

SENATE OF PAKISTAN

SENATE DEBATES

Sunday, November 26, 1994

The Senate of Pakistan met in the Senate Hall (Parliament House) Islamabad, at fifty five minutes past four in the evening with Mr. Chairman (Mr. Wasim Sajjad) in the Chair.

Recitation from the Holy Quran

بسم الله الرحمن الرحيم

والعصر ان الانسان لفي خسر O الا الذين آمنوا و عملوا

الصالحات و تواصوا بالحق و تواصوا بالصبر O

ترجمہ ، اللہ جل جلالہ قسم اٹھا کر فرماتے ہیں کہ قسم ہے زمانے کی کہ ہر انسان یقیناً خسارے میں ہے مگر وہ لوگ جو ایمان لائے اور اس ایمان کے تقاضوں کو پورا کرتے ہوئے اعمال صالحہ کئے اور تقین حق کی اور تقین صبر کی ۔

POINT OF ORDER

سید محمد جواد ہادی۔ پوائنٹ آف آرڈر۔

بناب چیئرمین۔ علامہ صاحب۔

POINT OF ORDER RE: TERRORISM

سید محمد جواد ہادی۔ جناب چیئرمین۔ میں عرض کرنا چاہتا ہوں کہ جیسا کہ اخبارات

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میں بھی آیا ہے کہ کل رات اس ملک میں پر امن شہریوں کا سٹاکانہ انداز میں قتل ہوا۔ یہ پر امن شہری جو اس ملک کی سلامتی اور بٹا اور وحدت مسلمین کے لئے عظمت اسلام کانفرنس میں شرکت کے لئے مینار پاکستان لاہور گئے تھے، جہاں انہوں نے اس ملک کی سلامتی، بٹا اور تحفظ کا عہد کیا تھا اور وحدت مسلمین کا نعرہ بلند کیا تھا، ایک قافلہ کی واپسی پر کچھ شر پسندوں نے کھاریاں شہر کے قریب، پولیس سے چند قدم کے فاصلے پر اتھائی بے دردی سے حملہ کر دیا، جس میں سات شہید اور بیس سے زیادہ زخمی ہوئے۔ اسی طریقے سے ایک اور قافلے کی واپسی پر فاروق آباد میں حملہ ہوا ہے جس میں ایک آدمی شہید اور کئی زخمی ہوئے ہیں۔ نیز ڈیرہ اسماعیل خان میں ایک قافلے پر حملہ ہوا، وہاں پر بھی ایک شہید اور کئی زخمی ہوئے ہیں۔ اس سے پتہ چلتا ہے اور ایسے گنتا ہے کہ اس ملک میں نہ کوئی حکومت ہے، نہ ہی کوئی انتظامیہ ہے۔

اس طرح کھلے بندوں اگر پر امن شہریوں کا قتل عام ہوتا رہا تو ظاہر سی بات ہے کہ ہر شہری یہ محسوس کرے گا کہ اپنے تحفظ کے لئے اسے خود کچھ کرنا چاہیے۔ اگر یہ سلسلہ جاری رہا تو یہ ملک خدا نخواستہ فتنہ جنگی جیسی صورت حال سے دو چار ہو سکتا ہے۔ اس سلسلے میں یہ بات قابل غور ہے کہ عظمت اسلام کانفرنس میں جو لوگ شریک ہوئے، انہوں نے اپنے تحفظ کے لئے اپنے ساتھ ایک چاقو بھی نہیں رکھا ہوا تھا۔ اس لئے کہ پنجاب کی انتظامیہ، چیف سیکرٹری اور آئی جی سے بات چیت ہوئی تھی اور انہوں نے اس بات کا ذمہ لیا تھا کہ ہم تمام راستوں کو پر امن بنائیں گے۔ لیکن وہاں کوئی انتظام نہیں تھا اس سے پتہ چلتا ہے اور سب کو یہ احساس ہوتا ہے کہ اپنے تحفظ کے لئے خود کچھ کرنا چاہیے۔

مجھے یہ شک پڑتا ہے کہ یہود و ہندو کے استیجنوں نے، جن کے خلاف مسلمانوں نے عظمت اسلام کانفرنس میں، مینار پاکستان کے سامنے نفرت کا اظہار کیا تھا، جس میں سو سے زیادہ بڑے بڑے مشائخ اور اہل سنت کے علماء شریک ہوئے تھے، سے بدلہ لیا ہے۔۔۔

جناب چیئرمین - علامہ صاحب - آپ کی بات سن لی ہے۔

سید محمد جواد ہادی - اسرائیل کے خلاف نفرت کا اظہار کیا تھا، یہاں ان کے استیجنوں نے اس کا بدلہ ہم سے لیا۔ میں اس سلسلہ میں حکومت پنجاب کو متنبہ کرتا ہوں کیونکہ پہلے سے ہی حکومت پنجاب کے وزیر اعلیٰ کے بارے میں کہا جاتا ہے۔ آج بھی روزنامہ پاکستان کے سپلیمنٹری میں۔۔

جناب چیئرمین۔ علامہ صاحب۔ میرے خیال میں کافی بات ہو چکی ہے۔

سید محمد جواد ہادی۔۔۔۔ گورنر نے جو ایک ذمہ دار آدمی ہے، اس نے کہا ہے کہ اس خبیث سنی فساد کے پیچھے مرزائیوں کا ہاتھ ہے۔

جناب چیئرمین۔ علامہ صاحب۔ میری عرض تو سنیں۔۔

سید محمد جواد ہادی۔ میری گزارش تو سن لیں کیونکہ یہ ایک بہت اہم مسئلہ ہے۔

جناب چیئرمین۔ واقعی یہ اہم مسئلہ ہے اور افسوس ناک بھی ہے۔

سید محمد جواد ہادی۔ جناب والا۔ حکومت کو تو اپنا اقتدار بچانے سے فرصت ہی نہیں ہے۔ وہ عام شہریوں کے تحفظ کرنے میں ناکام ہو چکی ہے۔ میرا خیال ہے کہ اس حکومت کے لئے کوئی اخلاقی جواز باقی نہیں ہے کہ وہ برسرِ اقتدار رہے۔ میں آپ کے توسط سے حکومت سے مطالبہ کرتا ہوں کہ ان دہشت گردوں کو فوراً گرفتار کیا جائے اور ان کو کیفرِ کردار تک پہنچایا جائے۔

جناب چیئرمین۔ جب آپ مسئلہ کو مناسب طریقے سے ہاؤس میں لائیں گے تو تب ہی حکومت اس کا جواب دے سکی گی۔ پوائنٹ آف آرڈر پر جواب نہیں دیا جاسکتا۔

مخدوم سید محمد اسرار حسین شاہ۔ جناب والا۔ میں آپ کی توجہ کورم کی طرف دلانا چاہتا ہوں۔ کورم نہیں ہے۔

جناب چیئرمین۔ کورم تو پورا ہی ہونا چاہیے۔ گنتی کریں۔

(اس موقع پر کورم کے لئے گھنٹیاں بجائی گئیں)

DISCUSSION OF ATTORNEY GENERAL REGARDING

IMPLEMENTATION OF RULE 72(A)

جناب چیئرمین۔ کورم پورا ہو گیا ہے۔

You know the issues as to what are the issues which have arisen. Basically, the issue has arisen because a Senator was arrested by the FIA on the 22nd of

November. On that day, I passed an order under rule 72(a) of the Rules of Procedure and Conduct of Business in the Senate, 1988, calling for the presence of the Senator in the sittings of the Senate. The following day, that is the 23rd, when I enquired as to why he had not been brought, an objection was raised by the Law Minister saying that this amounted to interference in the working of the judiciary and his argument was that the custody of the arrested person is with the court and therefore, unless the application is moved through the court, the Senator cannot be brought to the House. So, basically, we are now looking at the Rule 72(a) as to whether the argument is correct or there is any other argument as to why Rule 72(a) should not be enforced and should not be complied with by the Government.

Qazi Muhammad Jamil: Thank you, Sir. First of all, Mr. Chairman, allow me to express my gratitude for giving me this opportunity to address this august House. I consider it and I am profoundly grateful and proud of the fact that I am addressing this august House. Although an issue, where I feel highly overwhelmed in the sense that knowing you personally, I believe that the way that you have chaired this House over a number of years, I have always been an admirer of that and I also know you personally about your legal acumen and the legal propensities. In any case, I would not go into the details because reading the newspapers quite a few questions were asked by your honour and replied to by the Law Minister. I assure you, Sir, that as Attorney General, I stand as committed to this House in responsibility as I am to any other organ of the Government. Therefore, I would be a little concerned about the implications and effects of an order passed by your honour under Rule 72(a) and therefore, I would just lay down, as I said, a little bit for the convenience of this House and

for your honour's convenience as to the phraseology used in this Rule. Of course, everyone knows I donot have to dwell on this. The rule has been inserted quite recently. Rule 72(a) reads:

The Chairman or Chairman of the Committee may summon a member in custody on the charge, the first word, Sir, which we notice is the word 'may'. So, my humble submission is that may connotes your honour's discretion, may summon a member in custody on the charge of any offence or under any law relating to preventive detention to attend the sitting or sittings of the Senate or meeting of the Committee of which he is a member. Anyhow Sir, another phrase comes. If he, that is your honour, in your honour's discretion, considers his presence necessary, the word is may and in the last phrase if it is considered necessary by your honour to summon the arrested member. So, to my mind, there is no doubt that 72-A gives a discretionary powers to the Chairman to summon an arrested person if the Chairman considers necessary to do so i.e. if his presence is necessary. If it is so desired, I might go into the question whethere technically, discretionary.....

Mr. Chairman: That stage is over. The order was passed. I considered it necessary.

Qazi Muhammad Jamil: I have developed an argument on the basis of this. Now the crucial stage is given in paragraph 2. In paragraph 2, sir, it will be noticed that there are three agencies or there are three bodies outside the legislature who can be asked to produce the arrested member. One is the Federal Government, the other is the Provincial Government and the third one which is an addition, it does not appear in the Rules of Business in the

National Assembly, it is only for this House or any other authority. The Federal Government, the Provincial Government or to the Authority having or holding custody of the member. I do not know, Sir, whether it was an oversight or a deliberate omission but it does not appear in the rules relating to the National Assembly. In the National Assembly's rules only the Federal Government, and the Provincial Government is mentioned but the authority who is holding in custody any member, is not mentioned. Now, Sir, the question is, not so much the other consequences as that of the writ of your honour which is to be issued to an authority outside and its consequences. That is a very crucial question both for this very prestigious office and also for the legislature.

Mr. Chairman: We adjourn for fifteen to twenty minutes for MAGHIRIB Prayer.

