

Judgment Sheet
IN THE LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Crl. Revision No.67181/2023
(Mansha Ali vs. The State & another)

JUDGMENT

Date of hearing:	24.10.2023
Petitioner by:	M/s Ch. Ishtiaq Ahmed Khan, Zarish Fatima and Mian Ehtisham Ahmad, Advocates
State by:	Mr. Sultan Akbar Chattha, Deputy Prosecutor General with Muhammad Nawaz Inspector/Investigating Officer.

ALI ZIA BAJWA, J.:- Through the instant Criminal Revision petition filed under Sections 435 and 439 of the Code of Criminal Procedure, 1898 (hereinafter ‘Cr.P.C.’) read with Section 561-A Cr.P.C. vires of the order dated 06.10.2023, passed by learned Administrative Judge, Anti-Terrorism Courts, Lahore (hereinafter ‘the Administrative Judge’) were called into question through which the custody of the petitioner was handed over to the Investigating Officer of case FIR No.2597/2023, dated 14.09.2023, offences under Sections 440, 395, 386, 148 & 149 PPC read with Section 7 of the Anti-Terrorism Act, 1997 (hereinafter ‘ATA’), Police Station Township, Lahore, on physical remand. During the pendency of this petition, the impugned order elapsed but through Crl. Misc. No.3/2023, order dated 20.10.2023 has been placed on the record through which a further seven days physical remand of the petitioner was allowed by the Administrative Judge.

2. Under Section 439 Cr.P.C. the High Court is empowered, while exercising its revisional jurisdiction, to examine the vires of any proceedings the record of which has been called for by itself or which

otherwise comes to its knowledge. The revisional jurisdiction is very wide and is not a power, but rather a duty, which must be exercised whenever facts calling for its exercise are brought to the notice of the Court. Guidance is sought from the decision of the Supreme Court of Pakistan in Mushtaq Ahmad Case¹ and the relevant extract available on page 128 is reproduced *infra*--

“....Under section 439 of the Criminal Procedure Code the High Court has a power to interfere upon information in whatever way received, as the section clearly says that it may do so in any case in which it has itself called for the record or which has been reported for orders or 'which otherwise comes to its knowledge'. These are words of wide import. In the present case the record of the case was placed before the learned Judge in the course of his inspection and the facts of the case thus came to his knowledge. Under this section the High Court has also the right to exercise its power on its own initiative and there can be no warrant for the proposition that the High Court is debarred from examining the record suo moto.”

Further reliance can be placed on Dr. Waqar Hussain vs. The State – 2000 SCMR 735 and Syed Manzoor Hussain Shah vs. Syed Agha Hussain Naqvi and another - 1983 SCMR 775.

3. Arguments heard and the record perused.
4. Perusal of the record available on the file reflects that being a nominated accused of the aforementioned case, the petitioner was arrested by the investigating officer on 26.09.2023, who was produced before the Administrative Judge on 27.09.2023 with the prayer for grant of physical remand, which was allowed with the direction that the petitioner shall be produced before the said court on 11.10.2023. The remand granting order dated 27.09.2023 was challenged through Crl. Revision No.64428/2023 before this Court, which was allowed, the remand granting order was set aside being a non-speaking one and the matter was remanded to the Administrative Judge to adjudicate upon the

¹ Mushtaq Ahmad vs. The State - PLD 1966 Supreme Court 126

request of the investigating agency for grant of physical remand afresh after hearing all the concerned and furnishing cogent reasons. Accordingly, the Administrative Judge, vide order dated 06.10.2023, granted fourteen days physical remand of the petitioner to the Investigating Officer. On the expiry of said physical remand, on 20.10.2023 another request was made by the Investigating Officer for the grant of further physical remand, which was allowed, and custody of the petitioner was handed over to the Investigating Officer for an additional period of seven days. Through Crl. Misc. No.3/2023, subsequent physical remand granting order dated 20.10.2023 has also been brought to the notice of this Court.

