

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

Crl. Misc. No.13/H/2024

Muhammad Rafique
Vs.
Station House Officer and others

JUDGMENT

Date of hearing:	31.1.2024
For the Petitioner:	Mr. Zafar Iqbal Sheikh, Advocate.
For Respondent No.1:	Mr. Javed Iqbal, Assistant District Public Prosecutor, with Khalid/SI and Iqbal/SI.
For Respondents No.2 & 4:	Sardar Muhammad Shahzad Khan Dhukkar, Advocate.

Tariq Saleem Sheikh, J. – The Petitioner lives in Chak No.110/1L. On 21.03.2021, his 17-year-old brother, Muhammad Shafique, went to a nearby mosque to offer Isha prayers but did not return. Concerned, the Petitioner searched for Shafique but could not find him. On 12.04.2021, he lodged FIR No. 41/2021 under section 365 PPC at Police Station Islam Garh, District Rahimyar Khan, against unknown persons for abducting Shafique. On 14.11.2022, the Petitioner submitted a supplementary statement accusing Respondents No. 3 and 4 of the offence. However, the Investigating Officer (Respondent No. 1) found no evidence against them and declared them innocent. The Petitioner disagrees with this conclusion and asserts that Shafique remains in the custody of Muhammad Ramzan (Respondent No. 2) along with Respondents No. 3 and 4. Consequently, he has filed this petition under section 491 of the Criminal Procedure Code 1898 (Cr.P.C.) seeking Shafique’s recovery from the said Respondents.

2. Respondent No. 1 has submitted his report, stating that despite extensive efforts, he could not obtain any information on Shafique’s whereabouts. He acknowledges that the Petitioner nominated Respondents No. 3 and 4 but states that he found no incriminating evidence against them despite a thorough investigation. Consequently, on 28.11.2022, he declared them innocent, a conclusion that was affirmed by the S.P. (Investigation).

Respondent No. 1 also mentions that, at one stage, the Petitioner referred him to his uncle, Muhammad Ismail, who expressed an apprehension that the abductors had taken Shafique to Sindh. He told Respondent No.1 that he was trying to gather more information and promised to provide updates.

3. Respondent No. 1 has further stated in his report that on 28.01.2024, the Petitioner submitted a written application naming Noor Muhammad son of Usman, and Jalu Jee son of Andra Jee as new suspects. Respondent No. 1 arrested them and initiated an investigation, but there is still no clue about Shafique. He has assured the Court of his full cooperation with the Petitioner and his family to locate Shafique if they can provide further leads.

4. Shafique is still missing. Given that FIR No. 41/2021 remains active, the question arises as to whether a *habeas corpus* petition is maintainable under these circumstances.

5. *Habeas corpus* is a Latin term that means “you have the body.” *Habeas corpus* has its roots in the most valuable and sacred human rights, i.e., personal liberty and human dignity. All civilized societies have worked to protect a citizen’s liberty, and if the restriction on him is illegal, the courts should step in to free him. An English author writes: “Of what avail are the rights of man if he has no means of escaping arbitrary, improper, or wrongful imprisonment? *Habeas corpus* is the means whereby the validity of imprisonment is tested.”¹

6. Although its precise origins are unknown,² the writ of *habeas corpus* is one of the oldest writs known to the common law of England. During the twelfth and thirteenth centuries, the writ of *habeas corpus* was a special kind of summons used in the mesne process. It was merely a command by the court to bring a person before it. In most cases, it was aimed at persons not in custody but at large. In the early fourteenth century, the common law courts started using the writ of *habeas corpus* to summon individuals and to require an explanation for their detention. This development, marked by the appearance of the writ of *habeas corpus cum causa*, transformed the writ into a tool for examining the

¹ C. Gordon Post, *An Introduction to the Law*. Cited by Ataullah Sajjad, J. in *Muhammad Ajmal Khan v. Lt.-Col. Muhammad Shafaat and others* (PLD 1976 Lahore 396 at p.460).

