IN THE PESHAWAR HIGH COURT, PESHAWAR
(JUDICIAL DEPARTMENT)

Quashment Petition No.09-P/2025

Maj. Arshad Sohail (Rtd), Manager Security
vs
The State & others

Date of hearing:	17.10.2025
Petitioner by:	Ms. Neelum A Khan, Advocate.
Respondents by:	Mr. Zeeshan Mehsud, Advocate.
The State by:	Mr. Asad Jan Durrani, AAG.
Respondents No. 3 to 6 & 8	In person

JUDGMENT

FARAH JAMSHED, J:- Impugned herein is order dated 07.12.2024 of learned Judicial Magistrate Nowshehra, whereby, respondents No.02 to 08 - accused in case FIR No.536, dated 01.09.2023, registered under section 387, 506, 149 PPC at police station Aza Khel, district Nowshera, were discharged along with their sureties.

2. The record reveals that the instant FIR arose out of previous disputes between the same parties in Islamabad, culminating in earlier FIRs No.780 dated 09.02.2022 under Sections 427, 506, 452, 148, 149 PPC and No.400 dated 19.05.2023 under Sections 324, 506, 148, 149, 352, 382, and 109 PPC, both registered at Police Station Kohsar, Islamabad.

In the instant case, the learned Magistrate vide his impugned order dated 17.12.2024, discharged the accused/ respondents No. 02-08, on the sole ground that the offence under section 387 PPC is non-cognizable and the police was not competent to investigate the same without prior permission of the Magistrate.

3. While questioning the validity of the impugned order, learned counsel for the petitioner submitted that the order was passed by the learned Magistrate when he was seized of the matter under section 249-A Cr.P.C on the application filed by the accused/respondents. Contended that the Magistrate was not competent to pass the order of discharge while disposing of the application under section 249-A Cr.P.C especially after taking cognizance of the matter. She further submitted that section 387 PPC is also a scheduled offence under Third Schedule of section 2(t) of Anti-Terrorism Act, 1997 (the Act) and exclusively triable by the court of Sessions, hence, the impugned order is not in accordance with law and liable to be set aside.

4. Conversely, learned counsel for the respondents supported by the learned AAG for the State submitted that the FIR was registered and investigated in violation of Section 155 Cr.P.C, rendering the entire proceedings void ab initio. They maintained that since the investigation in a non-

cognizable offence was without prior authorization of the Magistrate, the learned Magistrate rightly discharged the accused.

5. Arguments heard and record perused.

6. Admittedly, accused/respondents No.02 to 08 were nominated in FIR No. 536 registered under section 387/508/149 PPC. According to Schedule II of Cr.P.C, section 387 PPC is a non-cognizable, non-bailable and non-compoundable offence, punishable with imprisonment of either description for 07 years and fine, by the court of Sessions.

7. Before addressing the legality of the impugned order, it is necessary to examine the relevant statutory framework regarding investigation of non-cognizable offences and the power to discharge an accused.

8. Section 155 Cr.P.C provides that:

> **155(1).** Information in non-cognizable cases: When information is given to an officer incharge of a police station of the commission within the limits of such station of a non cognizable offence, he shall enter in a book to, be kept as aforesaid the substance of such information and refer the information to the Magistrate.

9. It is clear from the above provision of the Code that a non-cognizable offence—meaning an offence for which the police cannot arrest without a warrant and cannot investigate

without the permission of a Magistrate—must be handled in accordance with section 155 of the Cr.P.C. Subsection (2) of Section 155 Cr.P.C. expressly prohibits police from conducting investigations in such cases without prior authorization from a Magistrate. Section 155(2) of the Code states: "No police officer shall investigate a non-cognizable case without the order of a Magistrate having power to try such case." This requirement ensures that police action in non-cognizable offences is subject to judicial oversight, safeguarding the rights of the accused.

