

**JUDGMENT SHEET
IN THE LAHORE HIGH COURT, LAHORE.
JUDICIAL DEPARTMENT**

Transfer Application No.10572-T of 2024

Mian Zaheer Abbas Rabbani ...Vs... The State, etc.

JUDGMENT

Date of hearing: 13.11.2024.

Petitioner by: Ch. Zulfiqar Ali Hargan, Advocate.

State by: Rana Ahsan Aziz, Additional Prosecutor General and
Ms. Maida Sobia, Deputy Prosecutor General.
Mr. Rafaqat Ali Dogar, Deputy Attorney General.
Mr. Waqas Umar, Assistant Advocate General.

Respondents By: Nemo.

Aalia Neelum, C.J.- The applicant filed an application under Section 526 Code of Criminal Procedure, 1898 (hereinafter referred to as "Cr.P.C.") for transfer of pre-arrest bail No.851-4/19-12-2023, titled "**Mian Zaheer Abbas Rabani versus The State**" whereby the petitioner has sought withdrawal of the pre-arrest bail No.851-4/19-12-2023 in case FIR. No.1386/2023, dated 16.12.2023, offences under Section 489-F PPC, registered at the police station, City Tandlianwala, District Faisalabad from the court of Mr. Muhammad Sajjad Hussain Khan, learned Additional Sessions Judge, Tandlianwala, District Faisalabad and its transfer to any other court of competent jurisdiction at Faisalabad or any other Districts/Tehsil Courts.

2. It was elicited from the arguments of the learned counsel for the applicant and the learned Additional Prosecutor General (hereinafter referred to as "APG") to have clarification whether, under section 528(1A) (1B) Cr.P.C., the learned Sessions Judge has the power to recall bail applications pending in the court of any learned Additional Sessions Judge

to another court in the same District or Tehsil. It was noticed that earlier, the Full Bench of this court (Comprising of three members) dealt with an identical matter, which was reported as **PLD 2020 Lahore 382 titled "Naveed Hussain versus The State, etc."** Then, the Honorable Chief Justice constituted a larger bench (Comprising four members), and after that, the case was heard at length. This is how the instant case comes up before a larger bench. The question before this larger bench is referred for the decision of whether a Sessions Judge has no power under section 528 of Cr.P.C. to transfer bail petitions from the court of an Additional Sessions Judge to some other competent court within his Sessions division under Section 528 Cr.P.C. We are required to answer this question.

3 The applicant has approached this court under Section 526 Cr.P.C. for the transfer of an anticipatory bail petition pending adjudication before the court of Mr. Muhammad Sajjad Hussain Khan, learned Additional Sessions Judge, Tandlianwala, District Faisalabad. Section 526 Cr.P.C. confers power on the High Court to transfer a case or appeal from one subordinate Criminal Court to any other Criminal Court of equal jurisdiction if it appears that it is expedient for the end of justice. The party is interested in transferring a case from one criminal court to another criminal court from one district to another and even in the same district. Section 526 Cr.P.C. is reproduced hereunder for ready reference: -

526. High Court may transfer case or itself try it:

(1) Whenever it is made to appear to the High Court:--

(a) that a fair and impartial inquiry or trial cannot be had in any Criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that a view of the, place in or near which any offence has been committed may be required for the satisfactory inquiry into a trial of the same, or

(d) that an order under this section will tend to the general convenience of the parties or witnesses, or

(e) that such an order is expedient for the ends of justice, or is required by any provision of this Code; it may order----

(i) that any offence be inquired into or tried by any Court not empowered under Sections 177 to 184 (both inclusive) but in other respects competent to inquire into or try such offence;

(ii) that any particular case or appeal; or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case or appeal be transferred to and tried before itself; or

(iv) that an accused person be sent for trial to itself or to a Court of Session.

(2) When the High Court withdraws for trial before itself any case from any Court, it shall, observe in such trial the same procedure which that Court would have observed if the case had not been so withdrawn.

