

absconding accused.

Discharge----- its meaning and object:

The word discharge has been defined as "To release; liberate; annul; unburden; disincumber; dismiss. To extinguish an obligation (e.g. a person's liability on an instrument); terminate employment of person; release as from prison".
(Black's Law Dictionary)

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. (PLD 2001 Lah. 293).

Scope: Import of an order under Section 63 Cr.P.C. is none other than release of accused person from custody and could not in any way be interpreted to be cancellation of a case Or stopping investigation. Magistrate having no control to interfere with proceedings before police. Order of discharge under Section 63 Cr.P.C. passed by Magistrate could not be an order closing investigation over which police alone has control. Such order, held only administrative in nature and not susceptible to interference in revision. Order passed in revision by Appellate Court without lawful authority. (1985 PCr.LJ 244).

2. **Relevant Laws and provisions**

Sections 63, 167, 169, 170 and 173(3) of Cr.P.C. deal with the discharge of an accused. Two sections of the code i.e. 63 and 169 are most important-----keeping their significance in view these are produce here-under:

3. **Section 63 Cr.P.C.**

“ 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.”

This provision clearly demonstrates that the concept of discharge of an arrested person is restricted only to the question of his release from custody and nothing more. This understanding is further fortified by the provisions of section 169 of the Code according to which:

4. **Section 169 Cr.P.C.**

“ If, upon an investigation under this Chapter, it appears to the officer-in-charge 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.”

This provision of the Code not only confirms the fact that the bond got executed from an accused person by such a police officer is relevant only to his custody and release for the time being but at the same time it also visualises a possibility that even an accused person released on the basis of such a bond and against whom there is no sufficient evidence available with the Investigating Officer for the time being may still be tried by a Court if a subsequently gathered evidence and such a

recommendation is favourably treated by the Magistrate. (PLD 2001 Lah. 291).

5. **Release of accused:**

Section 169, Cr.P.C. empowers the officer incharge police station or the

Investigating Officer to release an accused in his custody on executing bond with or without sureties if he finds no sufficient evidence or reasonable ground or suspicion to justify forwarding challan. [1971 P.Cr.L.J. 1164 + PLJ 1995 Lah 479].

6. **Some misunderstandings of law.**

Sometimes either through misunderstanding of law or through lack of proper application of mind by those concerned a simple concept of law 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 accused 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. (PLD 2001 Lah. 285).

7. **Kinds of discharge.**

There are two kinds of discharge. In other words, discharge operates in two ways.

1. Discharge of an accused.
2. Cancellation of case/FIR.

Discharge of an accused:

In police parlance it is called discharge-ghee() there only an accused is released from the custody due to deficiency of evidence or non-availability of in criminative material against him. It is a temporary release, neither the case is cancelled nor the investigation is stopped. Investigating Officer can re-investigate even again the discharged person without the permission of the Magistrate—but cannot re-arrest the accused without the prior permission of the Magistrate.

Procedure and permissions.

Sections 63, 167 and 169 of Cr.P.C. are applicable in the first category of "discharge" police itself can discharge the accused u/s 63 on his own bond or on bail, prior to getting physical remand—but if the accused is produced before the Magistrate and remanded to the Police custody, then police cannot release him by its own—there are two ways or options only.

- (i) Police can prepare a discharge report u/s 169 Cr.P.C. and produce the same along with the accused before the Magistrate and make a request for discharge of the accused—to this, Magistrate again has two options.

First—to agree with the police report and release the accused.
Second, to disagree with the police report and send the accused to Judicial lock up.

- (ii) Magistrate can himself discharge the accused under special order as contemplated by section 63 Cr.P.C. at the time when Police produce the accused for physical remand u/s 167 Cr.P.C. Normally, Magistrate passes

special orders for the persons apprehended u/s 54 Cr.P.C. (Arrest under suspicion).

Cancellation of case/FIR.

In police parlance it is called Cancellation Report (). It is prepared u/s 173 read with Rule 24.7 of Police Rules 1934. It is not a challan rather a final report drawn on form 25.57 whereas challan or charge-sheet is drawn on form 25.56 of police Rules 1934. Accused is not forwarded at the time

of sending this Cancellation Report. All such reports are sent to Illaqa Magistrate, whether the offence is triable by him or by the Court of Sessions. When a Cancellation Report () is sent to the Magistrate he has again two options.

