

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD**

Constitutional Petition No.D-1109 of 2023
Constitutional Petition No.D-1113 of 2023
Constitutional Petition No.D-1115 of 2023

Mr. Rao Faisal Ali, advocate for the petitioner in C.P. No. D-1109/2023.

M/s Shakeel Zai and Irshad Ahmed Ansari, advocates for petitioners in C.P. Nos.D-1113/2023 and 1115/2023.

Mr. Allah Bachayo Soomro, Additional Advocate General Sindh along with ASP Rehmani Shaikh on behalf of SSP Central Prison, Mirpurkhas, Inspector Manzoor Ali on behalf of SSP Hyderabad and SIP Abdul Hakeem, Police Station Tando Adam City on behalf of SSP Sanghar.

Date of hearing: 01.08.2023

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KHADIM HUSSAIN TUNIO, J- These petitions, identical on facts, involve the detention of (1) Farooq Jamil Durrani, husband of petitioner Adeela Gul and father of Abdul Sami Khan (C.P 1109/2023), (2) Jawaid Zai (Javed Zaheer), brother of petitioner Abid Zai (C.P 1113/2023) and (3) Akbar Shaikh, son of petitioner Muhammad Akmal Shaikh (C.P 1115/2023) under S. 3(1) of the Sindh Maintenance of Public Order Ordinance, 1960 for a period of thirty (30) days. Three separate orders were passed by the Home Department, Government of Sindh on 13.07.2023 ordering the detention of Farooq Jamil Durrani, Jawaid Zai (Javed Zaheer) and Akbar Shaikh who for the sake of brevity will now be called the detainees.

2. All three of these detainees have one thing in common, it was observed by the Home Department that all three of them were involved in participating in unlawful protests and promoting anti-State propaganda. Comments were called from the relevant officials all of whom did nothing but shift the blame on one another or altogether absolve themselves of any responsibility. Jawaid Zai is said to be affiliated with Muttahida Qaumi Movement (MQM) London and was

involved in "*objectionable activities*" as per comments filed by respondent No. 4/SSP Hyderabad. Farooq Jamil is admittedly not politically affiliated, but has held the position of Chairman, Municipal Committee Mirpurkhas. Akbar Shaikh also allegedly does not claim any political affiliation. The petitioners herein, through the instant constitutional petition, seek an appropriate writ declaring the orders dated 13.07.2023 involving the detainees as illegal and nullity in the eyes of law.

3. Learned counsel for the petitioners challenging the detention jointly made oral submissions before this Court while contending that the Sindh Maintenance of Public Order Ordinance, 1960 has time and again been used by rival political parties to harass their opponents and detain them on baseless grounds and that the rights and liberties guaranteed by the Constitution have been infringed by the Government of Sindh in using Sindh Maintenance of Public Order Ordinance, 1960 maliciously. They also argued that nothing has been brought on record against the detainees nor have they been allowed to meet their families or seek legal representation and all the petitioners apprehend serious risks to the life of the detainees.

The background

4. In December 1960 Government on the instructions of the then President Muhammad Ayub Khan promulgated the West Pakistan Maintenance of Public Order, Ordinance 1960 (*hereafter referred to as M.P.O*) to consolidate and amend laws related to preventive detention of persons and control of publications for the reason of safety, public interest and maintenance of public order.¹ When such an activity takes place, the provincial Government or the person authorized on its behalf, has ample mandate in this regard to take action or pass an order under section 3, M.P.O.

5. These petitions and detentions stem from the nationwide protests in the month of May 2023 over the arrest of former Pakistani Prime Minister and politician Imran Khan from the Islamabad High Court and then further political rivalry over consensus on population which resulted in hundreds of people being picked off the streets under the garb of preventive detention. The political unrest is surely one that showcased extreme levels of mischief with damage to properties, both belonging to the state and to the general public, causing immeasurable loss going up in the billions. In, what can only appropriately be termed

