

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

Writ Petition No. 9139/2023

Muhammad Ramzan etc.

Vs.

The State etc.

JUDGMENT

| | |
|-----------------------------|---|
| Date of hearing | 06.06.2023 |
| For the Petitioners: | Malik Sajid Hussain, Advocate. |
| For the Respondents: | Mr Sanam Fareed Khan Baloch, Assistant Advocate General, and Mr Adnan Latif Sheikh, Deputy Prosecutor General, with Aslam/SI. |

*"I know not whether laws be right,
Or whether laws be wrong;
All that we know who lie in goal
Is that the wall is strong,
And that each day is like a year,
A year whose days are long."*

— Oscar Wilde

Tariq Saleem Sheikh, J. – On 9.5.2023, Pakistan Tehreek-i-Insaf (PTI) workers took to the streets across the country to protest against the arrest of the party Chairman. They turned violent, blocked roads, battled with law enforcement agencies and caused extensive damage to public and private property. To quell the situation, the Deputy Commissioners issued preventive detention orders under section 3(1) read with section 26 of the Maintenance of Public Order Ordinance, 1960 (MPO), against various people in their respective districts. FIRs were also registered for breaches of law against nominated and unidentified accused.

2. The Petitioners were initially detained under the MPO. Their detention order was subsequently revoked, but the police arrested them under section 54 of the Code of Criminal Procedure, 1898 (Cr.P.C.), suspecting that they were actively involved in the agitation and wanted in one of the FIRs registered as aforesaid. On 25.5.2023, the police produced the Petitioners before Respondent No.2 (Magistrate Section-30, Multan) requesting her for their test identification parade (“TIP”) under Rule 26.32 of the Police Rules 1934 and Volume III, Chapter 11, Part-C of the Lahore High Court Rules & Orders. Respondent No.2 sent them to the New Central Jail Multan and asked the Investigating Officer to obtain a date from the competent court within three days for holding their identification test. She further directed him to bring the Petitioners back before her on 8.6.2023. The Petitioners claim that they were not involved in the incidents of 9th May and seek this Court’s indulgence under Article 199 of the Constitution of the Islamic Republic of Pakistan, 1973 (the “Constitution”) for an early holding the TIP so that they can begin the procedures for their release. The Petitioners allege that the Government is deliberately delaying the TIP to keep them imprisoned.

3. The Assistant Advocate General has vehemently denied any wrongdoing on the part of the administration. He states that the 9th May incidents were unprecedented in the country’s history. The people who took to the streets that day were in large numbers, and many were arrested. There is a long waiting list for the TIP, and the Petitioners will be summoned when their turn comes.

4. I have heard the learned counsel at length.

5. Every human being has the right to be treated with dignity and to have his liberty and security respected. Other individual rights become increasingly vulnerable, if not illusory, without an adequate guarantee for human freedom and security.¹ In *Siddharam Satlingappa Mhetre v. State of Maharashtra and others* (AIR 2011 SC 312), the Indian Supreme Court stated that “life bereft of liberty would be

¹ *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Chapter 5, p.161.

without honour and dignity, and it would lose all significance and meaning, and the life itself would not be worth living. This is why ‘liberty’ is called the quintessence of civilized existence.”

6. The international human rights law recognizes the importance of the right to liberty and security and guarantees it.² Nevertheless, it also understands that it cannot be absolute. Therefore, all human rights treaties declare, albeit in a slightly different language, that any constraint on liberty must be in all instances under the law (the principle of legality), and it must not be arbitrary. Regarding the principle of legality, the Human Rights Committee has held that “it is violated if an individual is arrested or detained on grounds which are not clearly established in domestic legislation.” In other words, the grounds for arrest and detention must be “established by law”.³ The Committee has interpreted the meaning of the phrase “arbitrary arrest” in Article 9(1) of the International Covenant on Civil and Political Rights (ICCPR) as follows:

“... ‘arbitrariness’ is not to be equated with ‘against the law’, but must be interpreted more broadly to include elements of inappropriateness, injustice, lack of predictability and due process of law ... [T]his means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in the circumstances. Remand in custody must further be necessary in all the circumstances, for example, to prevent flight, interference with evidence or the recurrence of crime”.⁴

