

Form No: HCJD/C.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Case No: Writ Petition No.2995 of 2022

The State through Advocate-General, ICT
Vs.
Learned Additional Sessions Judge and 2 others

Petitioner by: Mr. Jahangir Khan Jadoon,
Advocate-General, ICT, Raja
Rizwan Abbasi, Special Public
Prosecutor.
Talat S.I.

Respondents by: M/s. Barrister Salman Safdar,
Muhammad Shoaib Shaheen, Faisal
Farid Chaudhary, Malik Naseem
Abbas Nasir, Amna Ali & Farzana
Faisal Khan, Advocates.

Date of Decision: 16.08.2022

AAMER FAROOQ, J.- The petitioner calls in question orders dated 12.08.2022 passed by respondents No.1 & 2. The necessary facts for disposal of the instant petition are that respondent No.3 is an accused in FIR No.691/2022 dated 09.08.2022 under Sections 124-A, 120, 131, 153, 153-A, 505, 506, 121, 109 & 34 PPC, Police Station, Kohsar, Islamabad. He was arrested on 09.08.2022 in the said case and was brought before respondent No.2 on 10.08.2022. On the referred date two days physical remand was granted to the police of respondent No.3 which was to lapse on 12.08.2022.

He was again brought before the Magistrate on the said date and a request on behalf of the petitioner was made for further physical custody of the accused which was turned down. The petitioner preferred criminal revision against the order of respondent No.2 which was dismissed on the same date due to want of jurisdiction. Hence, the petition.

2. Learned Advocate-General alongwith Raja Rizwan Abbasi, Special Public Prosecutor/ASC, *inter alia*, contended that the order passed by the Magistrate under Section 167(3) Cr.P.C. is a judicial order hence, criminal revision was maintainable. He took the Court through the referred provision as well as Sections 435, 439 and 439(A) Cr.P.C. to argue that respondent No.1 had jurisdiction in the matter to call for the record and decide the matter. He further submitted that the observation by respondent No.1 to the effect that no proceedings are pending, hence no record can be called for under Sections 435, 439 and 439(A) *ibid*, is incorrect. It was submitted that the accused was remitted to judicial custody; that amounts to pendency of the proceedings. It was further added that reliance on **Bahadur and another v. The State and another** (PLD 1985 Supreme Court 62) is incorrect inasmuch as the referred case was not with respect to the remand issue. In support of his contentions learned counsel placed reliance on the case titled **Riaz ul Haq and another v. Muhammad Naveed and another** (2005 YLR 805), **Abdul**

Waheed v. Additional Sessions judge and others (2017 MLD 1319) & Riasat Alias Sazti v. The State etc. (2018 MLD 1942). Learned counsel sought to argue on merits of the case as well and he was stopped inasmuch as the question of maintainability of the criminal revision goes to the root of the present petition, hence needs to be decided first.

3. Mr. Shoaib Shaheen, ASC alongwith by Barrister Salman Safdar and Faisal Farid Chaudhary, Advocates, *inter alia*, contended that the order passed by respondent No.1 does not suffer from any jurisdictional or legal defect warranting interference. It was added that the order passed under Section 167 (3) Cr.P.C. is not in the nature of a judicial order, hence criminal revision is not maintainable.

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

5. The factual aspect of the controversy has been spelt out hereinabove, therefore, need not be reproduced. The legal questions which call for determination in the instant petition are twofold. Firstly, as noted above, respondent No.1 dismissed the criminal revision filed by the petitioner on the ground of maintainability on the basis that the order passed by the learned Judicial Magistrate refusing remand, is not a judicial order and hence criminal revision is not maintainability; secondly, the legality of the remand order

dated 12.08.2022 has been challenged on the basis that the same is without application of mind and does not comply with the parameters laid down by various pronouncements.

6. Taking up first issue of maintainability of the criminal revision against order passed under Section 167 Cr.P.C. it is relevant to reproduce the referred provision of law:

“167. Procedure when investigation cannot be completed in twenty-four hours: (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty four hours fixed by Section 61, and there are grounds for believing that the accusation or information is well founded, the officer incharge of the police-station or the police-officer making the investigation if he is not below the rank of the sub-inspector, shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate. Explanation : [Omitted by the Ordinance, XXXVII of 2001, dt. 13-8-2001.]

(2) The Magistrate to whom an accused person is forwarded under, this section may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has no jurisdiction to try the case or [send] it for trial, and considers further detention unnecessary, he

may order the accused to be forwarded to a Magistrate having such jurisdiction;

Provided that no Magistrate of the Third Class, and no Magistrate of the Second Class not specially empowered in this behalf by the Provincial Government shall authorise detention in the custody of the police.]

