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BEFORE HON'BLE ISLAMABAD HIGH COURT AT ISLAMABAD
(Appellate Jurisdiction)

Criminal Appeal No 273 /2023

Imran Ahmad Khan Niazi s/o Ikram Ullah Niazi
2-Zaman Park, Canal Bank,
Lahore
(Presently confined in Attock Jail)

.....Appellant

Versus

District Election Commissioner Islamabad
DEC Office, F-7, Markaz
Islamabad

.....Respondent

Criminal Appeal under §190(1) of the Election Act, 2017 read with all other enabling provisions of law against the Order dt.05-08-2023 by the learned ASJ Islamabad (West) whereby the Appellant was convicted and sentenced, inter alia, to three years in jail in a Complaint filed by the Respondent

It is respectfully submitted as follows:

Being aggrieved of and dissatisfied with the Order dt.05-08-2023 passed by the learned Additional Sessions Judge, Islamabad (West) whereby the Appellant was convicted under §174 of the Election Act, 2017 to Three years in jail and Rs.100,000 fine or in default thereof to six months in jail (hereinafter referred to as "Impugned Order"). The Impugned Order is not sustainable and is liable to be set aside by this Hon'ble Court, *inter alia*, on the following FACTS and GROUNDS.

(Impugned Order dt.05-08-2023 passed by the learned ASJ is Annexure-A)
(Charge Framed by the Trial Court is attached as Annexure-B)
(Complaint filed by the Respondent is attached as Annexure-C)

FACTS:

1. That on 08-11-2022 a complaint under section 190 of the elections act, 2017 in respect of offences allegedly committed under sections 167 and 173 of the Elections Act, 2017



JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Criminal Appeal No.273 of 2023

Imran Ahmad Khan Niazi

Vs.

District Election Commissioner, Islamabad

Appellant by:

M/s. Sardar Muhammad Latif Khan Khosa, Dr. Babar Awan, Syed Ali Zafar, Salman Akram Raja, Barrister Gohar Ali Khan, M. Shoaib Shaheen, Sher Afzal Khan Marwat, Sardar Shahbaz Ali Khan Khosa, Niazullah Khan Niazi, Malik Naseem Abbas Nasir, Barrister Umair Khan Niazi, Intizar Hussain Panjutha, Naeem Haider Panjutha, Sheraza Ahmad Ranjha, Malik Muhammad Fiaz Kandwal, Salman Ayub, Khalid Yousaf Ch., Malik Tariq Mahmood Noon, Rai Ashfaq Ahmed Kharral, Mirza Asim Baig, Saeed Khan Sadozai, Qamar Anayet Raja, Naheed Iqbal Awan, Murtaza Toori, Shaheena Shahab ud din, Suzain Jahan Khan, Syed Mahmood H. Gillani, Ali Ijaz Buttar, Zargham Bakhar, Sardar Masroof Khan, Raja Aftab Ahmad, Raja Haroon, Raja Zahid Mahboob, Mashaal Azam Khan & Mubashar Najeeb Khattak, Advocates.

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Examiner
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Authorised Officer at Order 1334
Islamabad High Court
Islamabad

Respondent by:

M/S. Muhammad Amjad Pervaiz & Nawaz Chaudhary, advocate.
Khurram Shahzad, Additional Director (Law), Zaigham Anees, Law Officer Election Commission of Pakistan & Falak Sher, Legal Assistant, Election Commission of Pakistan.

Date of Decision:

28.08.2023

C.M. No.01/2023

AAMER FAROOQ, C. J.- This is an application under Section 426 of Code of Criminal Procedure, 1898 (Cr.P.C.), on behalf of the appellant/applicant, for suspension of sentence awarded vide judgment dated 05.08.2023.

2. The appellant was tried in the Reference filed by the District Election Commissioner, Islamabad under Section 190 of the Elections Act, 2017 (the Act) with respect to offences under Sections 167 and 173 of the Act alongwith enabling provisions and was convicted vide judgment dated 05.08.2023. He filed appeal against the judgment and also through the instant application seeks suspension of the sentence.