10. A Magistrate may, therefore, take notice of an illegally conducted investigation in a non-cognizable offence and pass appropriate orders, including discharge. However, the concept of “discharge” is defined and limited by the Code. Section 63 Cr.P.C stipulates that a person arrested by a police officer shall not be discharged except on his own bond, on bail, or under the special order of a Magistrate. The relevant extract of section 63 of the Code of Criminal Procedure is reproduced below for quick reading:

> **63.** Discharge of person apprehended: No person who has been arrested by a police officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate.

11. Under *ibid* provision of Cr.P.C, the discharge of an accused person is restricted in cases of an *“arrested accused”*

to the extent of his release from custody, not termination of proceedings. The phenomenon is further fortified under section 169 of the Cr.P.C which allows a police officer to release an accused on bond when evidence is insufficient. Section 169 Cr.PC is reproduced as below:

> "**169. Release of accused when evidence deficient:** If upon an investigation under this Chapter, it appears to the officer incharge of the police station or to the police officer making the investigation that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognisance of the offence on a police-report and to try the accused or send him for trial."

12. Likewise, the discharge of an accused can also be made pursuant to sub section 3 of section 173 of the Cr.P.C which stipulates that:

> **173. Report of police officer:** (1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer incharge of the police-station shall [through the Public Prosecutor]—
> (a) forward to a Magistrate empowered to take cognizance of the offence on a police report, a report in the form prescribed by the Provincial Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating

whether the accused (if arrested) has been forwarded in custody or has been released on his bond, and, if so, whether with or without sureties, and

(b) communicate, in such manner as may be prescribed by the Provincial Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given:

[provided that, where investigation is not completed within a period of fourteen days from the date of recording of the first information report under Section 154, the officer incharge of the police station shall, within three days of the expiration of such period, forward to the Magistrate through the Public Prosecutor, an interim report in the form prescribed by the Provincial Government stating therein the result of the investigation made until then and the Court shall commence the trial on the basis of such interim report, unless, for reasons to be recorded, the Court decides that the trial should not so commence],

(2) Where a superior officer of police has been appointed under Section 158, the report shall, in any cases in which the Provincial Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer incharge of the police-station to make further investigation.

(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(4) A copy of any report forwarded under this section shall, on application, be furnished to the accused before the commencement of the inquiry or trial:

> Provided that the same shall be paid for unless the Magistrate for some special reason thinks fit to furnish it free of cost.
>
> (5) Where the officer incharge of a police station forwards a report under sub-section (1), he shall along with the report produce the witnesses in the case, except the public servants, and the Magistrate shall bind such witnesses for appearance before him or some other Court on the date fixed for trial."

13. The distinction between section 63 and sub-section 3 of section 173 of the Code is that Section 63 Cr.P.C stipulates that a person arrested by a police officer shall not be discharged except on his own bond, on bail, or under the special order of a Magistrate. This provision deals only with release from custody, not termination of proceedings, whereas Section 173(3) empowers a Magistrate, upon receipt of a police report, to discharge an accused person from such bond. The power under these provisions relates only to release from custody—not to acquittal or termination of trial proceedings. Guidance in this respect is taken form case of *Ashiq Hussain*[1], wherein it was held that:

> 14. The resume of the statutory provisions referred to above is that the word 'discharge' appearing in section 63 and subsection (3) of section 173 of the Code has been used in the context of releasing an accused person from custody. Under section 63 an arrested accused person can be discharged by a police officer upon

[1] Ashiq Hussain Vs. Sessions Judge Lodhran & 3 others (P L D 2001 Lahore 271)