² <https://www.brtiannica.com/topic/habeas-corpus>

legality of a person's detention. The requirement to produce the detainee along with the cause of their detention allowed the courts to assert their jurisdiction over rival courts, such as the Chancery and Ecclesiastical courts, by securing the release of individuals held by these courts if their detention was deemed unlawful. During the fifteenth century, the writ became a powerful instrument in the struggle for jurisdiction between the common law courts and other courts. By securing the physical presence of detainees, the common law courts could challenge and limit the authority of rival courts. The writ of *habeas corpus ad subjiciendum*, which emerged from this historical context, became the means by which individuals unlawfully imprisoned could seek release, turning the writ into a crucial constitutional safeguard against arbitrary detention by the State. The significance of the writ was further solidified after the Great Rebellion, where it became closely associated with the protection of individual liberty, often linked to the Magna Carta's prohibition against imprisonment without due process. Although there is no direct lineage from the Magna Carta to the writ, there is an undeniable connection in their shared goal of protecting personal freedom. Over time, several legislative reforms were introduced to enhance the effectiveness of the writ. The Habeas Corpus Acts of 1679 and 1816 addressed defects in the writ's application and extended its benefits to cases of civil detention, allowing judges to investigate the truth of the facts presented in the return to the writ. These reforms perfected the writ as a safeguard against unlawful detention. In *Thomas Pacham Dales' case* [1881 (6) QBD 376], it was stated:

“Then comes the question upon the *habeas corpus*. It is a general rule, which has always been acted upon by the Courts of England, that if any person procures the imprisonment of another, he must take care to do so by steps, all of which are entirely regular, and that if he fails to follow every step in the process with extreme regularity, the court will not allow the imprisonment to continue.”

7. The most distinguishing feature of the writ of *habeas corpus* is its peremptoriness. In *Cox v. Hakes*, [1890] UKLawRpAC 36; [1890] 15 A.C. 506, Lord Halsbury, LC., said: “The essential and leading theory of the whole procedure is the immediate determination of the right to the applicant's freedom and his release if the detention is found to be unlawful.”

8. The object of the writ is not to punish past illegality but to secure release from ongoing unlawful detention.³ Albeit the grounds for issuing it are somewhat similar, the writ of *habeas corpus* is not a part of the judicial review procedure.⁴ Courts have traditionally refused to entertain *habeas corpus* petitions to challenge convictions or sentences handed down by the Courts of Record or inferior courts, directing the party to seek the remedy provided by statute.

9. In the United States, Article I, Section 9, Clause 2 of the Constitution, known as the Suspension Clause, states: “The Privilege of the Writ of *Habeas Corpus* shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it.” According to Chief Justice William H. Rehnquist, “the assumption has been that the limitation on suspension of the writ contained in Article I implies a guarantee of its existence. The assumption has never been tested because the very first Congress provided for the writ by statute.”⁵

10. The right to *habeas corpus* can also be implied under the 14th Amendment of the U.S. Constitution, particularly through its Due Process Clause. The 14th Amendment, which was adopted in 1868, stipulates in part: “No state shall ... deprive any person of life, liberty, or property, without due process of law ...” This Due Process Clause has been interpreted by the U.S. Supreme Court to incorporate many of the fundamental rights guaranteed by the Bill of Rights. *Habeas corpus* is a crucial tool for contesting unlawful detention and is an essential part of due process rights that safeguard individual liberty. Therefore, while the Suspension Clause directly guarantees *habeas corpus*, the 14th Amendment’s Due Process Clause provides an additional layer of protection by ensuring that state actions that result in detention must comply with due process standards. Those detained have the right to challenge their detention through *habeas corpus* proceedings. *Corpus Juris Secundum* explains:⁶ “The privilege of the writ of *habeas corpus* exists independent of the statute and flows from the

³ *Secretary of State for Foreign and Commonwealth Affairs v Yunus Rahmatullah* [2012] UKSC 48

⁴ Durga Das Basu, *Commentary on the Constitution of India*, 9th Edn, Vol.10, p.10389

