unauthorized and twisted the facts for personal gains in a manner prejudicial to the interests of the State security. It has also been alleged therein that on 28.03.2022, a meeting was held in Banigala whereby the petitioner, along with others, attended the same and hatched a scheme to twist the contents of cypher for political gains. According to the case, actions on part of the petitioner along with accused persons, directly/indirectly benefited the interests of foreign powers in a way so as to prejudice the interests of the State.

5. The petitioner applied for bail after arrest, which was dismissed by the Judge, Special Court (Official Secrets Act), Islamabad vide order dated 14.09.2023, hence the petition for bail.

6. Sardar Latif Khan Khosa, Senior Advocate Supreme Court, appearing for the petitioner in W.P. No.2448-2023, *inter alia* contended that bare reading of sections 5 & 9 of Official Secrets Act, 1923 (the Act) discloses that no offence is made out in the facts and circumstances of instant case. In this regard, learned counsel took the Court through definition of 'prohibited place' as provided in subsection (8) of section 2 of the Act to argue that the alleged occurrence does not involve any 'prohibited place', hence offence under section 5 *ibid* is not made out. Learned counsel also took the Court through the definition of 'enemy' as provided in subsection (8A) of section 2 of the Act. Learned counsel further argued that under section 13 of the Act, the procedure provided for the trial of the offence is that same is to be conducted by the court not inferior to the Magistrate and cognizance can only be taken by a court upon complaint made by order of, or under authority from, the appropriate government. It was submitted that no complaint has been filed in the case and report under section 173 Cr.P.C. was presented, on the basis of which, further proceedings cannot take place. Learned counsel submitted that under Article 248 of the Constitution of the Islamic Republic of Pakistan, 1973 (the Constitution), the petitioner has the immunity from prosecution. It was also submitted that oath of the Prime Minister is provided in 3rd Schedule to the Constitution pursuant to Article 91(5) of the Constitution, which clearly stipulates that he has to take masses in confidence, which he accordingly did by making public the contents of the cypher and highlighted that a conspiracy has been hatched by a foreign government to overthrow his government. It was submitted

that concept of 'State' is provided in the Constitution and the referred concept includes the Federal Government and the bottom line is that State is to be governed by Islamic principles as enshrined in Quran and Sunnah.

7. Mr. Salman Safdar, Advocate Supreme Court, appearing for the petitioner in Crl. Misc. No.1354-B-2023, submitted that section 5 *ibid*, of which, the petitioner is implicated, is not attracted in the facts and circumstances; he took the Court through contents of section 5 of the Act and definitions provided in section 2 *ibid* of the Act to show that no offence is made out in the facts and circumstances. Learned counsel argued that the fact that there is no 'prohibited place' where any official secret was disclosed, means that section 5 *ibid* is not attracted. It was further contended that the Act of 1923 is of the colonial era designed for military installations and the secrets leaked with respect to such installations. It was submitted that this provision of law is never meant for proceedings against the civilians. On the basis of referred facts, learned counsel submitted that since provisions of section 5 *ibid* are not attracted, the case, against the petitioner, is of further inquiry. Learned counsel highlighted that issue of cypher was elaborately thrashed by Supreme Court of Pakistan in case reported as Pakistan Peoples Party Parliamentarian (PPP) through its Secretary General and 4 others Vs. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and 4 others (PLD 2022 Supreme Court 574). It was also submitted that even if the provisions of section 5 *ibid* are attracted, the punishment involved is up to life imprisonment, hence that in its own, calls for granting of bail. Reference was made to case reported as Zahid Malik Vs. The State (1990 P. Cr.LJ 1310). Learned counsel then argued that it is trite principle of interpretation that if there are two possible interpretations of a provision, one favourable to the accused is applicable. Reference was made to case reported as Sahib Ullah Vs. State through A.G. Khyber Pakhtunkhwa and another (2022 SCMR 1806). Learned counsel contended that petitioner is a victim of political victimization and other cases, in which, he was implicated, he has been granted bail. It was also argued that FIR/complaint was deliberately lodged by Secretary, Ministry of Interior, as at the relevant time, adverse political party was in power. Learned counsel contended that access to justice is a fundamental right, which has been reiterated by Supreme Court of Pakistan vide order dated 11.05.2023 in case titled Imran Ahmad Khan Niazi Vs. The State and others (Criminal M.A. No.641 of 2023 in Criminal Petition No.519-

