JUDGMENT-SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

W.P. No. 2829 of 2021

The State through Advocate General (ICT), Islamabad.

Versus

The learned Judicial Magistrate (West), Islamabad, etc.

Date of Hearing	:	**15.09.2022.**
Petitioner by	:	Mr. Jameel Fayyaz Rajpoot, Advocate with Khalid Awan, S.I, Imtiaz & Talha, Assistant Sub-Inspectors.
Respondent by	:	Mr. Umar Ali Satti, Advocate.

ARBAB MUHAMMAD TAHIR, J. The listed writ petition as well as writ petitions No. *2830, 2841, 2842, 2831 & 2843 of 2021* entail common question of law, facts besides the parties, therefore, being decided through this single order.

2. The respondents namely Mobeen Ali, Ali Khan Khattak and Ramesh Javed Bhatti were booked by the police of Police Station Aabpara, Islamabad in following cases:-

i. **Mobeen Ali**
FIR No. 373 dated 08.07.2021 u/s 13,20,65 AO.
FIR No. 371 dated 08.07.2021 u/s 337 H(ii)/188 PPC

ii. **Ali Khan Khattak**
FIR No. 372 dated 08.07.2021 u/s 13,20,65 AO.
FIR No. 375 dated 08.07.2021 u/s 337 H(ii)/188 PPC

iii. **Ramesh Javed Bhatti**
FIR No. 375 dated 08.07.2021 u/s 13 AO.
FIR No. 374 dated 08.07.2021 u/s 337 H(ii)/188 PPC

3. The subject FIRs were registered against the respondents with the allegations of **making aerial firing in disobedience to order duly promulgated by public servant, putting the human lives and properties of the general public in danger** and keeping in their possession illicit arm. The learned Judicial Magistrate vide separate orders of even date i.e. 09.07.2021 discharged the respondents in the referred cases. The orders whereby they were discharged in cases registered under section 13 of the Arms Ordinance, 1965 read as under:-

In case of respondent Mobeen Ali
"it is a request for judicial custody of accused. However, he has been discharged today for the main FIR case, further there is no description/details of recovered pistol in the FIR on in the recovery memo, so no sufficient material existed to remand accused to judicial custody, so he is discharged from the case. Be set at liberty if not needed in any other case."

In case of respondent Ali Khan Khattak
"it is a request for judicial custody of accused. However, in FIR or recovery memo no details have been provided of the recovered pistol nor the same is produced.

Further there is a license of .30 bore pistol in the name of accused, hence, in view of deficient material; he is discharged from the case. Be set at liberty if not needed in any other case."

In case of respondent Ramesh Javed Bhatti,
"Sufficient details of recovered pistol neither mentioned in the FIR nor in the recovery memo, not the pistol has been produced. Hence due to deficient material accused is discharged. Be set at liberty if not needed in any other case."

4. The discharge orders of the respondents in FIRs registered under section 337 H (ii) and 188 PPC read as under:-

> ***In case of respondent Mobeen Ali***
> *"It reflects that FIR is not registered by a public servant, thus embargo of section 195 bars the offence under section 188 PPC hence same is struck down.*
> *On query, video has been summoned through USB watched in open Court but nothing incriminating could be noted against accused except past implication on which is already under trial. Thus accused is discharged from the case, due to deficient material. He be set at liberty if not involved in any other case."*
>
> ***In case of respondent Ali Khan Khattak***
> *"Offence under section 188 PPC not made out as the public servant is not complainant.*
> *Further, as per video, watched in the Court, nothing is against the accused. So on account of deficient material, accused is discharged. Be set at liberty if not involved in any other case."*
>
> ***In case of respondent Ramesh Javed Bhatti,***
>
> *"Offence under section 188 PPC did not attract as FIR has not been registered by public servant.*
> *Further, video watched in the Court is also not incriminating. Hence accused due to deficient material is discharged from the case. He be set at liberty if not involved in any other case."*

5. Being dissatisfied with the orders ibid, the State through the learned Advocate General ICT, filed the instant writ petitions for which due audience has been given to the learned State Counsel and learned counsel for respondents. According to the learned State Counsel sufficient incriminating material is available on record against the respondents; that the Notification under section 144 Cr.P.C

regarding ban on aerial firing by the District Magistrate ICT, was in field and that a video clip viral on social media was also taken in possession, therefore, impugned orders are liable to set-aside.

6. On the other hand, learned counsel for respondents argued that the learned Judicial Magistrate after taking into consideration the material collected by the police, discharged the respondents due to deficient material, therefore, petitions are liable to be set aside.