5. It will be beneficial to explore the term ‘*remand*’ before further dilating upon the legal proposition involved in this case. According to the *Black’s Law Dictionary by Bryan A. Garner, Eighth Edition, printed by Thomson West, on page 1319* term ‘remand’ has been defined as infra: -

“To recommit (an accused person) to custody after a preliminary examination...”

In P Ramanatha Aiyar’s ADVANCED LAW LEXICON, 4th Edition, Volume-4, published by LexisNexis Butterworths Wadhwa at page 4155 ‘remand’ has been well-defined as under:-

“An order by a criminal court remanding the accused to further detention till the investigation of the offence is complete or the trial can commence.”

6. It shall not be out of place to discuss what orders can be passed by a Magistrate when an accused is produced before him during the course of an investigation. A person 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 can be arrested by a police officer

without a warrant or order of Magistrate.² Article 10 (2) of the Constitution of Islamic Republic of Pakistan, 1973 (hereinafter '*the Constitution*') read with Section 61 of the Code stipulates that a police officer cannot detain an arrestee in custody for more than 24 hours in the absence of a specific order of Magistrate passed under Section 167 of the Code. The Legislature has expressly separated the period for which a person can be detained in custody prior to the commencement of an inquiry or trial into two stages. The first phase is the period of 24 hours as envisaged under Article 10 (2) of the Constitution and Section 61 of the Code. In this period the investigating agency has the power to detain a person, subject to the conditions contained in Section 54 of the Code, for the purpose of investigation. If the investigation cannot be completed within 24 hours, the police must forward the accused to the nearest Magistrate as mandated by Section 167(1) of the Code.

7. When an accused is remanded back to the Investigating Officer by the Magistrate, it means that his custody is handed over to the investigating agency for the purpose of further investigation through a well-reasoned order that 'Custodial Interrogation' is indispensable to unearth the truth and collect the further evidence which is not possible in the absence of the accused. The prospect of the collection of further evidence/incriminating material is a substantial premise for remanding the accused to police custody. The Magistrate must undoubtedly be convinced of the need for remand of the accused to such custody while considering the material already available on the record and he must record his reasons in that respect. On the other hand, when the Magistrate arrives at the decision that there is no need or justification for further physical remand, he sends the accused to prison for further detention and it is called judicial remand because the accused is considered in custody of the Magistrate/court.

² Section 54 Cr.P.C.

8. The difference between ‘physical remand’ and the ‘judicial remand’ is characterized by the degree of access the Investigating Officer has to the accused for the purpose of interrogation. In police custody, an accused is in the exclusive custody of the investigating officer, and the primary aim is to allow the police to conduct “custodial interrogation” to unearth the truth in any given case. On the other hand, judicial custody refers to the custody of an accused in jail. When a person is in jail custody, he is indirectly deemed to be in the custody of the court. The police officers or investigating agencies do not have the same level of access to an accused as they do in police custody. In fact, police officers and investigating agencies usually cannot question the accused in judicial custody without seeking permission from the court and following such conditions as prescribed by the court.

9. The Magistrate under Sections 167 and 63 of the Code read with Rule 6 of Volume-III, Chapter 11, Part B of the Rules and Orders of the Lahore High Court, Lahore can also discharge an accused, in the custody of an investigating agency, against whom no sufficient cause or material is available on the record to connect him with the commission of a cognizable offence. Discharge of an accused person does not amount to smothering of the investigation, cancellation of the case, termination of prosecution or acquittal. An investigation, if in progress, can continue unaffected by such an order of discharge. Discharge of an accused by the Magistrate, be it of any kind, cannot be equated with acquittal of the accused person so discharged as there is a world of difference between a discharge and an acquittal and there is no question of mixing one with the other under any circumstances.³

10. To strike a balance, between the needs of a thorough investigation on the one hand, and the protection of the citizens from the oppressive attitude of the Investigating Agency, on the other hand, is the