(وقت کے بعد اجلاس کی کارروائی زیرِ صدارت جناب چیئرمین وسیم سجاد شروع ہوئی)
جناب چیئرمین۔ جی آپ پیر ۲۱ پر کچھ فرما رہے تھے۔

Qazi Muhammad Jamil: I was submitting Sir, that there are three authorities or three bodies - functionaries outside this August House which can be directed or ordered to produce an arrested member if so desired by your honour, one is the Federal Government, second is the Provincial Government and the third is some other authority which is in custody or control the accused member. Then Sir, a grave kind of responsibility rests on your honour's discretion in deciding whenever the question arises as to in whose custody the accused member is reading the rule as it is. In these particular cases Sir, to my mind going through the Criminal Procedure Code and the remification of different provisions in Criminal Procedure Code, the police or the arresting

authority both under the Criminal Procedure Code as well, as under the Constitution as one of the fundamental rights of citizens can not have a control over an arrested person for more than 24 hours

Mr. Chairman: So, during that 24 hours period who has the custody?

Qazi Muhammad Jamil: During that 24 hours the police arrests a person and in the process of producing him before a Magistrate, they have been given a time to produce him before the Magistrate but in the ultimate analysis it is always the Magistrate which determines whether the person should stay on with the police or should go to the other custody.

Mr. Chairman: No, but the moment a person is arrested by ordinary police will say, he has been taken into custody, normal language. Now who has the custody at that moment, it will be a different question once the man is produced before a Magistrate, that is another stage but upto that point of time how would you describe it who has the custody?

Qazi Muhammad Jamil: Sir, I would humbly submit that the custody is kind of an (*Amanat*) of that person because he has to produce before a Magistrate because ultimate analysis we cannot say that he is in custody of police because Sir, we do not really use this word as to along the police in the Anglo Saxon Jurisprudence as your honour would know they would suspect any person to be checked by the police for a period longer than 24 hours but it is contingent, inside this 24 hours, it is the custody of the Magistrate because he has then to decide whether the man has been rightly arrested, whether he is entitled to bail, whether he should go to the police or whether he should go to

the judicial lock up. Sir, in no case, I believe Sir, personally that there can be eventualities when the Federal Government can have custody of a person, like preventive cases or a Provincial Government can have custody of a person in other certain Ordinances we deal with certain situations of law and order but once an offence is committed then we cannot think of another custody than that of judicial custody because if we interpret differently then the Provincial Government and the Federal Government will be given enormous powers over the judicial process.

Mr. Chairman: But even under the CrPC the remand provision 167 says that when the accused is produced before a Magistrate, the Magistrate will remand him to such custody as he thinks fit. So, if the intention were that it is his own custody all you have to say that Magistrate will pass orders, put him in a custody, such custody means such ever custody.

Qazi Muhammad Jamil: Such custody but the Magistrate, your honour this exactly I wanted to read to your honour, that as he considers necessary. Now Sir, even in Section on Bail, Sir, may I for a moment digress and say that I really take this question in the sense that your honour sitting there with your legal acumen will decide a very important question side-tracking the judiciary, it is like saying we open the gate of the prison, we take out the man and we bring him here.

Mr. Chairman: No, we don't take him out. You see the difference is that we are not releasing him on bail when the person comes in custody, the practice has been that, we for example, in the case of MQM Senators we used to send orders to the Provincial Government, the Chief Secretary or the Home

Secretary, the Sindh police would handover the custody to the Islamabad police and he would come in custody to the House. at the end of the session he would be again taken into custody by the Islamabad Police or whatever Police, he is kept, wherever he is kept, whether in a hotel or in the Rest House, he is still under custody, his movement is restricted, so he is not released, he remains in custody.

Qazi Muhammad Jamil: Sir, actually my legal submission is that by doing so the Governments have been by passing the courts because even when a transfer is to take place of an under trial prisoner from one prison to the other, the Magistrate's consent is required. There are judgements in this respect Sir, I have brought. Sir, in PLD 1965 West Pakistan Karachi on 320. It was held that when an under trial prisoner is committed to a prison, he has to be received by the officer incharge in accordance with the warrant issued by the court, such person is then detained until he is discharged or removed in due course of law. One such warrant has been issued there is no power in the Provincial Government in the case of such prisoner to order his shifting from one jail to another. There is also no power in the Provincial Government to direct the Magistrate to issue an intermediary warrant that an under trial prisoner may be taken to one prison or he is shifted to another, the power of the Provincial Government for the removal of any prisoner confined in a prison is also laid down in the very Act under such and such Section. So, Sir, the question is not so serious as in political parlance as it has been made to, of course I am only representing a legal point of view but the fact should also be kept in mind that we have to have confidence in the judiciary and the Magistrate who is dealing with it, is also a Judge and in the scheme of the Constitution sir, which your

honour knows more than I know there is a trichotomy of power , there is legislature , there is executive , there is judiciary , now the judiciary cannot interfere in the internal proceedings of this august House, similarly this august House shall not interrupt or interfere the due course of law that is mutual, otherwise sir, three Organs of the Government would not be able to run. Now my respectful submission is that if we have , if your honour 's discretion is exercised on a particular arrested member, may I submit Sir, that if it is a privilege , it is not a universal privilege. It is not that at every time when a member is arrested that he must be brought to the House.

جناب چیئرمین۔ نہیں وہ تو ٹھیک ہے آپ کی بات۔

The rule says that if the Chairman considers it necessary he will pass an order. So as you rightly pointed out that power has been given to the Chairman and in this case it has been exercised. The Chairman considering all the circumstances he passed the orders saying it is necessary he should be produced.

آپ نے جو ذکر کیا۔

about transfer of a prisoner I have with me now the prison rules , rule 147 says , the transfer of prisoner from one prison to another other within the province shall be directed by the Inspector General . Now there is no reference to the court here.

Qazi Muhammad Jamil: Sir, they have made this thing, I am sorry sir. I have seen that sir and I have seen that they made a difference between a convicted person who is in the prison and the person who is not yet convicted, who is still in the custody of

Mr. Chairman: No,

یہ ۱۳۷ تو 'I think it applies to a prisoner, not a convicted prisoner.'

قاضی محمد جمیل۔ سر انہوں نے پھر اس judgement کو elaborate جو کیا ہے اگر آپ leisure time میں پڑھیں تو انہوں نے پھر اس کی جو distinction کی ہے وہ یہی کی ہے کہ ایک تو trial میں ہے 'enquiry میں ہے' ایک بندہ بالکل مجسٹریٹ کی پاور میں ہے کیونکہ جج جو ہے۔

He has then to see and superintend his whereabouts where he is, whether he will be brought to the court for trial or not. Sir, I think logic is quite obvious behind that distinction but once a person is convicted and sentenced, then the government has the power to transfer him from one jail to the other. I am not overemphasising that point, Sir, because this is not jail, he will not be transferred here as a jail but what I am saying is this that a judge or a magistrate should not be to my mind Sir, without any political perception to it Sir, I am not talking like a politician but in the interest of independence of judiciary, in the interest of this august House and in the interest of its relationship between the legislature and judiciary this should not be turned into.....

Mr. Chairman: No, but so far no court has prohibited this.

یا تو یہ ہونا کہ کسی عدالت نے آرڈر کئے ہوں کہ جی آپ اس کو یہاں سے نہ remove کریں یا کوئی ایسی بات ہو 'But so far there is no such conflict.'

Qazi Muhammad Jamil: No Sir, what I am saying is, I am just looking at the implications. I am not saying that the court has not prohibited but court has permit a certain custody but the court might permit a custody has also to determine the manner of the custody.

جناب چیئرمین۔ دیکھیں ریمانڈ آرڈر کس طرح ہوتا ہے۔

The Police produces the accused before a Magistrate and the Magistrate passes

the orders of remand.

Qazi Muhammad Jamil: That is right, Sir.

Mr. Chairman: Then 169 gives power even to the Police officer. After a remand order has been made, supposing the remand order has been made for fourteen days. Now under 169 the Police officer has the power even to release him after four days, after three days, if he comes to the conclusion that there are not sufficient grounds for proceedings against the person, the police officer can release him. So where is the custody of the court?

Qazi Muhammad Jamil: Sir, I was actually not going into this but as your honour raised this question. 169 deals with cases of doubtful evidence.

جناب چیئرمین۔ ٹھیک ہے۔

Qazi Muhammad Jamil: And that is almost releasing the person.

Mr. Chairman: No. No. Asking him to sign a bond to appear before the Magistrate.

Qazi Muhammad Jamil: But again Sir, even in cases of no evidence where a police officer thinks that there is no case and he is just releasing the person, your honour would see that there is a superintendence of the court.

Mr. Chairman: No. No.

۱۶۹ پڑھیں ناں اس میں تو کوئی نہیں ہے۔

قاضی محمد جمیل۔ ۱۶۹ جو ہے جناب ۱۶۹ اسی صورت میں آ سکتی ہے 'I agree' جناب

کی اس suggestion سے یہ اسی صورت میں آ سکتی ہے جب ثبوت فراہم نہ ہوں اس کے ساتھ۔

جناب چیئرمین۔ صحیح ہے۔

But the point I am trying to make is that the court has passed orders remanding the accused. Now if it is the custody of the court then how can the officer release him?

قاضی محمد جمیل۔ سر اصل میں دو باتیں ہیں۔ ایک تو یہ ہے جی کہ law میں ایک particular provision میں certain conditions میں اس آفیسر کو یہ پاور دی گئی ہیں۔ لیکن لاہ نے کہیں نہیں لکھا کہ جب جناب کا آرڈر ہو تو تب بھی پولیس والا produce کر سکتا ہے اپنی مرضی سے۔

جناب چیئرمین۔ نہیں نہیں۔ ہم تو پہلے یہ سمجھنے کی کوشش کر رہے ہیں

This argument which is being raised that it is the custody of the court and therefore nobody else can call for the custody of the person concerned. 167 says that the Magistrate may remand to such custody. It is not his own custody, as he thinks fit. So he can give it to judicial custody, he can give it to the police custody, he can give to some one, whatever, he can send it to Darul Aman.

یہ تو اس کی مرضی ہے کہ دارالامان بھیج دے کہ جی اس کو وہاں رکھا جائے۔

So it is the power of the Magistrate. 167 does not say that the Magistrate will take him in his own custody which is not possible.

یعنی خود تو نہیں کر سکتا۔

He may be dealing with three thousand prisoners. So then if it is the custody of the court as is being argued then how is it that a police officer can release, whether it is good evidence, insufficient evidence or evidence calling for further inquiry,

وہ تو اور چیز ہوتی ہے۔ Another situation is also there, اس پر بھی ذرا غور کریں۔

Now we have a specific case in point. One of our Senators from the MQM has about twenty cases against him, and these twenty cases are in

different places - Hyderabad, Karachi South, Karachi North, Sessions Judge, Magistrate, so which court has the custody? Do all of them have custody?

یعنی ۲۰ عدالتوں میں ہیں تو؟ Who has the custody then?