2023). It was contended that case of the accused is based on documentary evidence and there is no chance of his absconson and where such is the case, bail is normally granted. Reference is made to case reported as Saeed Ahmed Vs. The State (1996 SCMR 1132). It was contended that bail cannot be withheld as punishment. Reliance was made on case reported as Hussain Lawai Vs. State (2022 MLD 405). Reference was also made to case reported as Khawaja Salman Rafique Vs. National Accountability Bureau (PLD 2020 SC 456). Learned counsel further stated that petitioner is an elderly person, aged 71 years, the case, in hand, has been registered against him due to political enmity. It was reiterated that the case is result of incorrect application of law, the law pertains to plans, sketches etc; that there is nothing prejudicial to national security. It was submitted that amendments have been made in Official Secrets Act, 1923 through amending Act in 2023, which cannot be given retrospective effect; that there is no criminality for Prime Minister or Foreign Minister to discuss the contents of cypher received from foreign mission. It was argued that the case does not contain precise allegations and details have been omitted fraudulently; that there is delay of about seventeen months in registration of the case; that entire case is based on statement of co-accused; that after the petitioner left the Office of the Prime Minister, new Prime Minister assumed Office and it was much after that the case was registered, whereas the subsequent Prime Minister or his team, has not been arrayed as accused. Learned counsel then made references to a number of cases to substantiate and highlight that under Official Secrets Act, 1923, mostly Armed Forces personnel have been tried. Reference was made to (R) Imtiaz Ahmed versus The State (1996 PCr.LJ 1287), Akram Awan Vs. The State (2001 YLR 1329), Naveed Ahmed Khan Vs. The State (2011 MLD 521), Zahid Malik Vs. The State (1990 P Cr.LJ 1310), Talat Mehmood Vs. The State (2013 P. Cr. LJ 386), The Field General Court Martial through President, Azad Jammu & Kashmir Vs. Khani Zaman (2019 YLR 1812), Hussain Naqvi Vs. The State (PLD 1989 Lahore 810), Shahnaz Begum Vs. The Hon'ble Judges of High Court of Sindh in Baluchistan (PLD 1971 SC 677), Ghulam Sarwar Zardari Vs. Piyar Ali alias Piyaro (2010 SCMR 624).

8. Mr. Niaz Ullah Khan Niazi, Advocate Supreme Court made supplementary arguments in the bail application by stating that the guilt of the petitioner is still to be determined and in such matters, bail is granted liberally. Reference was again made to case reported as **1990 P. Cr.LJ 1310** supra.

9. Raja Rizwan Abbasi, Advocate Supreme Court appearing as Special Public Prosecutor for FIA made a joint response to the bail application as well as petition for quashing of the FIR. At the very outset, he discarded the submission of the petitioner that the Act is only meant for Armed Forces of Pakistan. It was contended that bare perusal of preamble of the Act shows that it is applicable to all sorts of persons, who fall in its ambit. Learned counsel took the Court through provisions of sections 5 & 9 of the Act to argue that they are very much attracted in the facts and circumstances of instant case. It was submitted that being the Prime Minister of the Country, the petitioner received a cypher copy in the decoded form in his Office and he was supposed to return the same, but he did not, rather kept it with him and tampered its contents for political advantage. It was submitted that 'narrative' built by the petitioner in his speech on 27.03.2022 and subsequent speeches, was that a conspiracy has been hatched in a foreign country to overthrow his government, whereas such was not the case. Learned counsel submitted that matter was taken up before National Security Committee which decided to issue demarche, however, it did not *per se* meant that there was a conspiracy or controversy against the government of the petitioner. Learned counsel highlighted that learned counsel for the petitioner are misreading contents of section 5 *ibid* inasmuch as they are conjunctively reading section 5, whereas the words used in section 5 are 'or' and there is comma(',') which makes the ingredients or eventualities disjunctive. Learned counsel contended that cognizance was taken by the court on the compliant made by the Secretary, Ministry of Interior, who had been authorized by the 'appropriate government', which in the instant case, is the Federal Government. It was submitted that there is no violation of section 13 of the Act in any manner. Learned counsel submitted that Article 248 of the Constitution is not attracted in the facts and circumstances of instant case inasmuch as statements/speeches made by the petitioner were not in furtherance of his duties rather were made for political benefits. He also submitted that the contention on behalf of petitioner that petitioner was under oath to divulge contents of cypher are also fallacious inasmuch as he was supposed to keep them safe. Learned counsel took the Court through 'Security of Classified Matter in Government Departments' which includes cypher. He also took the Court through guidelines laid down for Procedure for Issue, Circulation and Storage of Classified Messages Received and Issued in Cypher. It was submitted that contents of cypher were never

declassified, however in the Cabinet meeting, the matter was taken up but after extensive debate, it was decided that contents are not to be declassified, but only to be shared with few persons including Chief Justice of Pakistan. It was submitted that copies of the cypher were given to certain personnel and could not be made public. In support of his contentions, learned counsel placed reliance on cases reported as Brig. (R) Imtiaz Ahmed versus The State (1996 PCr.LJ 1287), Kulbhushan Parasher versus State (2007 Cri.LJ 3601), State versus Vipin Kumar Jaggi (1975 Cri.LJ 846), Kutbuddin and others versus State of Rajasthan (AIR 1967 Raj 257), (Nishant Pradeep Kumar Aggarwal versus State), The State versus Captain Jagjit Singh (AIR 1962 SC 253), Ranjit Singh versus Nand Lal (1975 Cri.LJ 1416), (Mukesh Saini versus State), Nirmal Puri versus Central Bureau of Investigation 39 (1989 DLT 476), Abdul Kabeer versus The State (PLD 1990 SC 823), Junaid Maseeh versus The State (2022 PCr.LJ 1331), Muhammad Nazir versus Fazal Karim and others (PLD 2012 SC 892), Muhammad Shahbaz Shabeer versus Additional Sessions Judge and 5 others (2023 PCr.LJ 810). It was also submitted that statements made by the prosecution witnesses under section 161 Cr.P.C. clearly show that due to actions/inactions of the petitioner, relations between Pakistan and another foreign country did become strained.

