JUDGEMENT SHEET

IN THE ISLAMABADHIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No.3691/2023

Iftikhar Ali Haideri
Vs.
The State and others

PETITIONER BY:	Mr. Muhammad Bilal and Ch. Wajahat Ellahi, Advocates.
RESPONDENTS BY:	Mr. Ahmed Junaid, State Counsel. Mr. Abdul Manan Bhatti, Advocate for respondent No.4. Mr. Rukhsar Mehdi, SP, SIUS, Islamabad. Mr. Athar Khan, ASI, Police Station Industrial Area I-9, Islamabad
DATE OF DECISION:	18.03.2024.

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BABAR SATTAR, J.- The petitioner has impugned order dated 03.11.2023 pursuant to which the Judicial Magistrate while considering the request of police authorities to grant remand of the accused (i.e. respondent No. 4) charged under FIR No.1043 dated 16.08.2023 under Sections 392, 380, 457 of Pakistan Penal Code **("PPC")** was rejected and the accused was discharged in exercise of authority under Section 63 of the Code of Criminal Procedure, 1898 **("Cr.PC")**.

2. The learned counsel for the petitioner submitted that the accused had been charged with theft in a shop owned by the complainant. The accused had been nominated through a supplementary statement and there were witnesses, who had corroborated the account of the complainant, who claimed to have been robbed by the accused on the date of occurrence during which robbery the accused had also revealed that they had committed theft in the shop premises owned by the complainant. In view of such material and

eye witness account, the Magistrate ought not have exercised his administrative authority under Section 63 of Cr.PC to discharge the accused. But should have allowed the matter to proceed to trial so that the truth of the allegation in the complaint could be proved or disproved by affording the parties an opportunity to adduce evidence. He submitted, while relying on a judgment of the Lahore High Court in ***Iftikhar Ahmed vs. The State*** **(PLD 2020 Lahore 931)** that the power under Section 63 of Cr.PC could only be exercised after the police authorities had completed an investigation and produced a report for perusal of the Judicial Magistrate under Section 169 of Cr.PC read with Section 63 of Cr.PC.

3. The learned State Counsel adopted the arguments of the learned counsel for the petitioner. He submitted that in exercise of authority under Section 63 of Cr.PC, the Judicial Magistrate could not exercise his/her power such that it circumscribed the power of police authorities to conduct an investigation. He could only form an opinion after the conclusion of such investigation as to whether the accused were liable to be discharged on the basis of the police report in exercise of authority under Section 169 of Cr.PC.

4. The learned counsel for respondent No.4 submitted that the accused were not named in the FIR and the FIR was lodged on the basis of *mala fide*. A relative of the accused had filed an application with the police authorities to seek change of the Investigating Officer together with a request that the incident be inquired into by the Superintendent of Police (SP). Pursuant to such application, the SP inquired into the matter and came to the conclusion that the complainant, Iftikhar Ali Haideri, was an official of Capital Development Authority (CDA) and was abusing his authority against the accused to settle scores in relation to

an incident that had transpired in Sialkot, in which a relative of the accused had registered an FIR against the brother of the complainant. While investigating the complaint, the SP took note of FIR No 1043 along with the three other FIRs that had been lodged on the behest of the complainant, Iftikhar Ali Haideri. He submitted that the Judicial Magistrate took into account the fact that the CDR for the mobile phone of the accused reflected that the accused was in Sialkot at the time of the purported incident of theft and could not possibly be in Islamabad. It was due to lack of evidence against the accused together with the report of the SP that the Magistrate discharged the accused.

5. The judgments of the Supreme Court cited by the learned counsel for the petitioner and the learned State Counsel are not germane to the controversy at hand. The crux of the case law cited is that the Judicial Magistrate while exercising his administrative authority for purposes of Section 63 of Cr.PC cannot exercise it in an arbitrary manner. Further, where such authority is exercised in an arbitrary manner to deprive any party of its right to due process and to unduly interfere with the power of the police to undertake an investigation, it is for the High Court to exercise its extra-ordinary jurisdiction under Article 199 of the Constitution read together with Section 561-A of Cr.PC to correct the same.