قاضی محمد جمیل۔ سر میں ایک عرض کرتا ہوں۔ basic submission میری یہ ہے

کہ Criminal Procedure Code جو ہے وہ 169 میں exception بناتے ہیں۔

under which police gets a certain power, but for the ultimate superintendence of the Magistrate getting a bond, but in rest of these sections, that for remand, there is a constructive custody of the court and whenever the court finds, now comes to the question, sir, it is a very crucial question. When a person walks into the court and he says, I have committed no offence, there, no *prima facie* is against me, please grant me bail. Only then the Magistrate sends him on bail or a Judge sends him on bail. The release of a person depends totally and squarely Sir, in my humble submission except for 169 on the Magistrate or the Judge. If we replace any other construction on this, then Sir, a murderer can write a letter to the Provincial Government, that I would like to see my son and please bring in and the Provincial Government has powers, of course, over the Police and they will tell the Police, bring him, take him to the House for that. Sir, the consequences, the situation demands that this particular basic requirement of Rule of Law must be preserved, otherwise Sir, this august House can ask or can make law, both Houses can get together, can make Law, can change Law, can amend the Law. But Sir, it is both in the books, British Books, if your honour would allow me that one House cannot create a Law Privilege which would be binding.

جناب چیئرمین۔ کیا Rules of Procedure of the Government کو آپ لائنیں

Qazi Muhammad Jamil: Sir, the Rules of Procedure would not replace Law.

جناب چیئرمین۔ نہیں اس کی کیا اہمیت ہے۔ یعنی - Is it Law? Is it not Law?

Qazi Muhammad Jamil: We call them as subordinate legislature.

Mr. Chairman: O.K. then it is legislature. So, it is legislation.

قاضی محمد جمیل۔ میں اس question پر ویسے deliberately 'نہیں آرہا تھا۔

جناب چیئرمین۔ نہیں میں اس لئے کہہ رہا ہوں کہ دو ایسے rules نظر آرہے ہیں

Constitution میں شاید اور بھی ہوں۔ دو ایسے نظر آرہے ہیں۔

one is the Rules of Procedure of the Government which are framed under powers given by the Constitution and *prima facie*, they have the force of Law and you know the Rules have the force of Law. It is a subordinate Legislation, you are quite right. But normally the heirarchy of legislation is Rules, Law and Constitution. Now, there are two kinds of Rules. Apparently, one is the Rules of Procedure of the Government. This is Constitutional legislation. You might call it subordinate Constitutional Legislation. Second is Rules framed by the National Assembly and the Senate. Again, they are framed under powers given by the Constitution and also under an article, I think it is 69.

Qazi Muhammad Jamil: 66 Sir. Article 66.

Mr. Chairman: 66. Which says that the jurisdiction of the officer who is administering these rules cannot be questioned in any court under these rules.

یعنی اس rule کی اہمیت کا اس سے اندازہ لگائیں کہ Constitution میں انہوں نے لکھا ہوا ہے کہ

they are not even subject to challenge before a Court of Law. So, ofcourse, it is being done under a Law.

قاضی محمد جمیل۔ جناب! میں ایک عرض کرتا ہوں۔ اس سوال پر ویسے آنا نہیں چاہتا

تھا۔

I was taking it for granted as a deference to this august House, which has made this rule not to challenge it and not to say it is a bad rule. I was only considering the consequences of that. I would just respectfully submit that under Article 66 it is clearly written that a privilege can only be created by law. And law, Sir, to my mind, is an enactment of both Houses of Parliament. Article 66, I am not doubting the wisdom of this House, but what I am saying is this that if this insertion is made and if it is considered as a privilege, it should be exercised with caution, considering other functionaries of the State. But, what I am saying is this, that in Article 66(1), freedom of speech is ensured, Sir. That privilege is created by Constitution, it is a Constitutional privilege. Then Article 2 is, in respect of the Power, immunities and privileges of Parliament and the immunities the Privileges of the Members of Parliament shall be such as replaced from time to time, as defined by law. Sir, I do not believe for a moment, with great respect that by sheer insertion of a rule in chapter headed as "Privileges", it becomes a privilege because it was there in law.

جناب چیئرمین۔ مثلاً یہ تو نئی چیز ہے جی۔

There are two other provisions of a similar nature in our rules which have existed from quite some time. One is that the process of a court cannot be served in the precinct of the Parliament.

وہ بھی privilege ہی ہوا ۔ Its a privilege of the House and that is a situation where

process issue یا issue کیا ہوا ہے یا warrant ایک بعض ایک there is direct conflict....

کی ہوتی ہے

and the House blocks it by its own rules and this has been there for, I have not studied it, but I am sure, it has been there atleast for quite some time. Second is that a person cannot be arrested within the precinct of the Parliament although there is a valid warrant from a court of law. The Court of Law has jurisdiction. They send a person with the warrant but we say, no. We will not allow you. Now, is this a privilege? You might say yes, it is a kind of privilege but nevertheless this privilege is conferred not by the law but by subordinate legislation which is a Rules of Procedure of the House.

Qazi Muhammad Jamil: This aspect that has been added by an Ordinance, I have brought a copy in which it is said by law. It has been said, the thing which, your honour has just mentioned. It has been said that under the civil litigation or even preventive detention, a person cannot be detained during so many days prior and during the session and after the session. I will just quote to you.

جناب چیئرمین۔ نہیں اس کے علاوہ یہ ہے کہ دو چیزیں آتی ہیں

One is that a process cannot be served. Rule 71 says, "No Member shall be arrested within the precinct of the Senate without the permission of the Chairman. Now there is no distinction between civil arrest or criminal arrest. Second is 72 (a), legal process issued by any court, tribunal or other authority, shall not be served to a Member within the precinct of the Senate without the permission of the Chairman".

Qazi Muhammad Jamil: Sir, one, I would like your honour to

note down is the Members' Privileges Ordinance 9 of 1963. It is "Members of the National Assembly Exemption From Preventive Detention And Personal Appearance Ordinance 1963" which lays down, which covered most of the privileges mentioned in this chapter. I do not have any doubt to the proposition that internally your honour has the control over.....

Mr. Chairman: So what now,

Let us say, they don't have any validity, then where do you اگر آپ یہ rules exactly derive that authority from?

قاضی محمد جمیل - جناب اس میں ایک تو یہ ہے کہ آپ Constitution سے یہ second authority derive کرتے ہیں کیونکہ Houses کے اندر انہوں نے privilege کیا ہوا ہے یہ ہے کہ

جناب چیئرمین - لیکن privilege تو یہ کہ freedom of speech ہے but this privilege کہ جی arrest نہیں ہو سکتی ہاؤس کے اندر۔۔

قاضی محمد جمیل - جناب وہ اس Ordinance میں ہے جس میں آپ نے۔۔۔

جناب چیئرمین - کیا آپ کے پاس اس Ordinance کی copy ہے؟

قاضی محمد جمیل - جی جناب ہے۔

جناب چیئرمین - اس کی کاپی کر وا لیتے ہیں۔ اس میں privilege جو confer کیا گیا ہے وہ یہ ہے کہ

No member shall be detained under any law related to preventive detention, 14 days before and 14 days after, second is that proceeding in the Civil Court shall not stand in anything to the contrary contained for the time being ... No civil or revenue court and no election tribunal shall proceed during the session and for a period of 14 days before and 14 days after the session with any matter before to

which the member is a party. But this particular privilege what I am talking about that the process cannot be served inside the precinct of the Parliament without the permission of the Chairman and a Member cannot be arrested within the precinct without the permission of the Chairman. Now whatever you might want to call it, protection, privilege. This appears to be purely the creation of Rules of Procedure.

Qazi Muhammad Jamil: Sir, I would humbly submit that instead of going to waste your honour's time, I would just simply fall back on the presumption that according to the Constitution. The Constitution enjoins that the privilege is to be created by law and those privileges. Sir, I am sorry, I could not read that totally which might cover your honour's question. It goes on saying, as your honour has very rightly pointed out, that there are some old times now this article covers that. This article says, "That by-laws and the privileges which were there in the past shall continue". So if we have borrowed from the privileges of the predecessor Houses of Parliament, the Houses which have gone. It is only creating a new privilege, which in my humble opinion, would require enactment. Now the advantage of enactment is that the enactment would then spell out different methodology which is lacking here. Sir, frankly speaking I was only worried and concerned about orders and its compliance and your honour's superintendence over those orders. When an authority outside this House would turn around and say, "it is not in our custody" then there will be a kind of a stalemate. A stalemate one would not like, technically, ideally, like between the legislature and that authority. We are all governed by the Constitution and Constitution is the source of law. Personally I was disturbed to read a statement yesterday, whosoever made it that whatever the Parliament

does is supreme. Actually the Constitution is the supreme law and it is the source of law and we are governed by this Constitution. I do not believe as a Constitutional lawyer and as a believer in a Constitutional Government that any one organ is superior to the other. But if you start believing that, there will be no end to it. There are checks and balances, of course, but you cannot just simply say like a British Parliament that this is a sovereign Parliament. This is a sovereign Parliament within the ambit of powers given to it. It is sovereign, it is sovereign in law making, it is sovereign regarding its law making powers. It asks the President to place the ordinances before it and if it rejects they go out. But on the other hand Sir, because the rule is there of course, now my request is that we have a great opportunity that your honours presiding over this House it should be interpreted in a manner that there should not be a deadlock between this House and the outside agencies and for that I was laying down the actual language and its interpretation. An interpretation is of course done by your honour.

Mr. Chairman: Before we proceed further are you of the opinion that 66(2) when it says, "may be defined by law" it only refers to an act of Parliament and not subordinate legislation?

Qazi Muhammad Jamil: No it does not.

Mr. Chairman: Because wherever they wanted an act of Parliament they have said so. For example in article 48(7) they say, "an act of Majlis-e-Shoora Parliament may lay down the procedure for holding of a referendum".

اس میں اور جگہ بھی آتا ہے

Act of Majlis-e-Shoora Parliament. Now here they are saying in other respect the powers, immunities and privileges of Majlis-e-Shoora Parliament and the immunities and privileges of the members of the Majlis-e-Shoora Parliament may from time to time be defined by law. So would we say that rules are not law?

Qazi Muhammad Jamil: Sir I would say that they are not law strictly to the sense of the law as understood by us is a law in the Constitution law made by the Parliament.

جناب چیئرمین - دیکھیں ہاں اگر خود Parliament نے distinction دی ہوئی ہے

Rules between an act of Law-Majlis-e-Shoora (Parliament) and law. Law

آ جاتے ہیں For example existing law has been defined in the Constitution. An existing law you will notice in article ...

قاضی محمد جمیل - اس کے ساتھ Notification کا لفظ ہے - Existing laws.

Notifications, by-laws, rules.

Mr. Chairman: So that means the word 'law' is wide enough to embrace the Rules. And wherever the Constitution has laid down that something is to be done strictly by an Act of Parliament which means both Houses are ascend by the President you have said so.

قاضی محمد جمیل - Sir earlier view یہ تھا superior courts کی judgements

میں اور

the days your honour was practicing and later on too. Earlier was that law is a very broad word which includes customs, precedents, everything which has courts of law. Latest view is that the law is strict to the sense of an Act passed by the Parliament because if we enlarge this definition of law then it can be a

misuse of the word 'law'. Earlier even judicial precedents and customs and other things were also considered under the law.

Mr. Chairman: Let us forget it. But what about direct legislation?

This is direct because this is under the Constitution and under the rules.