³Ashiq Hussain vs. Sessions Judge, Lodhran and 3 Others - PLD 2001 Lahore 271

crucial duty of a Magistrate dealing with the question of grant of physical remand. The Magistrate must examine whether there is a case made out by the Investigating Agency to hand over the accused on remand or on the pretext of remand, the liberty of a citizen is likely to be curtailed. Therefore, granting remand is an exception and not the rule for which cogent and plausible reasons must be rendered by the Magistrate dealing with the matter. One of the salutary requirements of natural justice is to spell out the reasons, meaning thereby, a speaking order is required to be passed. It is obligatory for the Investigating Officer to transmit the record of the police diaries along with the forwarding of the accused before the Magistrate. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon.⁴ The passing of the mechanical orders granting physical remand by the Magistrate has been deprecated by the Superior Courts of this Country. In Abdul Majid and another vs. Qazi Abbas Hussain Shah – 1995 SCMR 429, while dealing with the matter of grant of physical remand, it was ruled by the Supreme Court of Pakistan as infra: -

"This Court expects the presiding officers to perform their duties with their eyes and ears open as required under the law and pass orders after judicial application of mind and not in perfunctory and slipshod manner allowing room for mistakes because these mistakes whether they are inadvertent or not reflect upon the conduct of the Judge and can be considered as a minus point. We disapprove and deprecate such conduct of the presiding officers and it should be discouraged in true sense as far as possible."

This view was further affirmed by the Supreme Court of Pakistan in the case titled "The State vs. Nasir Javed Rana, Civil Judge 1st Class/Magistrate Section 30, Rawalpindi – PLD 2005 SC 86." Justice Fazal Karim wrote in his book⁵ that interrogation of the person in custody is a low-visibility area and most of the sins against constitutional and legal rights are committed during that period.

⁴ Boyd v. United States, 116 U.S. 616 (1886)

⁵ The Law of Criminal Procedure Published by Pakistan Law House at Page No. 323

11. Article 9 of the Constitution guarantees that no person would be deprived of life or liberty save in accordance with law, while Articles 10, 13 and 14 of the Constitution provide safeguards against the unlawful arrest, self-incrimination, and torture for the purpose of extracting evidence. Article 10-A of the Constitution, which ensures the right to a fair trial, is also available during the pre-trial proceedings including investigation. It was observed in Rehan vs. The State – 2009 SCMR 181 that a Magistrate, while granting remand, should be mindful of the Constitutional guarantees provided under the afore-referred Articles of the Constitution.

12. During the course of arguments learned Deputy Prosecutor General, time and again, by referring to Sub-section (2) of Section 21-E, ATA contended that it empowers the Administrative Judge that in case further evidence may be available while no bodily harm has been or will be caused to the accused, further physical remand can be granted. For ready reference Sub-section (2) of Section 21-E, ATA has been reproduced as under:-

“(2) No extension of the time of the remand of the accused in police custody 1[or custody of any other investigating agency joined in the investigation] shall be allowed unless it can be shown by the investigating officer to the satisfaction of the Court that further evidence may be available and the Court is satisfied that no bodily harm has been or will be caused to the accused: Provided that the total period of such remand shall not exceed ninety days.”

It is true that Section 21-E, ATA empowers the special court to grant physical remand, but the words ‘satisfaction of the Court’ used in the above-referred provision of law are of utmost importance. Satisfaction of the court connotes subjective satisfaction based on the cogent material available on the record to satisfy itself regarding the progress in the investigation made in the previous period of remand and further expectation of availability of evidence.

