Form No: HCJD/C-121

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
(JUDICIAL DEPARTMENT)

W.P. No.1639-2023

Farrukh Jamal Afridi

Versus

Federation of Pakistan, through Secretary Ministry of Interior
& 4 others

S. No. of order/ proceedings	Date of order/ proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	02.06.2023	Mr Sher Afzal Khan Marwat, Mr Osama Tariq, Advocates for petitioner. Mian Zain ul Abdeen Qureshi, State Counsel. Mr Tahir Siddique Shah, Deputy Superintendent, Central Prison, Rawalpindi. Mr Nasir Manzoor, SI/SHO, P.S. Margalla, Islamabad. Mr Muhammad Ishaq, Inspector, ICT Police.

Arbab Muhammad Tahir, J.- Through this consolidated order, I shall dispose-of following petitions as common questions of law and facts are involved.-

(i). W.P. No.1639/2023 "Farrukh Jamal Afridi v. Federation of Pakistan through Secretary, Ministry of Interior & 05 others
(ii). W.P. No.1681/2023 "Shehryar Afridi v. Federation of Pakistan through Secretary Ministry of Interior & 5 others"
(iii). W.P. No.1775/2023 "Shehryar Afridi v. Chief Commissioner, Islamabad & another"
(iv). Crl. Org. No.149/2023 "Farrukh Jamal Afridi v. Dr Akbar Nasir Khan, Inspector General Islamabad & 2 others"

2. Succinctly, the facts are that the officials of Police Station *Margalla*, Islamabad raided the house of *Shehryar Afridi*, former Interior Minister, on 16.05.2023 at about 02:30 a.m. pursuant to *rapat* No.02/38. Perusal of *rapat*

No.02/38 shows that *Shehryar Afridi* and his spouse *Rabia Shahryar Afridi* were taken into custody for the purposes of detention under section 16 of the Maintenance of Public Order Ordinance, 1960 (*"MPO"*). The mobile phone of the petitioner (Shahryar Afridi) was also taken into possession by the officials of Police Station Margalla, through recovery memo. It has been noted in the *rapat* that request will be made to the Deputy Commissioner, Islamabad for detention of the named detenus for a period of 90 days. The request of incharge Police Station Margalla and order of the District Magistrate for detention of the arrested persons was pursuant to a special report wherein it was alleged that they alongwith other persons were "found" involved in political instability, violent activities after the arrest of their party leader and spreading hatred against the armed forces.

3. The petitioner, who is brother of *Shehryar Afridi,* filed a petition under section 491 of the Code of Criminal Procedure, 1898 (*Cr.P.C.*) before the learned Additional Sessions Judge on 16.05.2023. On the same day, Bailiff was appointed to inspect the premises of Police Station *Margalla.* However, the Bailiff reported that *Shehryar Afridi* and his spouse were detained pursuant to orders issued by the District Magistrate under section 16 of MPO, therefore, the petition was dismissed by the learned Additional Sessions Judge.

4. W.P. No.1639/2023 & W.P. No.1681/2023 were filed by the petitioner assailing their detention merely on the basis of *rapat* No.02/38. It has been asserted that without a search warrant and detention order competently issued by the District Magistrate under the MPO, the arrest of the petitioners was illegal, without lawful authority and excess of jurisdiction by the Incharge Police Station Margalla, Islamabad. This Court vide order, dated 17.05.2023 directed respondents No.2 to 5 to appear in person and produce Mst.

Rabia Shahryar Afridi (detenu). On 18.05.2023, Inspector General of Police, Islamabad and Deputy Commissioner, Islamabad appeared in person. They conceded that no criminal case was registered against *Mst. Rabia Shahryar Afridi* and that no other complaint has ever been received against her. In the given circumstances, this Court vide order, dated 18.05.2023 held that the detention order issued under the MPO against *Mst. Rabia Shahryar Afridi* was legally not sustainable and was, therefore, set aside and she was set free. However, the respondents were directed to file a report to the extent of *Mr Shahryar Afridi.*

5. W.P. No.1775/2023 has been filed by the petitioner, *Shehryar Afridi*, seeking directions to the respondents i.e. Chief Commissioner, Islamabad and the Superintendent Central Prison, Rawalpindi for provision of better class facilities under the rules and constitution of medical board for his medical examination and treatment. Pursuant to notice, the Superintendent Central Prison, Rawalpindi filed report stating that better class facilities are provided pursuant to order of the Government or the detaining authority and that his application, dated 31.05.2023, has duly been forwarded to the concerned authorities for appropriate orders. It was further explained that the doctors are providing medical facilities to the petitioner in the prison premises.