6. The learned counsel for the petitioner has relied on ***Iftikhar Ahmed*** wherein it has been held that the power under Section 63 of Cr.PC can only be exercised by the Magistrate after the police report has been submitted for purposes of Section 169 of Cr.PC and a recommendation for discharge has been made, or else the remedy of bail will be rendered meaningless. This view has been considered and cast aside by a later decision of the Lahore High Court in ***Muzaffar***

Ahmed vs. The State **(2021 PCr.LJ 1393 Lahore)** where the various conflicting judgments have been considered and the law in relation to Section 63 of Cr.P.C has been clarified. The pillar judgment characterizing the nature of jurisdiction that the Magistrate exercises at the time of remand is ***Bahadur vs. The State*** **(PLD 1985 SC 62)**, wherein it was held that, *"though a magistrate in cancelling a registered criminal case is required to act judicially in that he has to act fairly, justly and honestly, a duty common to the exercise of all state powers, there is no lis before him, there is no duty to hear the parties, there is no decision given, no finality or irrevocability attaching to the order. The party is left free to institute a complaint on the same facts, and the same Magistrate does not even after passing such an order render himself functus officio. On the contrary he is quite competent to entertain and deal with such a complaint on material presented to him. These peculiarities establish beyond any doubt that in so concurring with a report submitted under section 173 Cr.PC. he does not function as a criminal Court. For that reason his order is not amenable to revisional jurisdiction under sections 435 to 439 Cr.PC."*

7. The most detailed judgment enumerating the manner in which the power of the Magistrate, while exercising his authority to allow the remand of an accused is to be exercised, is ***Ashiq Hussain v. Sessions Judge, Lodhran*** **(PLD 2001 Lahore 271)**. In the said judgment, after discussing the case law produced up until such point, the Lahore High Court summarized the law in relation to remand as follows:

> *(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 discharged 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 to be taken

or not and whether such an 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 an 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.

8. The law laid down by the Supreme Court in ***Bahadur*** was reiterated by the Supreme Court in ***Hidayatullah vs. The State*** **(2006 SCMR 1920)**, wherein it was held that, *"it is a settled principle of law that it is the discretion of the Magistrate concerned to pass order under section 63 of the Code of Criminal Procedure to discharge the accused persons. However, the discretion must be exercised by the concerned Magistrate justly, fairly and in case discharge order was passed by Magistrate mechanically without application of his independent mind to the facts of the case, blindfolded acceptance of a recommendation of the police in that regard, perversity of reasoning and adoption of a procedure which offends against the letter and spirit of the law relating to discharge, then High Court has ample jurisdiction to interfere and set aside such an order under section 561-A of Cr.P.C."*

9. The law as discussed above was not considered at length by the Lahore High Court in ***Iftikhar Ahmed***, that the petitioner relies on, wherein it was observed that the power under Section 63 of Cr.P.C must be exercised on the basis of the report produced by the police under Section 169 of Cr.PC. This opinion was then considered by the Lahore High Court in ***Muzzafar Ahmed*** and was found not to be in accordance with the law as settled in relation to Section 63 of Cr.P.C. The conflicting judgments on the question of scope of authority under Section 63 of Cr.P.C and whether such authority had to be exercised pursuant to a police report submitted under Section 169 of Cr.PC were cited and the Lahore High Court after discussing the case law held that, *"the power of the Magistrate to discharge an accused must be examined in the constitutional context of liberty, dignity, due process and fair trial. In Maqbool Ahmed v. Station House Officer, Police Station Changa Manga, District Kasur and another (1999 PCr.LJ 1198), this Court held that justice should be done even during investigation. The aforesaid power is in the nature of a check on malicious prosecution. If there is no incriminating material against an accused, he must not be detained."* It further held that, *"it is important to note that Rule 6, supra, distinguishes between the cases where the Magistrate has the jurisdiction to try the accused or send him for trial and those in which he does not have it. Nevertheless, it perspicuously states that an accused must be discharged without any loss of time if there is no cause for his further detention. There is nothing in Rule 6 which may require that the Magistrate can only exercise his power of discharge on a police report"*. The Lahore High Court concluded that, *"subject to Rule 6 of Volume-III Chapter 11 Part-B of the Rules and Orders of the Lahore High Court, the view that the Magistrate can discharge an accused even suo motu when*

