Form No: HCJD/C-121.

ORDER SHEET.

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.

JUDICIAL DEPARTMENT.

Criminal Misc. No. 955-B of 2021

Ismail Ijaz
Versus
The State

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	28.09.2021.	Mr. Aamir Abbas Malik, Advocate for the petitioner. Mr. Farrukh Shahzad Dall, Assistant Attorney General. Syed M. Hasnain, Sub Inspector/I.O. FIA. Through this petition the petitioner, Ismail Ijaz son of Shaukat Ali, has applied for post arrest bail in case, FIR No.16, dated 28.08.2021 registered under sections 9, 10 and 11 of the Prevention of Electronic Crimes Act, 2016 **("PECA, 2016")** at Police Station FIA/CTW, Islamabad. 2. The facts briefly are that the petitioner is alleged to have used his twitter handle to tweet content that renders him liable for offences under section 9, 10 and 11 of PECA, 2016. The Federal Investigation Agency through Enquiry No. E-26/2021 came to the conclusion that the petitioner was involved in dissemination, glorification and propagation of a banned organization i.e. Tehreek Labbaik Pakistan (TLP) through his twitter handle

(URL http://twitter.com/malik98905047). A raiding team went to the petitioner's house and found that he was accessing his twitter account through his cell phone, which was being used for dissemination, glorification and propagation of TLP. The petitioner was then taken into custody along with cell phone.

3. Learned counsel for the petitioner contended that the petitioner had not tweeted any material that had been authored by him and had merely re-tweeted the content generated by others. He submitted that it could consequently not to be concluded that the petitioner had disseminated any information regarding activities of the proscribed organization with the intent to glorify such organization. He further submitted that the content tweeted did not reflect that he was glorifying the proscribed organization or ideology of the proscribed organization and there was nothing on record to establish that he re-tweeted the material in question with the intent to advance the objectives of a proscribed organization or otherwise advance inter-faith, sectarian or ethnic hatred and consequently no offence is made out under sections 9, 10 and 11 of PECA, 2016. He further submitted that

section 9 prescribes a sentence of imprisonment for upto seven years or fine, section 10 prescribes an imprisonment of upto fourteen years or fine and section 11 prescribes a punishment of imprisonment for upto seven years or fine. And that as the fine is provided as an alternative punishment in all three offences that the petitioner is alleged to be liable for, the lesser punishment would need to be considered for purposes of bail and consequently the offences do not fall within the prohibitory clause of section 497(1) of Cr.P.C. He relied on ***Muhammad Hayat Khan Vs. The State and another*** ***(2019 PCr.LJ 472),*** ***Mustafa Ali Vs. The State*** ***(2014 PCr.LJ 1464),*** ***Asad Ullah Vs. The State*** ***(2012 YLR 2270),*** ***Haji Zahoor Ahmed Vs. The State*** ***(2013 YLR 2644),*** ***Haji Faqir Khan Vs. The State and another*** ***(2017 PCr.LJ 1017),*** ***Muhammad Tariq Ajmal Vs. The State*** ***(2021 PCr.LJ 40)*** ***and Professor Akhtar Khan Vs. The State*** ***(2021 P Cr.LJ 506).***

4. The learned Assistant Attorney General submitted that the forensic report in relation to cell phone had been generated which established that the petitioner had used his twitter handle and tweeted material glorifying

and propagating TLP, which was banned by notification dated 15.04.2021. He further submitted that offence under section 10 of PECA, 2016 fell within the prohibitory clause of section 497(1) of Cr.P.C. and bail could not be granted as a matter of right. He read through the tweets in question and submitted that the said tweet glorified Saad Hussain Rizvi, the head of TLP and also amounted to hate speech against public officials, including the institution of the judiciary and the petitioner was therefore not entitled to the concession of bail.

5. It has been held in a number of precedents that offences in relation to which fine has been prescribed as an alternative punishment, the lesser punishment is to be considered for grant of bail. While relying on ***Mustafa Ali Vs. The State (2014 PCr.LJ 1464)*** this Court in ***Muhammad Hayat Khan Vs. The State and another (2019 PCr.LJ 472)*** held that *"it is an established principle that for the purposes of grant of bail, the lesser sentence is taken into account."* The learned Peshawar High Court in ***Ameer Ullah Vs. the State (2012 PCr.LJ 1858)*** also held the following:

> *"7. It is remarked that when an offence is also punishable with fine or with both, accused shall be entitled to bail as of right because if at the trial he is only sentenced with fine, period as under trial prisoner due to refusal of bail shall amount to a case of double jeopardy."*

6. Sections 9, 10 and 11 of PECA, 2016, prescribe fine as an alternate punishment. It is for the trial court to determine, in the first instance, whether or not the accused is guilty of the offences he is charged with. In the event that the accused is found guilty after being tried, it is then for the trial court to determine at the sentencing stage whether in view of the facts and circumstances of the case, the accused is liable to be sent to jail or punished through imposition of fine. Even in the event that the trial court finds the accused guilty of the offences he is charged with, he might still be punished by imposition of fine as opposed to being sent to jail. In view of the discretion vested in the trial court for purposes of sentencing and the statute providing fine as an alternative to imprisonment as a punishment for the offences in question, any time that such accused spends behind bars would be in breach of his right to liberty guaranteed under Article 9 of the Constitution. In the

event that the accused is hauled up in prison pending trial, at which stage the presumption of innocence attaches to him, even if he is subsequently found guilty and punished by the trial court with fine, the state and the criminal justice system would have no means to recompense for the loss of liberty inflicted upon him.