10. In rebuttal, both the learned counsels for the petitioner categorically submitted that section 5 ibid is not attracted and the case in hand is a result of malafide on political motivation.

11. Submissions made by the parties have been heard and the documents, placed on record, examined with their able assistance.

12. The petitioner is implicated in the afore-noted case. The precise' of the prosecution allegations, against the petitioner, as contained in the case, are reiterated and are that the petitioner, along with co-accused Shah Mehmood Qureshi, the then Foreign Minister, misused and twisted the contents of the cypher received from Parep Washington, U.S.A. on 07.03.2023. It has also been alleged that the petitioner shared the twisted version of the contents of the cypher with unauthorized persons (public at large). The case, against the petitioner, also alleges that on 28.03.2022, the petitioner and others, had a meeting at Bani Gala, Islamabad, where they designed the conspiracy to twist the facts and share the twisted version of facts with public at large and in doing so, they compromised the cypher security system of the State and

secret communication method of Pakistani Missions abroad. It is also in the list of allegations against the petitioner that the actions of the accused persons directly/indirectly benefited the interest of foreign powers and caused loss to Pakistan. In this regards, the Secretary, Ministry of Interior, wrote letter dated 12.10.2022 to Director General, Federal Investigation Authority, Islamabad requesting the initiation of inquiry/proceedings in the matter of cypher as per direction by the Federal Government/Cabinet vide its decision dated 30.09.2022 .

13. The submissions made on behalf of the petitioner overlap and due to the said reason, quashing of the FIR as well as bail application, were somewhat heard together and findings are being rendered through this consolidated order. It is pertinent to state here that generally, in bail applications, the matter is not reserved and the result is announced at an early date, however, in the instant case, since elaborate arguments were advanced from both sides cumulatively spanning over eight hours and they were almost the same or overlapped, the bail application and the writ petition for quashing of FIR, were heard together and were reserved.

14. It is the stance of learned counsel for the petitioner that provisions of Official Secrets Act, 1923 are applicable to the Armed Forces of Pakistan only. The bare reading of the preamble to the Act shows that law relates to official secrets in Pakistan. In subsection (2) of section 1 of the Act, it is provided that law viz Official Secrets Act, 1923 applies to all citizens of Pakistan and persons in the service of Government wherever they may be. In light of the referred position, it cannot be said that applicability of the Act is solely for Armed Forces of Pakistan.

15. On behalf of the petitioner, much emphasis was laid that section 5 *ibid* is not applicable in the facts and circumstances due to the fact that there is no 'prohibited place' and that the word 'retention' has been added to section 5 *ibid* through amendment made in Official Secrets Act by virtue of Official Secrets Amendment Act, 2023, which cannot be given retrospective effect. On the other hand, learned counsel for the respondents has taken pains to show to the Court that section 5 *ibid* applies. It is only appropriate that before dissecting the said provision of law, it is reproduced for convenience. Section 5 *ibid*, as amended, reads as follows:-

"5. Wrongful communication, etc., of information. — (1) If any person having in his possession or control any secret official code or password or any sketch, plan, model, article, note, document or information which relates to or is used in a prohibited place or relates to the activities of Armed Forces during peace and

waror relates to anything in such a place, or which has been made or obtained in contravention of this Act, or which has been entrusted in confidence to him by any person holding office under Government, or which he has obtained or retained or to which he has had access owing to his position as a person who holds or has held office under Government, or as a person who holds or has held a contract made on behalf of Government, or as a person who is or has been employed under a person who holds or has held such an office or contract—

(a) wilfully communicates the code or password, sketch, plan, model, article, note, document or information to any person other than a person to whom he is authorised to communicate it, or a Court of Justice or a person to whom it is, in the interests of the State, his duty to communicate it; or

(b) uses the information in his possession for the benefit of any 1 [enemy] or in any other manner prejudicial to the safety of the State; or

(c) retains the sketch, plan, model, article, note or document in his possession or control when he has no right to retain it, or when it is contrary to his duty to retain it, or wilfully fails to comply with all directions issued by lawful authority with regard to the return or disposal thereof; or

(d) fails to take reasonable care of, or so conducts himself as to endanger the safety of, the sketch, plan, model, article, note, document, secret official code or password or information;

he shall be guilty of an offence under this section.

(2) If any person voluntarily receives any secret official code or password or any sketch, plan, model, article, note, document or information knowing or having reasonable ground to believe, at the time when he receives it, that the code, password, sketch, plan, model, article, note, document or information is communicated in contravention of this Act, he shall be guilty of an offence under this section.

(3) A person guilty of an offence under this section shall be punishable, —

(a) where the offence committed is a contravention of clause (a) of sub-section (1) and 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 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 or in relation to any secret official code, with death, or with imprisonment for a term which may extend to fourteen years; and

(b) in any other case, with imprisonment for a term which may extend to two years, or with fine, or with both”.