he is produced before him for remand under section 167 Cr.P.C. must be preferred."

10. This Court agrees with the enunciation of law in ***Muzaffar Ahmad*** holding that the requirement of relying on a police report to be filed for purposes of Section 169 of Cr.PC cannot be read into Section 63 of Cr.PC. The text of Section 63 of Cr.PC prescribes no such requirement and interpreting Section 63 of Cr.PC such would amount to reading in a statutory requirement, that has not been prescribed by the legislature itself. It was held by the Supreme Court in ***Deputy Director Finance and Administration FATA vs. Dr. Lal Marjan*** **(2022 SCMR 566)** that, "*where the legislature has not provided something in the language of the law, the Court cannot travel beyond its jurisdiction and read something into the law as the same would be ultra vires the powers available to the Court under the Constitution and would constitute an order without jurisdiction*." It was held by a Division Bench of this Court in ***Nadeem Basit Khan vs. Director General, Intelligence Bureau, Islamabad*** **(2021 PLC (C.S) 931)**, that, "*the doctrine of casus omissus is well settled and courts cannot supply language that is not provided in a statute"*. (Also see *Dr. Zahid Javed vs. Dr. Tahir Riaz Chaudhry* (PLD 2016 SC 637) and *The Collector of Sales Tax vs. Messrs Super Asia Mohammad Din and sons* (2017 PTD 1756)).

11. A principle of statutory interpretation, other than the doctrine of casus omissus, relevant for the present purposes, is that provisions of penal statutes are to be construed strictly and in case multiple interpretations are possible, the construction most beneficial to an accused is to be preferred. It was held by the Supreme Court in ***Muhammad Ali vs. The State Bank of Pakistan*** **(1973 SCMR 140)** that, "*we are dealing here with a penal statute, the provisions of which*

must be interpreted strictly, and in case of any ambiguity or doubt arising from the construction, the benefit must go to the accused person". This principle was reiterated in ***The Collector of Customs vs. Messrs. Abdul Majid Khan*** **(1977 SCMR 371)** and most recently in ***Tahir Naqsh vs. The State*** **(PLD 2022 SC 385)** wherein it was re-emphasized that, *"the rule of interpretation has been evolved according to which a penal statute should be strictly construed in favour of the accused."* (Also see *Chairman Board of Intermediate and Secondary Education, Bahawalpur vs. Rizwan Rasheed* (2005 SCMR 728) and *Province of Punjab vs. Muhammad Rafiq* (PLD 2018 SC 178)).

12. The learned counsel for the petitioner and the learned State Counsel have not been able to bring into the attention of the Court any judgment of this Court or that of the Supreme Court holding that the submission of the police report after completion of the investigation is a pre-requisite for exercise of authority under Section 63 of Cr.PC. On the contrary, there are number of cases that have been decided by this Court, where the authority under Section 63 of Cr.PC has been exercised by the Judicial Magistrate at the stage of remand and this Court has considered the legality of such orders of discharge in view of the facts of the cases to determine whether such orders were just, fair and reasonable. In other words, in case where a Judicial Magistrate has exercised the authority under Section 63 of Cr.PC to discharge an accused when the police authorities seeking further remand of such accused, this Court exercises its judicial review powers to determine whether the order of remand is just, fair and reasonable and has been passed in a manner that seems to uphold the fundamental rights of the accused, including the right to liberty under Article 9 of the Constitution,

while not undermining the right of the complainant to fair trial or due process guaranteed by Article 10A of the Constitution.