(3) The High Court may act either on the report of the Lower Court, or on the application of a party interested, or on its own initiative.

(4) Every application for the exercise of the power conferred by this section shall be made by motion, which shall except when the applicant is the Advocate-General, be supported by affidavit or affirmation.

(5) When an accused person makes an application, under this section, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, if so ordered, pay any amount which the High Court may under this Section award by way of compensation to the person Opposing the application.

Notice to Public Prosecutor of application under this section. (6) Every accused person making any such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of grounds on which it is made, and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6-A) Where any application for the exercise of the power conferred by this section is dismissed, the High Court may if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of compensation to any person who has opposed the application such sum not exceeding five hundred rupees as it may consider proper in the circumstances of the case.

(7) Nothing in this section shall be deemed to affect any order made under Section 197.

(8) Adjournment on application under this section: If in any inquiry under Chapter VIII or any trial, the fact that any party intimates to the Court at any stage that he intends to make an application under this section shall not require the Court to adjourn the case, but the Court shall not pronounce its final judgment or order until the application has been finally disposed of by the High Court and, if the application is accepted by the High Court, the proceedings taken by the Court subsequent to the intimation made to it shall, at the option of the accused be held afresh.

(9) If, before the argument (if any), for the admission of an appeal begins, or, in the case of an appeal admitted, before the argument for the appellant begins, any party interested intimates to the Court that he intends to make an application under this section, the Court, shall, upon such party executing, if so required, a bond without sureties of an amount not exceeding five hundred rupees that he will make such application within a reasonable time to be fixed by the Court, postpone the appeal of such a period as will afford sufficient time for application to be made and an order to be obtained thereon.

It may be mentioned here that section 526 of Cr.P.C. is similar to the provision of section 528 (1-A) Cr.P.C. Learned counsel for the applicant has submitted that the Sessions Judge is empowered under section 528 of Cr.P.C. to transfer the bail petitions from the court of Additional Sessions Judge to another competent court within his sessions division, if it is expedient in the interest of justice and the limitations imposed under section 528 (1-A) Cr.P.C. Section 528 Cr.P.C. is reproduced hereunder for ready reference: -

528. Sessions Judge may withdraw cases from Assistant Sessions Judge.

(1) Any Sessions Judge may withdraw any case from, or recall any case which he has made over to, any Assistant Sessions Judge subordinate to him.

(1 A) At any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge, any Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge.

(1 B) Where a Sessions Judge withdraws or recalls a case under sub-section (1) or recalls a case or appeal under sub section (1 A), he may either try the case in his own Court or hear the appeal himself, or make it over in accordance with the provisions of this Code to another Court for trial or hearing, as the case may be.

(1 C) Any Sessions Judge may withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and may refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same. [Inst. by Law Reforms Ordi. 1972 Para. 173.]

Explanation. All Magistrates shall be deemed to be subordinate to the Sessions Judge for the purposes of this sub-section.

(2) & (3) -----[Omitted by Law Reforms Ordinance, 1972].

(4) Any Magistrate may recall any case made over by him under section 192, sub-section (2), to any other Magistrate and may inquire into or try such case himself.

(5) A Magistrate making an order under preceding sub-section shall record in writing his reasons for making the same.

(underline and bold by us for emphasis)

A thorough examination of the Code of Criminal Procedure, 1898, reveals that Section 9 empowers the Provincial Government to establish courts of session, appoint judges, and direct where such courts shall hold their sitting. Section 9 Cr.P.C. is reproduced hereunder for ready reference: -

9. Court of Session. –

(1) The [Provincial Government] shall establish a Court of Session for every sessions division, and appoint a judge of such Court.

(2) The [Provincial Government] may, by general or special order in the official Gazette, direct at what place or places the Court of Session shall hold its sitting; but, until such order is made, the Courts of Session shall hold their sittings as heretofore.

(3) The [Provincial Government] may also appoint Additional Sessions Judges and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts.