7. According to the Human Rights Committee, liberty of person refers to freedom from bodily restraint rather than universal freedom of action. Security of person concerns freedom from injury to the body and the mind, often known as physical and mental integrity. Deprivation of liberty involves a more severe restriction of motion within a limited space than mere interference with the freedom of movement. Examples of deprivation of liberty include police custody, remand detention, imprisonment after conviction, house arrest,

² For instance, see Articles 3 & 9 of the Universal Declaration of Human Rights, 1948, Article 9 (1) of the International Covenant on Civil and Political Rights (ICCPR), 1966, Article 6 of the African Charter on Human and Peoples’ Rights, 1981, Article 5 of the European Convention on Human Rights, 1950, Article 7 of the American Convention on Human Rights, 1969. This right is also recognized in the Arab Charter on Human Rights, the ASEAN Human Rights Declaration, and the Commonwealth of Independent States Convention on Human Rights and Fundamental Freedoms.

³ *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, Chapter 5, p. 165.

⁴ Communication No. 458/1991, *A. W. Mukong v. Cameroon* (Views adopted on 21 July 1994), in UN doc. GAOR, A/49/40 (vol. II), p. 181, para. 9.8; footnote omitted from the quotation.

administrative detention, and involuntary hospitalization. It also includes cases where a person already incarcerated is subjected to further restrictions, such as solitary confinement or physical restraint devices. Deprivation of personal liberty occurs without free consent. If an individual goes to a police station voluntarily to participate in an investigation and knows he is free to leave at any time, he is not being deprived of his liberty.⁵

8. The Human Rights Committee further explains that “arrest” refers to any apprehension of a person that starts a deprivation of liberty. In contrast, “detention” refers to a loss of liberty that begins when the individual is apprehended and continues until his release. An arrest does not have to be formal. When a person who is already in prison is subjected to another deprivation of liberty, such as incarceration on unrelated criminal charges, the beginning of that deprivation also constitutes an arrest.⁶ In *Mohammed-Holgate v Duke* (1984) [1 All ER 1054], while interpreting the word “arrest” in section 2 of the Criminal Law Act 1967, Lord Diplock stated that “it is a term of art. First, it should be noted that arrest is a continuing act; it starts with the arrester taking a person into his custody (by action or words restraining him from moving anywhere beyond the arrester’s control), and it continues until the person so restrained is either released from custody or, having been brought before a magistrate, is remanded in custody by the magistrate’s judicial act.” In *Ch. Muhammad Anwar v Government of West Pakistan* (PLD 1963 Lahore 109), a Full Bench of this Court stated that the essence of custody is that there should be a lack of freedom to move about as one wishes coupled with a physical power immediately available to prevent an attempt to break the restraints specified, as opposed to the power afterwards to punish for a breach of these restrictions. If a person is ordered not to go beyond certain boundaries, but there is no physical impediment or threat of physical force to ensure that he does not go outside those boundaries, there would be no

⁵ UN Human Rights Committee, General Comment No. 35 (International Covenant on Civil and Political Rights), paragraphs 3-6. (internal citations omitted)
file:///C:/Users/IST/Downloads/G1424451.pdf

⁶ UN Human Rights Committee, General Comment No. 35 (International Covenant on Civil and Political Rights), paragraphs 13 (internal citations omitted)
file:///C:/Users/IST/Downloads/G1424451.pdf

confinement and no custody, even though that person may be liable to be punished in due course of law if he does go out. On the other hand, if someone is told not to cross particular boundaries, and he observes or is informed that physical force will be used to stop him if he does, his confinement or custody is not different from that of a person held in jail. There is merely a difference in magnitude. This view was followed in *Muhammad Aslam v. Province of West Pakistan* (PLD 1968 Lahore 1324) and *Begum Nazir Abdul Hamid v Pakistan* (PLD 1974 Lahore 7).