The bare reading of section 5 shows that its applicability is disjunctive inasmuch as there is ample use of the word ‘or’, which breaks the sentence or offence as provided in section 5 *ibid*. In the broken form, section 5 can be taken to read, if any person having in his possession or control any secret official code, or password, or any

sketch, plan, model, article, note, document or information (a) which relates to or is used in a 'prohibited place' (b) relates to the activities of Armed Forces during peace and war (c) relates to anything in such a place (d) which has been made or obtained in contravention of the Act (e) which has been entrusted in confidence to him by any person holding the office in the Government (f) or he has obtained or retained or to which he had access owing to his position as a person who holds or has held office under Government or as a person holds or held contract made on behalf of Government or as a person who is or has been employee, any person who holds or has held such Office or a contract.

16. It is the case of the prosecution that decoded cypher was entrusted in confidence to the petitioner by persons holding office in the Government i.e. the various officers of the Government (Ministry of Foreign Affairs and Staff of Prime Minister's Office); he obtained such information and document by virtue of his position as a Prime Minister. The *actus reus* and *mens rea* of the offence is contained in subsections (a & d) of subsection (1) of section 5 *ibid*. According to learned counsel for the respondents it is subsections (a & d) which are attracted in the present case inasmuch as decoded cypher was received and then lost by the petitioner and the contents thereof were twisted and communicated to the public at large, which he could not have done, as it was a secret and classified document. In this regard, subsection (a) of section 5(1) which attracts punishment of death or sentence up to 14 years provides that if any person willfully communicates the contents of the document or information to any other person other than the person, who has been authorized to communicate or the court of justice or a person to whom it is in the interest of the State, his duty to communicate, or as provided in subsection (d) of section 5(1) *ibid*, he failed to take reasonable care of or so conducts himself as to endanger the safety of the document, sketch, plan, model, article note, document, secret official code or password or information. It is pertinent to observe that punishment provided for the offences in subsections (b to d) is a term, which may extend to two years or with fine or with both.

17. In the referred backdrop, reading the contents of section 5 *ibid* in juxtaposition with the allegations leveled in the case against the petitioner shows that *prima facie* section 5 *ibid* is attracted in the facts and circumstances of instant case inasmuch as it is the case of the prosecution that cypher, in its decoded form, was transmitted by

Ministry of Foreign Affairs to the Prime Minister's Secretariat and was duly received by the Prime Minister (the petitioner) and he apparently lost the said document and/or twisted contents of the same for his political benefits and also made the contents thereof public. He was not authorized to do so as per section 5 *ibid*, it is reiterated that petitioner received the contents/information contained in cypher by virtue of his position as the then Prime Minister of the country and its communication with public at large in a political speech on 27.03.2022 tantamount to divulging contents thereof to the public, which they were not authorized to receive, as the same were secret and classified [this part of the offence *prima facie* falls under subsection (a) of section 5(1)].

18. In so far as the aspect of losing the cypher is concerned, subsection (d) of section 5(1) is attracted which attracts punishment up to two years.

19. The question whether petitioner was authorized to divulge the contents of cypher in a political speech, the petitioner has relied upon the oath of the Prime Minister as contained in 3rd Schedule to the Constitution made pursuant to Article 91(5) of the Constitution. It is part of the oath of the Prime Minister to perform his duties with the best of his ability and always in the interest of sovereignty, integrity, solidarity, well-being and prosperity of Pakistan and strive to preserve the Islamic Ideology. It is also an obligation of the Office of the Prime Minister as per the oath not to directly or indirectly communicate or reveal to any person, which is brought to his consideration or become known to him as Prime Minister except as required for the due discharge of his duties as the Prime Minister. It is part of the Constitution of Pakistan that Islam is the state religion of Pakistan and by virtue of Article 2A *ibid* of the Constitution and the principles and provisions set out in the Objectives Resolution are made substantive part of the Constitution. The life of people of Pakistan is to be governed according to Islamic principles and law. The definition of 'State' is provided in Article 7 of the Constitution, which means the Federal Government, Majlis-e-Shoora (Parliament), a Provincial Government, a Provincial Assembly and such local or other authorities in Pakistan as are by law empowered to impose any tax or cess.

20. It is the stance of the petitioner that as Prime Minister, it was obligatory upon him to bring it to the knowledge of the public that a conspiracy was hatched in a foreign country to overthrow his government by way of No Confidence Move. In order to appreciate the referred argument further and deliberate upon the obligation of the

Prime Minister, it is only appropriate, at this juncture, to discuss the nature of cypher and the hands which deals with it and the treatment to be given to it. In this regard, Cabinet Secretariat has formulated 'Security of Classified Matter in Government Departments'. Chapter-4 of the said instrument deals with classification of official matters and accountability. According to clause 4.2, four types of classification is made i.e. (1) Top Secret (2) Secret (3) Confidential (4) Restricted. Under clause 4.15, classification is accorded to a document by the Head of the Department. In this regard, classified matter is only to be brought on 'Need to Know' principle as per Chapter-5 (clause 5.1 a). The cypher security is dealt with Chapter-8, which provides in general, how the cypher operates. In this regard, clause 8.10, all messages supposed to be sent in cypher should be clearly marked with the appropriate security classification to ensure that such messages are not transmitted except in cypher. Under clause 8.16 (5), cypher telegram is an accountable classified document and a number is allotted to every copy. Further copying or transmission of the message to anyone within or outside the official circles is strictly prohibited. If the recipient of the cypher telegram desires to forward a copy of the same telegram to another person, this is done through endorsement. In case, cypher is misplaced or lost, it is to be dealt with as per procedure provided in clause 8.17.