> execution of a personal bond by such an accused person or he can be discharged on bail, or under the special order of a Magistrate if such an accused person undertakes to appear before the said police officer, a Magistrate or a trial Court if and when required to do so. Under sub section (3) of section 173 a Magistrate seized of a police report under clause (a) of subsection (1) of section 173 may discharge an accused person of his bond when he has already been released on the basis of executing a bond. Thus, an accused person who has not so far been released on the basis of a bond cannot be discharged by a Magistrate of his bond under subsection (3) of section 173 of the Code. It is further evident from the above resume of the relevant provisions of the Code that the power to discharge an accused person on the basis of a bond during an investigation rests with the police officer, the Court granting bail or the Magistrate under section 63; an accused person may also be released on the basis of a bond by the officer-in-charge of the police station or the Investigating Officer under section 169 or upon taking of security in a case of a bailable offence by the officer-in-charge of the police station under subsection (1) of section 170; the power to discharge him of such bond rests only with the Magistrate seized of a police report under section 173; and the said powers of the police officer and the Magistrate have absolutely nothing to do with the question as to which Court would ultimately have the jurisdiction to try the offence in question.

14. In this context, upon review of the impugned order, the learned Judicial Magistrate discharged the accused individuals and their sureties while disposing of the

application submitted under Section 249-A Cr.P.C. The language of section 249-A Cr.P.C specifies that:

> **249-A. Power of Magistrate to acquit accused at any stage:** Nothing in this Chapter shall be deemed to prevent a Magistrate from acquitting an accused at any stage of the case if after hearing the prosecutor and the accused and for reasons to be recorded, he considers that the charge is groundless or that there is no probability of the accused being convicted of any offence.

15. Section 24-9-A of the Cr.P.C does not provide a basis for the discharge of an accused, as it addresses a distinct legal matter. It is an established principle that the discharge of an accused person should not be equated with the acquittal of an accused person. The Lahore High Court in case of *Sardara*[2], held that discharge of an accused under sub-section (3) of section 173 of the Code cannot be recorded as his acquittal. The relevant extract is reproduced below for ease of reference:

> "In the second place, the order of the Magistrate "discharging" the accused was apparently one under section 173 of the Code of Criminal Procedure. Under that section the investigating officer forwards to the Magistrate empowered to take cognizance of an offence a report in a prescribed form and in such report if he has found that there is no sufficient evidence against the accused and has, therefore, released the accused on their executing a bond under section 169 of the Code to appear, if and when so required, before a

[2] Sardara & others vs Muhammad Niwaz and another, (PLD 1949 Lahore 537)

> Magistrate empowered to take cognizance of the offence on a police report, he recommends to the Magistrate that no further action be taken. If he uses the word "discharge" or "acquit" he will not have used the word correctly, nor will the Magistrate, whatever expression he uses to signify his intention that he does not propose to take any further action, be understood to discharge or acquit the accused person or persons. The order which the Magistrate passes under section 173 is essentially an administrative order and not a judicial order, and it does not amount either to a discharge or an acquittal of the accused. See in this connection Brahm Dev v. Emperor (AIR 1938 Lahore 469), which is based on AIR 1933 Patna 242."

Similarly, in *Taj Din* [3] case, it was held that:

> "A Magistrate who passes an order of discharge- can re-hear the case or entertain afresh complaint and provisions of section 369 or 403, Cr. P. C. do not operate as a bar to such an action."

16. In the present case, the record shows that after completion of investigation, the police submitted a complete challan under Section 173 Cr.P.C on 10.07.2024. The learned Magistrate initially returned it for clarification of status of one of the accused Ibrahim. Later, *Challan* was re-submitted and entertained on 03.09.2024 and posted for 09.09.2024 for the attendance of accused. On the next date, accused/respondents appeared along with their counsel and filed an application for

[3] Taj Din and 3 others vs. The state and another, (1977 P.Cr.L. J 933)

their acquittal under section 249-A Cr.P.C. which was disposed of through the impugned order of "*discharge.*" This sequence clearly indicates that cognizance of the case has already been taken under Section 190 Cr.P.C.

Section 190 of the Cr.P.C, reads as under:

> **190. Cognizance of offences by Magistrates:** [(1) All Magistrates of the First Class, or any other Magistrate specially empowered by the Provincial Government on the recommendation of the High Court, may take cognizance of any offence-
> (a) upon receiving a complaint of facts which constitute such offence;
> (b) upon a report in writing of such facts made by any police officer;
> (c) upon information received from any person other than a police officer, or upon his own knowledge or suspicion, that such offence has been committed which he may try or send to the Court of Session for trial and] 7[(2) A Magistrate taking cognizance under sub-section (1) of an offence triable exclusively by a Court of Session shall, without recording any evidence, send the case to the Court of Session for trial].