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

[(4) The Magistrate, giving such order shall forward copy of his order, with his reasons for making it, to the Sessions Judge].

[(5) Notwithstanding anything contained in Sections 60 and 61 or hereinbefore to the contrary, where the accused forwarded under sub-section (2) is a female, the Magistrate shall not except—in the cases involving Qatl or dacoity supported by reasons to be recorded in writing, authorise-the detention of the accused in police custody, and the police officer making an investigation shall interrogate the accused referred to in subsection (1) in the prison in the presence of an officer of jail and a female police officer.

(6) The officer incharge of the prison shall make appropriate arrangements the admission of the investigating police officer into the prison for the purpose of interrogating the accused.

(7) If for the purpose of investigation, it is necessary that the accused referred to in subsection (1) be taken out of the prison, the officer incharge of the police station or the police officer making investigation, not below the rank of

sub-inspector, shall apply to the Magistrate in that behalf and the Magistrate may, for the reasons to be recorded in writing, permit taking of accused out of the prison in the company of a female police officer appointed by the Magistrate :

Provided that the accused shall not be kept out of the prison while in the custody of the police between sunset and sunrise]. ”

7. The reading of above provision shows that it pertains to the procedure where the investigation cannot be completed in 24 hours; it provides that a person arrested and detained by the police but the investigation is not completed within 24 hours and there are grounds that the accusation or information against the person is well-founded, the Officer Incharge of the House or the Officer conducting investigation shall make an application alongwith entries in the case diary relating to the case for remanding custody of the accused to the police. Under Subsection 2 *ibid* the Magistrate to whom the request is made, whether has jurisdiction to try the case or not, can from time to time authorize detention of the accused as the Magistrate thinks fit for a term not exceeding 15 days in the whole. Where the Magistrate authorizes the detention reasons are recorded for doing so and a copy thereof, under subsection 4 *ibid*, is forwarded to the concerned Sessions Judge. An order passed under subsection 3 has been considered as a judicial order since long. The seminal judgments on this issue

is **Muhammad Rafi v. The State and 2 others (1969 P. Cr. L. J. 873)** wherein the Hon'ble Lahore High Court observed that the words of Section 167 Cr.P.C. are clear that the accused is to be forwarded to a Magistrate and not that a Magistrate has to make himself available to the police in a building where a police lock up is situated. It was added that it is now established that when a Magistrate passes an order of remand to police custody under Section 167 Cr.P.C., he performs a judicial function. The Hon'ble Lahore High Court went on to observe that judicial functions are to be performed in an open atmosphere. If the Magistrates are permitted to pass orders of remand in police stations where the accused, admittedly, have no means to have recourse to a lawyer or their relatives, the whole significance of section 167 Cr.P.C. of the Criminal Procedure Code would disappear and it will amount to a farcical performance of imperative legal requirements concerning the liberty of a citizen. In **Muhammad Siddiq v. Province of Sindh through home Secretary, Karachi and 2 others (PLD 1992 Karachi 358)** the Hon'ble Division Bench of the Sindh High Court reaffirmed the position that a Magistrate while hearing application for grant of remand of an accused person performs judicial function and the accused through his lawyer, friend or relative is entitled to raise objections to the passing of such orders. It was added that it is therefore, necessary for a Magistrate to pass orders only in

open Court and it is not expected that a Magistrate shall pass orders granting remand of accused in a mechanical manner but has to examine very carefully the justification for depriving a citizen of his liberty which can only be done if material justifying such action is available on record. It was further elucidated that Section 167 Cr.P.C. is an exception to Section 61 Cr.P.C. hence is to be interpreted with great caution and care.

8. In **Riaz ul Haq and another v. Muhammad Naveed and another** (2005 YLR 805) the Magistrate had refused remand under Section 167 Cr.P.C.; against the same a revision application was filed before the Sessions Court where further remand was granted. The Hon'ble Lahore High Court affirmed the position that the order passed by the Magistrate is a judicial function. Similar views were expressed in **Misbah ul Hassan v. The State and 3 others** (2005 P. Cr. L. J. 1709) as well as **Abdul Waheed v. Additional Sessions judge and others** (2017 MLD 1319) and **Mian Ghulam Ijaz and others v. The State and others** (PLD 2018 Lahore 151).