قاضی محمد جمیل۔ اگر کہیں لفظ Act or law لکھا ہوا ہے تو

it does not mean that law is not the same thing as an Act of Parliament.

Mr. Chairman: You may be right in saying that when the word law is used please do not include custom etc.etc.. But why not include or for example you may also say judgement of courts. But why not include direct legislation like rules, by-laws and laws.

قاضی محمد جمیل۔ میں عرض کرتا ہوں وہ جو earlier view تھا اسکو انہوں نے

discarded کیا courts نے discarded کیا consequences I am not talking about the

Mr. Chairman: Can make judgement that I can say....

Qazi Muhammad Jamil: Sir, I will be able to send it. But the latest view is

کہ باہر 'یہاں نہیں' Constitution کے اندر نہیں 'باہر' اب وہ سمجھتے ہیں کہ custom precedents وغیرہ کو نہ include کیا جانے بلکہ in strict sense لیا جائے law کے لفظ کو وہ جو لفظ ہے 199 Article میں اس کو کو define کرتے ہوئے کہتا ہوں کہ

this is the current view. Earlier was different. Here, Sir, of course, there is a lawmaking body which is the legislature then, Sir, President also makes laws, he makes laws we call them as Ordinances, we do not call them Acts of Parliament. He makes laws and his law are of temporary nature they have to be placed before this House and the other House and if rejected they go out. At the moment

when I entered this August House I had no intention to dispute it but what I am saying is this that when the House sits, makes rules, creates a new Privilege puts it in the chapter on privilege one has to be very cautious about it because the two Houses have not in a legislative process exercised their mind. The consequences of it are not known and then it is mainly based on the interpretation of the honourable Chairman or the honourable Speaker and therefore I was suggesting, otherwise Sir, I have brought, I could not get the latest edition of May's, Sir, I will find out the page and then point out to your honour that in May's Parliamentary Practice is given that one House cannot create the privilege.

Mr. Chairman: Again I would say that it all depends on the Constitution.

Qazi Muhammad Jamil: I am sorry Sir.

Mr. Chairman: You see, one House for example, under the Constitution the National Assembly can make law on money matters without reference to the Senate. So, therefore, it depends on the Constitution as to what power is given. Similarly, the power to make rules has been given to individual Houses, just like the power to make a Money Bill has been given exclusively to the National Assembly. And that is a valid legislation. So, as a general rule, you are quite right that law has to be made by both Houses of Parliament and assented to by the President but the Constitution, where ever it makes special provision in the case of Money Bills, as you have said is done only by the National Assembly. Instead of Rules of Procedure which is law they have said Government, in respect of Rules of Procedure of the National Assembly and the

Senate, they say National Assembly and the Senate .

Qazi Muhammad Jamil: I would , with great respect , not call subordinate legislation as law as mentioned by the Constitution because it has very serious consequences because as your honour know after practising for a long time , that you take a subordinate legislation , it can be tested at the touchstone of the law. Law passed by a sovereign legislature so if we confuse it or if we mix it with the subordinate legislation , we loose one test of this subordinate legislation which to my mind law used nowhere in the Constitution. Law made by the President is called Ordinance. Law made by the Parliament is called an Act. Wherever, the by-law, the by-rules or these things are mentioned but personally, Sir, with great respect , I would not include all the other things in law for the time being. This was just a digression from my original argument and this was made to reflect on the question as to how this August House, or the honourable Chairman, or the honourable Speaker would go around implementing this.

Mr. Chairman: Supposing the Government refuses to cooperate with the Supreme Court. Then what will the Supreme Court do?

اگر let us say وہ کہتے ہیں جیل میں ڈالو وہ کہتے ہیں جی ہم نہیں ڈالتے۔ Supreme Court کوئی فوج تو نہیں ہوتی۔

Qazi Muhammad Jamil: I was not talking to that. I was not coming to the disobedience, Sir, I was not talking to that. I was still on the methodology, which would be adopted and a great responsibility or burden lies on your honour. The methodology of ordering an authority, let us take an extreme example, let us take last one of the authority which has custody that is

any other authority, any other authority which stretch too far will be a code of law if that is a custody. Now, Sir, in that case, your honour would bring of possibility of directing a court to produce a man. Now, how and under what provisions of law dealing with the production of that accused will also be considered. Sir, my concern is that by simply ordering a particular Government, today is this Government, tomorrow other Government will come. I am not concerned about that. But I am concerned about case between the law making body and the executive. Where any executive, Sir, supposing, a province is of different political party's Government, and even a legitimate demand is made and even the Federal Government wants that, if the Provincial Government may turn round and say She does not have the custody of that man. We do not have it and we cannot give it. Now in that eventuality, Sir, there will be, then, a deliberation not in the House but the question may be asked in a committee that where the custody is and how to approach that body for production of the accused. Sir, I think before one jumps over the disobedience and the consequences, one has to pre-empt the disobedience and the best method of pre-empting disobedience is to evolve by capable men sitting here in the Senate for whom I have great regard, it is a mature House, to evolve a methodology by which the disobedience does not take place.

Mr. Chairman: Supposing, let us assume, that these rules were made into a law. Supposing that both Houses have passed it. Then what will have happened?

بت تو وی آئی۔

قاضی محمد جمیل۔ وہ تو میں نے عرض کیا تھا جی۔ وہ تو میں ایسے ہی چلا گیا

because of the gravity of the situation but I would suggest you, the consequences would be the same, I am not saying that I will request your honour to declare this rule as to be ultra-vires. That is why I dwelt upon this question in this August House. There is the different place for getting it declared as ultra-vires that is in court but not this House, that is why I concentrated on consequences because your honour very rightly pointed that you have passed the orders. The directions have been issued but modifying that directions in the interest of House in the interest of this particular rule not beyond your honour, because, ultimate control, ultimate superintendence of this order will be in your honour's hands. Now, here Sir, I would submit that ordinarily I do not see anything wrong in approaching a court, duly established by Law, for bail.

Mr. Chairman: Bail is a different thing. That is release from custody.

Qazi Muhammad Jamil: Sir, temporarily, for coming to the House, it can be done. That is the only source. I have looked through the Criminal Procedure Code, I have not been able to find out any provision under which a person can be otherwise, released. After conviction he can be released.

Mr. Chairman: You would have seen Asif Zardari's case. The last paragraph of that is important. The court in that paragraph says that there is no law impeding the Provincial Government from sending the accused.

Qazi Muhammad Jamil: I have got it. I read it Sir.

Mr. Chairman: In that the question is that, if I accept this argument which you have advanced and the Law Minister has advanced that the custody is with the court, then how is the last paragraph.

قاضی محمد جمیل۔ میں جناب وہ پڑھتا ہوں۔ اصل میں اس کیس میں یہ ہوا تھا کہ۔

The petitioner went to the High Court saying that I am tired of going to the Magistrates for bail every time and it should be declared as my right to go to the House, when I am arrested. The court rejected this argument. The High Court said that it is not your privilege when you are arrested. You are just an ordinary accused, you cannot claim it to go to the House every time but if you are so advised, as you have been doing earlier, you can go to the court.

Mr. Chairman: There is no mention of court. In the last paragraph, they have clarified..

Qazi Muhammad Jamil: I read it Sir,

جب ان کی انہوں نے ہٹری بیان کی تو اس میں لکھا کہ یہ میجنسٹریٹ کے پاس جاتے

ہے۔

It was the right procedure to adopt but towards the end they said, accordingly, the petitioner approached the concerned trial court. In two of the cases, the petitioner was permitted to attend the current session. They have approved it, what he has been doing, by a Special Judge, Mr. Justice (retired), Fakhar-ud-din, II Sheik, while in the third case, Special Judge, Mr. Kazi Muhammad Akbar, rejected the application. Hence another interlocutory application was made for the bail purpose. The said application was disposed of, as having become infructuous in view of the fact that we heard and disposed of the main petition, as shown above. However, before parting with this case, we would like to clarify that the dismissal of this petition does not mean that the Provincial Government is prohibited by any law, for making arrangements for the petitioner, who is in custody an under trial prisoner to attend the session of the National Assembly if

it proposes to do so.

Mr.Chairman: So, they don't mention -

کہ جی عدالت کے پاس جانے - رکاوٹ ہے - وہ یہ نہیں کہتے کہ جی۔

There is some impediment, the Provincial Government has to seek the permission of the court.

Qazi Muhammad Jamil: Sir, this case is somewhat misunderstood . Sir, the petitioner went to the High Court and he said that he is sick of attending Magistrates for bail and I feel it is my right to attend the House, whenever the session takes place. I consider it as a privilege. The court rejected the argument saying that it is not your privilege. We do not consider an under trial person to be privileged to go to the House. Every time you have to go to the Magistrate. You have been going to the Magistrate. You have done so. But if there is no Law prohibiting that Provincial Government should do that then the Provincial Government "may" do so. Sir, it is an observation. As your honour will see that this particular observation is a kind of obiter, it is a kind of suggestion to the Provincial Governments that it is not prohibited to produce him. Now Sir, to my mind this is neither here nor there because the main petition was dismissed. He was not allowed by the High Court. It was not considered his right to go to the House and it was approved that he goes to the Magistrate for bail but Sir, I personally feel and the law says that it will be a great hardship for any government to bring a person from the court custody while by-passing that court. Now, in this case too, if a suggestion came then the Government could have made certain machinery to move to get for bail for him, or the authority concerned could be asked about it but to my mind Sir, I really don't now see as

to how courts of law with whatever name they are being called today be bypassed under the law and the Constitution. I cannot say and I don't have any legal provision and Sir, the Constitution is a very important document. There are three Chapters. One deals with the executive, one deals the judiciary, one deals the legislature. All three of them function in their own fields and they are not permitted to encroach in each others affairs and they are not permitted to control one another. They have checks and balances but it is a simple order in the air, will not bring any solitary effect on the relationship which is the legislature under the Constitution.

Mr. Chairman: So, your argument is also the same that the custody is with the court.

Qazi Muhammad Jamil: Yes, if your honour would come to a conclusion that custody is with the Government.

Mr. Chairman: No, custody could be with the police. Custody could be with Dar- ul- aman. Custody could be with FIA. Custody could be with the Army. So it depends who has got physical control. As I said how would you define the custody for person who has been involved in 20 cases.

اس کو کیا کہیں گے آپ۔

قاضی محمد جمیل۔ میں briefly بات کرتا ہوں جناب۔

I don't think that even the honourable Chairman or the honourable Speaker substitute itself for a court of law.

جناب چیئرمین۔ ٹھیک ہے ہم نے تو اپنے رولز administer کرنے ہیں۔

قاضی محمد جمیل۔ جی ہاں۔ دیکھیں نا جی رولز کی interpretation آپ ایسے کریں

سے جو رول آ گیا ہے اس رول کی interpretation ایسے کریں گے کہ جو conflict with

other laws میں نہ آئے۔

Mr. Chairman: Right, so, I don't feel any conflict prima facie between asking the police authorities or FIA or whoever has custody to produce the man in custody. I am not saying to release him nor they do have the power to release him. I am saying that he is in your custody, if the SHO can release him on bail, if the IG of prison can authorise his transfer from one province to another, if within the province, the Superintendent Jail can say you go from Lylpur to Pindi, if, let us say, a member can be taken from Rawalpindi to some other place then what is there because I am not acting in vacuum. I am acting under what I assumed is a law made by the House in pursuance of Article 66 whatever is the Constitution and I am not releasing him on bail, I cannot, I am just saying, bring him so that he can attend the sitting of the House.