21. The instrument, for the present purposes, is a document received by the petitioner from Ministry of Foreign Affairs. The dealing of such like documents is provided in 'Procedure For Issue, Circulation and Storage of Classified Messages RECEIVED and Issued In Cypher' (Guidelines formulated by Ministry of Foreign Affairs). Cypher is a classified document and it is not to fall in hands of any unauthorized persons. As per the said instrument, movement of cypher telegram is to be properly recorded by the officer concerned or by the Crypto Centre. After the document has been sent to the restricted hands, it is supposed to be brought back and all the copies are destroyed and only one copy is maintained. The referred document and practice of Ministry of Foreign Affairs clearly shows that cypher is received as a 'classified document' meant only for certain restricted personnel and not to fall in hands of unauthorized persons and after some time, reverted back to the originator i.e. Ministry of Foreign Affairs. The 'classified document' cannot be made public or dealt with otherwise than for the purpose, for which, it was meant for. Any breach thereof tantamount to attraction of section 5 of the Act. Moreover, the oath of

the Prime Minister clearly depicts that Prime Minister is not to disclose any information directly or indirectly received by him in his capacity as Prime Minister unless the same is required for discharge of his duties and also not to do anything which jeopardizes the integrity, sovereignty of Pakistan or is against the State. The statements made by different present and former officials of Foreign Ministry, including the author of the cypher namely Mr. Asad Majeed under section 161 Cr.P.C, clearly show that no conspiracy was hatched in a foreign country and that, making the contents of cypher known to public, jeopardizes the cypher code security and let down Pakistan in international diplomatic circles and strained relations of Pakistan with a foreign country. In this regard, this Court while hearing bail applications, can look into statements under section 161 Cr.P.C. Reference is made to Hilal Khattak Vs. The State (2023 SCMR 1182), Shehzad Ahmed Vs. The State (2010 SCMR 1221) and The State Vs. Aleem Haider (2015 SCMR 133).

22. In so far as the impart of cypher is concerned and response thereto, the Supreme Court of Pakistan considered the issue by reproduction of certain events in chronological order. In case reported as Pakistan Peoples Party Parliamentarian (PPP) through its Secretary General and 4 others Vs. Federation of Pakistan through Secretary, Ministry of Law and Justice, Islamabad and 4 others (PLD 2022 Supreme Court 574), the Apex Court stated as follows;-

“75. In the cited case the Speaker decided the validity of an Ordinance that was binding on him. This was beyond his jurisdiction under the Punjab Assembly Procedure Rules. The Indian Supreme Court accordingly declared his ruling null and void and of no effect.

76. It is clear that the ruling of the Deputy Speaker dated 03.04.2022 violated Article 95(2) of the Constitution and was also without jurisdiction in respect of its subject matter (it attempted to interpret Article 5 of the Constitution) and mode of disposal (the RNC was outrightly rejected rather than being voted upon in the NA). The ensuing legal effect of declaring the ruling unconstitutional and invalid is exemplified in the case of Muhammad Anwar Durrani v. Province of Balochistan (PLD 1989 Quetta 25). In that matter, a larger Bench of the Balochistan High Court was confronted with the question of whether a Chief Minister who had been declared by the Speaker to be the holder of such office, but who had not obtained a vote of confidence in accordance with the provision of Article 130(3) of the Constitution as it then stood, was a validly appointed Chief Minister who could advise the Governor to dissolve the PA under Article 112(1) of the Constitution. The High Court held that a Chief Minister who had not taken a vote of confidence was not a Chief Minister within the meaning of Article 112, therefore, he could not advise the Governor to dissolve the PA. Resultantly, the dissolution of the Balochistan PA was set aside. In respect of the Speaker's power to interpret the language of Article 130, the High Court observed:

"11. ...Interpretation of written Constitution or ordinary Statute is the exclusive jurisdiction of the Courts and the Court has to interpret the Provisions of the Constitution... The word "majority" as used in Article 130(2-A) of the Constitution has to be interpreted by this Court and if it differs from the definition of the Speaker, this Court has jurisdiction to exercise its discretion."

(emphasis supplied)".

The bare reading of the above excerpt from the judgment of Supreme Court shows that contents of cypher were such that they only called for demarche and not any further strict action, as there was no conspiracy of any kind (the said part is also affirmed by Mr. Asad Majeed, the Pakistan's Ambassador to USA at the relevant time, in his statement under section 161 Cr.P.C.)

23. It was implicit in the arguments of learned counsels for the petitioner that perhaps, under the oath, when the petitioner made the speech, he was under obligation to do so as per his oath and he was doing so in discharge of his duties as Prime Minister. This argument does not hold ground inasmuch as the speech made on 27.03.2022 divulging the contents of cypher was not part of performance of his duties as the Prime Minister but was rather a political gathering. Moreover, the petitioner as a Prime Minister, had no authority to declassify the cypher or make the contents public, as it was a 'classified document', rather the submission made by learned counsel for the petitioner that in the speech before a public gathering on above date, when the contents of cypher were disclosed to the public, it was obligatory upon the petitioner, is an admission of the fact that such disclosure was made.

