

# **Discharge & Cancellation**

By

**Qaiser Javed Mian**

Director Research/Faculty Member,  
Punjab Judicial Academy, Lahore

# **SECTION-63**

## **OF CRIMINAL PROCEDURE CODE, 1898**

**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.

# SECTION-169

## OF CRIMINAL PROCEDURE CODE, 1898

- **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 cognizance of the offence on a police-report and to try the accused or [send] him for trial.

# **SECTION-173(3)**

## **OF CRIMINAL PROCEDURE CODE, 1898**

- 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.

# **Rule 24.7**

## **of The Police Rules, 1934**

- **Cancellation of cases** : Unless the investigation of a case is transferred to another police station or district, no first information report can be cancelled without the orders of a Magistrate of the 1st Class.

When information or other intelligence is recorded under Section 154, Criminal Procedure Code, and, after investigation, is found to be maliciously false or false owing to mistake of law or fact or to be non-cognizable or matter for a civil suit, the Superintendent shall send the first information report and any other papers on record in the case with the final report to a Magistrate having jurisdiction, and being a Magistrate of the First Class, for orders of cancellation. On receipt of such an order the officer incharge of the police station shall cancel the first information report cancelling the case with number and date of order. He shall then return the original order to the Superintendent's office to be filed with the record of the case.

# JUDGMENTS

1. Mst. Amna Bibi Versus State

2008 P Cr. L J 956

Lahore High Court, Lahore

- S.169---Constitution of Pakistan (1973), Art.199--- Constitutional petition---Magistrate had **discharged** the accused while cancelling the case under **S.169, Cr.P.C.**--- Validity---Evidence against the accused on record was deficient, on the strength of which the accused could not have been sent to face trial, because it would have been a futile exercise and wastage of time of the Court---Magistrate had passed the impugned order after consulting the record and making discussion therein, to which no exception could be taken---Constitutional petition was dismissed accordingly.

## 2. Abdul Wahid Versus State

2007 P L D 65

Lahore High Court, Lahore

- Investigation Officer who had arrested respondents had been requesting Magistrate for authorization of detention of said accused persons through remand---After getting permission/authorization as envisaged under S.167, Cr.P.C., **Investigating Officer could not discharge said accused for all times to come---Investigating Officer could release accused after their executing a bond with or without sureties, but could not discharge them, who earlier were detained with Investigating Officer by the permission of Magistrate---Words of S.169, Cr.P.C. “release him on his executing a bond with or without sureties” could not be expounded as having authorized or empowered Investigating Officer to discharge accused---From wording of subsection (3) of S.173, Cr.P.C., it became evident that accused released on bond, with or without sureties, was not a person released for all times to come, in fact, it was a temporary release, which had to be confirmed through an order of discharge from the Magistrate---Release of an accused under S.169, Cr.P.C. was upto confirmation of the action of Investigating Officer for the release of accused and upto discharge or order of Magistrate as provided in S.173, Cr.P.C.**

3. Muhammad Basharat                      Versus                      Khadim Hussain  
2006 P Cr. L J 1253  
Supreme Court, Azad Kashmir

- Report of Police Officer/Investigating Officer discharging respondents under S.169, Cr.P.C., was concurred by the Trial Court---Appellant, thereafter, filed private complaint under Ss.302 & 34 P.P.C. against **discharged** respondents before the Trial Court after about one year of order of the Trial Court---Trial Court issued process against respondents, which process was challenged before Shariat Court which culminated into the impugned order---Validity--**-Appellant did not, challenge the order confirming discharge of accused/respondents earlier passed by the Trial Court, but instead filed private complaint after, about one year---**Belated private complaint was not favoured by the Supreme Court, more so, when the order by police under **S.169, Cr.P.C.** was confirmed by same Court, which had tried other accused who were part of the case in which respondents were **discharged---** In absence of any fault in the order passed by Shariat Court, appeal against said order, was dismissed.



