

Stereo. HCJDA 38
JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Writ Petition No. 24030/2022

Razia Bibi

Vs.

**Province of the Punjab, through the Home Secretary,
and others**

JUDGMENT

Date of hearing	27.4.2023
For the Petitioner:	Muhammad Aqeel Wahid Chaudhry, Advocate.
For the Respondents:	Mr Sittar Sahil, Assistant Advocate General, with Dr Qadeer Alam, Additional Inspector General (Judicial).

“Justice does not stop at the prison gate.”

Tariq Saleem Sheikh, J. – The Petitioner's son, Naveed Ahmed, was arrested in case FIR No.913/2014 dated 25.11.2014 registered at Police Station Jhang Bazar, Faisalabad, for offences under section 365-A of the Pakistan Penal Code, 1908, and section 7(e) of the Anti-Terrorism Act, 1997. The trial court found him guilty and sentenced him to death on two counts. However, this Court altered his sentence from death to life imprisonment on both charges. He has filed Crl. P.L.A. No.308/L/2020 against his conviction and sentence before the Supreme Court of Pakistan, which is pending.

2. Naveed Ahmed was serving his sentence in the Central Jail Faisalabad, but Respondent No.3 (Superintendent, Central Jail Faisalabad) has lately shifted him to the Adiala Jail Rawalpindi. The Petitioner filed an application before Respondent No.3 requesting him to recall his order stating that she is an elderly, ailing and impoverished woman, hence cannot visit her son at Adiala Jail, which is a long

distance away. Respondent No.3 did not attend to her request whereupon she approached Respondent No.2 (Inspector General of Police (Prisons), Punjab) without fruition. The Petitioner now seeks the intervention of this Court under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the "Constitution").

3. Respondent No.3 has submitted his report stating that Naveed Ahmed is a desperate and hardened criminal. On 12.1.2015, he was admitted to the Central Jail Faisalabad as an under-trial prisoner in case FIR No. 913/2014. Following the decision of the case by the Anti-Terrorism Court, he was moved to the District Jail, Toba Tek Singh, by order of the Home Department, Government of the Punjab. Subsequently, he was transferred to the Central Jail Mianwali. On 16.10.2019, he was re-admitted in the Central Jail Faisalabad on the directives of the Deputy Inspector General of Prisons, Sargodha Region. According to Respondent No.3, Naveed Ahmed committed eight jail offences and is a serious problem for the authorities. On 16.11.2021, the Deputy Inspector General of Prisons, Faisalabad Region, sent him to Adiala Jail Rawalpindi for administrative reasons.

4. The Assistant Advocate General, on instructions, states that neither the Petitioner nor Naveed Ahmed made any representation before Respondent No.2 against the DIG's action.

Prisoners' rights

5. International law, as well as State laws, recognize that prisoners, both civil and military, have rights. International instruments include (i) the European Convention on Human Rights; (ii) the International Covenant on Civil and Political Rights; (iii) the United Nations Minimum Rules for the Treatment of Prisoners (Nelson Mandela Rules); (iv) the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment; (v) the Convention on the Rights of Persons with Disabilities; (vi) the United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules). The Third Geneva Convention defines humanitarian protections for prisoners of war.

6. Besides, recommendations and guidelines for dealing with prisoners are also found in the following: (a) the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment; (b) the European Prison Rules.

7. The Constitution of Pakistan safeguards prisoners' rights by Articles 4, 10, 10A and 14. The Prisons Act 1894 and the Prisoners Act 1900 are two key enactments governing prisoners' affairs and management. These Acts were enacted during the British Rule in India, which Pakistan adopted after the partition. These are now supplemented by the Rules and Orders of the Lahore High Court, Lahore Volume II, Chapter 27 (Judicial and Police Lock-ups), and Pakistan Prison Rules, 1978¹ (hereinafter referred to as the "Prison Rules").

8. According to international human rights law and contemporary perspectives on crimes and punishment, the prison system must balance the rights of the prisoners, victims of crime and society. Lord Woolf noted in his report on the riots in English prisons in 1990 that maintaining the perfect balance between security, control, and justice is the key to an effectively managed prison. To this end, the law empowers the jail authorities to take appropriate measures to maintain discipline in prison. However, Rule 36 of Nelson Mandela Rules emphasizes that "discipline and order shall be maintained with no more restriction than is necessary to ensure safe custody, the secure operation of the prison and a well-ordered community life." Rule 39 stipulates that no prisoner shall be sanctioned except in accordance with the terms of law, principles of fairness and due process. The Rule further contemplates proportionality between a disciplinary sanction and jail offence and prohibits inflicting punishment twice for the same offence. Principle 30 of the United Nations' Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment establishes a prisoner's right to be heard by the authorities before imposing disciplinary action. Rule 23 of the Bangkok Rules restricts prison authorities from imposing disciplinary sanctions on women prisoners, which create hardships for their families and legal counsel.