⁵ Fazal Karim, *Judicial Review of Public Actions*, 2nd Edn., Vol.3, p. 1607

⁶ *Corpus Juris Secundum*, 2014 Edn., Vol. 39, § 32, pp. 355-6

Constitution for the protection of all whose liberty may be restrained under unlawful authority although its functioning may be reasonably regulated by the legislature.⁷ The legislature may add to the efficacy of the writ,⁸ and reasonable regulations directly or indirectly affecting the writ and the procedure to be followed⁹ which do not substantially impair the efficacy of the writ, are constitutional.¹⁰ However, the legislature may not encroach on the constitutional power of the judiciary by limiting the constitutional jurisdiction of courts to issue the writ.”¹¹

11. According to *American Jurisprudence*, the writ of *habeas corpus* in the United States is applicable in two types of situations: when a private entity restrains a person or when they are detained under a legal process. It can be issued regardless of whether the person is detained in connection with a civil or criminal case. Generally, some form of actual or physical restraint is required to justify intervention through *habeas corpus*. Any limitation that restricts a person’s freedom of movement is considered sufficient, even if the person is not confined in a jail or prison. However, *habeas corpus* is not meant to interrupt the orderly administration of justice of the criminal laws by a competent court acting within its jurisdiction.¹²

12. As in the United Kingdom, *habeas corpus* in the United States is considered a writ of right, but not a writ of course. A probable cause must be shown. In other words, while a prisoner or detainee has the privilege to demand the writ as a matter of right, this does not automatically entitle them to the writ without first establishing a *prima facie* case for release. The power to issue a writ is not unqualified. It must be exercised with sound discretion.¹³

13. Insofar as the Indian sub-continent is concerned, we may begin with the Code of Criminal Procedure, 1898. It codified the writ of *habeas corpus* by introducing section 491. Originally, the High Courts in the three Presidency towns of Calcutta, Madras, and Bombay had the authority

⁷ Ind. – Fry v. State, 990 N.E.2d 429 (Ind. 2013).

⁸ W. Va. – State ex rel. Burgett v. Oakley, 155 W. Va. 276, 184 S.E.2d 318 (1971).

⁹ Ga. – Day v. Stokes, 268 Ga. 494, 491 S.E.2d 365 (1997).

Idaho – McKinney v. State, 133 Idaho 695, 992 P.2d 144 (1999).

¹⁰ N.Y. – People ex rel. Keitt v. McMann, 18 N.Y.2d 257, 273 N.Y.S.2d 897, 220 N.E.2d 653 (1966).

¹¹ Tex. – Ex parte Davis, 947 S.W.2d 216 (Tex. Crim. App. 1996).

¹² *American Jurisprudence*, 2nd Edn., (2008), pp. 222 to 228

¹³ *ibid.*

to issue this writ but they only exercised power in respect of their “ordinary original civil jurisdiction”. As a result, when the person held was outside the jurisdiction of such courts, section 491 was inapplicable. Subsequently, section 491-A was enacted, which provided that any Chartered High Court could exercise the powers conferred by the section, in the case of European British subjects, within the appellate criminal jurisdiction and such other territories as the Central Government may direct. The Criminal Procedure Amendment Act of 1923 extended section 491 to all the High Courts in respect of their “appellate criminal jurisdiction.” Consequently, all the High Courts in India could exercise jurisdiction under section 491 Cr.P.C. in their respective territorial jurisdictions but not when the person was detained beyond those limits.

14. In India, the prerogative writ of *habeas corpus* has been given a constitutional status under Articles 32 and 226 of the Constitution.¹⁴

15. In Pakistan, before July 1954, the *habeas corpus* jurisdiction vested in the High Courts under section 491 Cr.P.C. Thereafter, the Government of India (Amendment) Act, 1954 also conferred constitutional power on the High Courts to issue such writ by inserting section 223-A in the Government of India Act, 1935. Article 170 of the 1956 Constitution, Article 98 of the 1962 Constitution, and now Article 199 of the 1973 Constitution have maintained this jurisdiction.¹⁵