24. Another submission made on behalf of the petitioner was attraction of Article 248 of the Constitution i.e. the immunity from prosecution. The referred provision of the Constitution is reproduced below:-

"248. (1) The President, a Governor, the Prime Minister, a Federal Minister, a Minister of State, the Chief Minister and a Provincial Minister shall not be answerable to any court for the exercise of powers and performance of functions of their respective offices or for any act done or purported to be done in the exercise of those powers and performance of those functions:

Provided that nothing in this clause shall be construed as restricting the right of any person to bring appropriate proceedings against the Federation or a Province.

(2) No criminal proceedings whatsoever shall be instituted or continued against the President or a Governor in any court during his term of office.

(3) No process for the arrest or imprisonment of the President or a Governor shall issue from any court during his term of office.

(4) No civil proceedings in which relief is claimed against the President or a Governor shall be instituted during his term of office in respect of anything done or not done by him in his personal capacity whether before or after he enters upon his office unless, at least sixty days before the proceedings are instituted, notice in writing has been delivered to him, or sent to him in the manner prescribed by law, stating the nature of the proceedings, the cause of action, the name, description and place of residence of the party by whom the proceedings are to be instituted and the relief which the party claims”.

Sub-Article (2) of Article 248 of the Constitution clearly shows that immunity from criminal proceedings is restricted to the President and the Governor and that too, only during term of Office. Moreover, under Sub-Article (1) of Article 248, the immunity is attracted only where exercise of powers and performance of the functions as Prime Minister is in the exercise of such powers and not otherwise. The petitioner, when addressed the public gathering, was not doing so pursuant to the performance of his duties as Prime Minister, rather it was a political engagement.

25. It is also the case of the petitioner that proceedings before trial court are not being conducted in accordance with section 13 of the Act. While in the first place, if the proceedings are not in accordance with section 13 *ibid*, that does not warrant quashing of the case or the grant of bail to the petitioner, however, since arguments were addressed on the said aspect of the matter, finding is being rendered.

26. Under section 13(3) of the Act, no Court is to take cognizance under the Act upon complaint made by order of, or under authority from, the appropriate government. The ‘appropriate government, is defined in section 2(2A) of the Act and provides that it means in relation to matters enumerated in the Federal Legislative List in the Fourth Schedule to the Constitution and in relation to any other matter, the Provincial Government. The procedure prescribed for conducting the trial is provided in section 13(6) of the Act and by way of reference, the procedure in Pakistan Criminal Law Amendment Act, 1958 is made out. Under section 6 of the referred Act, the procedure provided in Chapter-XX of the Code of Criminal Procedure has been made applicable i.e. procedure for conducting trial before the court of Magistrate. Learned counsel for the petitioner has perhaps taken the complaint to mean a complaint in the sense of a complaint case, whereas such is not the case. The complaint means that if a complaint is made by an authorized officer of the

'appropriate government, which is the Federal Government in the instant case, only then the court has to take cognizance in the matter, meaning thereby that if a complaint is made which results in registration of FIR, pursuant to the complaint by any person other than persons provided in section 13(3) *ibid* and offences under Official Secrets Act is made out, that would not be cognizable but only cognizable where government officer, duly authorized, has brought complaint to the Investigating Agency. In the instant case, the complaint was made by the Secretary, Ministry of Interior after authorization of the Federal Government i.e. the Cabinet. The Secretary, Ministry of Interior is a government officer and has been authorized by the 'appropriate government' i.e. the Federal Government. The referred fact is borne out from the complaint which was made by the Secretary, Ministry of Interior on 25.09.2022 and subsequent letter dated 12.10.2022.

27. In the instant case, the punishment provided in section 5(3) of the Act for the offence committed under section 5(1)(a) of the Act, is death or imprisonment upto fourteen years which attracts prohibitory clause of section 497 Cr.P.C. and there does not exist any ground for further inquiry. In cases where accused faced similar charges, the offence (s) has been treated as serious and bail applications have been dismissed. In case reported as (R) Imtiaz Ahmed versus The State (1996 PCr.LJ 1287), the Lahore High Court dismissed the bail application and regretted the submission that delay in lodging FIR warranted release of petitioner on bail, non-recovery of cassettes also was held to be not damaging to the case of the prosecution, as there was ample incriminating evidence was available In case reported as Kulbhushan Parasher versus State (2007 Cri.LJ 3601), an Indian Navy Officer was being tried under Official Secrets Act, 1923; while dismissing his bail application, it was observed as follows:-

“15. In considering applications for bail, apart from the period of custody or detention, which is a relevant circumstance, other factors, such as the nature of accusation and the severity of punishment in case of conviction and the nature of supporting evidence; reasonable apprehension of tampering with the witness or apprehension of threat to the complainant; Prima facie satisfaction of the court in support of the charge, have to be considered by the court. In the present case, there are several circumstances which prima facie appear to connect the applicant with the incriminating features, such as evidence of his being instrumental in giving or offering illegal gratification; his being recipient of classified information through e-mail and chatting, and also his supplying the unauthorized pen drives used to copy sensitive and forbidden information, which were passed on to him”.