¹ These Rules have been framed under section 59 of the Prisons Act, 1894, and are referred to as the Jail Manual.

9. Rule 4 of the Prison Rules 1978 classifies the prisons into four categories, namely, Central Prisons, Special Prisons, District Prisons and Sub-Jails. Rule 224 states that the prisoners are of the following types:

- i) a criminal prisoner, which includes (a) a convicted prisoner, and (b) an unconvicted or under-trial prisoner;
- ii) a civil prisoner;
- iii) a State prisoner detained under Regulation III of 1818, or a person ordered to be detained in prison without trial under any law relating to the detention of such person.

Rule 224 also provides that lunatics may be temporarily detained in prisons under the orders of the Magistrate. Rules 225 to 249 specify additional classification and segregation of prisoners. Sections 29, 37, and 39 of the Prisoners Act 1900 govern prisoner transfers within the province, while section 40 outside it.

10. Section 29 of the Prisoners Act 1900 deals with the transfer of prisoners from one jail to another. It states—

29. Removal of prisoners.—(1) The Provincial Government may, by general or special order, provide for the removal of any prisoner confined in a prison—

- (a) under sentence of death, or
- (b) under, or in lieu of, a sentence of imprisonment or transportation, or
- (c) in default of payment of a fine,
- (d) in default of giving security for keeping the peace or for maintaining good behaviour,
- (e) unconvicted criminal prisoners,

to any other prison in the province, or, with the consent of the Provincial Government concerned, to any prison in the other Province, or, with the consent of the Central Government to any prison maintained by it or under its authority in any part of Pakistan.

(2) Subject to the orders, and under the control of the Provincial Government the Director of Prisons may, in the like manner, provide for the removal of any prisoner confined as aforesaid in a prison situate in the area for which he is appointed to any of the prison in such area.

(3) The Central Government may, by general or special order, provide for the removal of any prisoner or class of prisoners confined in any prison to any other prison in Pakistan maintained by or under the authority of the Central Government or of a Provincial Government with the consent of the Provincial Government concerned.

11. The original section 29 of the Prisoners Act 1900 was silent about the transfer of under-trial prisoners either within or outside the

province. Clause (e) was inserted in it by Notification No. Prs. I (M) 1572, dated 6th July 1977. In *Muhammad Tufail Khokhar v. The Inspector-General of Prisons, Punjab, and others* (PLD 1980 Lahore 162), this Court noted that the Governor had issued the said notification purportedly in the exercise of the powers under section 60 of the Act, which had already been repealed by the Government of India (Adaptation of Indian Laws) Order, 1937. Therefore, it held that it was null and void. A Division Bench of this Court endorsed this view in *Asif Kamal v. The Judge Accountability Court, Multan, and others* (2020 PCr.LJ 1), and added:

“... in the absence of any legal provision, either expressly placing a bar or allowing the Government to transfer, the custody of a duly committed under-trial prisoner, subject to the permission of the concerned court, from one prison to another, the Government may transfer, such a prisoner without causing prejudice to his admissible rights and privileges including his right to a fair trial. An under-trial prisoner may also seek his transfer upon showing his grievance regarding the breach of his admissible rights and privileges for fulfillment thereof by way of his confinement in a particular prison. The court, after giving a proper hearing to all the concerned, being under a legal obligation to consider all relevant, legal, factual necessities and situational demands with their possible consequences while keeping in view that the under-trial prisoner enjoys an inherent presumption of innocence till found guilty, shall pass such order of transfer of unconvicted prisoner. Needless to observe that such an order of the court is bound to affect either way, the right to life, not only of the individual prisoner but also some of his related persons. Therefore, the order of transfer of custody from one prison to another is a judicial order and not a ministerial one.”

12. It is important to note that section 29 of the Prisoners Act 1900 confers the power to transfer prisoners on three authorities, *viz*, the Provincial Government, the Director of Prisons (who exercises his powers subject to the orders and control of the Provincial Government within the area falling in his jurisdiction), and the Federal Government. In *Muhammad Tufail Khokhar, supra*, the Court also pointed out that the Inspector General of Prisons does not figure in that section. The relevant excerpt is reproduced below:

“Again, there is no power vesting with the Inspector-General of Prisons under section 29 of the Prisoners Act to transfer any unconvicted prisoner from one prison to the other, as even the above said notification of the Governor, issued under a non-existent provision of law, conferred that power only on the Provincial Government.”