Qazi Muhammad Jamil: Sir, exactly I think the threat from there. Somebody has to release him on bail otherwise he cannot come.

Mr. Chairman: How is he removed from one prison to another within the Province?

Qazi Muhammad Jamil: He is Sir, to my mind an under trial prisoner cannot be removed from one prison to the other as I vet to your honour.

جناب چیئرمین - وہ میں دیکھ لوں گا - روز آپ دیکھیں - prison rule میں تو صاف لکھا ہوا ہے -

قاضی محمد جمیل - یہ جو ۶۵ کراچی ہے جی کافی elaborate judgement ہے جی -

makes a distinction between the under trial accused, people who are not yet convicted or sentenced and taking logical conclusion that those people are under the Superintendence of a court because the court is trying them and therefore,

they cannot be removed from one prison to the other and from one custody to the other. Only when the person is convicted then he is taken from one jail to the other. Sir, that is judicially settled. So I would not dwell on that any more.

Mr. Chairman: No, let us say, for example a person, is accused of some offence. The police obtains his remand. Now, he may be required for example for investigation purposes,

کہ بھئی offence has been committed let us say somewhere else, لاہور میں ہوا ہے
پنڈی میں ہوا ہے وہاں لے جائیں گے اس کی recovery کروائیں گے۔

Then they don't ask the Magistrate every time. The power is given under the Prisons Rules as to how you take him from one place to another.

Qazi Muhammad Jamil: Sir, they must, because the custody while the order of remand is there is the custody, the manner, they place is determined constructively by the Magistrate and they must ask according to this judgement. And this judgement has a beneficial effect in the interest of rule of law and for that they have made a distinction between what is constructive custody, how the court is concerned about the man who has been arrested, why the court is concerned about him and why it requires that his permission should always be sought and this is how Sir, that the bail applications are moved. Otherwise Sir, here bringing without asking the court to this August House, howsoever noble purpose it may, cannot be termed or defined under any provisions of law. So my respectful submission is that I really do not go in its political perspective but as a lawyer I do not feel any harm for a person whose absolute right is not there, the right is conferred by your honour.

Mr. Chairman: No. No. Not by me, by the House.

Qazi Muhammad Jamil: By your discretion exercised for the necessity whether he is required or not, he could bypass court's order. So, I have tried my best to bring certain material, I will be able to give a list of it to your honour to deliberate about. I believe Sir, that this opportunity has gone on your shoulders. I am grateful Sir, that for few days - three days, four days you have deferred your opinion with regard to that and you have allowed me to address these arguments but I do believe Sir, that in the interest of the dignity of this House as well as in your honours own prestigious post that it should be seen how the orders are complied with.

Mr. Chairman: What is your opinion on Rule 31 of the Rules of Business of the Government,

دیکھا ہے آپ نے؟ رول ۳۱ یہ کہتا ہے کہ

All Divisions of the government shall comply with the Rules of Procedure of the National Assembly and the Senate. What is your response to that ?

Qazi Muhammad Jamil: Rule 31 Sir?

جناب چیئر مین۔ جی۔

Qazi Muhammad Jamil: It deals with compliance.

(Pause)

Qazi Muhammad Jamilullah: Sir, I really would not submit for a moment that your orders or your directions should be flouted, I am not saying that.

جناب چیئر مین۔ وہ تو ہوتا ہے۔ ابھی تو سوال یہ ہے

We are examining the grounds for it.

قاضی محمد جمیل - نہیں جی نہیں - یہ نہیں میں کہہ رہا۔ میں جناب کو یہ submit کر رہا ہوں کہ جہاں پر جناب custody کو۔

جناب چیئرمین - نہیں یا تو ہو ناں کہ کسی عدالت نے اعتراض کیا ہے یا کوئی

We have had no problem. There ' یعنی پچھلے ۶ مہینے میں ' contrary order are three MQM Senators, there are many cases against them in a variety of

courts, یعنی حیدر آباد میں ہے ' کراچی میں ہے ' سیشن جج کے پاس ہے سپیشل کورٹ کے پاس ہے Suppression of Terrorist Activities کے پاس ہے - And before passing this rule we had problems, یعنی اس سے پہلے یہ ہوا تھا

The background is that when this matter initially came up before the House I requested the honourable Law Minister that these Members should be allowed to attend the Senate. He said that he would assist, he would do his best. I then requested the Chief Minister Sindh. He said that he would have no objection and he would assist. So, these members have filed applications before the court and the court granted them permission. Once the permission was granted and the matter went to the Government it was rightly pointed out by somebody in the Government that this is only permission in once case. They should give permission in all the cases.

اور انہوں نے کہا جی یہ لٹ ہے اب یہ ۲۰ کیسز ہیں ۲۵ کیسز ہیں ' حیدر آباد میں اس پر پھر جب ممبر کے سامنے معاملہ آیا تو انہوں نے کہا جی کہ اس طرح تو یہ سارے بچنے رہیں گے۔ تو

why don't we have a rule on the same lines as the National Assembly. And I am grateful that Malik Sahib was here, Law Minister was here, some amendments were made, some changes were made and this rule was unanimously passed by the House. After that, not only that I had no problem whenever we called for the

Senators to attend the meeting of the Senate, the Chairman of the Committees also had no problem when it was pointed out by Makhdoom Hamid Raza Gillani that is Chairman of the Standing Committee on Establishment, he summoned the members. So far there appears to be no objection from any court.

یا تو ہو نہ کہ کسی کو اعتراض ہوا ہے۔ یا کسی عدالت نے کہا ہے جی کہ آپ کیوں اس کو لے کر جا رہے ہیں۔ یا contrary order ہے۔ پھر بھی دقت آ سکتی ہے۔ یعنی as I have said that if there is a direct conflict situation with the rules dealing with process ہوئی عدالت کی ہم اس کو روک رہے ہیں۔ تو یہاں conflict ہی کوئی نہیں ہے۔ جناب جی

Syed Iqbal Haider: I am submitting a reference on the point of fact. Even on 13th I have submitted these applications of Mohtarma Senator Nasreen Jalil, requesting the Honourable Judge Special Court STA Karachi, that she wishes to attend the Session and that I have already ...

جناب چیئرمین۔ یہ جو last ہے کس تاریخ کا ہے۔

Syed Iqbal Haider: 13-11-1992.

جناب چیئرمین۔ ہاں تو یہ مشترکہ اجلاس کا ہے۔ مشترکہ اجلاس میں ان کے لئے دقت یہ تھی کہ جی ہم کس کو apply کریں۔ اور میرا خیال ہے کہ انہوں نے جو Joint sitting لکھا ہوا بھی ہے۔ لفظ لکھا ہوا ہے۔

Syed Iqbal Haider: Sir, even before that I have submitted.

Mr. Chairman: Am I right in saying this?

کہ جوائنٹ سٹنگ ہے یہ۔

سید اقبال حیدر۔ نہیں سر، اس میں just a second Sir, let me read it out.

جناب چیئرمین۔ کیونکہ اس میں دقت یہ تھی کہ وہ کہہ رہے تھے کہ نیشنل اسمبلی کے رولز علیحدہ ہیں اور سینٹ کے علیحدہ ہیں۔ Joint sitting میں ہم کیا کریں۔ تو انہوں نے

گورنٹ کے کہنے پر انہوں نے یہ لفظ لکھا۔ I have a copy here.

"It is stated that I have been informed by the Chariman Senate that Joint Sitting of the Parliament will take place on 14-11-1994 at Islamabad. Accordingly it is requested to kindly allow the accused to proceed to Islamabad."

Syed Iqbal Haider: That is one point, then I have provided photocopies of all the orders that have been issued from time to time by the court even, dated 12th July 1994 and I may read that orders of the court has also been filed.

جناب چیئرمین۔ وہ تو آکتاب صاحب نے clarify کیا ہے۔

Syed Iqbal Haider: "This court has allowed Syed Ishtiaq Azhar to attend the 52nd session of the Senate scheduled to be held at the Parliament House on 14th July. You are hereby required to make arrangements and cause production of Senator Ishtiaq Azhar in the 52nd Session of the Senate scheduled to be held at the Parliament House, Islamabad on 14th July, 1994 at 10.00 A.M.."

The Judges, Mr. Rafiq Ahmed Awan, Judge Special Court 3, STA Karachi. My humble submission is that on all dates Sir, even on 2nd October's Order I have filed, 5th October's Order are there and in all cases Sir, whenever we have been producing the orders from the Court, have enabled and helped in producing them. And all these orders Sir, I have provided photocopies. Even from the first order also if I may read that reference, accused Senator Ishtiaq Azhar, Senator Mohtarma Nasreen Jalil moved an application on their behalf in the above case requesting there in to permit above accused Senators to attend the Session of Senate which is being held at Islamabad. The Court after hearing, Additional APP for the State and Defence Advocate passed the following order:-

"No objection is given if the prayer is allowed in public interest as well as in the interest of justice. In view of such no objection given by State through APP I allow the application and direct full security arrangements be made at Karachi and Islamabad and for transit as well as prior intimation to all authorities concerned before the above Senators are taken to Islamabad, so as to avoid any mishap. The above Senators be sent to Islamabad for attending Session of the Senate as per rule and observing all the codes of conduct while sending above mentioned accused Senators to Islamabad so as to avoid any mishap. The above Senators being sent to Islamabad for attending session of the Senate as per rule and observing all the code of conduct, while sending above mentioned accused Senators to Islamabad. My contention is Sir,

Mr. Chairman: You know Senator explained the other day he said that he filed no application after the rules are framed and secondly as there are more than twenty cases.

Syed Iqbal Haider : Sir allow me to correct that, I will give you precise detail. The number of cases which were pending on 31st December, 1993 the date may be incorrect Sir, are against Senator Syed Ishtiaq Azhar Sahib, 8 cases.

جناب چیئرمین۔ ہاں تو آٹھ آرڈر ہیں آپ کے پاس۔

سید اقبال حیدر۔ ایک سیکنڈ میں ان کی بھی نوعیت بتا دیتا ہوں۔ کہ وہ کہاں کہاں

ہیں۔

جناب چیئرمین۔ نہیں وہ کہہ رہے ہیں اور آپ بھی کہہ رہے ہیں کہ جی

custody court کے پاس ہوتی ہے۔

سید اقبال حیدر۔ جناب وہ آٹھ cases ہیں آٹھ Courts نہیں ہیں اور نسرین جلیل صاحبہ کے خلاف چار cases ہیں محترم جناب آفتاب بیخ کے خلاف آٹھ کیس ہیں courts دو یا تین ہی ہیں۔

جناب چیئرمین۔ تو پھر تین آرڈر دکھائیں اور پھر ہر case میں ہونا چاہیے اگر آپ کی arguments کو دیکھیں۔ تو پھر ہر case میں ہونا چاہیے۔

then in each case the custody is separate and it is with the particular court. So in each case he should release custody.