9. In the *Hostages in Tehran* case, the International Court of Justice stated that “wrongfully to deprive human beings of their freedom and to subject them to physical constraint in conditions of hardship is in itself incompatible with the principles of the Charter of the United Nations, as well as with the fundamental principles enunciated in the Universal Declaration of Human Rights, Article 3 of which guarantees ‘the right to life, liberty and security of person’.”⁷

10. Arrest has far-reaching ramifications for the accused, his family, and, in certain cases, the entire community. In *Siddharam Satlingappa Mhetre v. State of Maharashtra and others* (AIR 2011 SC 312), the Indian Supreme Court stated that great ignominy, shame and disgrace are associated with it. Most people do not differentiate between pre-conviction and post-conviction arrests. The Supreme of Pakistan expressed similar views in *Salman Rafique and another v. National Accountability Bureau and others* (PLD 2020 SC 456) and added that the power to arrest must be exercised with caution, prudence, and sensitivity. It should not be used to oppress or harass anyone. A person’s arrest must be justified by referring to *prima facie* evidence and adequate actionable material sufficiently linking him with the alleged offence and by demonstrating that no other less intrusive or restrictive means were available in given circumstances.

11. International human rights law has a particular concern about pre-trial detention. Though definitions may vary, this term signifies the period during which the State detains a person while

⁷ Case Concerning United States Diplomatic and Consular Staff in Tehran (*United States of America v. Iran*), ICJ Reports 1980, p. 42, para. 91

awaiting trial to determine whether he is innocent or guilty of a crime.⁸ The person could be at the “pre-court” (or the investigation stage) or an under-trial prisoner. Its repercussions are more serious than post-conviction custody. The Indian Supreme Court mentioned some of them in *Moti Ram and others v. State of Madhya Pradesh* (AIR 1978 SC 1594). It stated:

“The consequences of pre-trial detention are grave. Defendants presumed innocent are subjected to the psychological and physical deprivations of jail life, usually under more onerous conditions than are imposed on convicted defendants. The jailed defendant loses his job if he has one and is prevented from contributing to the preparation of his defence. Equally important, the burden of his detention frequently falls heavily on the innocent members of his family.”

12. The most painful aspect of pre-trial detention is that it benefits the person who is found guilty when criminal litigation concludes rather than the one who is determined innocent. On the proof of guilt, an accused may be compensated for his suffering and distress by deducting the duration of custody from the sentence imposed by the court’s final verdict. As a result, when an accused is convicted and sentenced to imprisonment, the period of pre-trial detention may not bring him any additional harm. However, if the accused is ultimately acquitted, then the entire episode of pre-trial detention remains solely as a trauma, anguish and stigma for him, besides the financial and social costs he has suffered.⁹

13. Despite its serious repercussions, international law and domestic legal systems recognize pre-trial detention as an unavoidable measure. The stated justification is that it safeguards other people’s rights through evidence protection, proper investigation and unhindered trial. It also prevents further violation of law and human rights and ensures the accused’s presence during the investigation and trial process.¹⁰ Nonetheless, according to international legal standards, pre-trial detention is exceptional. Rule 6.1 of Tokyo Rules, 1990, states that “pre-trial detention shall be used as a means of last resort in criminal

⁸ Tauqeer Hussain, *Pre-Trial Detention and its Compensation in International and Pakistani Law*. Policy Perspectives , Vol. 15, No. 3 (2018), pp. 47-66.
<https://www.jstor.org/stable/10.13169/polipers.15.3.0047>

⁹ *ibid.*

¹⁰ *ibid.*

proceedings, with due regard for the investigation of the alleged offence and for the protection of society and the victim.” Rule 6.2 requires that alternatives to pre-trial detention should be employed as early a stage as possible. Pre-trial detention must not last longer than necessary to achieve the objectives outlined in Rule 6.1. It must be administered humanely and with respect for the inherent dignity of human beings. (Bail, release on recognizance and release under supervision are alternatives to pre-trial detention). The UN Human Rights Committee, while interpreting Article 9(3) of the ICCPR, has stated that pre-trial detention is an ‘exception rather than a rule’.¹¹

