

ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE.
(JUDICIAL DEPARTMENT)
Writ Petition No.43904/2023

Rabia Sultan
Vs
Province of Punjab and two others.

S.No. of order/ Proceedings.	Date of order/ Proceeding	Order with signature of Judge, and that of Parties of counsel, where necessary.
------------------------------	---------------------------	---

06.07.2023 Mr. Sarfraz Ahmad Cheema, Advocate for the petitioner.
Mr. Sattar Sahil and Falak Sher Bakhsh Gill AAGs with Mr.
Qadeer Alam, AIG (Prisons).

Petitioner applied for better class facility in the jail for her husband Omar Sarfraz Cheema who after his arrest in case FIR No.1271/2023 dated 10.05.2023 under sections 353/186/427/ 109/ 302/ 324/290/ 291/147/ 148/149/ 152/153/ 505/ 120-B/ 452/ 436/ 395 PPC registered at police station Gulberg, Lahore is confined in Central Jail, Kot Lakhpat, Lahore. The petitioner’s application dated 15.05.2023 addressed to Superintendent Central Jail, Kot Lakhpat, Lahore/respondent No.3 was not decided upon which she filed a Writ Petition No.39605/2023 with the same grievance i.e. for providing B-Class facilities to her husband; the said writ petition, however, vide order dated 12.06.2023 was disposed of in the terms that Additional Chief Secretary Home, Punjab was directed to decide the above-referred application if pending, expeditiously and preferably within three days from the date of said order. As a net result vide order dated 15th June, 2023 passed by Additional Chief Secretary (Home), finally the said application dated 15.05.2023 was dismissed. Hence, the instant writ petition.

2. Learned Counsel for the Petitioner states that petitioner’s husband Mr. Omar Sarfraz Cheema belongs to a noble family and maintains a high social status being a politician and also remained Governor of the Punjab; therefore, under rule 248 read with rule 242 of the Pakistan Prisons Rules, 1978, he is entitled for better class

facility in the jail. His claim of such facility was also urged on the principle of parity too while placing on record the orders of Government of the Punjab Home Department passed in favour of ex-Chief Minister Punjab, Ch. Pervaiz Elahi, and former Secretary, Punjab Assembly, Muhammad Khan Bhatti, the similarly placed prisoners. In support of his contention, he has placed reliance on cases reported as, “Mst. AASIA alias SALAAM SHAIKH Versus THE GOVERNMENT OF SINDH THROUGH HOME SECRETARY AND 4 OTHERS” (1997 P Cr. L J 79); “ALI ASGHAR SHAH versus THE STATE” (PLD 2006 Karachi 162); “SHAHID BAWANI Versus GOVERNMENT OF SINDH through Home Secretary and another” (1993 P Cr. L J 2528). On the other hand, Learned Assistant Advocate General contested such claim while distinguishing the case of petitioner’s husband to other facilitated prisoners on the ground that he is involved in offences u/s 395 PPC and u/s 7 of Anti-terrorism Act, 1997, and as per amendments of year 2018 in Prisons rules, such category of offenders is excluded from the benefit of rule 242 supra.

3. Contentions were attended; relevant law applicable on the subject was perused in the light of Article-4 of the Constitution of the Islamic Republic of Pakistan, 1973.

4. The petitioner’s husband is behind the bars in case FIR No. 1271/2023 u/ss 353/186/427/ 109/302/ 324/290/291/147/ 148/ 149/152/153/505/120-B/452/436/395 PPC, section-7 ATA, 1997 P/S Gulberg, Lahore; therefore, in order to ascertain his status as a prisoner, the relevant law “The Prisons Act, 1894” was examined which identifies the persons involved in criminal processes as mentioned in sub-sections (2) and (3) of Section 3, as follows:-

(2) “criminal prisoner” means any prisoner duly committed to custody under the writ, warrant or order of any Court or authority exercising criminal jurisdiction, or by order of a Court-martial:

(3) “convicted criminal prisoner” means any criminal prisoner under sentence of a Court or Court-martial, and includes a person detained in prison under the provisions of Chapter VIII of the Code of Criminal Procedure, 1898, or under the Prisoners Act, 1900:

From the above definition, it is clear that there are two broad categories of prisoners in a criminal process, i.e., under-trial prisoners (UTPs) and convicted prisoners. For their classification and separation, section 59 (17) of the Pakistan Prisons Act, 1894 authorizes the government to frame rules.