¹ W.P. Ordinance No. XXXI of 1960

as, a state of chaos the Government thought it fit to launch this wave of detentions under the M.P.O. which has remained a controversial piece of legislature often used over the years to serve bona fide and mala fide purposes alike. The detainees in these petitioners were the victims of this move by the Government which led to their arrests from their places of abode, public humiliation and then facing an arrest procedure akin to kidnapping. The Additional Advocate General, to the extent of detainee Jawaid Zai while referring to the written statement filed on behalf of SSP Hyderabad stated that he was affiliated with MQM-London Group and was seen vandalizing walls by chalking them. Not one official respondent has been able to provide as much as a picture of what was chalked on these walls by Jawaid Zai. As for Farooq Jamil Durrani and Akbar Shaikh, nothing overt was attributed to them even from the comments filed by the official respondents besides the stereotypical orders passed by the Home Secretary Sindh. M.P.O. applies, squarely, to cases where an activity is prejudicial to public peace, an activity performed in deviation thereof would not attract the provisions of M.P.O. and without proving the same or satisfying themselves of it², the Home Secretary could not have blindly acted on the recommendation alone. M.P.O. provides for **preventive detention** such that action is taken against an individual who is perceived to disturb the peace. This exercise can never be satisfactorily complied with until it is proved by the detaining authority that the detention was necessary and that the delinquent person, for whom detention is sought, was acting in a manner that was otherwise prejudicial to the integrity, defence and security of Islamic Republic of Pakistan.³

Article 9 – life and liberty

6. Everyone has the right to liberty and security of person and no one is to be deprived of this right save in cases where they are either charged of a criminal offence or wrongdoing or where they pose a serious threat to the integrity of Pakistan. Even then, in times of distress a government action is not shielded merely on the ground of national security or necessity.⁴ This Court cannot abdicate its responsibility as the guardian of fundamental rights accorded to every citizen of Pakistan. The act of the Home Secretary in issuing the detention orders is nothing less than a direct infringement of the right of liberty of the detainees and in

² Mrs. Arshad Ali Khan v. Government of Punjab, 1994 SCMR 1532

³ Arbab Akbar Add v. Government of Sindh, PLD 2005 Karachi 538

⁴ See *Korematsu v United States* 584 F Supp 1406 (1984); para 21 where Patej, J. observed that national security must not be used to protect governmental actions from close scrutiny and accountability.

the absence of any objective reasoning, it is illegal. No one can be deprived of his right of liberty based on mere presumptions unless cogent material and proof is available against the person sought to be detained. Any order lacking any such material would be nothing, less than, a nullity in law.

Requirements for preventive detention

7. For an order of preventive detention to be deemed lawful, it is incumbent upon the detaining authority to ensure that the material available before it is sufficient to a degree where a reasonable person would be satisfied of the necessity of such detention; mandating that the approach of the detaining authority be objective and not subjective.⁵ Next, it is important for the detaining authority to satisfy itself that every single reason provided for the detention is such that a reasonable person would be satisfied of the necessity of such detention and even if a single one is left unproven, it would invalidate the whole order.⁶ A perusal of the detention orders passed by the Home Secretary Sindh dated 13.07.2023 show identical grounds for detention for each of the three detainees; (i) instigating and provoking public to block roadways and (ii) organizing sit-ins. No proof regarding either of these grounds has been brought forward and even if the first ground is taken on its face value to be true, the second ground still requires strict proof such as the time, date and place of these sit-ins; none of that has been presented before this Court. Lastly, when this order comes before the Court for review, the Court needs to satisfy itself that the grounds as alleged are factual, not just a show put up by the detaining authority and that the act of the detaining authority, after complete scrutiny, was lawful.⁷

8. A prudent perusal of the above inadvertently proves that the detention orders passed by the Home Secretary is bad in law and not maintainable on every single count. Proper recourse is and was available to the Government at the time in the shape of the provisions of S. 127 to 132 Cr.PC rather it chose to, in a slipshod manner, curtail the liberty of individuals on the basis of negligible evidence. Umpteen times have the Courts deprecated such infringements of fundamental rights and

⁵ See Government of West Pakistan v. Haider Bux Jatoi, PLD 1969 SC 210.

⁶ Gawyer C.J. in Keshov Talpada v. Emperor, AIR 1943 FC 1 observed that if a detaining authority gives four reasons for detaining a man without distinguishing between them, and any two or three of the reasons are held to be bad, it can never be certain to what extent the bad reasons operated on the mind of the authority or whether the detention order would have been made at all if only one or two good reasons had been before them.

⁷ See Abdul Baqi Baloch v. Government of Pakistan, PLD 1968 SC 313

curtailments of liberty and the Government ought to pay heed if good governance and preservation of rule of law is desired by it.

9. Above are the reasons which necessitated us to allow the instant constitutional petitions, set aside the impugned orders dated 13.07.2023 passed by the Home Secretary, Government of Sindh and order the release of the three detainees namely Farooq Jamil Durrani, Jawaid Zai and Akbar Shaikh with immediate effect if they were not required in any other custody case vide short order dated 01.08.2023.

JUDGE

JUDGE

Date of reasons: 02.08.2023