16. Section 491 Cr.P.C. continues to be in effect in Pakistan alongside Article 199 of the Constitution. Notably, Ordinance VIII of 2002 introduced sub-section (1A) to section 491 Cr.P.C., which allows Sessions Judges and Additional Sessions Judges to issue directions of the nature of a *habeas corpus* subject to the conditions specified by the High Court in a

¹⁴ Article 32 of the Constitution of India grants every individual the right to move the Supreme Court for the enforcement of their fundamental rights. Article 226(1) states that every High Court shall have powers to issue orders or writs, including *habeas corpus*, *mandamus*, prohibition, *quo warranto*, and *certiorari*, to any person or any government for the enforcement of fundamental rights and other purposes.

¹⁵ Article 199(1)(b)(i) of the Constitution of 1973 provides:

(1) Subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law,—

(b) on the application of any person, make an order—

(i) directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

general or special order published in the official Gazette.¹⁶

17. Article 199(1)(b)(i) of the Constitution of 1973 provides that, subject to the Constitution, a High Court may, if it is satisfied that no other adequate remedy is provided by law, make an order directing that a person in custody within the territorial jurisdiction of the Court be brought before it so that the Court may satisfy itself that the person is not being held in custody without lawful authority or in an unlawful manner. The High Court can exercise this power on the application of any person. The terms “without lawful authority” and “in an unlawful manner” both imply actions that are not legally permissible, but they differ in scope and application. “Without lawful authority” refers to actions taken by someone who lacks the legal right or power to act. This term suggests that there is no legal foundation or authorization for the action being performed. For instance, if a person is detained by an individual who has no legal authority to do so, that detention is “without lawful authority.” On the other hand, “in an unlawful manner” pertains to the method or process by which an action is carried out, even when there is some legal basis or authority to act. It means that while the person or entity may have the right to perform an action, the way it is executed violates legal norms or rules. For example, a police officer may

¹⁶ Presently, section 491 Cr.P.C. reads as under:

491. Power to issue directions of the nature of a *habeas corpus*.— (1) Any High Court may, whenever it thinks fit, direct:

- (a) that a person within the limits of its appellate criminal jurisdiction be brought up before the Court to be dealt with according to law;
- (b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;
- (c) that a prisoner detained in any jail situate within such limits be brought before Court to be there examined as a witness in any matter pending or to be inquired into in such Court;
- (d) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners for trial or to be examined touching any matter pending before such Court-martial or Commissioners respectively.
- (e) that a prisoner within such limits be removed from one custody to another for the purposes of trial; and
- (f) that the body of defendant within such limits be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment.
- (1A) The High Court may, by general or special order published in the official Gazette, may direct that all or any of its powers specified in clauses (a) and (b) of sub-section (1) shall, subject to such conditions, if any, as may be specified in the order, be exercisable also by –
 - (a) a Sessions Judge; or
 - (b) an Additional Sessions Judge,

within the territorial limits of a Sessions Division.

(2) The High Court may, from time to time, frame rules to regulate the procedure in the cases under this section.

(3) Nothing in this section applies to persons detained under any other law providing for preventive detention.

have the authority to make an arrest, but if the arrest is conducted using excessive force or without following due process, it is done “in an unlawful manner.” Therefore, the key difference lies in whether there is a legal right to act (“without lawful authority”) versus whether the action itself is conducted lawfully (“in an unlawful manner”).

18. Section 491(1) Cr.P.C. states that any High Court may, at its discretion, order that a person within its appellate criminal jurisdiction be brought before the Court to be dealt with according to law. It also allows the Court to set at liberty anyone who is illegally or improperly detained in public or private custody within its jurisdiction. In **Fizza Mai v. Shahbaz Hassan Khan and others** (2019 MLD 1772), it was held that the jurisdiction under section 491 Cr.P.C. is exercised by the court to “restore” the custody of the detainee to the person where it rightfully and lawfully belongs. Before passing an order for the restoration of custody, the court must form a *prima facie* view that the custody from which the detainee is sought to be recovered is “illegal and improper”, and that there is real urgency in the matter.