6. Through Crl. Org. No.149/2023, the petitioner, Farrukh Jamal Afridi, seeks initiation of proceedings under the Contempt of Court Ordinance, 2003 for allegedly violating order, dated 29.05.2023, passed in W.P. No.1639/2023.

7. Pursuant to notices, the respondents filed their written reports. The report submitted on behalf of the

Islamabad Capital Territory Police reiterated the facts narrated in *rapat* No.02/38. The Superintendent, Central Prison, Rawalpindi submitted reports wherein detail of the medical treatment given to *Shehryar Afridi*, his meetings with family members on 01.06.2023 pursuant to order, dated 1.06.2023 in W.P. No.1775/2023 passed by this Court have been mentioned.

8. It was asserted by the petitioner, *Shehryar Afridi*, that he has been confined in death cell in the prison and that his application for better class facilities was deliberately kept pending. To this extent the Superintendent Central Prison, Rawalpindi responded in his report as follows.-

> *"It is submitted that detenue Mr Shehryar Afridi s/o Haji Nadir Shah Afridi was admitted in this Jail on 16.05.2023 by orders of the District Magistrate ICT Islamabad vide order No.6(43)-RDM/2023/815 dated 16.05.2023 in u/s 3(1) of the West Pakistan Maintenance of Public Order, Ordinance 1960, for the period of 15 days from the date of his entrance at Central Jail Rawalpindi (Annexure-A). Moreover, he is not confined in death cells, he has been confined in a cell of security ward with separate enclosure due to security reasons."*
>
> *"Better Class facilities are extended to detenues as per rule No.4(2) of Punjab Public Dentenue Rules 1979, either by the detaining authority or the Government and the undersigned is not competent to award better class facilities to any prisoner."*
>
> *"That, as submitted above this office has not recdeived any written request from the petitioner for the provision of better class facilities till 30.05.2023. On receipt of application the same was sent to the relevant authority."*

9. Heard. Record perused.

10. The preliminary question that has emerged from the facts and circumstances of the case in hand is, whether *Shahryar Afridi* and his spouse *Mst. Rabia Shahryar Afrid*

(*they both shall hereinafter be referred to as* ***"Petitioners"***) could have been legally arrested without any valid detention order. Bare perusal of *rapat* No.2/38, P.S. *Margalla,* Islamabad shows that the Petitioners were not taken into custody in any criminal case already registered at P.S. *Margalla*, Islamabad, rather it mentions that a request will be made to the Deputy Commissioner, Islamabad for their detention under the MPO. For the sake of convenience the relevant portion of *rapat* No.2/38 is reproduced below.-

آئندہ جناب DC اسلام آباد کو جملہ حالات واقعات مفصل تحریر کر کے زیر دفعہ 3MPO کے تحت 90ایام کے لئے نظر بند کرنے کی استدعا کی جائے گی۔

11. Bare perusal of the above reproduced portion of *rapat* No.2/38 clearly reflects that at the time of arrest of the Petitioners, no order of the Deputy Commissioner, Islamabad under the MPO was in the field. The report submitted on behalf of the Inspector General of Police, Islamabad shows that the petitioner (*Shahryar Afridi*) was involved in the commission of offences reported in FIR No.728/2022, dated 22.08.2022, P.S. Aabpara and FIR No.623/2023, dated **10.05.2023** P.S. Industrial Area, Islamabad. It is surprising that the Incharge Police Station, Margalla was unaware of the criminal cases already registered, particularly the one registered on 10.05.2023 and instead of arresting the petitioner in the subject FIRs, preferred to submit a report for preventive detention of the Petitioners. The Hon'ble Supreme Court in the case reported as 1994 SCMR 1532 titled *"Mrs. Arshad Ali Khan v. Government of the Punjab through Secretary, Home"* has held that when the detenu was accused of substantive offences under the penal law the preventive detention on the same allegation could not be justified in law. It has been further held that the preventive detention under section 3 of MPO only covers the cases of persons who act in a manner prejudicial to public safety or maintenance of public order. The District Magistrate and the

Incharge Police Station Margalla, instead of availing the other remedies i.e. arresting the petitioner (*Shahryar Afridi*) in the already registered criminal cases, registered on almost the same allegations, firstly arrested the Petitioners through rapat No.02/38 and then managed the issuance of the detention order under the MPO.