9. Learned Revisional Court while holding that a criminal revision is not maintainable against the order passed under Section 167 Cr.P.C. has placed reliance on the case titled **Bahadur and another v. The State and another** (PLD 1985 Supreme Court 62). The referred matter concerned submission of report under Section 173 Cr.P.C. where the

police authorities had recommended discharge of the accused which was allowed by the Magistrate and against the same decision a revision petition was filed under Sections 435 to 439 Cr.P.C. The august Apex Court held that in Criminal Procedure Code a Magistrate is entrusted with diverse duties and in discharging the same does not always function as a Court, conduct judicial proceedings or is amenable to the revisional jurisdiction. It was added that some of his powers and duties under the Code are administrative, executive or ministerial and he discharges these duties not as a Court but as a *persona designate*. The Hon'ble Supreme Court of Pakistan added that mere name or designation of a Magistrate is not decisive of the question.

10. On the touchstone of the referred judgment of the Hon'ble Supreme Court of Pakistan it has been concluded by the revisional Court that the function under Section 167 Cr.P.C. is not a judicial. Preponderance of the authorities after **PLD 1985 Supreme Court 62** *supra* are that the function performed under Section 167 Cr.P.C. is a judicial. In **PLD 1985 Supreme Court 62** *supra* the specific function regarding granting or refusing of remand under Section 167 Cr.P.C. was never discussed. In a subsequent decision reported as **Safdar v. Zafar etc. (2002 SCMR 63)** a three members Bench of the Hon'ble Supreme Court of Pakistan obiter approved the filing of revision petition against the

discharge order.

11. In the referred backdrop since **2002 SCMR 63** *supra* is later in time and is of three members Bench as was the case also in **PLD 1985 Supreme Court 62** *supra* hence, the later in time will prevail. Moreover, the decision in **PLD 1985 Supreme Court 62** *supra* refers to Part-D of Lahore High Court Rules and Orders Volume-III (which are also being adopted and used by this Court) whereas the relevant section for the present controversy is Part-B of Volume-III *ibid*.

12. In view of the above referred position of law, the order dated 12.08.2022 passed by respondent No.1 is untenable and cannot sustain in the eye of law.

13. Though on the question of refusal of remand no arguments were advanced by learned counsel for the parties but few judgments which lay down the guiding principles are being mentioned for further guidance of the Magistrate/Courts. Part-B of Lahore High Court Rules and Orders Volume-III pertains to remand in police custody. Rule 8 deals with principles applying in remand. The said Rule is reproduced below:

8. Principle applying remand cases.-- The following principles are laid down for the guidance of Magistrates in the matter of granting remands, and District Magistrates are required to see that they are carefully applied:-

(i) Under no circumstances should an accused person be remanded to Police

custody unless it is made clear that his presence is actually needed in order to serve some important and specific purpose connected with the completion of the inquiry. A general statement by the officer applying for the remand that the accused may be able to give further information should not be accepted.

(ii) When an accused person is remanded to Police custody the period of the remand should be as short as possible.

(iii) In all ordinary cases in which time is required by the Police to complete the inquiry, the accused person should be detained in magisterial custody.

(iv) Where the object of the remand is merely the verification of the prisoner's statement, he should be remanded to magisterial custody.

(v) An accused person who has made a confession before a Magistrate should be sent to the Judicial lock-up and not made over to the Police after the confession has been recorded. If the Police subsequently require the accused person for the investigation, a written application should be made giving reasons in detail why he is required and an order obtained from the Magistrate for his delivery to them for the specific purposes 70 named in

the application. If an accused person, who has been produced for the purpose of making a confession, has declined to make a confession or has made a statement which is unsatisfactory from the point of view of the prosecution he should not be remanded to Police custody.”

14. Under Rule 9 as well as Sections 163 & 167 (3) Cr.P.C. where the remand is granted to police reasons for doing so are forwarded to the Sessions Judge or District Magistrate, as the case may be. The sole reason for such provision is to ensure check and balance on the police authorities as well as the Magistrate inasmuch as the Sessions Court has supervisory function inasmuch as the remand in police custody has a drastic impact on the liberty of an individual as he is deprived of his fundamental right of freedom; the Sessions Court needs to supervise function of Magistrate as well as police authorities. The case of **Ghulam Sarwar and another v. The State (1984 P. Cr. L. J. 2588)** lucidly summarises the law on the subject and lays down principles to be followed for grant or refusal of remand in police custody. The principles are as follows:

“(1) During first 15 days, the Magistrate may authorise the detention of the accused in judicial custody liberally but shall not authorise the detention in the custody of the police except on

strong and exceptional grounds and that too, for the shortest possible period;

(2) The Magistrate shall record reasons for the grant of remand.

(3) The Magistrate shall forward a copy of his order passed under section 167, Cr.P.C. to the Sessions Judge concerned.