## 4. State Versus Ubaidullah

2005 M L D 1883

Peshawar High Court, NWFP

- If Magistrates were given the powers to **discharge** and release an accused at the very initial stage, there would be no room for success in blind heinous criminal cases which were always investigated on different theories of probabilities based on spy information---Once an accused was apprehended and found innocent, he could be set free during investigation by obtaining **discharge** order from the Court---**discharge of an accused was also governed by S.169, Cr.P.C. which was at the conclusion of investigation and on submission of report under S.173, Cr.P.C.**

5. Abid Hussain                      Versus    Ikram-ul-Haq Chaudhry  
2005 P Cr. L J 1403

Lahore High Court, Lahore

- Refusal to grant remand and **discharge** of accused from the F.I.R.---If the Magistrate had no jurisdiction to try accused produced before him for remand, he could authorize the detention, but if he considered the detention unnecessary, he could order the accused to be forwarded to a Magistrate having such jurisdiction--- Impugned order whereby remand was refused and accused was **discharged** from F.I.R., **was passed by Duty Magistrate on Sunday---Said Magistrate did not have the jurisdiction to try the accused---** If said Magistrate thought that further detention was unnecessary, he could have forwarded the accused to the Magistrate having jurisdiction to try him---Impugned order had been passed by the Magistrate without jurisdiction and same was void ab initio---Magistrate being not competent to pass order of **discharge** of accused while exercising powers under S.167, Cr.P.C., High Court accepted Constitutional petition set aside order being illegal, unjustified and untenable.

**6. Malik Hamid Saeed                      Versus                      The State**  
**2004 P Cr L J 117**  
**Peshawar High Court, NWFP**

- **Discharge** of accused---**discharge** of an accused under **S.169, Cr.P.C.** was an administrative act of Magistrate and it would not amount to an acquittal of accused---  
Order of **discharge** could be recalled by the Magistrate subsequently and accused could also be summoned by Trial Court to face the trial.

## 7. Jamil Asghar Bhatti Versus The State

2001 M L D 1578

Lahore High Court, Lahore

- **Discharge** of accused---Police having found the accused innocent, requested Judicial Magistrate to **discharge** the accused, request of the police was turned down by the Magistrate, on the ground of lack of jurisdiction as the case was triable by the Sessions Court---Validity---**discharge** of the accused from the case did not amount to his acquittal.

8. Syed Sikandar Shah

Versus

Inspector General Police, NWFP, Peshawar

2000 P Cr L J 25

Peshawar High Court, NWFP

- Criminal Procedure Code (Cr.P.C.)----  
Ss.169 & 173---**discharge** of accused after  
submission of challan in the Court---Once  
the challan is submitted in the Court under  
S.173, Cr.P.C., the provisions of **S.169,**  
**Cr.P.C.** cannot be invoked.

**9. Mastan Shah**

**Versus**

**Additional Sessions Judge/Special Judge, Bannu.**

**1999 P Cr L J 469**

**Peshawar High Court, NWFP**

- **Investigating Officer has discretionary power under S.169, Cr.P.C. to release accused on bail bond during course of investigation before submission of challan---Such interim relief has been made permissible under law to innocent person who would have to stand the test of judicial scrutiny to be made by Trial Court at a proper stage---Right course to be adopted by Investigating Officer is that at the conclusion of investigation he should place name of accused **discharged under S.169, Cr.P.C.** in column No.2 of challan with his own remarks---Court has to form its own opinion on basis of material on record---Resort to provisions of **S.169, Cr.P.C.**, by Investigating Officer during investigation or **re-investigation deprecated---Serious notice should be taken by superior Police Officers including Superintendent of Police and Deputy Inspector General concerned in the interest of justice by having a strict observance over investigation so that said discretionary powers of Investigating Officer were not misused in any way nor exercised blindly without any valid and legal base---Police, before submission of challan, can resort to S.169, Cr.P.C. at preliminary stage of investigation---Trial Court should not interfere at such a stage as that would be premature.****

**10. Ghulam Yasin Versus D.S.P  
2010 P Cr L J 946**

**Lahore High Court, Lahore**

- **After completion of investigation and submission of case Magistrate concerned had power to Discharge accused under S.63, Cr.P.C. in case of his innocence, that in case Magistrate found accused innocent, he would refuse to take cognizance of the matter; that Rule 24.7 of the Police Rules, 1934 made a provision for cancellation of cases during the course of investigation under the orders of the concerned Magistrate and that remedies were available to accused who claimed to be innocent and could seek relief without going through the entire length of investigation.**