5. Pursuant to section 59 supra, Later Pakistan Prisons Rules, 1978 were framed which identify three classes of facilities for convicted prisoners in jail as per rule 225 & two classes for under-trial prisoners as per rule 248, which are as under:-

Classification of convicted prisoners

Rule 225. (i) Convicted prisoners shall be classified into: -

- (a) superior class;
- (b) ordinary class; and
- (c) political class.

(ii) Superior class includes A and B class prisoners. Ordinary class comprises of prisoners other than superior class.

Political class comprises of prisoner who commit crimes not for personal gain but for political motives. This class is not criminal and does not require reformatory or correctional treatment.

Classification of under-trial prisoners

Rule 248. (i) There shall be only two classes of under trial prisoners-

- (a) better class; and
- (b) ordinary class.

(ii) better class will include those under-trial prisoners who by social status, education or habit of life have been accustomed to a superior mode of living and will correspond to A and B class of convicted prisoners.

Ordinary class will include all others and will correspond to C class.

(ii-a) Those undertrial prisoners who pass matriculation or higher examination in 1st Division during their stay in the jail shall be allowed better class jail facilities with effect from the date the result is announced.

(iii) Before an under-trial prisoner is brought before a competent Court, it will be at the discretion of the Officer not below the rank of Assistant Superintendent/ Deputy Superintendent of police having jurisdiction in the area to properly classify him. After he is brought before the Court, he be classified by that Court, subject to the approval of the provincial Government.

For assessment of their class, following qualifications and parameters were loaded in rule 242, which are reproduced for reference; it was primarily for convicted prisoners:-

Rule 242 (i) Convicted shall be divided into three classes; A. B and C class. Class A will contain all prisoners who are—

- (a) Casual prisoners of good character.
- (b) By social status, education and habit of life have been accustomed to a superior mode of living and,
- (c) Have not been convicted of offence involving elements of cruelty, moral degradation, personal greed, serious or premeditated violence, serious offence against property, offences relating to the possession of explosives, firearms and other dangerous weapons with object of committing or engaging an offence to be committed and abetment or incitement of offences falling within these sub-clauses.

Prison Rules bereft of any express provision for restriction on under-trial prisoners, as were in place for convicted prisoners, to seek better class facility: however, Police Rules, 1934 somehow or the other cater to the situation which reads as under;

26-21A. Classification of under-trial prisoners. Under trial prisoners are divided into two classes based on previous standard of living. The classifying authority is the trying court subject to the approval of the District Magistrate; but during the period before a prisoner is brought before a competent court, discretion shall be exercised by the officer in charge of the Police Station concerned to classify him as either 'better class' or 'ordinary'. Only those prisoners should be classified provisionally as 'better class' who by social status, education or habit of life have been accustomed to a superior mode of living. The fact, that the prisoner is to be tried for the commission of any particular class of offence is not to be considered. The possession of a certain degree of literacy is in itself not sufficient for 'better class' classification and no under-trial prisoner shall be so classified whose mode of living does not appear to the Police Officer concerned to have been definitely superior to that of the ordinary run of the population, whether urban or rural. Under-trial prisoners classified as 'better class' shall be given the diet on the same scale as prescribed for A and B class convict prisoners in Rule 26-27(1).

(Emphasis supplied)

6. By virtue of Notification No. SO (R&P) 4-24/10(P-I) dated 1st April 2018, Government of the Punjab introduced amendment in Prisons Rules for a modified version of Rules 225 & 242 to club both the categories of convicted and under-trial prisoners in one form of sailing and rule 248 was omitted. What rule 225, after amendment, speaks is as under:-

Rule 225: - Convicted and under-trial prisoners shall be classified as:-

- (a) better class;
- (b) ordinary class; or
- (c) political class

Explanation: A convicted or under-trial prisoner, to be classified as “a political class, is a person who commits a crime for political and not for any criminal motive.”

The relevant part of rule 242 is reproduced as under:-

Conditions for Classification of Prisoners

Rule 242: - (1) If the Officer Incharge is satisfied that the recommendation of the Inspector General of Prisons or the Deputy Commissioner concerned, submitted under rule 245, is in accordance with rules, he shall within forty-eight hours of the receipt of the recommendation, sanction better class facilities to the prisoner.