(4) A Sessions Judge of one sessions division may be appointed by the 1 [Provincial Government] to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in either division as the 1 [Provincial Government] may direct.

(5) All Courts of Session existing when this Code comes into force shall be deemed to have been established under this Act.

(underline and bold by us for emphasis)

From a close reading of the above-said provisions of the Code, it becomes abundantly clear that the Code uses the words “court of sessions,” “Sessions Judge,” “Additional Session Judge,” and “Assistant Sessions Judge” with the difference in their meanings. It is also clear that a court presided over by an Additional Sessions Judge is also a court of Sessions. The “Additional Session Judge” powers are similar to those of the Sessions Judge. The difference is that the Sessions Judge presides over the Sessions Court and is the person who can receive the cases, appeals, revisions, and all other petitions under the law that the Additional Sessions Judge could not receive directly. The Additional Sessions Judge can only hear the cases entrusted to him by the Sessions Judge. The Additional Sessions Judge has no power under the law to entrust cases to the other courts. Sub-Section (4) of Section 17 of the code provides for an emergency in which whenever the Sessions Judge is unavoidably absent or incapable of acting, he may make provision for the disposal of any urgent application by an Additional or Assistant Sessions Judge, or if there be no Additional or Assistant Session Judge, by such Judge or Magistrate shall have jurisdiction to deal with any such application. Except for this provision of law in the Code, no provision makes the Additional Session Judge subordinate to the Session Judge. Sub-Section (4) of Section 17 of the Code is reproduced hereunder for ready reference: -

17. Sub-Ordination of Magistrate and Benches to Sessions Judge:-

(1). -----

(3) -----

(4). The Sessions Judge may also, when he himself is unavoidably absent or incapable of acting, make provision for the disposal of any urgent application by an Additional or Assistant Session Judge or if there be no Additional or Assistant Judge, by such Judge or Magistrate shall have jurisdiction to deal with any such application.

Section 193 of the Code deals with the procedure regarding making over the cases to the Additional and Assistant Sessions Judges in the sessions division. The said section reads as follows: --

193. Cognizance of offences by Courts of Session.-

(1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction, unless the case has been sent to it under section 190, sub-section (2).

(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the [Provincial Government] by general or special order may direct them to try, or as the Sessions Judge of the division, by general or special order, may make over to them for trial.

(underline and bold by us for emphasis)

The provisions quoted above would give a picture of the making over, recalling, and transferring of cases within a Sessions Division. Section 193 of the Code states that an Additional Sessions Judge is to handle only those cases made over to him by the Sessions Judge.

**VOLUME IV, CHAPTER I SUPERINTENDENCE AND CONTROL,
PART I – GENERAL, PART G --- POSITION OF ADDITIONAL
DISTRICT AND SESSIONS JUDGES of the High Court Rules
provided that:**

2. Additional Judge is subordinate to the District Judge in administrative matters. - In administrative matters, the position of the District Judge is defined in Section 33 of the Punjab Courts Act, 1918. Subject to the general superintendence and control of the High Court, the District Judge is to have control over all Civil Courts under that part of the Act and within the local limits of his jurisdiction; the Court of an Additional Judge is included among such Courts by the earlier Section 18. **It follows that for purposes of administrative control such as the grant of casual or other leave,**

appointment of ministerial staff and general discipline, the Additional Judge is subordinate to the District Judge; and that all correspondence with the High Court should ordinarily be addressed through the District Judge.