13. The purpose of Section 63 of Cr.PC is to grant the Judicial Magistrate power of oversight over police authorities that are seeking to investigate the accused and ensure that the accused is not denied unreasonably his right to liberty guaranteed by Article 9 of the Constitution. In the event that the police authorities can place on record no material, which reflects that some offences made out against the accused needs to be investigated, the Judicial Magistrate cannot simply act as a post office and pass a ministerial order granting physical remand of the accused to police authorities. The purpose of requiring that an accused be presented before a Magistrate under Article 10 of the Constitution is to ensure that the Judicial Officer considers in view of the material brought before him whether there existed legitimate basis to intrude into the right of the accused to liberty guaranteed by Article 9 of the Constitution. Under the scheme for enforcement of fundamental rights as prescribed by the Constitution, it is for the judicature to confirm that the police powers of the State are not being exercised in a manner that deprives a person of his liberty except in accordance with law. It is due to such scheme that the institution of Judiciary is missing from the definition of the State as provided under Article 7 of the Constitution (in Part II of the Constitution that deals with Fundamental Rights and Principles of Policy).

14. The presentation of the accused before the Judicial Magistrate would serve no purpose if the Magistrate were to blindly remand the accused in the custody of police for up to a period of fifteen days (i.e. the maximum period for which physical remand is permissible). There is no reason why the fundamental right to liberty of an accused should be

denied to him on the basis of bald allegations in a complaint that takes the form of an FIR unless there is some incriminating material on the basis of which police authorities can satisfy the Judicial Magistrate that the accused is liable for an offence that requires his arrest for purposes of investigation. It is thus that Article 10 of the Constitution requires that where a person has been arrested he/she is to be produced before a Magistrate within a period of 24 hours of such arrest. The requirement of Article 10 is a substantive due process requirement of the Constitution. The purpose is to afford the Judiciary supervision over the exercise of the power of arrest within 24 hours of such arrest so that the Magistrate can satisfy himself/herself that the manner in which a person has been arrested does not amount to abuse of the police powers of the State. It is for purposes of exercising such oversight powers that Section 63 of Cr.PC then vests power in the Magistrate to discharge an accused where there is no incriminating material providing a reasonable basis to the police authorities to arrest such person. Article 10A guarantees the right of an accused to a fair trial and due process. Such right includes the right of a suspect or an accused to be presented before the Magistrate and for the police authorities that have exercised their power of arrest to satisfy such Magistrate that there exists reasonable basis backed by relevant material justifying the arrest and detention of the suspect/accused and curtailment of his right to liberty guaranteed by Article 9 of the Constitution.

15. There is no basis to interpret the scheme of the Constitution read together with provisions of the Cr.PC to conclude that once a person has been arrested and presented before the Magistrate he/she is to remain in custody, either by granting police authorities physical remand or by placing the detainee in judicial custody and ordering him

to be held in jail, pending the trial of such person. And that such accused can only be released from detention pending his trial in exercise of authority by the Court to grant bail under Section 497 of Cr.PC. The exercise of authority to grant bail before arrest or to grant bail after arrest is also meant to uphold the right of an individual to liberty and due process as guaranteed by Articles 9 and 10A of the Constitution. Where an accused is presented before the Magistrate and the Magistrate forms an opinion that there exists no incriminating material against the accused, there is no reason for the Magistrate to look the other way and wait for such accused to move an application for bail in order for such accused to be released from detention.