12. The petitioner (*Shahryar Afridi*) has been imprisoned in the Central Prison, Rawalpindi. He filed an application that he has been kept in death cell. The relevant portion of the report submitted by the Superintendent, reproduced above, shows that the petitioner has been detained in security ward in pursuance of rule No.03 of Punjab Public Detenue Rules, 1979 due to security reasons. However, the Superintendent failed to explain the reasons for such an exercise of discretion. Furthermore, the family members were not allowed to meet the petitioner and it was pursuant to the specific direction of this Court that on 01.06.2023, his meeting with family members was arranged. The facts and circumstances of the case in hand and the acts and omissions of the Incharge Police Station Margalla, Islamabad, the District Magistrate, Islamabad and the Superintendent Central Prison, Rawalpindi are, prima facie, inter-linked and raise doubts as to their bonafides. The omission of the District Magistrate to classify the detenu in terms of Punjab Public Detenue Rules, 1979, the arbitrary exercise of authority by the Superintendent Central Prison to keep the petitioner in security ward without any justification, his refusal to handover custody to Islamabad Police pursuant to production order issued by the learned Judicial Magistrate in case FIR No.626/2023 (623), P.S. Indutrial Area (*as mentioned by the Incharge Police Station, Margalla in his report*), the issuance of detention order under the MPO by the District Magistrate Islamabad without recourse to other legal remedies i.e. causing arrest in the already registered criminal cases and the instrumental role of Incharge Police

Station Margalla, are sufficient to hold that all these acts and omissions are based on malafide and for extraneous considerations.

13. The petitioner is presently in custody and two separate FIRs have been registered against him within the jurisdiction of this Court. The police officials omitted to investigate the petitioner (*Shahryar Afridi*) in the said criminal cases. He was taken into custody in Islamabad and committed to prison under the orders of the District Magistrate, Islamabad. The police officials waited and are still waiting for termination of the terms of preventive detention of the petitioner. The report submitted by SHO, P.S. Margalla, Islamabad shows that the Superintendent Central Prison, Rawalpindi refused to hand over custody of the petitioner on the ground that he is now in preventive detention under the MPO pursuant to orders of the Deputy Commissioner, Rawalpindi. Insofar as the question of investigation in the already registered criminal cases is concerned, the detention under the MPO is not a bar in the way of investigations in the already registered criminal cases. The detention under the MPO is merely preventive measure to stop the detenu from disturbing the public order. The detenue if handed over to the police for investigation in an already registered criminal cases, in no way serves an order for release of the detenu from preventive detention, rather serves the ends of justice.

14. The learned High Court of Balochistan in the case titled *"Gen. (R) Syed Pervez Musharraf v. The State and another"* [PLD 2014 Balochistan 33] has held as follows.-

> *"That under section 167, Cr.P.C. an accused required in more than one criminal cases when arrested will be deemed to have been arrested in all the cases registered against him. There is no legal bar for interrogating an accused person with regard to the allegations against him in another*

> *case. It is rather desirable that when a person required or accused in more than one cases or where more than one F.I.Rs. are registered against him is arrested and remanded to physical custody, then he should be interrogated about the allegations against him in all the cases. Reference in this regard is made to the case of Razia Pervaiz v. Senior Superintendent of Police 1992 PCr.LJ 131."*

15. The learned Lahore High Court in the case titled *"Razia Pervez and another v. The Senior Superintendent of Police Multan and others"* [1992 P.Cr.LJ 131 Lahore] has held as follows.-

> *"…the arrest of the accused by the police and the provisions of section 167, Cr.P.C. pertaining to the remand of the accused person to police custody have been misused and old unwarranted police tactics of arresting the accused person repeatedly in more than one cases, have been played in the instant case, although the law does not authorise the police to arrest an accused required in more than one cases, in one case and to wait for his arrest in the other case till the expiry of the period of remand under section 167, Cr.P.C. or till he is released on bail in the first case. This commonly committed mischief not only defeats the object of section 167, Cr.P.C. of limiting the period of physical detention of an accused person to fifteen days but is obviously a joke with the powers of the Magistrate in the matter of remand and custody of an accused person."*

16. The petitioner has been subjected to preventive detention so as to block his potential ability to disturb the public order, however, the respondents deliberately kept suspended his arrest in the already registered criminal cases. In the case in hand, arrest of the accused in the already registered criminal case would have been sufficient. It is settled law that where express statutory power is conferred on a public functionary, it should not be pushed too far, for such conferment implies a restraint in operating that power, so as to exercise it justly and reasonably. Excessive use of lawful power is itself unlawful. Reliance is placed on *"Independent Newspapers Corporation Pvt. Ltd. and another versus Chairman, Fourth Wage Board and Implementation*

Tribunal for Newspaper Corporation Pvt. Ltd. and another" [1993 SCMR 1533]. The effect of the respondents' acts and omissions is that the (i) petitioner was initially arrested without a valid order (ii) then he was detained under the MPO (iii) his arrest in the criminal cases was kept suspended (iv) now jail authorities are refusing to hand over his custody to the Investigating Officer and waiting for expiry of the second detention order issued by the Deputy Commissioner, Rawalpindi, (v) the Islamabad Police is waiting to re-arrest the petitioner after his release from prison. In essence, what the executive authorities, prima facie, are trying to achieve is to curtail, at any cost, the liberty of the petitioner through preventive detention and that too in an arbitrary manner.