(4) After the expiry of 15 days, the Magistrate shall require the police to submit complete or incomplete challan and in case, the challan is not submitted, he shall refuse further detention of the accused and shall release him on bail with or without surety.

(5) After the expiry of 15 days, no remand shall be granted unless, the application is moved by the police for the grant of remand/ adjournment.

(6) The application moved by the prosecution/ police after the expiry of 15 days of the arrest of the accused, be treated as an application for adjournment under section 344, Cr.P.C.

(7) Before granting remand, the Magistrate shall assure that evidence sufficient to raise suspicion that the accused has committed the offence has been collected by the police and that further evidence will be obtained after the remand is granted.

(8) The Magistrate shall not grant remand /adjournment in the absence of the accused.

(9) The Magistrate should avoid giving remand /adjournment at his residence.

(10) The Magistrate shall give opportunity to the accused to raise objection, if any, to the grant of adjournment /remand.

(11) The Magistrate shall record objection which may be raised by an accused person and shall give reasons for the rejection of the same.

(12) The Magistrate shall examine police file before deciding the question of remand.

(13) If no investigation was conducted after having obtained remand, the Magistrate shall refuse to grant further remand /adjournment.

(14) The Magistrate shall not allow remand/ adjournment after 2 months (which is a reasonable time) of the arrest of the accused unless it is unavoidable.

(15) In case, complete challan is not submitted, the Magistrate shall commence trial on the strength of incomplete challan and examine the witnesses given in the list of witnesses.

(16) If the challan is not submitted within 2 months, the Magistrate shall report the matter to

the Sessions Judge of the district and also bring the default of the police to the notice of Superintendent of Police of the district.

(17) The Magistrate shall not grant remand mechanically for the sake of co-operation with the prosecution/ police.

(18) The Magistrate shall always give reasons for the grant of remand and adjournment.

The Magistrates should realize that they are answerable and account able to the High Court for the illegalities and irregularities done by them and that the High 'Court under section 439, Cr.P.C. is quite competent to examine the correctness of the orders passed by them and in case they violate the instructions given by High Court, serious action may be taken against them.”

15. In **Rashid v. The State and 2 others** (PLD 1970 Lahore 389) the Hon’ble Lahore High Court observed that the order for remand should not be made for a mechanical fashion rather with the application of mind. It was observed that under Section 167 Cr.P.C. though the Magistrate is not expected to pass elaborate order he is certainly required to briefly intimate the reasons for remand a person to police custody. It was added that Magistrate acting under Section 167 Cr.P.C. has to weigh evidence to decide whether the prisoner should be detained in custody or not and this function

of his is essentially a judicial function. The remand to police or judicial custody should not be granted in a mechanical fashion; application of mind is must and should be granted in case of real necessity and the period should be fixed to the reasonable required of the case as it involves the liberty of the citizen of the State.

16. In view of above case law as well as Lahore High Court Rules and Orders it is crystal clear that remanding an accused to police custody is to be exercised with great caution as it tantamount to depriving a citizen of his liberty; however, the accusation or allegation made against the accused also needs to be investigated in a thorough and proper manner and where the custody of the accused is essential for moving forward with the investigation he may be remanded to police custody for a minimum possible time keeping in view the request made by the police and in regards to the material available and also by going through the police diaries as to the investigation so far conducted by the police. As also noted above, the order for remanding an accused to police custody needs to be intimated to the Sessions Court as it has supervisory jurisdiction.

17. The contention by learned Advocate-General, Islamabad Capital Territory as well as Raja Rizwan Abbasi, Special Public Prosecutor that proceedings are pending in the form of appearance of the accused before the learned

Magistrate when he is remitted to judicial custody, hence the observation by respondent No.1 to the effect that no proceedings are pending are not correct. Though the arguments on remand were not addressed but the case law was cited by the learned counsel for the petitioner at the time of admission of case as to the scope and principle of remand, hence they are produced above, but no finding is being rendered on the merit of refusal of remand as only the legal question regarding maintainability of the criminal revision is being decided in the instant matter.

18. In view of the foregoing, the instant petition is allowed and order dated 12.08.2022 passed by respondent No.1 is set aside; consequently, the criminal revision filed by the petitioner shall be deemed to be pending before respondent No.1. This Court was informed that a bail application filed by respondent No.3 is fixed for today; criminal revision shall be taken up today by respondent No.1 and the parties shall appear before referred respondent. The criminal revision shall be decided in accordance with law after hearing the parties. Office is directed to remit copy of this judgment to the Sessions Court for guidance.

(AAMER FAROOQ)
JUDGE

Approved for reporting