- A. To disagree with the cancellation report and ask the I.O. for submission of formal challan on form No.25.56 of Police Rules 1934. Investigating Officer is at liberty to place the accused person(s) in column No.2 of the challan but is bound to submit the challan. After it, all the accused persons shall stand trial.
- B. To agree with the cancellation/Ikhraaj Report on receipt of such an order the SHO shall cancel the FIR by drawing a red line across the page, noting the name of the Magistrate canceling 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. (see Rule 24.7 of Police Rules). Case cannot be reopened nor the accused person can be re-arrested without the prior permission of the Magistrate. Investigation is stopped—case finally comes to an end—this way, discharge of an accused is different from that of the Cancellation of case.

8. Grounds of discharge & Cancellation of case.

There is only one ground of discharge i.e. deficiency of evidence or in criminative—material is not found against the

accused—It is a temporary release, neither the case is cancelled nor the investigation is estopped-----whereas Cancellation of case has different grounds. i.e.

- i). If the case is found to be maliciously false or false owing to mistake of law or fact.
- ii) Or the case is non-cognizable.
- iii) Or investigation is transferred to another Police Station or District. Here the SHO himself shall cancel the case without obtaining order from the Magistrate (See Rule 24.7 of Police Rules). This is the discharge, leading to cancellation of case, virtually having the effect of an acquittal of the accused.

9. **Discharge of an accused----- its effects:**

Discharge of accused. Strictly, there is no power for the cancellation of a case in the Code of Criminal Procedure. Such power of cancellation however may be treated as inherent in S. 173, read with, S.190 of the Code, though the language of Sub S. (3) of S. 173 does not directly refer to the matter.

I now turn to the understanding of the concept of discharge developed through various judgments rendered by different Courts in the Indo-Pakistan Sub-Continent. In the case of Parul Bala Sen Gupta v. The State AIR 1937 Calcutta 379 an elaborate discussion about the true import of the concept of discharge of an accused person during an investigation was summed up as follows:

Section 62 merely provides that no person who has been arrested by a police officer shall be discharged except on his own bond, of under the special order of a Magistrate. That section appears in Chapter V of the Code of Criminal Procedure, which contains merely general provisions for arrest, escape and retaking. As far as I can see section 63 merely empowers a Magistrate in a special

case to make an order discharging the accused at a time when investigation is in progress. In special circumstances, a police officer may think it right to fortify himself with an order of the Magistrate, and in such case the Magistrate may direct the person to be discharged on bond or on bail when the investigation is in progress. (AIR 1937 Cal 379).

10. **When an accused can be discharged:**

Discharge of accused where no sufficient cause shown for his remand to police custody: Magistrate before whom an arrested person is produced may proceed under Section 63 read with Section 167 Cr.P.C. to make a special order to release or discharge him if police has not been able to show sufficient cause for remanding him to police custody. (1997 M L D 1135(b)).

The police has the power to release a person in custody on his executing a bond with or without sureties for his appearance before a Magistrate if and when so required thus. Section 169, Cr.P.C. in terms applies only to the case of an accused who has never been forwarded to a Magistrate and is confined to the stage of investigation by the police. Consequently, reference by the police to the Magistrate is unnecessary. Equally no such order under Section 169 Cr.P.C. could be passed by the Magistrate. (1971 P Cr. L J 1164).

11. **Release of arrested person:**

Where Investigating Officer finds that there is no sufficient proof against the accused he may release an accused person on executing a bond. The power may be exercised where the case is triable by a Magistrate or Court of Sessions. (PLD 1980 Lah. 28).

12. **Powers under S.169, Cr.P.C. when to be exercised.**

Powers under S. 169, Cr.P.C. can only be exercised by the police during the course of investigation when the accused is in the police custody. (1996 P Cr. L J 1187(a)).

No need to write a detailed Judgment:

13. Impugned order of discharge was an executive order an not a judicial order and the Magistrate while passing the same was only duty bound to apply his conscious mind to the facts of the case which he had done and he was not expected to have written a detailed judgment. Discharger order could not be termed as a mechanical order as the Magistrate had observed therein that the accused has been involved on account of previous litigation. Incharge C.I.A. Staff being a Police Officer after conclusion of investigation was competent to get a discharge order passed from the Magistrate under S. 63 Cr.P.C. and even otherwise the report had been forwarded to the Magistrate by the D.S.P. Complainant even had the remedy of filing a private complaint against the accused. Petition was dismissed accordingly. (1996 M L D 907 (a)).

14. When an accused can not be discharged?

Discharge of an accused person by a Magistrate is not legally possible after taking of cognizance of the case by a trial Court. (PLD 2001 Lah 271). 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 u/s 249-A or S.265-K of the Code or on the basis of 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 FIR 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. (PLD 2001 Lah 271).