19. According to the Black’s Law Dictionary, the word “illegal” means “forbidden by law, or unlawful”.¹⁷ On the other hand, it defines the term “improper” as “incorrect, unsuitable or irregular, fraudulent or otherwise wrongful”.¹⁸ As per Advanced Law Lexicon, “illegal” means “contrary to law or something that is against the law”¹⁹ and explains that “improper” when applied to human conduct refers to “such conduct as a man of ordinary and reasonable care, and prudence would not, under the circumstances, have been guilty of.”²⁰

20. The terms “illegal” and “unlawful” are often used interchangeably, but they carry subtle distinctions, particularly in legal contexts. “Illegal” typically refers to actions explicitly prohibited by law, indicating that such acts violate specific statutes or legal provisions. For example, theft is considered illegal because it directly contravenes criminal laws that define and prohibit this behaviour. In contrast, “unlawful” is a

¹⁷ Black’s Law Dictionary, 10th Edn., p. 864.

¹⁸ *ibid*, p. 875.

¹⁹ Advanced Law Lexicon, 4th Edn., Vol.II, p. 2248.

²⁰ *ibid*, Vol.II, p. 2286.

broader term that refers to actions that are not authorized or sanctioned by law. An act can be unlawful if it is forbidden by law, even if it doesn't necessarily violate a specific statute in the same way an illegal act does. For instance, a contract might be deemed unlawful if it involves activities that are not legally permitted, although it might not be classified as illegal in a criminal sense. Furthermore, the distinction also suggests that "illegal" implies a failure to comply with the technical or procedural requirements of the law, whereas "unlawful" encompasses a broader range of actions that are contrary to the law, whether due to their substance or form. While "illegal" focuses on procedural non-compliance, "unlawful" suggests a violation beyond mere technicalities, potentially including ethical or moral considerations.

21. The terms "lawful" and "legal" also have distinct meanings. "Lawful" generally refers to something that is authorized or permitted by law, with an emphasis on both ethical and legal legitimacy. On the other hand, "legal" pertains more to the adherence to the technical forms and procedures of the law without necessarily implying ethical approval. Therefore, while an action can be legal by following the proper forms and procedures, it may not be lawful if it lacks ethical or substantive legitimacy.

22. The High Court's jurisdiction under Article 199(1)(b)(i) of the Constitution of 1973 is much broader than section 491 Cr.P.C.²¹ In **Government of West Pakistan and another v. Begum Agha Abdul Karim Shorish Kashmiri** (PLD 1969 SC 14), Hamoodur Rahman, CJ. stated that the phrase "in an unlawful manner" in Article 98(2)(b) of the 1962 Constitution²² was intentionally included to reinforce the constitutional guarantee that every citizen has the inalienable right to be treated according to the law, as declared in Article 2.²³ His Lordship further stated that the Constitution's framers intended that a citizen's liberty should not be deprived lightly. Thus, Article 98(2)(b) aimed to empower the High Courts to review the actions of detaining authorities without being constrained by the formalities or technicalities of section 491 Cr.P.C. or the traditional writ of *habeas corpus*. This review extends beyond merely assessing the validity

²¹ *Muhammad Ajmal Khan v. Lt.- Col. Muhammad Shafaat and others* (PLD 1976 Lahore 396).

²² It paralleled Article 199(1)(b)(i) of the Constitution of 1973.

²³ Article 4 of 1973 Constitution mirrors Article 2 of the 1962 Constitution.

of the law or the actions of the officer involved, requiring the courts to ensure that the detention is not unlawful in any respect. However, in making this determination, the Court must consider the language of the relevant statute, the purpose behind the detention, and the circumstances under which it was ordered. While the Constitution grants the High Court this broad power, which cannot be limited by ordinary legislation, these factors help determine the true nature, scope, and legality of the detention.