11. Muhammad Khan

Versus

Magistrate Section 30, Pindi Gheb, District Attock

2009 P L D 401

Lahore High Court, Lahore

- Constitutional petition- Object of S.489-F, P.P.C.---Scope---Magistrate while refusing to give judicial remand of the accused respondent had **Discharged** him inter-alia on the ground that after expiry of a period of four months, the Criminal Law (Amendment) Ordinance, 2002.
- Parliament had validated and affirmed the Ordinance and it was not required to be re-promulgated.
- Case was still under investigation when the accused was produced before the Magistrate for obtaining his **judicial remand**---Before submission of challan in the Court and taking cognizance of the offence, **it was not permissible for the Magistrate to examine and analyze the evidence with reference to delay in lodging the F.I.R. by holding mini trial of the case before the inception of regular trial**---Civil nature of the dispute also could not estop the complainant to invoke the criminal law---Section 489-F, P.P.C. had clearly laid down that whoever dishonestly issued a cheque towards repayment of a loan or fulfillment of an obligation, was liable to face the legal consequences on its being dishonoured---Issuance of a cheque towards repayment of a loan or fulfillment of an obligation was primarily a civil matter.



- **Object of S.489-F, P.P.C.** was not to affect recovery of the amount in question under the dishonoured cheque, but to punish a person who dishonestly issued the cheque with reference to his civil liability---Similarly, availability of an alternate remedy to the complainant was no ground to **Discharge** the accused, because the aggrieved complainant could invoke civil and criminal law simultaneously---Impugned **Discharge** order passed by Magistrate was, consequently, set-aside being illegal and without lawful authority and the police request for judicial remand of the accused would be deemed as pending before the Magistrate for disposal in accordance with law---Constitutional petition was accepted accordingly.

**12. Mst. Mehnaz**

**Versus**

**Judicial Magistrate Ist Class/ Civil Judge, Attock**

**2008 YLR 1669**

**Lahore High Court, Lahore**

- **S.63---Discharge of accused---Jurisdiction of Magistrate---Scope---Magistrate is competent under S.63, Cr.P.C to Discharge accused, when he is taken into custody in any case triable by Magistrate, Court of Session or any Special Court---Provisions of S.63, Cr.P.C. empowers a Magistrate to Discharge arrested accused person irrespective of the fact, whether or not he himself is competent to try him in case of submission of challan against him.**

### 13. Hidayatullah and Others.

Versus

The State through Advocate General, NWFP,  
Peshawar High Court, Peshawar.

2006 SCMR 1920

SUPREME COURT

- **Discharge** of accused---Exercise of discretion by Magistrate---Principles---Accused were **Discharged** by Magistrate under **S.63 Cr.P.C.** on the ground that alleged forged document was also subject-matter of civil suit pending before civil court and no complaint was filed by the court concerned---Order passed by Magistrate was maintained by Lower Appellate Court but High Court in exercise of powers under S.561-A, Cr.P.C. set aside the **discharge** order---Validity---Magistrate concerned had discretion to pass order under **S.63, Cr.P.C** to **discharge** accused persons---Such discretion must be exercised by the concerned Magistrate justly and fairly; in case **discharge** order was passed by Magistrate mechanically without application of his independent mind to the facts of the case, blindfolded acceptance of a recommendation of police in that regard, perversity of reasoning and adoption of a procedure which offended against letter and spirit of law, relating to **discharge**, then High Court had ample jurisdiction to interfere and set aside such order under S.561-A Cr.P.C.

**14. Lal Khan**

**Versus**

**Station House Officer, Police Station Kotwali, Jhang**

**2010 P Cr L J 182**

**Lahore High Court, Lahore**

- After submission of challan in the court, the prosecutor was required to **prosecute cause of the State** by producing material falling within the definition of **“legal evidence”**.