15 Duty of the Magistrate.

It is a duty of the Magistrate to give his findings regarding the guilt or innocence of the accused involved in non-boilable case after applying his judicial mind a after taking into account the F.I.R., statements u/Ss. 161 and 164

Cr.P.C. the recovery and medical evidence on record. Magistrate passing order without saying a word about the ocular evidence, can be said to have reached a misleading conclusion tainted with [prejudice to refuse judicial remand of accused. Having influenced from large number of affidavits produced by police and jumping to the conclusion that the accused was innocent would amount not only acting with irregularity but also failing to apply judicial mind to the facts of the case. (1997 MLD 1135).

16. Affidavits can not be made basis of discharge:

Magistrate without saying a word about the ocular evidence had wrongly held the accused to be innocent on the basis of some affidavits produced in defence during investigation even without waiting for the finalization of investigation. Magistrate had not to give his finding regarding the guilt of innocence of accused who was involved in a murder case, which was exclusively triable by Sessions Court. Magistrate has, thus, proceeded illegally to determine innocence or guilt of accused without taking into account the statement of the first informant supported by two eye-witnesses and without applying his mind properly even to the facts of the case produced before him through diaries recorded under S. 172 Cr.P.C. Magistrate had reached a misleading conclusion tainted with prejudice to refuse judicial remand of accused and to make the impugned discharge order which being patently illegal was set aside. Constitutional petition was accepted accordingly. (1997 M L D 1135 (c)).

17. Order for cancellation of case and discharge of accused—Validity:

Complainant lodged report against accused in which he charged accused for injuring him on head with a stone and

complainant was medically examined on the same day by Doctor, but during investigation, Inquiry Officer after examining some witnesses and receiving their affidavits, recommended for cancellation of case against accused and for his release under S.169 Cr.P.C Investigating Officer not only obtained order of cancellation of case against accused from Illaqa Magistrate, but also initiated proceedings for prosecution of complainant under S. 182 P.P.C. Case against accused having been prima facie established from the statement of injured person coupled with medical evidence and statement of eye-witness, Investigating Officer should not have thrown it out from prosecution against the accused by taking into consideration affidavits of few interested persons. Order of cancellation of case against accused obtained by Investigating Officer from Illaqa Magistrate seemed to be a mala fide act on part of Investigating Officer and the manner in which he

obtained those orders from Illaqa Magistrate for discharge of accused from prosecution of case amounted to abuse of process of the Court. Order of Magistrate, was set aside by High Court, under S.561, Cr.P.C. directing disposal of case on merits in accordance with law. (1998 P Cr. L J 743).

18. Ocular evidence be taken into account.

Magistrate without saying a word about the ocular evidence had wrongly held the accused to be innocent on the basis of some affidavits produced in defence during investigation even without waiting for the finalization of investigation. Magistrate had not to give his finding regarding the guilt of innocence of accused who was involved in a murder case, which was exclusively triable by Sessions Court. Magistrate has, this, proceed illegally to determine innocence or guilt of accused without taking into account the statement of the first informant supported by two eye-witnesses and without applying his mind properly even to the facts of the case produced before him through diaries recorded under S. 172

Cr.P.C. Magistrate had reached a misleading conclusion tainted with prejudice to refuse judicial remand of accused and to make the impugned discharge order which being [patently illegal was set aside. Constitutional petition was accepted accordingly. (1997 M L D 1135 (c)).

19. Submission of challan----Delay---Effect:

Submission of challan within stipulated period no doubt was the foremost duty of the police which if not performed due to some unavoidable circumstances during Investigation, accused would not be benefited of the lapses of police for good reasons. If Investigating Officer was found of slackness/ignorance in not submitting challan to the court in time then the should be taken to task as submission of challan under Section 173, Cr.P.C. had no relevance with bail matter (P L D 1997 Pesh. 173 (c)).

20. Investigating Officer was not competent to exclude accused from challan.

Investigating Officer not only did not mention name of accused in either of the columns of challan, but had discharged him under Section 169, Cr.P.C. despite ocular evidence against accused was duly corroborated by recoveries from spot and circumstantial evidence. Without going into deep appraisal of the prosecution case or plea of defence set up by accused and evidence in support thereof, Investigating Officer was not competent to exclude accused from challan submitted to the Court. What Investigating Officer was competent to do was to place accused in column No.2 of complete challan if he was satisfied from the statement in support of alibi of accused. Petition for quashing was granted with the direction to S.H.O. Police concerned to resubmit complete challan in case mentioning accused in column No.2 therein. (1998 P.Cr.L.J. 832).