13. Although, Section 21-E, ATA authorizes/empowers the Administrative Judge to allow the detention of the accused either in police custody or in judicial custody, however, as the remand order deprives the personal liberty guaranteed under Articles 9 and 10 (2) of the Constitution, therefore, such order should not be passed in a mechanical manner, rather such powers should be exercised with great caution. Learned DPG has further contended that providing reasons while granting physical remand is a requirement of Section 167(3) of the Code whereas physical remand in cases of terrorism is dealt with under Section 21-E, ATA which does not require that Administrative Judge should provide any such reasoning while handing over the custody of accused to the police. This contention of learned DPG is highly misconceived firstly for the reason that under Section 24-A of the General Clauses Act, 1897, it was the mandatory duty of the Administrative Judge to pass an order, which is judicial in nature, under Section 21-E, ATA after due application of judicious mind to the record available before him while furnishing cogent and satisfactory reasons. Furthermore, Section 21-E, ATA does not bar the application of general principles to be followed by a Magistrate while dealing with the matter of remand under Section 167 of the Code. In this regard, Section 32, ATA is relevant which provides an overriding effect of said Act. It has been specifically provided in that Section that the provisions of Code shall, in so far as they are not inconsistent with the provisions of this Act, apply to the proceedings before Anti-Terrorism Court. Section 32(1) of the ATA has been reproduced below as a ready reference:

"32. Overriding effect of Act.--1. The provisions of this Act shall have effect notwithstanding anything contained in the Code or any other law but, save as expressly provided in this Act, the provisions of the Code shall, in so far as they are not inconsistent with the provisions of this Act apply to the proceedings before [an Anti-Terrorism Court] and for the purpose of the said provisions of the Code [an Anti-Terrorism Court] shall be deemed to be a Court of Sessions."

Underlined for emphasis

As per Section 32(1), ATA, provisions of the Code are fully applicable to the Anti-Terrorism Court, if they are not inconsistent with any provision of ATA. Section 167(3) of the Code requires that while authorizing the detention of an accused in the custody of the police, the Magistrate shall record his reasons for so doing. Moreover, sub-section (3) of Section 21-E, ATA provides that while dealing with the question of remand, the Administrative Judge of the Anti-Terrorism Court shall be deemed to be a Magistrate. This provision makes it abundantly clear that while dealing with the request of remand, the Administrative Judge shall act as a Magistrate. In the light of above discussion, the Administrative Judge is required to provide cogent reasons while allowing detention of an accused in police custody. Reference is made to the decision of this Court in Raja Waheed Mehfooz case⁶, wherein it was categorically ruled as under:-

"7. ...The learned Judge, ATC-II, Rawalpindi, is badly mistaken in understanding that, while exercising his powers under section 21-E of Anti-Terrorism Act, 1997, he is not required to give reasons for the order granting physical remand of the accused persons and his such interpretation is completely in violation of the provisions of subsection (3) of section 21-E of the Act, which provides that, the Special Court under Anti-Terrorism Act, 1997, shall be deemed to be a Magistrate for purposes of subsection (3) of section 21-E of the Act. As such, the learned Special Court under Anti-Terrorism Act, while dealing with the matters of remand of the accused persons, is equally responsible to observe the provisions of section 167(3), Cr.P.C., and the remand order, if passed without assigning any reasons, would be a nullity in the eye of law, and would be termed nothing, but as an invalid remand order."

Thus, there should not be any confusion that general principles of granting physical remand provided under the Code are fully applicable while dealing with the remand proceedings under Section 21-E, ATA and we are persuaded to hold that proceedings of remand in the cases triable by Anti-Terrorism Court, shall be dealt with under Section 21-E, ATA read with Section 167(3) of the Code.

⁶ Raja Waheed Mehfooz v. Special Judge, Anti-Terrorism Court-II, Rawalpindi and 2 others, (2016 PCr.LJ 1773)