3. Sardar Muhammad Latif Khan Khosa, Senior ASC, learned counsel for the applicant, *inter alia*, contended that the sentence awarded by the Trial Court is three years which tantamount to a short sentence, hence the applicant is entitled to the suspension of sentence and be released on bail. In support of his contentions learned counsel made reference to Soba Khan v. The State (2016 SCMR 1325), Mian Muhammad Nawaz Sharif v. The State (2019 Islamabad 38), Muhammad Saleem v. The State (PLD 2006 SC 483), Muhammad Riaz v. The State (2021 P.Cr.L.J. 1517), Muhammad Khan v. Mst. Bakhat Jan (2018 YLR Note-129).

4. Learned counsel for the applicant also contended that the complaint filed by the respondent and the cognizance taken by the Trial Court suffers from serious jurisdictional defects. It was argued that

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29 AUG 2023

Authorized Director of Criminal Justice
Islamabad High Court
Islamabad

under Section 190 of Cr.P.C. read with other enabling provisions the complaint was to be routed through the Magistrate and the Sessions Court did not have jurisdiction to directly entertain the matter. Learned counsel pointed out that in this regard the Hon'ble Supreme Court of Pakistan has categorically held that this is the legal position regardless of any *non obstante* clause. Reference was made to Muhammad Iltaf Khan .v. Bashir (2022 SCMR 356). It was also argued that Section 137 (4) of the Act provides limitation cap of 120 days from filing of statement of assets and liabilities for invocation of criminal proceedings for corrupt practices whereas the complaint was filed much belatedly, hence was barred by limitation. Learned counsel further argued that the complaint filed on behalf of the Election Commission of Pakistan also was not instituted through duly appointed person inasmuch as after the decision of the Election Commission of Pakistan dated 21.10.2022 Secretary, Election Commission of Pakistan authorized Deputy Election Commissioner which he could not have done as under Section 6 of the Act that could have been done by Election Commission of Pakistan only. Learned counsel also contended that since these are the jurisdictional issues, hence they ought to have been decided by the Trial Court first rather than rendering findings on merits. Reference was made to Zahid Zaman Khan v. Khan Afsar (PLD 2016 SC 409) and Rashid Ahmed. V. The State (PLD 1972 SC 271) . It was argued lastly that no opportunity of presenting the defence was afforded by the Trial Court to the applicant and the application for summoning witnesses was turned down on the basis that the witnesses are not relevant. It was also

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Islamabad High Court
Islamabad

contended that despite pendency of criminal revision on the subject, in which this Court had issued notices, the matter was decided in haste. Learned counsel emphasized that the Trial Court decided the matter in an undue haste without providing appropriate opportunity to the applicant.

5. Mr. Muhammad Amjad Pervaiz, Senior ASC, learned counsel for the respondent, at the very outset, objected that the applicant has not impleaded the State as party which he ought to have done. Learned counsel, in this behalf, drew attention of the Court towards Section 422 of the Cr.P.C. to say that no distinction has been drawn where appeal has been filed against any conviction arising of State case and /or a complaint case. It was submitted that the State is a necessary party inasmuch as after the conviction the appellant is in custody of the State.

It was also contended by the learned counsel for the respondent after reading Section 422 Cr.P.C. that it is only after notice to the State that the matter is decided in Appeal. Learned counsel however, candidly admitted that the omission to implead the State is not fatal to the proceedings, however, since suspension is part of the appeal, the State should be heard even at this stage while hearing the application. It was further contended that it is not a rule of thumb that every short sentence awarded is to be suspended. Reference was made to The State v. Qaim Ali Shah (1992 SCMR 2192). He further argued that the Secretary is the Executive Head of Election Commission of Pakistan and has drawn authority to file complaint against the applicant from the decision of Election Commission of Pakistan dated 22.10.2022. It was further

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29 AUG 2023

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argued that on the basis thereof he authorized the Deputy Election Commissioner. It was further contended that the question of limitation also does not go to the root of the matter inasmuch as Section 137 (4) of the Act is not mandatory and not applicable in the facts and circumstances. Learned counsel emphasized that the complaint could have been filed directly before the Sessions Court as provided in Section 190 of the Act in terms of judgment of Lahore High Court, Lahore reported as Malik Iqbal Ahmad Langrial. V. The State (PLD 2017 Lahore 683). He emphasized that all the cases with respect to election matters under the erstwhile, Representation of the People Act, 1975 were initiated before Sessions Court directly and not routed through Magistrate. He said that even otherwise, assuming without conceding that it was to be routed through Magistrate it is not fatal to the proceedings in terms of Section 529 of the Cr.P.C. read with Section 537 *ibid*. Learned counsel argued that the accused does not have, as a matter of right, opportunity to lead evidence in defence and has to satisfy the conscious of the Court that the material he seeks to produce is relevant. It was submitted further that the Trial Court rightly exercised the discretion in favour of the complainant and against the applicant. He also argued that the decision was not handed down by the Trial Court in haste inasmuch as ample opportunities were provided to the applicant to appear before the Trial Court and present its case which option was not exercised and on many occasions neither the applicant nor his counsel entered appearance. It was also submitted that applicant

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29 AUG 2023

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15/08/2023

entered appearance only twice or thrice and attempts were made to frustrate the proceedings of the Trial Court.