23. The essential requirement for issuing a writ of *habeas corpus* is that the individual for whom the writ is sought must be in some form of detention, whether by authorities or a private person. In other words, detention is the condition precedent for filing a *habeas corpus* petition. Resultantly, if the petition does not explicitly claim “illegal detention”, it is liable to be summarily dismissed. Detention does not simply refer to physical confinement; it includes any restriction on a person’s liberty.²⁴ In *Union of India v. Yumnam Anand M. alias Bocha alias Kora alias Suraj and another* (2007) 10 SCC 190, the Supreme Court of India stated:

“Article 21 of the Constitution having declared that no person shall be deprived of life and liberty except in accordance with the procedure established by law, a machinery was definitely needed to examine the question of illegal detention with utmost promptitude. The writ of *habeas corpus* is a device of this nature. Blackstone called it “the great and efficacious writ in all manner of illegal confinement”. The writ has been described as a writ of right which is grantable *ex debito justitiae*. Though a writ of right, it is not a writ of course. The applicant must show a *prima facie* case of his unlawful detention. Once, however, he shows such a cause and the return is not good and sufficient, he is entitled to this writ as of right.”²⁵

(emphasis added)

24. The *habeas corpus* jurisdiction cannot be invoked to locate a missing person or someone regarding whose abduction an FIR has been registered with the police. In *Sulochana Bai vs. State of Madhya Pradesh and others*, [2008 (2) MPHT 233], the petitioner was the daughter-in-law of Kanchhedi Lal, who went missing after leaving for work at Khamariya Factory on June 26, 2003. Despite a case being registered at Police Station Ranjhi and public notices in newspapers, he was not found. The petitioner stated that her husband, Pramod Burman, who was the son of the missing person, had a mental illness, and she struggled to care for him and her

²⁴ *Human Rights Commission of Pakistan and others v. Government of Pakistan and others* (PLD 2009 SC 507).

²⁵ Also see: *Barnardo v. Ford*, (1862) AC 326.

children while also dealing with the authorities. She asserted that despite her repeated efforts and visits to the police station and factory, no progress had been made in locating Kanchhedi Lal. She filed a *habeas corpus* petition in the High Court of Madhya Pradesh for his recovery. She further complained that the investigating agency had been unresponsive and had not provided any updates. The High Court dismissed the petition for being not maintainable. The relevant excerpt is reproduced below:

“12. ... the writ of *habeas corpus* can only be issued when there is assertion of wrongful confinement. In the present case, what has been asserted in the writ petition is that her father-in-law has been missing for last four years and a missing report has been lodged at the police station. What action should have been taken by the police that cannot be the matter of *habeas corpus* because there is no allegation whatsoever that there has been wrongful confinement by the police or any private person. In the result, the writ petition is not maintainable and is accordingly dismissed.”

25. In Selvaraj v. The State,²⁶ the petitioner’s son went to Mayiladuthurai to buy vegetables and did not return. After an unsuccessful search, he lodged a complaint with the police, which was registered as Crime No. 367 of 2015. The police could not trace his son, so he filed a *habeas corpus* petition in the Madras High Court. The petition, however, did not allege “illegal detention,” nor was there any evidence or suspicion to suggest such detention. The High Court ruled that this was a missing person case, already under police investigation, and did not qualify for a *habeas corpus* petition under Article 226 of the Constitution of India. The Court emphasized that a *habeas corpus* petition is only competent if there is a clear case of illegal detention or at least a strong and credible suspicion. It stated:

“20. The constitutional courts across the country predominantly held in a catena of judgments that establishing a ground of “illegal detention” and a strong suspicion about any such “illegal detention” is a condition precedent for moving a *habeas corpus* petition and the Constitutional Courts shall be restrained in entertaining such *habeas corpus* petition, where there is no allegation of “illegal detention” or suspicion about any such “illegal detention”. Man/Women missing cases cannot be brought under the provision of the *habeas corpus* petition. Man/Women missing cases are to be registered under the regular provisions of the Indian Penal Code and the Police officials concerned are bound to investigate the same in the manner prescribed under the Code of Criminal Procedure. Such cases are to be dealt as regular cases by the competent Court of Law and the extraordinary jurisdiction of the Constitutional Courts cannot be invoked for the purpose of dealing with such Man/Women Missing cases.”