Syed Iqbal Haider: Sir, allow me to state, suppose there are different trials, that is an issue to be examined and I am sure the criminal procedure provides for this once and accused is facing trial in more than one case in three different courts and once a custody is assigned by one of the courts to judicial custody or to the police, normally it is subject to that. I will satisfy you, thus it provides for that, that no other order of custody is required for these, because otherwise it will be conflict of jurisdiction.

جناب چیئرمین۔ لیکن remand تو ہر case میں دینا پڑتا ہے۔

سید اقبال حیدر۔ جناب remand تو لے لیا۔

but remand to the same person. Now I give you one proposition. There are 4 cases if all the four cases instituted simultaneously on the same day and remand is taken by one court gives remand to police, the other court says no it is remanded to judicial custody. So there will be conflict of authority. So one remand is issued by one court normally it is followed by the other courts also. The object is and suppose Sir, I put it conversely. One court says that this application should be granted and the other three remaining courts say no it should not be granted. Then would it not result into controversy? Naturally the

law will never provide such a chaotic result and consequence and conflict of law is not intended and conflict of jurisdiction and conflict of authority is always avoided by the law and while we do the interpretation of law we always keep the basic maxim of law that it should not result into absurdity, it should not result into chaos, it should not result into confusion and there should be no conflict of authority or jurisdiction. I welcome the presence of my brother Senator Aftab Sheikh.

جناب چیئرمین۔ یعنی ایک اور جو

aspect of this particular situation that I, as Chairman Senate and each and every Senator we take an oath that we will abide by the rules of procedure and in our oath the Rules of Procedure has the same validity, weight as the Constitution, I take an oath that I will uphold the Constitution and the Rules of Procedure. Similarly each member takes the same oath. So far any member to say that the rules are bad or ultravires

تو وہ تو ہو نہیں سکتا۔ ٹھیک ہے جی۔

So if they are untravires then the plain language of the rules says that whoever has the custody as it said the custody could be with any body.

یہ جو language improve ہوئی ہے غالباً ملک صاب نے کروائی تھی یا Law Minister Sahib نے کروائی تھی۔ کیونکہ پہلے اسی pattern پر کیا جا رہا تھا تو انہوں نے یا کسی نے کہا کہ جی custody تو پتہ نہیں کس کے پاس ہو سکتی ہے

it could be illegal custody also, custody can be legal which means it could be with some authority, it could be illegal also, it could be somebody else

کسی نے پکڑ کر رکھا ہوا ہے تو اس کو expand کیا تھا۔

It is not a restricted provision the addition of the words "any other authority having custody expanded the rule brought in everybody within the ambit of rule"

and it was, in a way, an improvement of the National Assembly Rules.

Qazi Muhammad Jamil: Sir, I only emphasize on the third one because it reflects back on the earlier two institutions, i.e. the Federal Government and the Provincial government and I simply formulated a proposition for your honour's consideration that person can be produced from the custody only when the custody is there. Now if somebody turns around tells your honour I do not have custody. Now I am only preempting that situation by leaving it to your honour consider whether certain persons, certain honourable Senators now arrested on different charges, we need not going into that, whether they are in custody of the court or they are in custody of the Federal Government. I just explain the legal position. I am nobody to look into what has been happening in the past or how the people were brought, but as I was very graciously asked by your honour to explain the legal position what emerges from the law. I have read that rule, without questioning, as *ultravires*, as it does also expressly talks about custody and we cannot for a moment say that this custody is irrespective of the constructive custody. We just ask the Federal government to produce a man and Sir that is not today, tomorrow or day after tomorrow. Your ruling will be guide line for all times to come. This is the interpretation.

Mr. Chairman: Its importance is, supposing we say we have no such powers even this power has been given by the House. It is not that I have assumed this power. Supposing we take the view that this power is not available then tomorrow somebody, supposing they want to pass a law they do not have a majority all they would do put ten in jail or take them into preventive custody and say....

Qazi Muhammad Jamil: No Sir, it is very easy. You will deem it necessary to bring them and no court would assault with refuse....

جناب چیئرمین - پہلے تو یہ ہے کہ the moment you say go to the court

inherit تو then you have to assume that court has the power to say yes or no

ہے کہ Magistrate یا

whoever it is he has the power when to say yes or no, he may be very gracious and kind to say OK I will allow it but he may say no then what will you do.

Qazi Muhammad Jamil: Sir with great respect here sitting in this August House which is a law making body we have to make a distinction between acts of convenience and acts of expediency and law. An order is not an order which is not passed within law. Even if somebody says that this order be complied with but the order is not passed under the law that order will not be complied with. Sir I take an extreme example...

جناب چیئرمین - Supposing آپ کا اور Law Minister کا یہ کہنا ہے یعنی

argument میں یہ سمجھا ہوں کہ جی رول صحیح نہیں ہے - Dr. Sher Afghan, he used a word

there is no problem. Now he otherwise rule ہے تو صحیح ہے

said that کہ اگر یہ اختیار دے دیا جائے کہ کوئی کہتا ہے میں یہ نہیں مانتا کیونکہ یہ Constitution

کے مطابق نہیں ہے - کل کو کوئی یہ کہہ دے گا کہ میں Constitution کو نہیں مانتا کیونکہ یہ

قرآن کے مطابق نہیں ہے

So where are we heading then. You see once the rule is framed then I would assume that because of rule 31 because of the fact that House of Parliament at least the Government has an obligation the authorities under the government have an obligation to obey it and if there is any problem let us go with the court orders in conflict without understanding

کہ جی عدالت نے کہا ہوا ہے کہ نہیں جی آپ نے چیئرمین کا آرڈر نہیں مانا یا ہم نے اسے آرڈر کر دیا ہے کہ اس کو یہاں سے remove نہیں کرنا ہے

that would be understandable. But if there is no such order, if we have had not problem in the six months if the man is, let us here suppose at the moment in this particular case, the person is being held by the FIA. There is no court order

کہ جی آپ اسے نہیں لے جاسکتے

can you assure if FIA wants to take him to Karachi or Pindi nobody would question it. So why are you saying that because the Senators have asked, therefore we will not do so.

Qazi Muhammad Jamil : Sir, If one does not go to the court, the court cannot pass the orders.

جناب چیئرمین۔ تو ضرورت کیا ہے جانے کی۔ نہیں یعنی آپ نے اسے assume کر لیا ہے۔

قاضی محمد جمیل۔ میری ایک عرض ہے۔ آپ نے کہا کہ عدالت نے اگر نہیں کہا prohibition نہیں ہے۔ عدالت کے پاس جاتے ہی نہیں ہیں۔

Mr. Chairman- Then what is the problem.

یعنی چوہینے تو کوئی پرائم نہیں آیا۔
قاضی محمد جمیل۔ نہیں سر ایک بات ہے۔ میں صرف legally بات کرتا ہوں۔
عدالتیں جو رازوں میں آکر تو انصاف نہیں کریں گی۔۔۔۔۔
جناب چیئرمین۔ میں یہی تو کہہ رہا ہوں۔

قاضی محمد جمیل۔ میری ایک عرض ہے۔ عدالتوں کے پاس درخواست جاتی ہے۔
prohibition Order درخواستوں کے بعد پاس ہوتے ہیں۔ اگر جج حضرات high & dry بیٹھے رہیں۔
اور ہم کہیں کہ جج تو باطل احمق ہیں۔ یوٹوٹے ہیں۔ ہم جاتے ہی نہیں ہیں۔۔۔

جناب چیئرمین۔ ضرورت تب پیش آنے گی۔۔

قاضی محمد جمیل۔ میری ایک عرض سن لیں۔ جناب کہیں کہ کورٹ کا

prohibition آرڈر نہیں ہے۔

therefore I am sitting there as a functionary, take away the person bring it here

That perhaps technically to my mind is not acceptable as a legal

جناب چیئرمین۔ تو پھر کیسے قیدی کو کراچی حیدر آباد۔۔

قاضی محمد جمیل۔ میری عرض سن لیں۔

I just can go back to the proposition that the word "custody" is to be interpreted by your honour....

جناب چیئرمین۔ ٹھیک ہے وہ کریں گے۔

Qazi Muhammad Jamil: I do not believe for a moment that if something illegal has been practised in the past, we should perpetuate. I do not believe that you should leave prints on the sand of this Senate like in a manner that future Chairman should come and say as he has done it, we do it. But as a law in my mind, as lawyer, does not accept that, if there is a law which says how an accused could be taken out of the custody. I do not believe that I would be compelled, I would be compelled to obey an order which wants me to disobey the orders....

جناب چیئرمین۔ نہیں پھر یہ بھی تو law ہے۔

قاضی محمد جمیل۔ نہیں سر یہ جو لا ہے یہ آپ کا ایک رول ہے۔ اس رول میں

ایک بات ہے کہ آپ آرڈر کرتے ہیں۔ جس کی custody میں ہے۔ آپ نے رول میں یہ نہیں لکھا کہ جس کی custody میں نہیں ہے اس کو بھی آرڈر کریں۔ آپ نے یہ تو نہیں لکھا سر۔ میں

تو اس وقت آپ کے رولز کے اندر رو کر یہ بات کر رہا ہوں۔۔۔ In an other time, in other

place I might talk in a court of law

جناب چیئرمین۔ ہمارے لئے آسانی یہ ہو جاتی ہے۔ the moment that a person

is arrested the rules provide that the arresting authority will inform the Chairman

So, the person has told that the person has been arrested. ہمیں انٹارمیشن آگئی۔

us کہ جی میں نے arrest کیا ہے۔ میری تحویل میں ہے۔

قاضی محمد جمیل۔ وہ تو سر ٹھیک ہے۔ question یہ ہو گا۔ apart from an

information can he bring him to your honour without the intervention of the

court. گویا یہ سوچنے والی بات ہے۔۔۔ It is not a question which....

جناب چیئرمین۔ ہمارے ابھی یہ مسند تو نہیں ہے۔ atleast in this case

because we have received information from FIA کہ جی ہم نے ان کو arrest کیا اور

باقاعدہ جو ہمارا فارم ہوتا ہے۔ اس کے تحت انہوں نے ہمیں inform کر دیا۔

قاضی محمد جمیل۔ وہ تو under the rule ہر کیس میں آپ کو inform کرنا ہوتا

ہے۔۔۔۔۔ I mean I do not think that will be

Mr. Chairman: And another interesting thing is that this information

is to be given immediately on arrest

یعنی یہ نہیں کہ مجسٹریٹ کا انتظار کیا جائے۔ the moment the person is arrested

immediately the Chairman and the Speaker have to be informed and the authority

informed them, we are not talking of, let say everybody following the rules in the

procedure.

قاضی محمد جمیل۔ صحیح ہے۔ وہ اپنی جگہ پر ٹھیک بات ہے۔ اگر کوئی شخص یہ

نہیں کرتا۔ تو اس صورت میں آپ نوٹس لے سکتے ہیں۔ آپ نے ہمیں انٹارم کیوں نہیں کیا۔

there are two different things, one is arrest of a person and information and other

is producing after he has been arrested.