In case reported as State versus Vipin Kumar Jaggi (1975 Cri.LJ 846), it was observed as follows:-

“17. Considering the very serious nature of the allegations against Jaggi and (the fact that yit cannot be said that there are no reasonable grounds for believing that he has riot been guilty of an offence punishable with death or imprisonment for life, it was not a case where the discretion vested in the Sessions Court of granting bail should have been exercised in favor of the said accused. In the State v. Jagjit Singh MANU/SC/0139/1961 : [1962]3SCR622 it was observed by their Lordships of the Supreme Court that among other considerations, which a court has to take into account in deciding whether bail should be granted in a non-bailable offence, is the nature of the offence; and if the offence is of a kind in which bail should not be granted considering its seriousness, the court should refuse bail even though it has very wide powers under Section 498 of the Code of Criminal Procedure, 1893. In that case under Sections 3 and 5 of the Indian Official Secrets Act, 1923, pertaining to military affairs of the Government, the accused in the event of conviction could be liable up to fourteen years imprisonment. The order of bail granted by the High Court was set aside., The present case is more serious. The bail granted by the learned Sessions Judge not being justified the order dated May 18, 1974 has to be set aside. The mere fact that after the grant of bail the respondent has not been shown to have misused the privilege of bail is not a sufficient ground by itself, irrespective of other considerations, for not interfering with the order of the learned Sessions Judge”.

In case reported as Kutbuddin and others versus State of Rajasthan (AIR 1967 Raj 257), it was observed as follows:-

“In view of this observation of the Supreme Court I shall have to assume that the case against the applicants falls under Section 3 and is punishable with 14 years' rigorous imprisonment. Apart from this assumption, the evidence mentioned by the learned Deputy Government Advocate is prima facie indicative that the information relating to aerodromes, about the strength of the 61 Cavalry and the like were obtained and passed by some of the applicants. There is evidence of continued association and collaboration between the 4 applicants before me in their activities. Besides this, the presumption engrafted in Sub-section (2) of Section 3 of the Act fortifies the prima facie case being under Section 3 punishable with 14 years' rigorous imprisonment, which is non-bailable.

6. The offence under Section 3 is a serious one and its gravity was assessed by their Lordships of the Supreme Court in the case of MANU/SC/0139/1961 : AIR 1962 SC 253 where they were pleased to cancel the bail granted to Captain Jagjit Singh by the High Court of Punjab. It is unfortunate that the prosecution of the applicants has taken a long time and it will be just and proper if the trial is expedited. But having regard to the circumstances of the allegations against the applicants, I am not prepared to admit them on bail. Their application is accordingly dismissed”.

In case reported as The State versus Captain Jagjit Singh (AIR 1962 SC 253), while setting aside bail granting order of High Court, the Supreme Court of India observed as follows:-

“3. There is in our opinion a basic error in the order of the High Court. Whenever an application for bail is made to a court, the first question that it has to decide

is whether the offence for which the accused is being prosecuted is bailable or otherwise. If the offence is bailable, bail will be granted under section 496 of the Code of Criminal Procedure without more ado; but if the offence is not bailable, further considerations will arise and the court will decide the question of grant of bail in the light of those further considerations. The error in the order of the High Court is that it did not consider whether the offence for which the respondent was being prosecuted was a bailable one or otherwise. Even if the High Court thought that it would not be proper at that stage, where commitment proceedings were to take place, to express an opinion on the question whether the offence in this case fell under section 5 which is bailable or under section 3 which is not bailable, it should have proceeded to deal with the application on the assumption that the offence was under section 3 and therefore not bailable. The High Court, however, did not deal with the application for bail on this footing, for in the order it is said that the question whether the offence fell under section 3 or section 5 was arguable. It follows from this observation that the High Court thought it possible that the offence might fall under section 5. This, in our opinion, was the basic error into which the High Court fell in dealing with the application for bail before it, and it should have considered the matter even if it did not consider it proper at that stage to decide the question whether the offence was under section 3 or section 5, on the assumption that the case fell under section 3 of the Act. It should then have taken into account the various considerations, such as, nature and seriousness of the offence, the character of the evidence, circumstances which are peculiar to the accused, a reasonable possibility of the presence of the accused not being secured at the trial, reasonable apprehension of witnesses being tampered with, the larger interests of the public or the State, and similar other considerations, which arise when a court is asked for bail in a non-bailable offence. It is true that under section 498 of the Code of Criminal Procedure, the powers of the High Court in the matter of granting bail are very wide; even so where the offence is non-bailable, various considerations such as those indicated above have to be taken into account before bail is granted in a non-bailable offence. This the High Court does not seem to have done, for it proceeded as if the offence for which the respondent was being prosecuted might be a bailable one.

4. The only reasons which the High Court gave for granting bail in this case were that the other two persons had been granted bail, that there was no likelihood of the respondent absconding, he being well connected, and that the trial was likely to take considerable time. These are however not the only considerations which should have weighed with the High Court if it had considered the matter as relating to a non-bailable offence under section 3 of the Act.