²⁶ Indian Kanoon – <https://indiankanoon.org/doc/19974910/>

26. In Swapan Das v. The State of West Bengal and others,²⁷ the petitioner's thirty-four-year-old son, who worked for a company named A to Z for about twelve years, went missing on April 27, 2013. Following his disappearance, an entry was made in the general diary of Shyampukur police station on the same day. However, the police took no action to locate him. The petitioner then approached the Calcutta High Court, seeking a *habeas corpus* writ to compel the police to find, recover, and present his missing son. The High Court held:

“A *habeas corpus* writ is to be issued only when the person concerning whose liberty the petition has been filed is illegally detained by a respondent in the petition. On the basis of a *habeas corpus* petition the power under Article 226 is not to be exercised for tracing a missing person engaging an investigating agency empowered to investigate a case under the Code of Criminal Procedure, 1973. The investigation, if in progress, is to be overseen by the criminal court. Here the petitioner is asking this court to direct the police to track down his missing son.”

27. Similarly, in Sudharani v. The State of Karnataka and others,²⁸ the Karnataka High Court ruled that a writ of *habeas corpus* is not competent in cases of missing persons unless there is an allegation of illegal custody by the police or a third party. The Court emphasized that a writ of *habeas corpus* can only be issued if there is a specific claim that an identified individual had unlawfully detained a particular person. It also stated that the power under Article 226 of the Indian Constitution should not be used to locate missing persons, as this is the responsibility of the investigating agency under the Code of Criminal Procedure.

28. In Pakistan, the Sindh High Court applied the above-mentioned principle in Bakaullah Khan Samoo v. Province of Sindh and others (PLD 2022 Sindh 308). In that case, the petitioner's brother, Abdul Waheed alias Wanhial, went missing after his marriage to Respondent No.7. The petitioner sought help from the Additional Inspector General of Police, Hyderabad, to locate his missing sibling. Meanwhile, Respondent No. 7, denying the marriage, filed a criminal complaint under sections 22-A and 22-B Cr.P.C., accusing Abdul Waheed of kidnapping and raping her and making objectionable videos. An FIR was registered at the concerned police station, and an investigation was initiated. Later, Respondent No. 10, the mother of Respondent No.7, filed another

²⁷ Indian Kanoon – <https://indiankanoon.org/doc/12820968>

²⁸ <https://www.casemine.com/judgement/in/5ac5e4084a93261a672d63e8#9>

application under the same sections, seeking an FIR against Abdul Waheed and his associates, claiming that they had also kidnapped her other daughter, Majida. An FIR was registered for this incident as well. The petitioner approached the High Court under Article 199 of the Constitution, seeking a writ of *habeas corpus* directing the police to recover Abdul Waheed, alleging that the private respondents were illegally detaining him. He also complained that the police had made no significant effort to trace Abdul Waheed. The Sindh High Court dismissed the petition as not maintainable, ruling that *habeas corpus* is limited to addressing cases of unlawful detention by specific individuals. It is not meant to trace missing persons when an investigation is underway.

29. The category of missing persons mentioned above (which I would refer to as “untraceable persons” for more clarity) is distinct from cases of enforced disappearances, even though individuals in the latter category are also generally described as missing persons. Enforced disappearances are a serious violation of human rights, which occurs when individuals are secretly abducted or imprisoned by State authorities or groups acting on their behalf without acknowledging the detention or revealing the person’s fate or whereabouts. This practice is not only a grave infringement on the personal liberty of the victim but also a direct assault on the rights and freedoms that are fundamental to human dignity. The International Convention for the Protection of All Persons from Enforced Disappearance (ICPPED), adopted by the United Nations General Assembly in 2006, defines²⁹ enforced disappearance as “arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law.”³⁰ The Convention makes enforced disappearance a crime under international law and establishes the rights of victims and their families, including the right to

²⁹ Article 2 of the Convention.