6. In rebuttal, learned counsel for the applicant submitted that generally the matters of suspension are akin to bail and complicated questions are not addressed in the same. It was submitted that the Hon'ble Supreme Court of Pakistan has deprecated the practice of lengthy arguments and the judgments in bail matters and for that matter suspension of sentence issued. Reference was made to Chairman NAB v. Mian Muhammad Nawaz Sharif (PLD 2019 SC 445), Muhammad Shakil v. The State (PLD 2014 SC 458) and Soba Khan v. The State (2016 SCMR 1325). It was further submitted that the State can be impleaded as respondent while deciding the main appeal.

7. Submissions made by the learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

8. In the instant application the applicant has made the following prayer:

"It is, therefore, prayed most respectfully that pending final disposal of the Appeal, the sentence of the Applicant may very kindly be suspended, and he be released on bail."

9. The background leading to filing of the instant application has already been mentioned in the preceding paragraphs, hence need not be reproduced. As noted above, the applicant has been awarded three years Simple Imprisonment (S.I.) alongwith fine of Rs.100,000/- and to

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29 AUG 2023

Page 27 of
2023
Criminal Appeal No. 273 of 2023
Supreme Court
Islamabad

undergo six months S.I. in default thereof. In the criminal complaint filed by Election Commission of Pakistan under Section 190 of the Act the sentence awarded by the Trial Court to the applicant qualifies as a short sentence. Undoubtedly, the Hon'ble Supreme Court of Pakistan in The State v. Qaim Ali Shah (1992 SCMR 2192) has held that it is not necessary that in every case the sentence is to be suspended and the discretion vests with the High Court to grant or refuse bail. In the referred judgment the Hon'ble Supreme Court of Pakistan emphasized that the discretion must be, like all other discretions, exercised upon sound judicial principles. Keeping in view the referred dictum it is also noted and observed that the sentence of three years generally is regarded as a short sentence and where such is the case the discretion is exercised in favour of the applicant by way of suspension of sentence. Reference is made to Muhammad Khan v. Mst. Bakhat Jan (2018 YLR Note-129) wherein the Sindh High Court while referring Abdul Hamid v. Muhammad Abdullah (1999 SCMR 2589) suspended the sentence which was enhanced by the Appellate Court to five years on the basis that it is a short sentence. Sardar Muhammad Latif Khan Khosa, Senior ASC, was correct in pointing out that in terms of the dictum of the Hon'ble Supreme Court of Pakistan in Chairman NAB v. Mian Muhammad Nawaz Sharif (PLD 2019 SC 445) the Hon'ble Supreme Court of Pakistan has deprecated the practice of lengthy judgments in suspension matters. Similar observations were made by the Hon'ble Supreme Court of Pakistan in Soba Khan v. The State (2016 SCMR 1325). Even otherwise, the arguments raised by both

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29 AUG 2023

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Islamabad High Court
Islamabad

sides as to the jurisdiction and other issues involve deeper appreciation of the matter which at the stage of suspension is not warranted, especially, where the sentence is a short one, hence though lengthy arguments were address by the parties such questions are not decided and are left to be decided at the stage when the appeal is taken up for adjudication. As noted above, the sentence involved in the instant matter is short, hence we feel that the applicant is entitled to the suspension of sentence and be released on bail.

10. For the above reasons, the instant application is allowed and the sentence awarded by the Trial Court vide judgment dated 05.08.2023 is suspended; consequently, the applicant is ordered to be released on bail in the instant matter subject to furnishing bail bonds in the sum of Rs.100,000/- with one surety in the like amount to the satisfaction the Deputy Registrar (Judicial) of this Court.

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29 AUG 2023

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(TARIQ MEHMOOD JAHANGIRI)
JUDGE

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(CHIEF JUSTICE)