جناب چیئرمین - ایک اور دلچسپ بات یہ ہے اور لفظ بھی یہ لکھے ہوئے ہیں۔ the

Mr. so and so member of the Senate کہ Form which send to us
was accordingly arrested/taken into custody at... time.... on date and at

prison lodged him so and so custody میں نے دیا کہ میں نے custody میں لے لیا

ہے۔

قاضی محمد جمیل - صحیح ہے۔ سر ٹیکل لفظ ہے۔ custody میں تو arrest

کرنے کو کہتے ہیں۔ ہمیشہ physically custody جیل کے پاس یا پولیس کے پاس رہتی ہے۔ ٹھیک
ہے جناب۔ لیکن اس کی جو preventive custody جس کے بغیر پتا نہیں بتا۔

I am giving importance to the judiciary for my own sake and for the sake of those
who have rule of law nearest to their heart. And if we go on individually
discrediting the judges and we expect institutions to by pass the judges then I
do not think we will ever have rule of law then these institutions will just
become talking shops.

Mr. Chairman: We have no intention to bypass judges. I see no
conflict in the situation.

Qazi Muhammad Jamil: Sir, under the law and the precedent that
order is not an order which is not passed strictly in accordance with the law.
And that order which is, if not complied with, nothing will happen. If I, today,
Sir, have no custody of a person and your honour may issue me ten orders, I
cannot oblige it. If those into the ...

جناب چیئرمین - تو آپ کا argument یہ کہہ رہا ہے کہ rules according to

یعنی ہمارے جو روز ہیں وہ آپ کہہ رہے ہیں کہ law نہیں ہیں۔ you are not law.

قاضی محمد جمیل۔ سر میں یہ نہیں کہہ رہا۔

جناب چیئرمین۔ تو پھر؟

قاضی محمد جمیل۔ میری ایک اور عرض ہے۔

Mr. Chairman: If that is law, and this order has been passed into that.

قاضی محمد جمیل۔ Sir میں تو وہ پوزیشن آپ کی accept کرتا ہوں۔ ان premises پر آتا ہوں۔ ان premises کو accept کرتے ہوئے ان رولز کو enforceable rules مان کر میں نے جناب کے سامنے submissions کیں۔ زیادہ concern میرے آنے کا یہ نہیں تھا کہ جی رولز برے ہیں۔ زیادہ concern یہ تھا کہ جناب such order ہے۔ اس کی compliance جو ہے وہ ان situation میں اس کی non-compliance جو ہے pre-empt کی جا سکتی ہے۔ Thank you very much, Sir. I am grateful for this.

جناب چیئرمین۔ شکریہ جی جناب راشدی صاحب۔

Mr. Hussain Shah Rashdi: Mr. Chairman, if you allow me, I shall submit through you to the House.....

Mr. Chairman: If there is any additional thing, which you want to?

Mr. Hussain Shah Rashdi: Yes Sir, now first, I must compliment the Attorney General for ably arguing the case and in principle, I agree with the broad principles that he has laid down before you. But I understood from the trend of questioning that section 169 Cr.P.C. was agitating your mind, Section 169 of Criminal Procedure Court.

جناب چیئرمین۔ نہیں جو دو تین چیزیں ہیں custody کے بارے میں I think, the

relevant section, Prison Rules are relevant custody کے

پس ہے۔ 167, Remand Order 169, 497(2) کے تحت The Thanidar can release a

custody تو person on bail والی بات نہیں ہے ۔

Mr. Hussain Shah Rashidi: Sir, something which is worrying your mind, I am trying to answer that question. I am addressing to that question particularly. Now Sir, it is laid by the Constitution and the law that once a police officer arrests a person, he cannot retain his custody for more than 24 hours without taking him to a Magistrate. And such Magistrate, whether he has the jurisdiction to try the case or he does not have the jurisdiction to try the case, but the person who is in custody has to be produced before a Magistrate. Therefore, the police can retain his custody for 24 hours and not beyond that. Now that is one.....

Mr. Chairman: They can retain his custody, even after that provided that the custody is authorized by the Magistrate. Custody

Custody تو اور حری ہوئی ہے ۔ یعنی جیلے جو ہے

he can arrest him but beyond 24 hours the custody will become illegal. So he has to get the authority of the Magistrate to legalize the continuance of that custody.

Mr. Hussain Shah Rashdi: Exactly Sir, it is not question of legalizing it. The question is, he has to produce the FIR and the relevant papers. The condition under Section 167 Cr.C.P. is that if the investigation is not completed within 24 hours, it is for the Police officer, suppose, if he has sufficient evidence to complete investigation within 24 hours, then he has to bring the investigation papers, alongwith the custody of the person before a Magistrate. 167 Cr.P.C. is very clear on this point. Not only that Sir, but 167 Cr. P.C. says that when the Magistrate finds that he has no jurisdiction, and the cusotody of the person is necessary, then he has not to tell the police man to

take him away but then it is the law which imposes a duty on the Police to refer to the Magistrate having competent jurisdiction. That is to say that after 24 hours, it is the order of the Magistrate which holds the custody and not the police. This is my one submission.

The other question you asked Sir, was that how was that once the custody of the prisoner or the arrested person was being held by a Magistrate, the police released him under section 169 Cr.P.C. that was perhaps, the other question which I understood. Now, my submission is that these Sections fall within Part-5 Chapter-6, which relates to information to the Police and their powers to investigate. Section 169 Cr.P.C. is a part of that Chapter. When a person is produced before a Magistrate within 24 hours, it is for the Magistrate, either to retransfer the custody to Police for the purpose of investigation or to remand him to judicial custody where the Magistrate fears that he would be subjected to physical torture or some sort of confession would be taken from him. Otherwise, normally the Law lays down that within 14 days the investigation at the maximum has to be completed. So, my submission is that under Section 167 Cr.P.C. when the Magistrate remands the arrested person to the custody of Police it is for the purpose of investigation. Once the Police have come to know that there is no sufficient evidence against him under Section 169 Cr.P.C. will they release him and that would not be a violation of the order of the Magistrate. Then in that case the Law does not provide that he should go back to the Magistrate and inform him that I am released. Section 169 Cr.P.C. is very clear. Now, this rule 72 (a) that is here, I would say that this is a perfect rule and this House in its wisdom has inserted a third authority, which can likely hold custody of a Member of this honourable House. One is the Federal Government, the

other is Provincial Government and the third is any other authority. Now, any other authority, could be any authority plus the court. We have to see here in this particular case as to who is holding the custody of the distinguished Senator. If your Honour comes to the conclusion that the custody is being held by a court which has given remand to Police or which has sent him to judicial custody whether that authority is holding his custody or the Provincial Government or the Federal Government. It is an established fact that once the Police has arrested and produced him before a Magistrate and the Magistrate has transferred his custody to any authority, the Federal Government or the Provincial Government, as the case may be, do not come into the picture. Yes, the Federal Government and the Provincial Government have the authority to withdraw the case altogether. They can give permission to the prisoner to do something but that is an extraordinary power, but so far as custody is concerned that is with the court from whom the remand has been obtained by FIA. Mr. Chairman, you have referred to the case of MQM's Senator that there are 20 cases against him and they cannot be going to each and every court to get permission. In this case, my submission is that even if one court has given permission to a Senator to attend the Parliament session, it is not necessary for him to go to other courts. Because, in this case, a Senator's custody is being held by 20 different courts, including the court which has given him permission to attend the sitting of the Senate. Now, what happens is, Sir, that though the custody is before 20 courts, but in each and every case, for example, there is date in one case today the Police has to produce him on that date, it does not have to go before 19 other courts to say that we are taking him out of jail to produce him before such and such court. Then, after two days there is date of hearing of

another case. Then, again the police does not go or the Government does not go before the other courts to say that we will take him to such and such court for the date of hearing. So, my submission is that once the court has given the permission to 'a Senator or to a person who is being held in custody under the orders of the court, then he can go to attend this session of Parliament, say Senate or National Assembly as the case may be. But whenever there are dates of hearing of other cases then it is incumbent on the police to produce him before those courts also. So, it is not that in order to come to this August House, the detained member has to go before each and every court, there may be 50 cases against him but if one court allows him to go to attend the session, he can go and as the case is and as the learned Law Minister has produced before Your Honour, four cases in which the courts have given permission. So, under the permission of that court, that particular court has transferred the custody of the member to Your Honour, the Chairman of the Senate, and as soon as the session is over then it is your duty Sir, Mr. Chairman, to hand over the custody back to the police. So, my submission is that Rule 72 lays down that who ever holds custody should be ordered or a writ should be issued to that authority. This is the power that this House has vested in you. Now, it is for you Mr. Chairman, to think, whether it would be proper for you to issue a writ to a court demanding production of that particular member of this August House. It is also for you to decide Sir, and as very rightly pointed out by the learned Attorney-General, that you have to consider that there is a big responsibility on your shoulders whether Your Honour would go to the extent of bringing this House into conflict with the judiciary.

Mr. Chairman: As I have pointed out that in my view prima facie the

custody means physical custody and the court never retains custody, 167 says that the Magistrate will pass an order , remanding the accused to such custody as he thinks fit, he does not say the Magistrate will pass an order , taking over the custody of the accused and it is in pursuance of this power that the Magistrate either sends him to a prison , judicial lock- up or he sends him to the police or he could send him somewhere else as I said

دارالمان بھیج سکتے ہیں۔

2 , I see no conflict between the power of the court to grant a remand and the power conferred on the Chairman or the Speaker to call for the person in custody,

یعنی custody release نہیں ہوتی

This is something which must be clarified that the man who is being released on bail , all that is happening is that for example under the Prison Rules it is permissible for the Superintendent, IG Prisons etc. to move him from one place to another, of course, in custody.

bail کے لئے تو جانا پڑتا ہے مجسٹریٹ کے پاس یا پولیس خود bail کر سکتی ہے

So, this power that is the power to move the man in custody from one place to another is with the Government or with IG or with the Home Secretary and this power has been exercised and in Asif Zardari's case in the concluding paragraph it is very clearly said that there is no law in the way of the Provincial Government , no impediment created by law in the way of the Provincial Government to produce him if they want too.

کوئی رکاوٹ نہیں اس کا مطلب یہ ہے کہ

the High Court is assuming that the control of the person is with the Provincial Government and there is no law and by law we mean CrPC

اس کی کوئی رکاوٹ نہیں ہے کوئی اور قانون یعنی

there is nothing which prevents the Provincial Government. So, this is what I am saying.

جناب حسین شاہ راشدی - جناب! میں اسی کی وضاحت چاہتا تھا۔ ایک تو جب custody میں مجسٹریٹ بھیجتا ہے یا جج بھیجتا ہے یا پولیس کو دیتا ہے for the purpose of investigation یا اگر کوئی بھگڑی عورت ہے اس کو وہ دارالامان میں بھیجتا ہے تو وہ مجسٹریٹ کے behalf پر custody hold کرتا ہے

جناب چیئر مین - ٹھیک ہے 'you can say وہ صحیح ہے۔

that the Magistrate can control custody, I mean give it to anybody he likes.