13. Interestingly, neither the Prisons Act 1894, nor the Prisons Act 1900 mention the post of the Inspector General of Prisons in the Punjab. Chapter II of the 1894 Act contains provisions for appointing other officers of prisons except the Inspector General. Section 5 thereof stipulates that the Provincial Government shall appoint Directors of Prisons for designated areas, who shall exercise general control and superintendence of prisons in their respective areas, and the staff employed therein, subject to the Provincial Government's orders.² Section 6 states that every prison must have a Superintendent, a Medical Officer (who may also be the Superintendent), a Medical Subordinate, a Jailer and other officers as the Provincial Government thinks necessary.³ The situation mentioned above has arisen because of a lapse on the part of the legislature. A peep through history reveals that the original 1894 Act envisioned "Director of Prisons" for specified regions, defining the term in section 3(7) read with section 5. West Pakistan (Adaptation and Repeal of Laws) Act, 1957 (W.P. Act XVI of 1957) substituted "Director of Prisons" with "Inspector General of Prisons". The Prisons (West Pakistan Amendment) Act 1958 (XLI of 1958) inserted clause (7A) in section 3 of the 1894 Act to introduce the office of the Deputy Inspector General of Prisons. However, West Pakistan (Adaptation of Laws) Ordinance, 1962 (XXV of 1962) deleted clauses (7) and (7A) of section 3 and replaced both these posts with Director of Prisons. As of today, these clauses do not exist in the Statute Book in the Punjab though section 5, which talks of the Directors of Prisons, is there. Sindh and Khyber Pakhtunkhwa have been vigilant. Sind Ordinance No.1 of 1978⁴ amended the Acts of 1894 and 1900, substituting "Director"

² For facility of reference, section 5 of the Prisons Act 1894 is reproduced below:

5. Directors of Prisons.— Directors of Prisons shall be appointed for the areas to be defined by the Provincial Government, and shall exercise, subject to the orders of the Provincial Government, the general control and superintendence of prisons and the staff employed in the prisons in the respective areas for which they are appointed.

³ The proviso to section 6 reads:

Provided further that in the Punjab the Provincial Government may appoint for any prison a Deputy Superintendent instead of a Jailer, and an Assistant Superintendent instead of a Deputy or Assistant Jailer, and these officers when so appointed shall exercise the same powers, shall discharge the same duties, and shall be subject to the same disabilities as Jailers and Deputy or Assistant Jailers respectively.

⁴ The Prisons and Prisoners (Sind Amendment) Ordinance, 1978.

wherever occurring with “Inspector General”.⁵ The North-West Frontier Province Adaptation of Prisons Laws Act, 1977 (NWFP Act No.VI of 1977) made similar amendments to the two statutes.⁶ A closer examination of these enactments reflects that the terms “Director of Prisons” and “Inspector General Prisons” have been used interchangeably throughout history. Therefore, the Punjab legislature’s failure to make appropriate revisions to the Acts of 1894 and 1900, particularly section 5 of the former, has no legal ramifications. The “Director of Prisons” in section 5, *ibid.*, must be read as “Inspector General Prisons”. Chapter 36 of the Prison Rules reinforces my point of view. It is captioned “Inspector General”, and the sub-heading reads: “Appointment and Powers of Inspector General under section 5, Act IX, 1894.” Nonetheless, it is recommended that the Chief Secretary Punjab and the Secretaries of the Home Department and the Ministry of Law take immediate steps to remove the anomalies.

14. Chapter 36 of the Prison Rules defines the duties and powers of the Inspector General and the Deputy Inspector General of Prisons. Chapter 7 deals with the issue of prisoner transfers.

15. Everyday injustice in jails fuels a sense of injustice: inconsistent processes, arbitrary decisions, bureaucratic delays, ignored complaints, poor living conditions and the lack of privacy due to a shared cell. Unfair or unjust treatment breeds resentment, anger and violence, creating a cycle of conflict and harm.⁷ Nevertheless, transferring a prison from one jail to another is sometimes necessary for

⁵ The Sindh Prisons & Correction Service Act 2019 (and the Sindh Prisons and Corrections Service Rules 2019) now provides for the regulation, control and management of prisons.