(2) The better class facilities shall be awarded to a prisoner who;

(a) is not a habitual offender and has not been convicted more than twice; and

(b) is or has been a commissioned or gazetted officer of armed forces or civil services or is or has been a member of the Parliament or a Provincial Assembly: or

Has in the preceding financial year paid minimum income tax of Rs. 600,000/- (six hundred thousand) or more: and

(c) has not been involved in, or convicted for, an offence:

(i) of serial killing;

(ii) of espionage;

(iii) of anti-state activities;

(iv) under section 10 and section 12 of the Prohibition (Enforcement of Hadd) Zina Ordinance, 1979 (VIII of 1979);

(v) under section 364, section 364-A or section 365-A, section 375, section 376, section 377, section 376, section 391, section 392, section 394, section 395, section 396, section 397, section 402-A, section 402-B, section 402-C or under Chapter XV of the Pakistan Penal Code, 1860 (XLV of 1860);

(vi) under the Explosive Substances Act, 1908 (VI of 1908);

(vii) under the Anti-Terrorism Act, 1977 (XXVII of 1977) if he is a member of a proscribed or under-watch organization involved in a terrorism offence;

(viii) under the Punjab Destitute and Neglected Children Act 2004 (XVIII of 2004) or any other law on the subject for the time being in force;

(ix) under the Control of Narcotic Substances Act, 1997 (XXV of 1997); or

- (x) under the Security of Pakistan Act, 1952 (XXXV of 1952).

The contention of learned law officer was attended; according to him, petitioner's husband is confined for an offence u/s 395 PPC and u/s 7 of Anti-terrorism Act, 1997, therefore, pursuant to restriction cited above, the request for grant of better class jail facilities was rightly rejected by the Additional Chief Secretary (Home).

7. It has been observed that better class facility to the petitioner's husband was restricted by the authority by applying Rule 242 (2) (c) (v) supra, which though include section 395 PPC but not the section-7 of Anti-terrorism Act, 1997. We have minutely examined the language used in clause (c) above which is reproduced again for ready reference as under;

“(c) has not been involved in, or convicted for, an offence.”

In this clause, the words “has not been” are used; whereas Clause (a) of same subsection finds mentioned the word ‘is’ & ‘has not been’ and Clause (b) uses the words ‘is’ or ‘has been’. Both the words, ‘is’ or ‘has been’ maintain different connotations and meanings; the use of word “is” obviously represents the present tense and would refer to something that is to be done or is being done in the present, therefore, by not using the word ‘is’, rather simply inserting the word “has been” in clause (c) makes it clear that it talks about something done in the past, thus the instant clause would apply on an offender who remained involved previously in such offences and this clause is not specified for first offender. In the cases reported as “PRAMATHA NATH CHOWDHURY AND 17 OTHERS versus (1) KAMIR MONDAL, (2) ISMAIL MODAL, (3) BAJU MONDAL alias HAGURA MONDAL AND (4) DUKHA MONDAL” (PLD 1965 Supreme Court 434) and “THE INCOME-TAX OFFICER (INVESTIGATION) CIRCLE I, DACCA AND ANOTHER” (PLD 1970 Supreme Court 80) wherein the term “has been” in unequivocal terms was declared as denoting past time. No information was placed on record that petitioner's husband maintains criminal history of like cases. Therefore, we have no hesitation to hold that order passed by Additional Chief Secretary

(Home) is result of wrong appreciation of legal provision, misapplication of law as well as of discrimination. The similarly placed prisoners were already extended this facility, therefore, it is the constitutional right of the petitioner's husband to enjoy the protection of law and to be treated in accordance with law which is an inalienable right of every citizen wherever he may be, as ordained under Article 4 of the Constitution of the Islamic Republic of Pakistan. 1973, therefore, he cannot be deprived of such right. No doubt petitioner's husband by his social status, education or habit of life has been accustomed to a superior mode of living; therefore, he is entitled to better class facility under the Pakistan Prisons Rules, 1978 as cited above.

8. Consequently, this writ petition is allowed, order impugned is set aside with the direction to grant better class facility immediately to Mr. Omar Sarfraz Cheema, the petitioner's husband.

(Ali Baqar Najafi)
Judge

(Muhammad Amjad Rafiq)
Judge

Approved for reporting.

(Ali Baqar Najafi)
Judge

(Muhammad Amjad Rafiq)
Judge

This judgment was pronounced on 06.07.2023, however, after dictation and preparation it was signed on 11.07.2023.

Javed*