14. The Constitution of Pakistan (1973) contains several provisions relating to the sanctity and protection of the people’s life, liberty and dignity. Article 4 states that every citizen, wherever he may be, and every other person for the time being in Pakistan, has an inalienable right to enjoy the protection of law and to be treated in accordance with the law. In particular, no action detrimental to any person’s life, liberty, body, or reputation shall be taken except in accordance with the law. Article 9 mandates that no person shall be deprived of life or liberty save in accordance with the law. Article 10 provides safeguards against arbitrary and unlawful arrest and detention. Article 10A guarantees the right to a fair trial. Article 14 declares that the dignity of man is inviolable. The Code of Criminal Procedure, 1898, is the main statute that deals with the procedures relating to arrest and detention, including pre-trial detention, under the framework of the Constitution.

15. Chapter V of the Code of Criminal Procedure, 1898, relates to arrest, escape and retaking. Section 54 Cr.P.C. provides that any police officer may, without an order from a Magistrate and a warrant, arrest any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been so concerned. Section 55 Cr.P.C. pertains to arrest of vagabonds, habitual robbers etc. Section 60 Cr.P.C. states that when a

¹¹ UN Human Rights Committee, General Comment No. 35 (International Covenant on Civil and Political Rights), paragraph 38. file:///C:/Users/IST/Downloads/G1424451.pdf

police officer arrests a person without a warrant, he shall immediately take or send him to the Magistrate having jurisdiction in the case or to the officer-in-charge of a police station. Section 61 Cr.P.C. stipulates that no police officer shall detain a person arrested without a warrant for more than twenty-four hours (excluding the time necessary for the journey from the place of arrest to the Magistrate's court), and section 62 Cr.P.C. mandates that every arrest must be reported to the designated authorities. Section 63 Cr.P.C. talks of the discharge of the person apprehended.¹²

16. Section 167 Cr.P.C. ordains that if police cannot complete the investigation into the alleged offence within twenty-four hours after arresting an accused, they shall present him with the relevant record before the nearest Magistrate and seek his remand. A Magistrate, regardless of whether he has jurisdiction in the case, can remand the accused in police custody for a maximum period totalling fifteen days if the circumstances warrant. If Magistrate lacks jurisdiction to try the case or send it for trial, and considers the accused's further detention is unnecessary, he may order him to be forwarded to the Magistrate having the jurisdiction. When an accused is not discharged or granted bail, he is sent to judicial lock-up to await trial.

17. Section 169 Cr.P.C. empowers the police officer investigating a case to release an accused from custody if he finds that the evidence against him is insufficient and direct him to appear before the competent Magistrate when required, provided he executes a bond with or without sureties. This is a salutary provision. It may, however, be observed that even when the police officer has released an accused as aforesaid, the court may summon him to face trial. Section 170 Cr.P.C. authorizes the officer-in-charge of a police station to obtain security from an accused in any bailable offence to appear before a Magistrate without first arresting him.

¹² Discharge does not amount to cancellation of a case which is dealt with by Rule 24.7 of the Police Rules, 1934. Cancellation terminates further investigation by the police while the discharge does not. In the event of discharge, the FIR remains alive. The police may associate a discharged accused with investigation at any subsequent stage, but if his arrest is required formal permission from the Magistrate should be obtained.

18. Section 344 Cr.P.C. authorizes the trial court to remand the accused for up to fifteen days at a time during the trial. Although the law emphasizes that a case should be adjourned only for a “reasonable” time and aims to avoid unnecessary delay and adjournments to ensure quick decisions, a criminal prosecution sometimes takes very long.

19. Rule 25.2(2) of the Police Rules 1934 states that “no avoidable trouble shall be given to any person from whom enquiries are made and no person shall be or unnecessarily detained.” Rule 26.1 clarifies that the authority given to the police under section 54 Cr.P.C. to arrest without a warrant is *permissive* and not *obligatory*. Rules 26.2 and 26.9 provide further guidelines to the police officers involved in criminal investigations, requiring them not to interfere with the suspects’ liberty “until the investigation is sufficiently complete” and “the facts justify arrest”. According to Rule 26.1, the facts necessitating an immediate arrest may include the possibility of the suspect evading justice or an inconvenient delay that will result in the police failing to arrest him.