**15. Mst. Eram  
Versus  
Muhammad Adnan Chaudhry  
2010 YLR 1580  
Karachi High Court, Sindh**

- **Ss.169, 170 & 173---cancellation of F.I.R---**  
Powers of Investigating Officer and Magistrate--  
Investigating Officer can dispose of F.I.R. as cancelled if he finds the same false, founded on mistake of law or a dispute of civil nature or untraceable, after taking all necessary steps to the best of his endeavour and ability, but order **of cancellation of F.I.R.** must be obtained from a Magistrate competent to take cognizance of the offence and to try the case, or to send the matter for trial to higher Court.

**Brig. (Retd.) F.B. Ali and another.**

**Versus**

**The State**

**P L D 1975 Supreme Court 506**

**Present: Hamoodur Rahman, C.J., Muhammad Yaqub Ali, Salahuddin Ahmed,  
Anwar-ul-Haq and Muhammad Gul, JJ**

**Judgment By: Hamoodur Rahman, C.J.**

In my view the mere lodging of an information does not make a person an accused nor does a person against whom an investigation is being conducted by the police can strictly be called an accused. Such a person may or may not be sent up for trial. The information may be found to be false. An accused is, therefore, a person charged in a trial. The Oxford English Dictionary defines an "accused" as a person "charged with a crime" and an "accusation" as an "indictment". Aiyer in his Manual of Law Terms also gives the same meaning. I am of view, therefore, that a person becomes an accused only when charged with an offence. The Criminal Procedure Code also uses the word "accused" in the same sense, namely; a person over whom a Court is exercising jurisdiction.

**Bahadur and another**

**Versus**

**The State and another**

**P L D 1985 Supreme Court 62**

**Present: Shafiur Rahman, S.A. Nusrat and Zaffar Husain Mirza, JJ**

❖ Magistrate concurring with Police Report submitted under S.173, Cr.P.C. discharging accused and cancelling a criminal case registered under S.379/420, P.P.C does not function as criminal Court—Order of cancellation of criminal case for that reason is not amenable to revisional jurisdiction of High Court under Ss.435 to 439, Cr.P.C.—Penal Code (XLV of 1860), Ss. 379 & 420 –Criminal Procedure Code (V of 1898).

❖ Under the 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. Some of his powers and duties under the Code are administrative, executive or ministerial and he discharges these duties not as a Court but a *persona designata*. Mere name or designation of a Magistrate is not decisive of the question because “Judges often administer and administrators often Judge.”

❖ A Magistrate, even while concurring in cancellation of a case is required to judicially examine the report submitted under section 173, Cr.P.C. and this has led to the impression that he must while doing so be acting and functioning as a Court. This obviously is a mistaken impression.



❖ The primary characteristics of 'pure' judicial functions, by whomsoever exercised, are:-

(1) The power to hear and determine a controversy.

(2) The power to make a binding decision (sometimes subject to appeal) which may affect the person or property or other rights of the parties involved in the dispute.

❖ Administrative functions, on the other hand, consist of those activities which are directed towards the regulation and supervision of public affairs and the initiation and maintenance of the Public services.

- ❖ Though a Magistrate in cancelling a registered criminal case is required to act judicially in that he has to act fairly, justly and honestly, a duty common to the exercise of all state powers:
  - (i) There is no lis before him
  - (ii) There is no duty to hear the parties
  - (iii) There is no decision given
  - (iv) No finality or irrevocability attaching to the order
  - (v) And the same Magistrate does not even after passing such an order render himself *functus officio*.

❖ On the contrary he is quite competent to entertain and deal with such a complaint on material presented to him. These peculiarities establish beyond any doubt that in so concurring with a report submitted under section 173, Cr.P.C. he does not function as a criminal court. For that reason his order is not amenable to revisional jurisdiction under sections 435 to 439, Cr.P.C. This appeal is, therefore, allowed, and the impugned order of the High Court is set-aside, as one without jurisdiction.