17. Section 190(2) Cr.P.C mandates that when a Magistrate takes cognizance of an offence triable exclusively by a Court of Sessions, he shall, without recording evidence, send the case to that Court for trial. Hence, once cognizance is taken, the Magistrate's role is purely administrative - to transmit the case file to the Sessions Court, through a speaking order in writing.

18. The law is settled that once cognizance has been taken, the Magistrate has no jurisdiction to discharge or cancel the case. In case of ***Muhammad Alam***[4], the Apex Court held that the discharge of an accused person or cancellation of case by a Magistrate are not legally possible after cognizance of the case has been taken by the trial court. Similarly, in ***Syed Waqar Hussain Shah***[5] case, it was held that:

> When a Court takes cognizance of an offence on receipt of incomplete or complete challan the prosecution is left with two courses only.
> One: to produce evidence in Court and allow the learned trial Judge to decide the case on merits according to law.
> Two: to seek withdrawal of the case u/s. 494, Cr. P. C.
>
> It is apparent that the prosecution did not follow any of the above courses and instead initiated parallel independent proceedings by filing supplementary challan and getting the two accused discharged through an executive order of the Illaqa Magistrate.

19. In Ashiq Hussain *Supra* case, the Lahore High Court further elaborates that:

> I am adding here that after taking of cognizance by the trial Court only three results are possible in a criminal case: firstly, conviction of the accused person either upon admission of guilt by him or on the basis of the evidence led by the prosecution; secondly, acquittal of the accused person either under sections 249-A/265-K of the Code or on the basis of

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[4] Muhammad Alam and another vs Additional Secretary to Government of N.W.F.P, Home and Tribal Affairs Department and 4 others, reported (PLD 1987 SC 103)
[5] Syed Waqar Hussain Shah Vs. The State (P L D 1988 Lahore 666)

> failure of the prosecution to prove its case on merits beyond reasonable doubt; and thirdly, withdrawal from prosecution by a Public Prosecutor under section 494 of the Code. In this view of the legal position any attempt by the police or the prosecution to get an accused person discharged or to get an F.I.R. cancelled from a Magistrate at that stage may not only be illegal but the same may also be perceived as an attempt to subvert the normal legal process for motives which may be otherwise than bona fide."

20. No doubt, order of discharge of an accused person is an administrative and not a judicial order but it is also true that discharge of an accused by a Magistrate is not legal, once cognizance of the case has been taken by him.

21. In view of the above, while a Magistrate may notice illegality in investigation of a non-cognizable case, he cannot, after taking cognizance, discharge the accused or terminate proceedings under the guise of Section 249-A Cr.P.C. Under section 190(2) Cr.P.C, a Magistrate while taking cognizance of an offence is required to examine the material placed before him/her in order to determine whether the allegations made therein make out a *prima facie* case exclusively triable by the Court of Sessions and while doing so he is required to pass a speaking order in writing but at that stage of the case, the discharge of an accused is not a legal and proper order especially when seized of the matter u/s 249-A Cr.P.C.

22. To sum up, the impugned order dated 17.12.2024 is legally unsustainable, having been passed without jurisdiction and contrary to the settled principles of criminal procedure.

23. Consequently, this petition is accepted. The impugned order dated 17.12.2024 is hereby set aside and case is remanded back to the learned Magistrate, Nowshehra, for re-writing of order in accordance with law, taking into consideration the pending application filed under section 249-A Cr.P.C.

24. Accused/respondents are directed to appear before the court of learned Magistrate on **03.11.2025.**

Announced:
17.10.2025
Usama, JSS

J U D G E

(SB) Hon'ble Ms. Justice Farah Jamshed.