5. The first question therefore that we have to decide in considering whether the High Court's order should be set aside is whether this is a case which falls prima facie under section 3 of the Act. It is, however, unnecessary now in view of what has transpired since the High Court's order to decide that question. It appears that the respondent has been committed to the Court of Session along with the other two persons under section 120B of the Indian Penal Code and under sections 3 and 5 of the Act read with section 120B. Prima facie therefore, a case has been found against the respondent under section 3, which is a non-bailable offence. It is in this background that we have now to consider whether the order of the High Court should be set aside. Among other considerations, which a court has to take into account in deciding whether bail should be granted in a non-bailable offence, is the nature of the offence; and if the offence is of a kind in which bail should not be granted considering its seriousness, the court should refuse bail even though it has very wide powers under section 498 of the Code of Criminal Procedure. Now section 3 of the Act erects an offence which is prejudicial to the safety or interests of the State and relates to obtaining, collecting, recording or publishing or communicating to any other

person any secret official code or pass-word or any sketch, plan, model, article or note of other document or information which is calculated to be or might be or is intended to be, directly or indirectly, useful to an enemy. Obviously, the offence is of a very serious kind affecting the safety or the interests of the State. Further where the offence is committed in relation to any work of defence, arsenal, naval, military or air force establishment, or station, mine, minefield, factory, dockyard, camp, ship or aircraft or otherwise in relation to the naval, military or air force affairs of Government or in relation to any secret official code, it is punishable with fourteen year's imprisonment. The case against the respondent is in relation to the military affairs of the Government, and prima facie therefore, the respondent if convicted would be liable upto fourteen year's imprisonment. In these circumstances considering the nature of the offence, it seems to us that this is not a case where discretion, which undoubtedly vests in the court, under section 498 of the Code of Criminal Procedure, should have been exercised in favour of the respondent. We advisedly say no more as the case has still to be tried.

6. It is true the two of the persons who were prosecuted along with the respondent were released on bail prior to the commitment order; but the case of the respondent is obviously distinguishable from their case inasmuch as the prosecution case is that it is the respondent who is in touch with the foreign agency and not the other two persons prosecuted along with him. The fact that the respondent may not abscond is not by itself sufficient to induce the court to grant him bail in a case of this nature. Further, as the respondent has been committed for trial to the Court of Session it is not likely now that the trial will take a long time. In the circumstances we are of opinion that the order of the High Court granting bail to the respondent is erroneous and should be set aside. We therefore allow the appeal and set aside the order of the High Court granting bail to the respondent. As he has already been arrested under the interim order passed by this Court, no further order in this connection is necessary. We, however, direct that the Sessions Judge will take steps to see that as far as possible the trial of the respondent starts within two months of the date of this order”

Reliance was also placed on cases reported as Ranjit Singh versus Nand Lal (1975 Cri.LJ 1416), (Mukesh Saini versus State) and Nirmal Puri versus Central Bureau of Investigation 39 (1989 DLT 476). It is also the stance of the prosecution that since the petitioner is convicted in another case, he is not entitled to bail in the instant matter; reference was made to Abdul Kabeer versus The State (PLD 1990 SC 823).

28. The case law cited by the petitioner for grant of bail in the facts and circumstances is not relevant inasmuch as undoubtedly the evidence is all documentary but according to the prosecution, the copy of cypher is still in custody of the petitioner and in light of the case law from across the border as well as superior courts of the country, where allegations are serious and prima facie link the accused with the commission of the offence, bail is to be denied in case of Official Secrets Act, 1923.

29. In so far as quashment of FIR is concerned, report under section 173 Cr.P.C. has been filed and the petitioner has the efficacious and alternate remedy by way of

moving an appropriate application under section 249-A Cr.P.C. Where such is the case, a petition under Article 199 of the Constitution is not maintainable. Reference is made to case reported as D.G. Anti Corruption Vs. Muhammad Ikram Khan (PLD 2013 SC 401). Likewise, petition under Article 199 of the Constitution filed by the petitioner cannot be treated as one under section 561-A Cr.P.C. in light of recent judgment of the Supreme Court in case Federal Investigation Agency Vs. Syed Hamid Ali Shah (PLD 2023 SC 265). Reliance is also placed on Junaid Maseeh Vs. The State (2022 P. Cr.LJ 133) and Muhammad Nazir Vs. The State (PLD 2012 SC 892).

30. Moreover, the petitioner is co-accused in the case and even if the arguments advanced for quashment of FIR on his behalf are accepted, FIR cannot be quashed inasmuch as there are other co-accused and there cannot be a partial quashing of FIR. Reference is made to case reported as Naeem Abbas Vs. D.G. FIA (2015 P. Cr.LJ 1592), Syed Nayab Hussain Sherazi Vs. SHO Sabzazar, Lahore (2018 P Cr.LJ 656) and D.G. Anti-Corruption Vs. Muhammad Ikram Khan (PLD 2013 Supreme Court 401)

31. In view of foregoing, petition for quashing of FIR as well as bail application are without merit and are accordingly dismissed.

32. It is clarified that any observations, made hereinabove, are tentative in nature and shall not prejudice learned trial court during the trial.

(CHIEF JUSTICE)

Announced in Open Court on 27.10.2023

(CHIEF JUSTICE)

Approved for Reporting

