

ORDER SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD.
JUDICIAL DEPARTMENT.

Crl. Misc. No.1134-T/2021

Muhammad Raziq

Versus

The State, etc.

S. No. of order/ proceedings	Date of order/ Proceedings	Order with signature of Judge and that of parties or counsel where necessary.
	20.01.2022	Malik Jawwad Khalid, Advocate for the petitioner. Raja Rizwan Abbasi and Mr. Zeeshan Abbasi, Advocates for the respondents. Mr. Hazrat Younas, State Counsel. Murtaza, S.I.

The instant application calls in question order dated 22.09.2021, passed by learned Acting District & Sessions Judge, East-Islamabad, whereby bail applications were transferred from one Court to another.

2. The facts leading to filing of the instant petition are that with respect to case FIR No. 354, dated 03.07.2021, under sections 324, 337-H(ii), 148, 149 & 440 PPC, Police Station Bhara Kahu, Islamabad, three bail applications were pending in two different Courts of learned Additional Sessions Judges, East-Islamabad. In this behalf, a bail before arrest of the petitioner namely Abdul Quddus titled Abdul Quddus versus The State and bail of the accused in cross version were pending in the Court of Mr. Awais Muhammad Khan, learned Additional Sessions Judge, East-Islamabad. Another bail application of the co-accused in the same case titled Raja Muhammad Sarang Sultan versus The State was pending

in the Court of Ms. Zeba Choudhry, learned Additional Sessions Judge, East-Islamabad. An application was filed for consolidation of the bail applications and vide impugned order the learned Acting District & Sessions Judge, East-Islamabad transferred the matters pending in the Court of Mr. Muhammad Awais Khan, learned Additional Sessions Judge, East-Islamabad to the Court of Ms. Zeba Choudhry, learned Additional Sessions Judge, East-Islamabad.

3. Learned counsel for the petitioner/applicant, *inter alia*, contended that order passed by the learned Acting District & Sessions Judge, East-Islamabad is untenable in light of decision of the Hon'ble Lahore High Court in case titled Naveed Hussain versus The State and others (PLD 2020 Lahore 382). In this behalf, it was contended that under section 528 Cr.P.C, no power vests with Sessions Judge to transfer the bail application from one Court to another.

4. Learned counsel for the respondents, *inter alia*, contended that the learned Sessions Judge does have the power to transfer the matter from one Court to another by way of cumulating reading of sections 17(4), 193 (2) and 528 Cr.P.C. In this behalf, he placed reliance cases reported as Talib Hussain versus Muhammad Aslam Somra, Additional Sessions Judge, Multan and others (1996 PCr.LJ 466), Abdul Rafiq alias Qassu versus The State (1994 PCr.LJ 2507) and Haji Misri versus The State (1968 PCr.LJ 1463).

5. Arguments advanced by learned counsel for the parties have been heard and the documents placed on record examined with their able assistance.

6. The relevant provisions of law for the purposes of present controversy are sections 17(4), 193(2) and 528 of the Code of Criminal Procedure, 1898. For ease of convenience, the referred sections are reproduced below:-

"Section 17(4) Cr.P.C:- *The Sessions Judge may also when he himself is unavoidably absent or incapable of acting, make provision for the disposal of any urgent application by an Additional or Assistant Sessions Judge and such Judge shall have jurisdiction to deal with any such application.*

Section 193(2) Cr.P.C:- *Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Provincial Government by general or special order may direct them to try, or as the Sessions Judge of the division, by general or special order, may make over to them for trial.*

528. Sessions Judge may withdraw cases from Assistant Sessions Judge. *(1) Any Sessions Judge may withdraw any case from, or recall any case which he has made over to any Assistant Sessions Judge subordinate to him.*

(1A) At any time before the trial of the case or the hearing of the appeal has commenced before the Additional Sessions Judge, any Sessions Judge may recall any case or appeal which he has made over to any Additional Sessions Judge.

(1B) Where a Sessions Judge withdraws or recalls a case under sub-section (1) or recalls a case or appeal under sub-section (1A), he may either try the case in his own Court or hear the appeal himself, or make it over in accordance with the provisions of this Code to another Court for trial or hearing, as the case may.