The Code does not define the words "Case" and trial used in Sub-Section (1-A) Section 528, Cr.P.C. Above said various provisions of the Code indicate that the Code is not confined to the cases in which offences only are tried, but includes many other type of proceedings that, may not be strictly called as trials of offences, for example, security proceedings or maintenance proceedings or bail applications, which can by no stretch of imagination be construed as cases wherein offences are tried; nevertheless they are essential part of the cases which the Criminal Courts try. It goes without saying that 'case' comprises various stages, i.e., the case at the investigation stage, the case at the inquiry stage, and the case at the trial stage; so, the case is not only trial but also other proceedings as well, e.g., physical as well as judicial remand of the accused, order on application of *superdari* (سپرداری) of case property, application for bail and other allied matters. It is relevant to mention here that at the time of deciding the application for bail, the court applies its judicial mind to determine whether reasonable grounds are available on the record to connect the accused with the commission of an offence and passes a speaking order of judicial nature which is termed as "case decided"; in this regard, case of "**Iqbal Hussain versus The State**" (**PLD 1985 Lahore 65**) can be advantageously referred; the relevant portion from the same is hereby reproduced:-

"It is by now well settled that the term 'case' does not necessarily mean the "whole case" and this term is wide enough to include decision on any substantial question even though the same is of interlocutory nature as distinguished from purely formal and incidental order."

Similarly, reference can also be had to the case of “**Abdul Rafiq alias Oassu versus The State**” (1994 P.Cr.L.J 2507); the relevant portion from the same is hereby reproduced:-

“The order passed on a bail application is a judicial order. The word “Case” is a very wide term which would include all the miscellaneous applications moved in a case on which a judicial order is to be passed. In the case of Haji Karamat Ali Pandat v. Saadat Ali alias Shahadat Ali and others (1955) 7 DLR 351 it was held that word “case” as used in section 192, Cr.P.C. is wide enough to include a case under section 193, Cr.P.C. IC”

Article 37(d) of the Constitution of the Islamic Republic of Pakistan, 1973 requires inexpensive and expeditious justice to the litigants at their doorstep in accordance with law; in this regard, guidance has been sought from the case of “**Mehboob Hassan versus Akhtar Islam and others**” (2024 SCMR 757). Even the Legislature, in furtherance of said spirit, introduced Section: 439-A Cr.P.C. for providing the remedy of revision to the litigants at their doorstep, i.e., at Sessions Court level; similarly, Section: 491(1-A) Cr.P.C. was also introduced for providing the remedy of getting the order in habeas corpus petitions at Sessions Court level; needless to add that Section: 22-A, B Cr.P.C. was also introduced for providing remedy to the public at their door step for having issuance of direction regarding registration of case, etc.; similarly, Section: 528 (1-A and 1-B) was brought on the statute for empowering Sessions Judge to recall any case or appeal which he has made over to any Additional Sessions Judge before the commencement of trial of the case or hearing of the appeal and may try the case in his own court or hear the appeal himself, or make it over to another court for trial or hearing.

4. It appears from a plain reading of Sub-Section (1-A) Section 528, Cr.P.C. that at any time before the trial of the case or hearing of the appeal has commenced before an Additional Sessions Judge, the Sessions Judge may recall any case or appeal which he has made over to him. It,

therefore, follows that the Sessions Judge is not empowered to withdraw or recall any case or appeal that he has made over to an Additional Sessions Judge after the trial of the case or hearing of the appeal has commenced. It is noteworthy that given Section 193 Cr.P.C., an Additional Sessions Judge is empowered to try only such cases as the Sessions Judge of the division by general or special order makes over to him for trial, and in view of Section 409 Cr.P.C., an Additional Sessions Judge is empowered to hear only such appeals as the Sessions Judge of the division may by general or special order make over to him. The making over of a case for trial or an appeal for hearing to an Additional Sessions Judge by the Sessions Judge relates to the distribution of business, which is purely administrative. Section 409 of the Code is reproduced hereunder for ready reference: -

Sec 409. Appeals to Court of Session how heard:
Subject to the provisions of this section, an appeal to the Court of Session or Sessions Judge shall be heard by the Sessions Judge or by an Additional Sessions Judge or an Assistant Sessions Judge:

Provided that an Additional Sessions Judge shall hear only such appeal as the Provincial Government may, by general or special order, direct or as the Sessions Judge of the Division may make over to him:

Provided further that no such appeal shall be heard by an Assistant Sessions Judge unless the appeal is of a person convicted on a trial held by any Magistrate of the Second Class or Third Class.