7. The law related to bail and the meaning of the proviso of Section 497 of Cr.P.C. has been enumerated by the august Supreme Court. The legislature, while promulgating PECA, 2016, was aware of how the proviso to Section 497 of Cr.P.C., is construed by the courts in deciding questions of bail. The legislature is also expected to be aware of the law laid down by the Peshawar High Court in ***Ameer Ullah Vs. The State (2012 PCr.LJ 1858)***, ***Haji Faqir Khan Vs. The State and another (2017 PCr.LJ 1017)*** and ***Professor Akhtar Khan Vs. The State (2021 PCr.LJ 506)***, the Lahore High Court in ***Muhammad Mustaqeem Vs. The State (2004 YLR 68)***, ***Haji Zahoor Ahmed Vs. The State (2013 YLR 2644)*** and ***Muhammad Tariq Ajmal Vs. The State (2021 PCr.LJ 40)***, the Balochistan High Court in ***Mustafa Ali Vs. The State (2014***

PCr.LJ 1464) and this Court in ***Muhammad Hayat Khan Vs. The State and another (2019 PCr.LJ 472).*** In ***Muhammad Mustaqeem Vs. The State (2004 YLR 68)***, ***Haji Zahoor Ahmed Vs. The State (2013 YLR 2644)*** and ***Muhammad Tariq Ajmal Vs. The State (2021 PCr.LJ 40)*** the Lahore High Court, and in ***Haji Faqir Khan Vs. The State and another (2017 PCr.LJ 1017)*** the Peshawar High Court while adjudicating bail petitions in relation to offences under the Emigration Ordinance, 1979 held that where fine was provided as an alternative to jail term as punishment, the lesser punishment would be taken into account for purposes of bail and the offence would not be regarded as falling within the prohibitory clause. In ***Mustafa Ali Vs. The State (2014 PCr.LJ 1464)*** the Balochistan High Court rendered a similar opinion in relation to offences under the Electronic Transaction Ordinance, 2002, wherein fine was provided as an alternative punishment to imprisonment. The Islamabad High Court in ***Muhammad Hayat Khan Vs. The State and another (2019 PCr.LJ 472)*** and the Peshawar High Court in ***Professor Akhtar Khan Vs. The State (2021 PCr.LJ 506)***, while adjudicating bail petitions in

relation to offences under sections 9, 10 and 11 of the PECA, 2016, which provide for the punishment of fine as an alternative to imprisonment, held that the lesser punishment was to be taken into account for purposes of bail. In the event that the legislature intended that the offences defined under sections 9, 10 and 11 of PECA, 2016 are of such heinous nature that citizens accused of committing them are to be deprived of their liberty pending trial, it would not have provided fine as an alternative punishment to jail term, given that where fine is provided as an alternative punishment to imprisonment, courts consider the lesser sentence for purposes of grant of bail and determination of whether or not the offence falls within the prohibitory clause. In view of the above offences under sections 9, 10 and 11 of PECA, 2016 cannot be regarded as falling within the prohibitory clause of section 497 of Cr.P.C.

8. It is a settled principle that an accused is to be deemed innocent until proven guilty. The right to liberty and dignity is also protected under Articles 9 and 14 of the Constitution as is the right to a fair trial under Article 10-A. In the event that after a fair trial

the accused are found to be innocent, there is no mechanism to offer restitution for their loss of liberty pending their trial. It was held by the august Supreme Court that bail cannot be denied as a punishment pending trial in ***Manzoor and 4 others vs. The State*** ***(PLD 1972 SC 81)*** in the following terms:

> *"It is important to remember that bail is not to be withheld as a punishment. There is no legal or moral compulsion to keep people in jail merely on the allegation that they have committed offences punishable with death or transportation, unless reasonable grounds appear to exist to disclose their complicity. The ultimate conviction and incarceration of a guilty person can repair the wrong caused by a mistaken relief of interim bail granted to him, but no satisfactory reparation can be offered to an innocent man for his unjustified incarceration at any stage of the case albeit his acquittal in the long run."*

9. In view of the facts of the case, the State has failed to point out the existence of any material that reflects that the petitioner has been involved in glorification of proscribed organization since 15.04.2021, when the TLP was declared a proscribed organization, or which reflects that he was involved in advancing the objectives of TLP as an organization. Given that the offending tweets which form the basis of the FIR are

actually re-tweets by the petitioner, it cannot be concluded without further inquiry that the petitioner possessed the necessary intent (*i.e. mens rea*) to glorify a proscribed organization or advance the objectives of a proscribed organization.

10. Thus, in any event, the question of the petitioner's intent, which forms an essential component of the offences he has been charged with, in relation to his action of re-tweeting certain tweets is one of further inquiry. The instant petition is therefore **allowed** and the petitioner is admitted to bail, subject to furnishing bail bonds in the sum of Rs.50,000/- (Rupees Fifty Thousand) with one local surety in like amount to the satisfaction of the learned trial Court.

11. Needless to mention that the observations recorded in the instant petition are based on tentative assessment, which ought not prejudice the proceedings before the learned trial court.

(BABAR SATTAR)
JUDGE

Approved for reporting.

Saeed