**Ashiq Hussain Versus Sessions judge, Lodhran**  
**PLD 2001 Lahore 271**  
**Before Asif Saeed Khan Khosa, J**

- SS. 63 & 173 Cr.P.C-----Sometimes either through misunderstanding of law or through lack of proper application of mind by those concerned a simple concept of law or practice assumes a meaning which is neither contemplated by the relevant law itself nor the same fits into the normal scheme of things. One such example is the law relating to 'discharge' of an accused person in a criminal case. It is unfortunate that of late a lot of confusion has been created about the true meaning and scope of discharge of an accused person in a criminal case. Lately an understanding is gaining ground that discharge of an accused person in a criminal case means that further investigation qua him or his prosecution for the reported crime has come to an end, he has finally been absolved of the allegations with his discharge virtually having the effect of an acquittal and, because of such a consequence of an order of discharge, such a discharge can be ordered only by the court competent to try the offence in question and not by a Magistrate if he otherwise lacks jurisdiction to try the relevant offence. All these views have in fact been expressed before me in the present case by the learned counsel for the petitioner. Unfortunately all such notions and impressions about discharge are misplaced and misconceived. Therefore, through the present judgment I propose to restate the legal position in this regard.

- 29. For facility of cognition and reference the above discussion is summed up with the following resume and conclusions:
  - (i) The concept of discharge is relatable only to custody of an accused person in a criminal case and it has no relevance to anything else during an investigation or a trial.
  - (ii) The Investigating Officer of a criminal case may discharge an accused person under section 63 of the Code of Criminal Procedure and release him from custody during the investigation on executing a personal bond regarding his appearance before the Investigating Officer or a Magistrate whenever required to do so during the investigation. Likewise under the same provision of law an accused person may be discharged from custody during the investigation either on bail or under the special order of a Magistrate.

- (iii) Upon receipt of the police report under subsection (3) of section 173 of the Code of Criminal Procedure a magistrate may discharge an accused person of his bond if such an accused person has already been released upon executing a bond.
- (iv) There is a difference between discharge of an accused person by an Investigating Officer on a bond or on bail or under the special order of a Magistrate under section 63 of the Code of Criminal Procedure and discharge of such an accused person of his bond by a Magistrate under subsection (3) of section 173 of the Code of Criminal Procedure as in the former case the accused person is released on the condition of executing a bond whereas in the latter case he is released of his bond making his release unconditional and unfettered for the time being.

- (v) Discharge of an accused person does not amount to smothering of the investigation qua him, cancellation of the case against him, termination of his prosecution or his acquittal.
  
- (vi) A discharged accused person can always be associated by the police with the investigation of the given criminal case at any subsequent stage during the investigation without obtaining any permission from the Magistrate discharging the said accused person as long as that accused person is not to be taken into custody during such subsequent investigation.

(vii) If after having been discharged by a Magistrate the police needs to arrest an accused person during any subsequent state of the investigation then a formal permission from the Magistrate is necessary for the purpose.

(viii) Discharge of an accused person has nothing to do with the prospects of such an accused person ultimately facing a trial or not as his discharge is not from the case but only on or of his bond.



(ix) Whether an accused person had been discharged or not and whether the police had opined about his guilt or not in its report under section 173 of the Code of Criminal Procedure are factors which are irrelevant to the issues whether cognizance of the offence is to be taken or not and whether such an accused person is to be summoned or not to face a trial because such decisions are to be made by the Magistrate taking cognizance of the offence and the Trial Court on the basis of the material collected during the investigation and the attending circumstances of the case and not on the basis of any opinion formed by the police or the basis of such material.

- (x) Discharge of an accused person by a Magistrate is not possible after taking of cognizance of the case by the Trial Court.
- (xi) An order regarding discharge or otherwise of an accused person lies within the competence of a Magistrate having jurisdiction to take cognizance of the offence and it has not relevance to the question as to which Court is to ultimately try the offence in question unless a special statute provides otherwise specifically.

(xii) An order regarding discharge of an accused person is an administrative and not a judicial order.

(xiii) An order regarding discharge is essentially a discretionary order which may not ordinarily be interfered with by a higher forum unless strong and compelling reasons exist for such interference.

30. For what has been discussed above I have failed to find any merit in the present petition which is hereby dismissed.