(underline and bold by us for emphasis)

The scheme of the Code clearly shows that the exercise of power by the Sessions Judge under Sections 193 read with 17(4) of the Code is administrative in nature; it is the simple distribution of work. The question is how to invoke the power under Section 528(1-A) of the Code. Is it open to a litigant to move the Sessions Court for such withdrawal or recall? Once there is the source of power as conferred under the Code, one

does not need to labor much as to how to exercise that power. The Additional Sessions Judge could reference it, which could be on motion made by a litigant. However, the scope of the motion is only for administrative convenience. **HIGH COURT RULES AND ORDERS, (Volume III), CHAPTER 26, TRANSFER OF CRIMINAL CASES, PART A. – Transfer of Criminal Cases.**

2. Sessions Judges' power to transfer. Under section 528 of the Code, Sessions Judges also have the general power to withdraw any case from any Judicial Magistrate and to refer it for enquiry or trial to any other Judicial Magistrate competent to inquire into or try the same.

The Sessions Judge may also, at any time before the trial of a case or the hearing of an appeal has commenced before an Additional Sessions Judge, recall the case or appeal and may try the case or hear the appeal himself or may make it over to another Court for trial or hearing, as the case may be.

Sessions Judge may empower any Judicial Magistrate who has taken cognizance of any case to transfer such case for trial to any other Judicial Magistrate in his District any such magistrate may dispose of the case accordingly.

As noted above, one course is under Section 528 (1-A) Cr.P.C. for withdrawing, recalling, and making over. However, under Section 528 (1-A) Cr.P.C., once the trial of the case has commenced or the hearing of the appeal has started, the exercise of that power under Section 528 (1-A) Cr.P.C. is barred. Should it mean that in such a situation, the only resort is the High Court? If so, what is the logical meaning and purpose of Section 528 (1-A) Cr.P.C.?

Section 528 (1-A) Cr.P.C. is related to the power of the Sessions Judge to withdraw cases and appeals. This power is conferred on the Sessions Judge presiding over the Court of Session. Section 528 (1-A)

Cr.P.C. provides that the power of transferring a criminal case from one criminal court to another in the Sessions division is to be exercised only if it is expedient for the end of justice. It does not require an elaborate discussion to hold that it is a judicial exercise of power. The Additional Sessions Judge is not subordinate to the Sessions Judge. But it has to be noted that the Additional Sessions Judge gets jurisdiction to deal with a case only if such a case or appeal is made over to him by the Sessions Judge. Any time before the trial or hearing of the case or appeal, the Sessions Judge is also empowered to withdraw such cases. That power conferred on the Sessions Judge is meant in the interests of the litigant public and also to lessen the burden of the High Court, lest, for every transfer of a criminal case or appeal in a sessions division, the litigant public will always have to approach the High Court. Since the power under Section 528 (1-A), Cr.P.C. is judicially exercised, therefore, reasons are to be recorded, any party aggrieved can always take recourse to the remedy under Section 526 Cr.P.C. Similarly, under Section 528 (1-C) Cr.P.C. Sessions Judge may withdraw any case from or recall any case which he has made over to any Magistrate subordinate to him and may refer it for inquiry or trial to any other Magistrate competent to inquire into or try the same. Since the application for bail in a case is part of the case, therefore, before the commencement of the trial, the application for bail pending before any Additional Sessions Judge can be recalled by the Sessions Judge from the cause list of learned Additional Sessions Judge, and he can hear the same himself or make it over to any other Additional Sessions Judge for hearing; similarly, before the commencement of trial, Sessions Judge may withdraw the case from cause list of learned Additional Sessions Judge and he can hear the same himself or make it over to any other Additional Sessions Judge for hearing; before hearing of the appeal, Sessions Judge may withdraw the appeal from cause list of learned Additional Sessions Judge and he can hear the same himself or make it over to any other Additional Sessions Judge for hearing. Even in cases

triable by a Magistrate, the application for bail pending before any learned Additional Sessions Judge can be withdrawn from said court and heard by Sessions Judge himself or made over to any learned Additional Sessions Judge for hearing. However, if the trial has commenced, then the case cannot be withdrawn from the Additional Sessions Judge by the Sessions Judge, and, at that stage the application for bail pending before the Additional Sessions Judge can also not be withdrawn, and for that purpose, the relevant forum would be the High Court.