20. A learned Single Judge of this Court considered section 54 Cr.P.C. in *Abdul Qayyum v. SHO, Police Station Shalimar, Lahore* (1993 PCr.LJ 91), and held that it must be construed strictly because the powers granted to police officer encroach upon a person’s liberty. The Supreme Court approved this view in *Ghulam Abbas v. The State* (1999 SCMR 944). It further stated that it was impossible to define “reasonable” in section 54 Cr.P.C. However, there must be some concrete legal evidence upon which the police officer can form an opinion as to whether it is sufficient to establish the reasonableness and credibility of the charge, information or suspicion.

21. Article 22 of Qanun-e-Shahadat 1984 says that the facts which establish the identity of anything or any person whose identity is relevant are admissible in a court of law. TIP is an investigation tool used by the police to help identify the offender if there was a witness. It involves lining the suspect of a crime with individuals (dummies) who match his description. A witness is then called upon to identify the culprit among those present. The TIPs are usually undertaken when the accused is unknown to the witnesses, and they catch his fleeting glimpse.

The Code of Criminal Procedure, 1898 and Qanun-e-Shahadat, 1984, do not specify the procedure for holding the TIPs. However, Volume III, Chapter 11, Part-C of the Lahore High Court Rules & Orders, and Rule 26.32 of the Police Rules 1934 give some guidelines which must be followed. The Supreme Court of Pakistan elaborated them in *Azhar Mehmood and others v. The State* (2017 SCMR 135); *Hakeem and others v. The State* (2017 SCMR 1546); *Mian Sohail Ahmed and others v. The State and others* (2019 SCMR 956) and *In Re: Kanwar Anwar Ali* (PLD 2019 SC 488 : PLJ 2019 SC (Cr.C.) 153].¹³ It is pertinent to point out that the TIP has only corroborative value and is not a substantive piece of evidence. Furthermore, the court must carefully examine the identification evidence according to the criteria elucidated by the Supreme Court of Pakistan in the above-mentioned cases.

22. The TIP is also important from the accused's point of view. It checks against false implications and becomes necessary when the culprits are not nominated.¹⁴

23. Currently, the procedure from the stage when an accused or suspect is apprehended until the TIP is conducted is mostly governed by practice. Generally, the Sessions Judge designates the judges and magistrates under him for various categories of cases. He gives responsibility for the TIPs to one or more Judicial Magistrates (JM) or Special Judicial Magistrates (SJM), depending upon the workload and the number of police stations in his jurisdiction. After arresting the accused, the Investigating Officer takes him to the Area Magistrate and requests that he may be sent to judicial lock-up and kept there for the TIP. The Area Magistrate grants the request routinely and directs the Jail Superintendent to keep the accused isolated from other prisoners. He also sets a date for production of the accused after TIP proceedings, which is normally between seven to fourteen days. Thereafter, the Investigating Officer applies to the assigned JM/SJM for fixing a date for the TIP, which he does according to his roaster. If more than one

¹³ Notice in compliance with the order dated 12.2.2019 passed in Crl. Appeal No.259 of 2018 to Mr. Kanwar Anwar Ali, Special Judicial Magistrate on account of dereliction of duty and lack of sufficient legal knowledge.

¹⁴ Muhammad Sajjad v. The State (2008 PCr.LJ 831).

JM/SJM is designated for the TIPs, the Investigating Officer files an application before the Sessions Judge, who marks it to one of them and then fixes the date for the TIP. If the complainant and witnesses appear before him on the scheduled date, the JM/SJM completes the proceedings and sends the case file in a sealed envelope to the Sessions Judge; otherwise, he sets another date. When the TIP is done, the Investigating Officer produces the accused before the Area Magistrate for further proceedings.

24. The Special Courts/Anti-Terrorism Court follows a slightly different procedure. When an accused, for example, is arrested in a terrorism-related FIR and his TIP is required, the Investigating Officer brings him before the Judge, who remands the accused in judicial custody. He further directs the Investigating Officer to request the Sessions Judge for the TIP. The Sessions Judge assigns the application to any of the designated JM/SJM, who then follows the procedure outlined in the preceding paragraph.