16. One of the purposes that Section 63 of Cr.PC serves is to ensure that police authorities do not exercise their powers to arrest the accused in an arbitrary fashion. The Supreme Court in ***Mst. Sughran Bibi vs. The State*** **(2018 PLD SC 595)** held that merely because an FIR has been registered does not mean that the police authorities are under an obligation to arrest the suspect. The decision of the police authorities to arrest the accused must be guided by material of an incriminating nature that establishes, *prima facie,* that the accused is wanted for an offence and that such charge is baked by some material implicating him in the matter. The law thus requires police authorities to produce an accused before the Magistrate and it has been left within the discretion of the Magistrate to consider the material presented before him to determine whether or not remand of the accused is to be granted to the police. During such process, if the Judicial Magistrate comes to a conclusion that there is absolutely no incriminating material connecting the accused with the offence that he has been charged with, denying such accused his liberty by placing him under judicial custody

pending filing of an application for grant of bail serves no purpose. Reading the provisions of Cr.PC to the contrary would mean that even on the basis of a false complaint, wherein an FIR has been registered, and there is absolutely no material implicating the accused, such accused must be denied his liberty and kept incarcerated till his bail is granted and he must suffer the inconvenience of a criminal trial till such time that either the police authorities themselves furnish a discharge report or the trial Court considers the acquittal of the accused under Section 249-A of Cr.PC.

17. The crux of the above discussion is that police powers are to be exercised by the State such that they are least restrictive when it comes to enjoyment of fundamental rights by citizens. Further, the process that unfolds after an arrest has been affected cannot be set up in a manner that the process itself becomes the punishment. If the principle that an accused is to be deemed innocent until proven guilty is to mean anything, every time that an accused is presented before a Magistrate or a Court at any stage in the processes under the Criminal Procedure Code, it is for the Magistrate/Court to ensure that the process is being carried out in a fair, just and reasonable manner and the right of the accused to liberty is not being curtailed except in accordance with law. It is in this context that the Lahore High Court has correctly expounded the law in ***Muzaffar Ahmad*** and held that, "*an accused can even be discharged suo motu in exercise of his [Magistrate's] authority under Section 63 of Cr.PC when such accused is produced for purposes of remand under Section 167 of Cr.PC*."

18. Section 63 of Cr.PC gives the Judicial Magistrate the power to pass a special order or discharge the accused where the material collected by police authorities up until such time is not such that

implicates the accused or justifies his arrest and/or continued detention. Such order of discharge doesn't prohibit the police from continuing the investigation and collecting further evidence against the person who has been discharged. It was held by a Divisional Bench of Balochistan High Court in ***Muhammad Khan Kurd vs. Arbab Muhammad Hashim*** **(PLD 2020 Balochistan 38)** that, *"the acquittal and discharge are two different terminologies and are diametrically not synonymous. The acquittal means to declare a "person accused of a crime to be innocent", while on the contrary discharge means "to release someone from custody" or allow someone to leave…"* Where a person has merely been discharged, he can be re-arrested subject to permission of the Court that has discharged the accused and the principle of double jeopardy is not attracted. The discharge of an accused does not suspend the investigation being undertaken by the police. All that the Magistrate holds by issuing an order of discharge is that at that material point in the investigation, there is not enough incriminating material implicating the suspect/accused thereby justifying the detention of such suspect/accused.

19. In view of the above, the Court is not impressed with the arguments of the learned counsel for the petitioner as well as the learned State Counsel that Section 63 of Cr.PC must be read along with Section 169 of Cr.PC. In view of the record produced before the Court, including the report of the SP stating that the complainant has lodged false FIRs, including FIR No.1043, which forms the subject-matter of the instant case and the finding of the Judicial Magistrate that at the time of alleged occurrence the accused was in Sialkot and not in Islamabad and could therefore not have been involved with the occurrence, this Court is not convinced that the impugned order is

unjust, unfair and unreasonable or otherwise qualifies as colorable exercise of the administrative authority vested in the Judicial Magistrate under Section 63 of Cr.PC. The petition is therefore without merit and is ***dismissed***.

(BABAR SATTAR)
JUDGE

Announced in the open Court on **05-04-2024**.

JUDGE

Approved for reporting.

A. Rahman Abbasi.