7. Heard, record perused.

8. On the subject of ***"discharge"***, reliance is placed upon **"Ashiq Hussain v. Session Judge Lodhran" (PLD 2001 Lhr 271),** wherein it has been held that:-

> *"For facility of cognition and reference the above discussion is summed up with the following resume and conclusions:*
>
> *(i) The concept of discharge is relatable only to custody of an accused person in a criminal case and it has no relevance to anything else during an investigation or a trial.*
>
> *(ii) The Investigating Officer of a criminal case may discharge an accused person under section 63 of the Code of Criminal Procedure and release him from custody during the investigation on executing a personal bond regarding his appearance before the Investigating Officer or a Magistrate whenever required to do so during the investigation. Likewise under the same provision of law an accused person may be discharge from custody during the investigation either on bail or under the special order of a Magistrate.*

(iii) Upon receipt of the police report under subsection (3) of section 173 of the Code of Criminal Procedure a Magistrate may discharge an accused person of his bond if such an accused person has already been released upon executing a bond.

(iv) There is a difference between discharge of an accused person by an Investigating Officer on a bond or on bail or under the special order of a Magistrate under section 63 of the Code of Criminal Procedure and discharge of such an accused person of his bond by a Magistrate under subsection (3) of section 173 of the Code of Criminal Procedure as in the former case the accused person is released on the condition of executing a bond whereas in the latter case he is released of his bond making his release unconditional and unfettered for the time being.

(v) ***Discharge of an accused person does not amount to smothering of the investigation qua him, cancellation of the case against him, termination of his prosecution or his acquittal.***

(vi) ***A discharged accused person can always be associated by the police with the investigation of the given criminal case at any subsequent stage during the investigation without obtaining any permission from the Magistrate discharging the said accused person as long as that accused person is not to be taken into custody during such' subsequent investigation.***

(vii) If after his having been discharged by a Magistrate the police needs to arrest an accused person during any subsequent stage of the investigation then a formal permission from the Magistrate is necessary for the purpose.

(viii) Discharge of an accused person has nothing to do with the prospects of such an accused

person ultimately facing a trial or not as his discharge is not from the case but only on or of his bond.

(ix) Whether an accused person had been discharged or not and whether the police had opined about his guilt or not in its report under "section 173 of the Code of Criminal Procedure are factors which are irrelevant to the issues whether cognizance of the offence is be taken or not and whether such art accused person is to be summoned or not to face a trial because such decisions are to be made by the Magistrate taking cognizance of the offence and the trial Court on the basis of the material collected during the investigation and the attending circumstances of the case and not on the basis of any opinion formed by the police on the basis of such material.

(x) Discharge of an accused person by a Magistrate is not possible after taking of cognizance of the case by the trial Court.

(xi) An order regarding discharge or otherwise of an accused person lies within the competence of a Magistrate having jurisdiction to take cognizance of the offence and it has no relevance to the question as to which Court is to ultimately try the offence in question unless a special statute provides otherwise specifically.

(xii) An order regarding discharge of art accused person is an administrative and not a judicial order.

(xiii) An order regarding discharge is essentially a discretionary order which may not ordinarily be interfered with by a higher forum unless strong and compelling reasons exist for such interference."

9. The principles laid down ibid guide to observe that the "*discharge*" is relatable exclusively to custody of an accused in a criminal case and nothing else during investigation or

trial. The authority in terms of section 63 Cr.P.C can be exercised by the Investigating Officer and by the Magistrate as well. The discharge of an accused person does not amount to halt the process of investigation, cancellation of the case and likewise termination of the prosecution or acquittal. Under the principle, a discharged accused can always be associated by the police with the investigation of the given criminal case at any subsequent stage during the investigation and in case of a discharge by the Magistrate, in case of need to cause arrest of an accused at subsequent stage during the investigation, formal permission from the Magistrate is necessary.

10. Section 195 (1) (a) the Code of Criminal Procedure, 1898 (‘**the Code’**) stipulates that no Court shall take cognizance of any offence punishable under sections 172 to 188 of the Pakistan Penal Code, except on the complaint in writing of the public servant concerned or of some other police servant to whom he is subordinate. The provision does not bestow authority to a police officer to register an FIR for alleged violation of section 144 Cr.P.C unless a complaint in writing made by the authority in terms of section 195 (1) (a) Cr.P.C ibid. The learned State Counsel remained unable to produce any complaint by the authority in the case at hand for the registration of FIRs against the respondents.

11. The aspect of making alleged aerial firing by the respondents and keeping in possession illicit arms were also taken into consideration and on being found the same deficient, proceeded to discharge the respondents.

12. In view of above, on examination of the material placed on record in the light of relevant provisions, the impugned order does not suffer from any jurisdictional defect. Consequently instant writ petition along with listed petitions are **dismissed**.

(ARBAB MUHAMMAD TAHIR)
JUDGE

Announced in an open Court on ___09.2022

JUDGE

//*Kamran***//****