25. Evidently, the current practice for the TIPs is inefficient. The delay in conducting the test following the accused's arrest also compromises the credibility of the procedure. Therefore, the courts insist that it should be conducted as early as possible after the arrest of the accused.¹⁵ Besides causing unnecessary hardship to the accused, such delays impact his fundamental rights to liberty, dignity, due process and a fair trial. In *Syed Khursheed Ahmed Shah v. The State* (PLD 2022 SC 261), the Supreme Court ruled that depriving the accused person of his liberty and freedom even for a single day is unconscionable and below human dignity. It follows that justice should be served even while an investigation is ongoing.

26. The constitutional courts are the guardian of the Constitution. They are required to review the executive actions and the conduct of the public authorities on the touchstone of fairness, reasonableness and proportionality.¹⁶ It is necessary to issue the

¹⁵ *Asghar Ali alias Sabah and others v. The State and others* (1992 SCMR 2088); *The State v. Farman Hussain and others* (PLD 1995 SC 1); *Khawand Bux and others v. The State* (1997 PCr.LJ 280); *Ghulam Nabi v. The State* (2002 PCr.LJ 349); and *Saifullah v. The State* (2018 MLD 751).

¹⁶ *Salman Rafique and another v. National Accountability Bureau and others* (PLD 2020 SC 456).

following directives to actualize the rights guaranteed to the accused under Articles 4, 9, 10, 10A and 14 of the Constitution:

- i. In all cases where the Area Magistrate commits an accused to jail for the TIP, he shall immediately forward a copy of his order to the Sessions Judge. He shall fix it as a “TIP Case” in his cause list to ensure the accused is produced before him after the TIP.
- ii. If, for any reason, the Magistrate who sends an accused to jail for the TIP is not the Area Magistrate, he shall also forward a copy of his order to him.
- iii. Immediately on receipt of a copy of the Magistrate’s order as aforesaid, the Sessions Judge shall depute a JM/SJM for holding the TIP, who shall direct the Investigating Officer to take the requisite steps and conclude the exercise within 48 hours.
- iv. If the Sessions Judge has designated a JM/SJM in any area for the TIPs, he shall direct him, or if he is not available for any reason, depute another JM/SJM for holding the TIP. Such JM/SJM shall also conclude the exercise within 48 hours.
- v. If the TIP is not done within 48 hours as aforesaid, the JM/SJM shall bring the matter to the notice of the Sessions Judge and the Police Head concerned. If he finds any delinquency or dereliction of duty by the Investigating Officer, he shall also recommend action against him. In any case, the JM/SJM shall ensure the TIP is held the next day.
- vi. The JM/SJM concerned shall promptly forward his report to the Sessions Judge after the TIP is done.
- vii. The Sessions Judge’s office shall prepare a separate file for all TIP requests and place them on the court’s cause list until the matter is disposed of.
- viii. Where the matter relates to a Special Court/Anti-Terrorism Court and the Investigating Officer requests it for the TIP of an accused, it shall also ensure that it is done within 48 hours.

27. The police may be reminded that they have a duty under Article 4(1)(c) of the Police Order, 2002, to protect the legal rights and privileges of the person taken into custody.

28. In the present case, the Petitioners have been awaiting the TIP since 25.5.2023. Although Respondent No.2 directed the Investigating Officer to get a date from the competent court within three days for the TIP, he has not done so. The Petitioners face further delays that infringe on their constitutional rights discussed above. Therefore,

the Sessions Judge, Multan, is directed to look into the matter personally and ensure that the Petitioners' TIP is carried out within two days.

29. The Registrar of this Court shall send a copy of this judgment to all the Sessions Judges, the Special Courts in the province, and the Inspector General of Police with direction to follow the directives detailed in paragraph 26 in all future cases.

30. **Disposed of.**

(Tariq Saleem Sheikh)
Judge

Naeem

Approved for reporting

Judge