⁶ Sections 2 & 3 of NWFP Act No.VI of 1977 are reproduced below for ready reference:

2. Amendment of the Prisons Act, 1894. – In the Prisons Act, 1894 (IX of 1894).—

(a) and in all rules, orders or notifications made or issued under the said Act, for the expression “Director of Prisons”, wherever occurring, the expression “Inspector General of Prisons” shall be substituted; and

(b) for section 5, the following section shall be substituted. namely:—
“5. Inspector General of Prisons. — An Inspector General of Prisons shall be appointed by the Provincial Government and shall exercise, subject to the orders of the Provincial Government, the general control and superintendence of prisons and the staff employed in the prisons.”

3. Amendment of Prisoners Act, 1900. – In the Prisoners Act, 1900 (III of 1900), and in all rules, orders or notifications made or issued thereunder, for the expression “Director of Prisons”, wherever occurring, the expression “Inspector General of Prisons” shall be substituted.

⁷ <https://howardleague.org/wp-content/uploads/2020/02/Justice-and-Fairness-in-Prison-breifing-one.pdf?cv=1>

administrative or security reasons. Using this power arbitrarily can cause injustice and immense hardship for the prisoner and his family. In ***Re: Human Rights Cases by Syed A. Tajwar, Lawyer, Ansar Burney Welfare Trust and another*** (1994 SCMR 1527), the Supreme Court of Pakistan directed the authorities of all the four provinces to follow a uniform policy, as far as practicable, to keep the prisoners closer to their home districts. It held that doing so would not only be in keeping with the spirit of the Prison Rules but would also help alleviate a human problem.

16. Although Chapter 7 of the Prison Rules contains provisions to prevent abuse of the power to transfer prisoners, in ***Dr Muhammad Aslam Khakhi and others v. The State and others*** (PLD 2010 FSC 1), the Federal Shariat Court stressed the need to structure it and make the entire process more transparent and fair. The Court stated that Islam forbids the arbitrary exercise of authority. It said:

“Direction by the Government or the Inspector General of Prison Department for removal of a prisoner from one prison to another prison within the Province or from one Province to another Province must be supported by a speaking order. Unless it is a question of dire necessity or emergency, a notice of transfer must be given to the prisoner. It is the right of a prisoner to know why he is being transferred away from his home town. There must be legal justification to lodge a prisoner far away from the place of his residence. Such a transfer has, in many cases, worked to serious disadvantage, particularly of women folk and children, of prisoner.”

17. In *Aslam Khaki's* case, the Federal Shariat Court ruled that Rules 147 through 149 of the Pakistan Prisons Rules, 1978, as well as section 29 of the Prisoners Act, are repugnant to the Islamic Injunctions insofar as the Government has unfettered power to transfer a prisoner from one province to another province without giving notice to the prisoner or without obtaining his consent or without referring to any lawful reason by way of a speaking order conveyed to the detenu and without providing any remedy against exercise of such authority. The Federal Shariat Court declared that the power of the Inspector General of Prisons to transfer a prisoner from one prison to another within the province without notice to the prisoner or obtaining his consent and without providing a right of appeal before an independent tribunal is similarly repugnant to the Islamic Injunctions. Section 29 of Prisoners

Act, 1900 and Chapter 7 of the Prison Rules should be recast so that (a) arbitrary, unbridled and unfettered powers are neither given to the Government nor the Inspector General of Prisons; (b) transfers within or beyond the province, without notice or consent, should be avoided unless the gravity of the situation truly demands it. This does not apply to a convict whose release date is approaching, and he is being relocated near his home town following Rule 148, or who is required to be produced in another court in a case being tried elsewhere, or if there are other legitimate grounds such as safety, security or health.

18. Legislative reforms and a comprehensive policy on prisoner transfer based on the guiding principles outlined in the international instruments referred to in the earlier part of this judgment and the *Aslam Khaki* case are long overdue. On 24.11.2022, this Court directed the Punjab Government to take immediate measures in this regard. Dr Qadeer Alam, AIG (Judicial), has apprised that the requisite reforms are on the anvil and will be notified shortly. All future transfers would be made according to it. He prays that this petition may be converted into a representation and referred to the Home Department for reconsideration. The Petitioner's counsel has no objection to this course.

19. The Punjab Government is directed to ensure that there is no more delay in the much-needed legislative reforms. Insofar as this petition is concerned, the matter is referred to the Home Department for reconsideration, as both sides have requested.

20. **Disposed of.**

**(Tariq Saleem Sheikh)
Judge**

Announced in open Court on _____

Naeem

Judge

Approved for reporting

Judge