³⁰ In 2011, on the directions of the Supreme Court of Pakistan, the Federal Government constituted the Commission pursuant to powers conferred under section 8 of the Pakistan Commission of Inquiry Act, 1956. Clause (d) of Regulation 2 of the Commission of Inquiry on Enforced Disappearances Regulations has defined the expression “Enforced Disappearance/Missing person” as meaning such a person picked up/taken into custody by one of the law enforcement/intelligence agencies, working under the civilian or military control, in a manner which is contrary to the provision of law”.

know the truth about the circumstances of the disappearance and the fate of the disappeared person. It also obligates States to prevent enforced disappearances, investigate allegations, prosecute those responsible, and provide reparations to victims and their families.

30. The key distinction between the disappearances addressed in this judgment (untraceable persons) and enforced disappearances is that the former is carried out by any private individual or group, often for reasons such as ransom or personal vendetta, without involvement or backing from the State. In contrast, enforced disappearances are typically carried out by security or intelligence agencies, often under the justification that the individual poses a threat to national security. In **President Balochistan High Court Bar Association v. Federation of Pakistan and others** (2012 SCMR 1958), the Supreme Court of Pakistan held that a constitutional petition for enforced disappearances is maintainable. In **Human Rights Case No. 29388-K of 2013** (PLD 2014 SC 305), the Supreme Court noted that Pakistan has not ratified the ICCPED. However, since Article 9 of the Constitution guarantees the right to life, which has received an expansive interpretation from the courts, and because Article 10 provides direct protection from enforced disappearances, the Supreme Court held that it could apply the principles enshrined in the 2006 Convention to ensure justice. In **Mst. Hajra v. Province of Sindh and others** (PLD 2020 Sindh 727), the Sindh High Court found that law enforcement agencies unlawfully detained the petitioner's son, Salman Khan, due to his affiliation with the political party Jeay Sindh and, subsequently, registered an FIR to fabricate a justification for his arrest. The High Court proceeded with the *habeas corpus* petition filed by Salman's mother for his recovery, quashed the FIR, ordered his immediate release, and directed an inquiry into the misconduct of the police officers involved. The Court emphasized that fundamental rights, such as the right to liberty and protection from illegal detention under Articles 4, 9, and 14 of the Constitution, cannot be undermined by fabricated charges or manipulative actions by law enforcement. In **Mahera Sajid v. Station House Officer, Police Station Shalimar, and others** (2018 CLC 1858), the Islamabad High Court, while exercising jurisdiction under Article 199 of the Constitution, awarded compensation to the family of the missing person in the case of an alleged enforced disappearance.

31. Let's now consider the case at hand. The Petitioner lodged FIR No. 41/2021 dated 12.04.2021 under section 365 PPC against unknown persons regarding the abduction of his brother, Muhammad Shafique. Respondent No. 1 investigated the matter but was unable to trace Shafique. On 14.11.2022, the Petitioner named Respondents No. 3 and 4 through a supplementary statement, but Respondent No. 1 declared them innocent due to lack of incriminating evidence, a conclusion supported by the S.P. (Investigation). On 28.11.2022, Respondent No. 1 submitted a report under section 173 Cr.P.C. based on these findings.

32. Importantly, on 28.01.2024, the Petitioner submitted a written application to Respondent No. 1, nominating Noor Muhammad son of Usman, and Jalu Jee son of Andra Jee, as suspects in the case. Respondent No. 1 has arrested them and is investigating, but Shafique remains untraceable. The Petitioner has not arrayed Noor Muhammad and Jalu Jee as respondents in this petition.

33. In this petition, the Petitioner has asserted that Shafique is in the custody of Respondents No. 2 to 4, which conflicts with his claim in the application dated 28.01.2024 referred to above. Considering these facts and circumstances, this is a case of an untraceable person. In light of the law discussed above, this petition is not maintainable. However, the Petitioner would not be precluded from availing other legal remedies.

34. Respondent No.1 is directed to take all possible steps to trace Muhammad Shafique.

35. **Disposed of.**

(Tariq Saleem Sheikh)
Judge

Naeem

Approved for reporting

Judge