5. It will also be profitable to draw an analogy regarding the exercise of power by the District Court under Section 24 of the Code of Civil Procedure, 1908. The said section reads as follows: --

Section 24 General power of transfer and withdrawal:

(1) On the application of any of the parties and after notice to the parties and after hearing such of them as desire to be heard, or of its own motion without such notice, the High Court or the District Court may at any stage---

(a) transfer any suit, appeal or other proceeding pending before it for trial or disposal to any Court subordinate to it and competent to try or dispose of the same, or

(b) withdraw any suit, appeal or other proceeding pending in any Court subordinate to it, and

(i) try or dispose of the same; or

(ii) transfer the same for trial or disposal to any Court subordinate to it and competent to try or dispose of the same; or

(iii) re-transfer the same for trial or disposal to the Court from which it was withdrawn.

(2) Where any suit or proceeding has been transferred or withdrawn under sub-section (1), the Court which thereafter tries such suit may, subject to any special directions in the case of an order of transfer, either retry it or proceeded from the point at which it was transferred or withdrawn.

(3) For the purposes of this Section, Courts of Additional and Assistant Judges shall be deemed to be subordinate to the District Court.

(4) The Court trying any suit transferred or withdrawn under this section from a Court of Small Causes shall, for the purposes of such suit, be deemed to be a Court of Small Causes.

The Presiding Officer of a District Court is the District Judge. The District Judge on the civil side is empowered to transfer any case from one Additional District Court at any stage. If so, why should there be a restricted meaning for transfer on the criminal side if a provision akin to Section 24 (3) CPC regarding subordination is not expressly provided under the Code of Criminal Procedure 1898? Should not that enabling provision be read into under Section 528 Cr.P.C. It goes without saying that Section 528 Cr.P.C. appears under Chapter XLIV of the Code dealing with the transfer of criminal cases and itself is captioned as the power of Sessions Judge to transfer cases and appeals from one criminal court to another criminal court at any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge. It has also to be noted that the power under Section 528 is to be exercised only if it is expedient for the end of justice and not for any other reason. Thus, there is a statutory but administrative subordination in making over, recalling, withdrawing, and transferring cases, as far as the Additional Sessions Judge is concerned, to the Sessions Judge. The power of transfer does not always depend on superior jurisdiction. It can also confer power, as seen in Section 24 of the Civil Procedure Code, 1908. Thus, given the scheme provided under the Criminal Procedure Code, 1898 conferring power on the Sessions Judge to transfer a case/appeal pending before the

Additional Sessions Judge, the decision in the case titled “NAVEED HUSSAIN Versus The STATE and Others” reported as P L D 2020 Lahore 382, (supra) requires to be overruled and we do so.

6. As in the instant case, since the facts and law are intertwined in the pre-arrest bail petition, the petitioner is certainly free to move the Sessions Judge under Section 528 Cr.P.C. for withdrawing and transferring the petition to another Additional Sessions Court so that it can be heard and decided.

7. With above observations, instant petition stands disposed of.

8. The Registrar shall immediately transmit copy of this judgment to all Sessions Judges in Punjab for compliance as well as intimation to all the Judicial Officers in the Province of Punjab.

(Aalia Neelum)
Chief Justice

(Asjad Javaid Ghural)
Judge

(Syed Shahbaz Ali Rizvi)
Judge

(Ali Zia Bajwa)
Judge

(Farooq Haider)
Judge

Approved for reporting

Chief Justice

Judge

Judge

Judge

Judge