(1C) Any Sessions Judge may withdraw any case from, or recall any case which he has made over to, any Magistrate subordinate to him, and may refer it for inquiry or trial to any other such Magistrate competent to inquire into or try the same.

(4) Any Magistrate may recall any case made over by him under section 192, sub-section (2), to any other Magistrate and may inquire into or try such case himself.

(5) A Magistrate making an order under this [preceding sub-section] shall record in writing his reasons for making the same."

The examination of section 17(4) *ibid* shows that where a Sessions Judge is incapable of acting and/or is absent, he/she can make provision for disposal of any urgent application by an Additional or Assistant Sessions Judge, which the Court/Judge has the jurisdiction to deal with such application; likewise, under sub-section (2) of section 193 Cr.P.C, the Additional and/or Assistant Sessions Judges are to try cases only when the Provincial Government by general special order may direct them to try or the Sessions Judge of any division by general or special order may make over to them for trial. Under sub-section (1A) of section 528 Cr.P.C, the Sessions Judge can transfer or withdraw any case before the trial from one Court to another and the appeal as well. The cumulative reading of the provisions shows that the Sessions Judge can make or entrust any urgent application to any Additional Sessions Judge if he is incapable of acting in such position or is unavoidably absent. The Additional Sessions Judges can hear and try the cases which are entrusted to them by any general or

special order of the Sessions Judge and in case the trial has not commenced and appeal is not heard, the same can be entrusted from the Court of Additional Sessions Judge to another. The Hon'ble Lahore High Court in case titled *Naveed Hussain versus The State and others (PLD 2020 Lahore 382)*, interpreted the provision of section 528 Cr.P.C. The Hon'ble Court was deliberating upon the same proposition as has been raised in the case in hand, whether the Sessions Judge has power to transfer the bail application from one Court to another Court. In this behalf, it was observed that the Sessions Judge has no such power, however, it is explained and dilated that though the Hon'ble Lahore Court has mentioned that no case can be transferred under section 528 Cr.P.C, it can safely be concluded that though reference was made to the word case, the Court meant bail application inasmuch section 528 (1A) *ibid* does provide jurisdiction to the Sessions Judge to transfer the case before the trial from one Court to another. The judgments which have been relied upon by the learned counsel for the respondents do not reflect the correct position of law and only reach at conclusion by inferences and implications. Even though, none of the judgments cited at bar are binding on this Court but carry persuasive values, hence the rationale propounded in *Naveed Hussain versus The State and others (PLD 2020 Lahore 382)* seems to be correct position with explanation as mentioned hereinabove.

7. In view of the above position, the conclusion that can safely be drawn by combined reading of the three provisions concerned alongwith section 526 Cr.P.C is as follow:

(i) Under section 17(4) Cr.P.C, the Sessions Judge, where he is incapable or unavoidably absent, can entrust any urgent application to another Additional Sessions Judge, however, does not has the power and jurisdiction to withdraw the same once entrusted.

(ii) Under section 193(2) Cr.P.C, the Sessions Judge can entrust by general or special order any work/case to another Additional Sessions Judge.

(iii) Under section 528 (1A) Cr.P.C, at any time before the trial in case has commenced or hearing of appeal before the Additional Sessions Judge, the Sessions Judge may recall any case or appeal which he had made over to any Additional Sessions Judge and, under section 528 (1B) *ibid*, the Sessions Judge may either try the case/appeal himself or entrust the same to another Court for trial or hearing, as the case may be; where the trial has commenced, power to transfer vests with the High Court under section 526 Cr.P.C.

(vi) The bail application once entrusted cannot be transferred from one Court to another. Needless to add that this Court retains the power to effect the transfer in bail application under section 561-A

Cr.P.C and/or constitutional jurisdiction under Article 199 of the Constitution, 1973.

8. In view of the referred position of law and facts, order passed by learned Acting District & Sessions Judge, East-Islamabad is without jurisdiction and lawful authority, hence merits setting aside.

9. For what has been stated above, the instant petition is **allowed** and impugned order dated 22.09.2021, is **set-aside**; consequently, transfer application filed by respondent No.2 stands **dismissed**.

(AAMER FAROOQ)
JUDGE

M. Shah/*

Appar A For Reporting