14. The Superior Courts of the Country have time and again ruled that remand is not to be granted in a mechanical manner each and every time the Investigating Agency makes such a request. Hence, whenever a request for physical remand of an accused is made in a criminal case, the Magistrate must apply his independent judicious mind to the facts and circumstances of that case especially while considering the accusations leveled against him, so that it would be investigated in a thorough and proper manner. Where the custody of the accused is essential for moving forward for the purposes of the investigation, he may be remanded to police custody for the minimum possible time keeping in view the request made by the police and the material available on the record as well as the investigation conducted so far by the investigating agency.⁷ Rule 7, Chapter-11, Part-B, Volume-3 of the Rules and Orders of the Lahore High Court, Lahore, also provides that the remand can be granted in cases of real necessity only and the Magistrate should satisfy himself that the accusation is well founded and that there are good and sufficient reasons for remanding the accused to Police custody instead of detaining him in the Magisterial custody. It is further provided that in order to form an opinion as to the necessity or otherwise of the remand applied for by the Police, the Magistrate should examine the copies of the diaries, prepared under Section 172 of the Code and submitted to the Magistrate under Section 167 of the Code to ascertain what previous orders (if any) have been made in the case, and the longer the accused person has been in custody the stronger should be the grounds required for further remand to police custody.

15. Perusal of the police file reflects that the petitioner was arrested in this case on 26.09.2023 and he was produced before the Administrative Judge on 27.09.2023. The Investigating Officer moved an application for the grant of physical remand of the petitioner for the recovery of *Kalashnikov* allegedly used during the occurrence, currency

⁷ The State through Advocate-General, ICT vs. Additional Sessions Judge and 2 others, (2023 P Cr. LJ 83)

amount of Rs.10,00,000/-, prize bonds, different registered deeds, ID Card, and cheque book. Although that order was set aside being a non-speaking order and case was remanded back to the Administrative Judge to decide the application of the Investigating Officer requesting remand through a speaking order. The petitioner was handed over to the investigating agency for fourteen days till 20.10.2023. A bare glance at the police file reflects that no proceedings were carried out till 30.09.2023 i.e., four days after arrest of the petitioner, when he remained on physical remand with the investigating agency as no police diaries for those four days are available on the police file. Rule 25.53 of the Punjab Police Rules, 1934 casts a duty on the Investigating Officer that in consonance with the provisions of Section 172(1) of the Code a case diary shall be maintained and submitted daily during an investigation. The same has been reproduced hereinafter for ready reference: -

"25.53. Case diaries. - (1) Section 172(i), Code of Criminal Procedure requires that a case diary shall be maintained and submitted daily during an investigation by the investigating officer. In such diary shall be recorded, concisely and clearly, the steps taken by the police, the circumstances ascertained through the investigation and the other information required by Section 172(i), Code of Criminal Procedure."

In the instant case, there is absolutely nothing available on the record as to why the investigation remained without any progress from 26.09.2023 to 30.09.2023 while petitioner was in custody. Even on 01.10.2023 and 02.10.2023, no case diary qua the investigation proceedings is available on the police file. Similar was the position on 08.10.2023 and 15.10.2023. It is also noteworthy that Investigating Officer did not incorporate the fact of not carrying out investigation during these days in the next case diary when he conducted further investigation. Rule 25.57 of the Punjab Police Rules, 1934 requires that if on any day or days, an Investigating Officer of a case makes no investigation, he shall enter a statement to this effect in the case diary of the day on which he next does something towards the completion of the case. The record reflects that

for most of the days, the investigation remained at a halt without any justification. The petitioner remained on physical remand for twenty-four days but there is no material progress in the investigation. The Investigating Officer could not make any significant progress in the investigation of this case. Recovery of two lac rupees was affected from the house of the petitioner, which was already in the knowledge of police on two different occasions, to show off the so-called progress in the investigation. Police diaries also reflect that no serious efforts were made by the investigating officer to conclude the investigation swiftly. An accused cannot be handed over to the Investigating Officer on his whims and wishes. The petitioner has been languishing in police custody for the last twenty-four days without any material progress in the investigation.

16. In the instant case, keeping in view the poor progress shown by the Investigating Officer during the physical remand, spreading over 24 days, we are constrained to observe that the provisions of Sub-section (2) of Section 21-E, ATA read with Section 167 of the Code and principles enunciated by the Superior Courts of this Country on the subject were squarely overlooked by the Administrative Judge, which straightway require that further remand of the accused in police custody cannot be justified. In *Ghulam Sarwar and another case*⁸, this Court authoritatively observed that the Magistrate shall examine the police file before deciding the question of remand and if no investigation was conducted after having obtained physical remand, the Magistrate shall refuse to grant further physical remand.