21. Discharge of accused on the basis of defence evidence—validity:

Investigating Officer not only did not mention name of accused in either of the columns of challan, but had discharged

him under Section 169 Cr.P.C. despite ocular evidence against accused was duly corroborated by recoveries from spot and circumstantial evidence. Without going into deep appraisal of the prosecution case or plea of defence set up by accused and evidence in support thereof, Investigating Officer was competent to do was to place accused in column Nop.2 of complete challan if he was satisfied from the statement in support of alibi of accused. Petition for quashing was granted with the direction to S.H.O., police concerned to resubmit complete challan in case mentioning accused in column No.2 therein. (1998 P Cr. L J 832).

**22. Discharge by Magistrate without giving any reasons-----
-----Validity:**

Though a Magistrate in canceling 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 power, there is no lis before him, there is no duty to hear the parties, there is no decision given, no finality or irrevocability attaching to the order. The party is left free to institute a complaint on the same facts 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 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. (PLD 1985 SC 62 + PLD 2001 Lah. 305).

23. Discharge by Police:

Justice is not to be administered only in the Court. Even during the investigation the police has to do the justice to the [parties. It is on the basis of this theory that S. 169 Cr.P.C. has been incorporated to play the legal role whereby the police is empowered to get discharged the accused person(s) and to get

cancelled the F.I.R., if there is no material against the accused due to

deficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Court. (1999 P.Cr.L.J. 1198).

Investigation Officer undisputedly has discretionary powers u/s 169 Cr.P.C. for releasing an accused on bail bond during the course of investigation before submission of challan. This is an interim relief made permissible under law to an innocent person who of course will have to stand test of judicial scrutiny to be made by Trial Court. Right course for investigation officer in such cases would be to place name of the accused discharged in column 2 of final report u/s 173 Cr.P.C. (NLR 1998 CrI. 516 = PLJ 1998 CrI.C Pesh. 1181 = 1998 PLR 895, 1998 P.Cr.L.J. 832).

24. **The police have the power to release a person in custody on his executing a bond with or without sureties**

Whatever course the Investigating Officer adopts by acting u/s 169 or u/s 170, Cr.P.C. it is incumbent upon him to submit final report 173, Cr.P.C. with regard to result of investigation to a competent Magistrate. (1983 SCMR 270). The police have the power to release a person in custody on his executing a bond with or without sureties for his appearance before a Magistrate if and when so required. (1971 P.Cr.L.J. 1164). If an accused is released under S. 169 his case is altogether different from the cases of other persons mentioned in column Nos. 2 & 3 of the report submitted under S.173 Cr.P.C. In former case the trial Court has no power to pass an order for placing the accused in column 2. [1997 MLD 1430] Power under S. 169 can only be exercised by the [police during the course of investigation when the accused is in police custody. (1996 P.Cr.L.J. 1187).

Sufficient evidence: Investigating Officer is competent to weigh, assess and evaluate the material collected by him during the course of investigation and where the I.O. finds that the

accused is falsely involved or there is no sufficient evidence against him, the I.O. can release the accused under S. 169. Cr.P.C. (2001 P.Cr.L.J. 199).

25. Opinion of police is not binding.

Opinion of police is not binding upon the Court. It has no authority whatsoever to give judgment about the merits of the case, which definitely is the job of the trial Court. (1996 MLD 903). Magistrate can take cognizance of offence even in case of negative report submitted by Police that accusation is baseless, where Magistrate disagrees he can take action under clause (b) of S. 190 Cr.P.C. against those whose names have been placed under column 2 of

challan and he can issue process against those person whose names were mentioned in said column who appear to him on the basis of report or other material places before him. (PLJ 2002 S.C. 304).

26. Discharge and cancellation----- distinguished:

Terms " discharge" and " cancellation" are not synonymous and cannot be amalgamated because they have different connotations--- Where the case is cancelled by a competent Court, the F.I.R. ceases to exist, but where the accused is discharged the F.I.R remains intact and the discharge order relates to only that particular accused.(1995 P Cr. L J 441).

Order of discharge under S.169 not to be treated as an order of acquittal nor the same would bar subsequent proceedings. (1969 MLD 1822) Magistrate discharging accused on interim police report can try on final report, (1971 P.Cr.L.J. 1164) if evidence establishes prima facie case against him. (1993 P.Cr.L.J. 646) Court can order further investigation u/s 156(3), Cr.P.C. or can take cognizance of case u/s 190(1), Cr.P.C. or when report is sent u/s 173 Cr.P.C. Court either can discharge bond or order re-arrest of accused. (1991 MLD 2564).