17. The purpose of preventive detention is limited i.e. to ensure public order. During preventive detention, handing over a person to the police for investigation in an already registered criminal case would in no way defeat the purpose of such detention. Article 10A of the Constitution guarantees fair trial and due process in respect of determination of a person's civil rights and obligations or in any criminal charge. The preventive detention under the MPO is subservient to the provisions of the Constitution. Laws cannot be used arbitrarily by public functionaries to defeat the fundamental rights of citizens. The acts and omissions of the respondents are, prima facie, designed to deprive the petitioner from his legal rights, which are otherwise available to every accused under the law when arrested in criminal cases.

18. In the case in hand, the Islamabad Police arrested the petitioner (*Shehryar Afridi*) but instead of investigating him in the criminal cases, requested the District Magistrate to detain him in preventive custody. The exercise of power and jurisdiction is arbitrary on part of the police officials and mechanical and without applying judicious mind on part of the District Magistrate, ICT. The Islamabad Police further

waited for expiry of the term of preventive detention of the petitioner (*Shehryar Afridi*) to seek his custody for investigation in the already registered criminal cases. This Court cannot turn a blind eye as to the conduct of the Incharge Police Station Margalla and the District Magistrate. They willfully used the law in arbitrary manner so as to subject the petitioner (*Shehryar Afridi*) to face unnecessary hardship, detention and acted in anticipation to deprive the petitioner from availing his legal remedies. The District Magistrate, ICT was aware of the social status of the petitioner (*Shehryar Afridi*), and yet deliberately omitted to classify in the detention order, the petitioner's entitlement to better facilities in prison.

19. For what has been discussed above, the instant petitions are allowed and disposed-of in the following terms.-

(i). The arrest of the Petitioners by the Incharge Police Station Margalla, Islamabad is hereby declared unlawful and *void.*

(ii). The detention orders issued by the District Magistrate, Islamabad under the MPO against the Petitioners was a result of arbitrary exercise of jurisdiction, excessive use of lawful authority and issued without applying judicious mind. The said detention orders, therefore, cannot be validated by this Court and are, therefore, declared unlawful and issued while excessively using his lawful authority by the District Magistrate, ICT.

(iii). The petitioner (*Shehryar Afridi*) shall be deemed to have been arrested in the criminal cases registered against him within the jurisdiction of this Court. Therefore, the Investigating Officer is directed to produce

him before the learned Judicial Magistrate at Islamabad vested with jurisdiction forthwith. The Superintendent Central Prison, Rawalpindi is directed to facilitate the Investigating Officer.

(iv). As observed during the proceedings of this case, due to non-mentioning of the classification, the detenus were exposed to unnecessary hardship in prison and the petitioner had to file a separate petition and miscellaneous application for provision of better class facilities. Henceforth, the District Magistrate shall classify in all the detention orders, the status and class entitlement of the detenus in the prison.

(v). The mobile phone taken into possession by the officials of Police Station Margalla, Islamabad through the recovery memo is directed to be handed over to the representative/wife of the petitioner forthwith.

(vi). The arbitrary exercise of authority on part of the District Magistrate, ICT and the Incharge Police Station Margalla, Islamabad is evident in the case in hand. Their conduct, as observed, is, therefore, deprecated. They have exposed themselves to legal consequences, *inter alia*, under the laws of discipline, at the option of the Petitioners, at the appropriate forums.

(vii). As fresh directions have been issued to the Islamabad Police and the Superintendent Central Prison, Rawalpindi for production of

the petitioner (*Shahryar Afridi*) before the competent court, therefore, Crl. Org. No.149/2023 is disposed-of. However, in case the petitioner is not produced before the court of competent jurisdiction at Islamabad till 07.06.2023, as directed above, the petition seeking initiation of proceedings under the Contempt of Court Ordinance shall stand revived and the respondents shall appear in person to explain as to why contempt proceedings may not be initiated against them for misleading this Court in order to hinder the course of justice.

(ARBAB MUHAMMAD TAHIR)
JUDGE

Luqman Khan/*