17. It seems that the remand of the petitioner was extended in a slipshod and whimsical manner without inspection of case diaries, which was a mandatory duty of the Administrative Judge granting remand. As discussed above, the Magistrate granting remand should be cautious and watchful, especially for extending the period of remand to police custody

⁸ Ghulam Sarwar and another vs. The State -1984 P.Cr.L.J. 2588.

as the same requires very strong and compelling grounds which are conspicuously missing in the impugned order dated 20.10.2023. The impugned order, on the face of it, is violative of the statutory provisions governing the question of grant of physical remand and guidelines rendered by the Superior Courts on the subject.

18. Before parting with the judgment, it shall be beneficial to formulate guidelines, for the Magistrate/Administrative Judge to be followed in the future, as infra: -

- I. The question of remand in cases exclusively triable by the Anti-Terrorism Court is governed by Section 21-E of the ATA but Section 167 of the Code and the relevant considerations shall also be applicable as much as those are not inconsistent with the provisions of ATA.
- II. The remand of an accused can only be granted when he is produced before the Magistrate. No remand order should be passed by the Magistrate in the absence of an accused.
- III. It is the bounden duty of the Magistrate to apply her/his independent judicious mind to the facts and circumstances of the case to arrive at the decision, whether the physical remand should be granted or refused. Application of an independent judicious mind being *sine qua non* must be reflected in the order passed by the Magistrate and for that purpose, the case diaries and other documents available on the record must be examined to arrive at a just decision.
- IV. The Magistrate must pass a speaking order while dealing with the question of grant or refusal of physical remand, furnishing cogent and convincing reasoning as the grant of remand to police custody is not a rule, but an exception, therefore, the accused can only be handed over to

investigating agency in cases of real necessity and that too for the shortest possible time required for investigation.

- V. Before granting remand, the Magistrate should ensure that *prima facie* evidence is available on the record to connect the accused with the commission of the offence in question and the physical custody of the accused is necessary for the collection of further evidence.
 - VI. In case the Investigating Officer seeks an extension in physical remand, the Magistrate should examine the progress since the previous order(s), as the longer the accused person has been in custody the stronger should be the grounds required for further remanding him to the police custody. If no investigation was conducted after having obtained the physical remand, further remand should be refused.
 - VII. The accused must be given a fair opportunity to oppose the request of the Investigating Officer regarding the grant of remand himself or through his counsel. His objections should be brought on the record and the Magistrate should ensure that no physical harm is caused to him during police custody.
 - VIII. To strike a balance, between the needs of a thorough investigation on the one hand and the protection of the citizens from the oppressive attitude of the Investigating Agency, on the other hand, is the foremost duty of a Magistrate dealing with the question of grant or refusal of physical remand.
19. In the sequel to what has been discussed above, the instant revision petition is **accepted** and the impugned order dated 20.10.2023 passed by the Administrative Judge qua further granting physical remand of the petitioner is **set-aside**. The Investigating Officer present in Court

is directed to produce the petitioner before the Administrative Judge today for lodging him into judicial lockup.

20. These are the detailed reasons for our following short order of even date allowing the instant revision petition: -

“For the reasons to be recorded later, the instant revision petition is accepted, the remand order dated 20.10.2023 passed by learned Administrative Judge, Anti-Terrorism Courts, Lahore, is set-aside. The Investigating Officer is directed to produce the petitioner before the trial court today for lodging him into judicial lockup.”

(Shehram Sarwar Ch.)
Judge

(Ali Zia Bajwa)
Judge

The judgment was pronounced on 24.10.2023 and after completion, it was signed on
24.11.2023.

JUDGE

JUDGE

Approved for Reporting

JUDGE

JUDGE

Riaz