Mr. Hussain Shah Rashdi: He not only then controls, he is the only person who controls.

جناب چیئر مین - نہیں کنٹرول اور بات ہے، کس کی custody میں ہے؟ Because if we assume that the custody of the Magistrate let us say the first Court which takes cognizance is court (a) مشکل ہو جائے گا۔ ٹھیک ہے جی اب اس کے پاس custody آگئی، اب اس کا مطلب ہے کوئی اور عدالت کے پاس بھی پیش کرنا ہے تو کورٹ A کی اجازت لے کر جاؤ۔ No you can take the man from one court to the other because the custody is actually the physical

costudy with who ever it is وہ جس عدالت کا حکم آتا ہے وہاں پیش کر دیتا ہے۔

جناب حسین شاہ راشدی - وہ تو عدالت کا حکم ہو، وہی تو گزارش کر رہا ہوں جناب۔

جناب چیئر مین - عدالت کا حکم ہو۔ یعنی دیکھیں ناں مثلاً دس FIR ہیں، اگر یہ argument accept کر لی جائے تو پہلے جس نے remand کیا ہے، جس کے پاس پہلی دفعہ پیش کیا ہے، اس کی custody ہو گی، اس کے بعد دوسری FIR میں پیش کرنا ہے تو کیسے کریں گے؟ Unless they take permission from court (A) پھر تیسرے میں پیش کرنا ہے وہ کیسے کریں گے؟

Unless they take permission from court (A) پھر ہر کیس میں investigation کرتے

Mr. Hussain Shah Rashdi: Sir there was a case in Sindh High Court in which Judgement is there, I think the learned Attorney-General would know, I don't remember the citation, in which the court has held that it is not for Police to go over to jail and take the custody from the Jailer for the purpose of investigation in other cases without getting permission from the relevant court. Now there has been a practice previously.

(interruption)

Mr. Hussain Shah Rashdi: No Sir, I am talking of recent judgement of 1992-93.

Qazi Muhammad Jamil: No but that laid down the foundation.

Mr. Hussain Shah Rashdi: That lays down the foundation. My submission simply is that the custody of the distinguished Senator is not with the Federal Government, it is not with the Provincial Government, it is with the concerned court. Now what happens Mr. Chairman, you are also a distinguished lawyer, in many of the cases we file petition that such and such girl is in detention. Now, for example, even in number of cases, particularly during the Martial Law regime, what happened was that a person would be picked up, his arrest would not be shown, we file constitutional petition for his production. The very policemen who arrested him would come and make the statement that his custody is not with him, the court would say that you find out where the custody is.....

Supposing the Senator - جناب چیئرمین - ٹھیک ہے وہ تو problem آ سکتی ہے۔

ہیں that situation would arise, supposing the Senator disappears, یعنی disappears,

پتہ ہی نہیں ہے کہ کہاں پر ہے تو پھر تو یہ دقت آنے لگی ناں کہ بھی کس کو کہیں produce کرو۔

You are quite right. But where you see now we are talking of an illegal situation where we do not know where the man is? But here at least in the present case we have no problem, one, because we have already received intimation. We exactly know that the man is being held in FIR number so and so by such and such authority. Similarly in case of the MQM Senators we knew exactly that they were being held in cases number so and so pending before such and such courts in and in such and such jail.

تو وہاں پر تو کوئی دقت نہیں آتی۔

جناب حسین شاہ راشدی۔ یہاں بھی آپ کو دیکھنا یہ ہے کہ آپ نے جو حکم صادر فرمایا ہے Federal Government کو اور Provincial Government کو کہ معزز سینیٹر کو لے آئیں۔ سوال یہ پیدا ہوتا ہے کہ جب وہ custody فیڈرل گورنمنٹ اور صوبائی گورنمنٹ کے پاس ہے ہی نہیں تو وہ کس طرح کریں گے۔ اب آپ کو یہ پہلے دیکھنا ہے کہ یہ custody کس کورٹ میں ہے۔

جناب چیئرمین۔ وہ interpretation تو اب کرنی پڑے گی ناں

جناب حسین شاہ راشدی۔ وہ آپ کو دیکھنا ہو گا۔

If without producing him before the Magistrate, the FIA is holding custody they shall have to obey the writ and your order Mr. Chairman. But suppose, if they have already transferred the custody to the court and the court has transferred the custody back to police or to judicial custody then it was very rightly pointed out by the Attorney-General that you have to consider whether you Mr. Chairman can issue a writ for production of the Senator.

جناب چیئرمین۔ نہیں پھر تو یہ Rule 72(a) meaningless ہو گیا Because

what you are saying is کہ یہ تو پھر implement ہو ہی نہیں ہو سکتا۔ یعنی پھر تو کسی کس میں بھی نہیں ہو سکتا۔ پھر اس کا فائدہ کیا ہے؟ why we have passed it۔

Mr. Hussain Shah Rashdi: Sir, Preventive detention.

جناب چیئرمین: نہیں preventive detention کا تو علیحدہ ایک لکھا ہوا ہے۔

جناب حسین شاہ راشدی، نہیں جناب، یعنی وہ تو سیشن سے پہلے اور سیشن کے

بعد۔

جناب چیئرمین، ہمارے روز میں خصوصی طور پر ذکر ہے کہ person in

preventive detention can be called for by the Chairman Senate. وہ تو ایک علیحدہ

situation ہے۔

But where there is charge against a person and if we accept your argument then in any case in which there is a charge against a person then you are saying that the custody is with the court and therefore, I can't call for him.

اس کا مطلب ہے کہ۔ it is an exercise in futility.

Mr. Hussain Shah Rashdi: No Sir, in that case you could direct the detained member to approach the Court and at the most the Government won't oppose.

جناب چیئرمین، یہ جو situation ہے approaching the court والی یہ تو روز

سے پہلے بھی موجود تھی۔ یعنی روز سے پہلے اگر کوئی درخواست دیتا ہے جس طرح کہ ہم نے

situation دیکھی ہے۔ اور عدالت اجازت دیتی ہے تو پھر کیا رکاوٹ ہے؟ the reason why

we passed this rule was کہ یہ دقت آ رہی تھی یعنی آپ کی اگر argument مان لی جائے تو

پھر یہ روز بے معنی ہیں؟ اس کا کوئی مقصد نہیں ہے۔ ہم نے وقت ضائع کیا ہے۔

جناب حسین شاہ راشدی، نہیں جناب! میں مودبانہ گزارش کروں گا کہ آپ کا

موقف یہ ہے کہ چونکہ ڈنڈا ہاتھ میں آ گیا ہے لہذا کسی کو مارنا ضرور ہے۔ یہ نہیں ہونا چاہیئے۔

جناب چیئرمین : میرا موقف یہ ہے کہ یہ اختیارات ہاؤس نے مجھے دئے ہیں - یہ میرے پاس امانت ہیں -

and in an appropriate case I have to exercise these, because it is for the benefit of the House under the Law, which is the Rules of Procedure of the Senate

جناب حسین شاہ راشدی : Under the Law.

جناب چیئرمین : Under the Law which is the Rules of Procedure of the

Senate. Do you subscribe with this view کہ یہ لائنیں ہے یا آپ کہتے ہیں کہ لاہ ہے۔

Mr. Hussain Shah Rashdi: I will fully support this rule as it is correct, I support it personally and that enforces my argument that besides Provincial Governments and besides the Central Government, the House has envisaged another situation where the custody could be with any other authority.

جناب چیئرمین : تو اگر وہ envisage کیا ہے - Do you think I have the power to direct the Court?

Mr. Hussain Shah Rashdi: No. No.

جناب چیئرمین : پھر آپ کا کہنا یہ ہے کہ ہم نے فصول پاس کی ہے ؟ کہ آپ کہہ رہے ہیں کہ ان کیسوں میں

power is with the court and I don't have the power and yet you have given it to me.

جناب حسین شاہ راشدی : میں گزارش یہ کروں گا - اس میں جو ہے وہ any other authority include ہو مگر دوسری بھی چیزیں ہو جاتی ہیں - ایک آدمی جو ہے وہ بھاگ کر گھر سے اور ایسی کے پاس چھپ جاتا ہے یا دارالامان میں پہنچ جاتا ہے - وہ custody دارالامان کے پاس ہے ، وہ ایسی کے پاس ہے ، وہ کسی جیوڈیشری کے پاس نہیں ہے - یہاں جو

نازک situation پیدا ہو گئی ہے۔ اس روز کے آنے کے بعد۔ اگر وہ ہوتا کہ صوبائی حکومت اور مرکزی حکومت اور کوئی دوسری اتھارٹی نہ ہوتا تو پھر آپ کا حکم ماننا پڑتا۔

جناب چیئرمین، اگر آپ کی یہ بات مان لی جائے تو یہ لفظ نکال دیں تو پھر یہ مانا جائے گا؟ اگر یہ الفاظ نکال دینے جائیں "any other authority" then you feel تو پھر ماننا پڑے گا پھر حکم؟

جناب حسین شاہ راشدی، جناب، صوبائی حکومت کے پاس ہے یا مرکزی حکومت کے پاس ہے they have to produce۔

جناب چیئرمین، تو نیشنل اسمبلی میں یہ الفاظ نہیں ہے پھر وہاں کیوں نہیں ہو رہا ہے۔ نیشنل اسمبلی میں جو روز ہے وہاں پر یہ الفاظ نہیں ہیں یہ تو اس وقت وزیر قانون نے فیصلہ کیا تھا کہ اس کو expand کرو۔ کہ ہو سکتا ہے کہ کسی ایسی اتھارٹی کے پاس ہو، مٹری کے پاس ہو، دارالامان میں ہو۔ تو آپ کے کہنے کے مطابق تو نیشنل اسمبلی میں پھر اس کو implement ہونا چاہیئے تھا۔

جناب حسین شاہ راشدی، مگر اس میں situation دوسری ہے۔ آپ کو تو ہر کیس کی نوعیت دیکھنی پڑے گی Sir، مٹری کے پاس ہے، پولیس غیر قانونی طور پر لے گئی ہے۔ فلاں ہے فلاں ہے۔ produce نہیں کر رہے وہ دوسری چیزیں ہیں۔ مگر جب یہ چیز طے ہے، معلوم ہے کہ آدمی کی custody عدالت کے پاس ہے تو میں سمجھتا ہوں اس کے بعد ہمارے لئے مناسب نہیں ہوگا اس باؤس کے لئے۔۔۔۔

جناب چیئرمین، نہیں آپ کی arguments کے مطابق ہر کیس میں عدالت کے پاس ہے۔ جس کیس میں مقدمہ ہو۔ آپ کے مطابق ہر کیس پھر عدالت کے پاس ہے۔

So in any case in which there is a charge the custody is with the court and you are saying I have no power to direct the court, therefore, all this is meaningless.

Mr. Hussain Shah Rashdi: Sir, this is my submission that once the custody is with the court then you have to issue writ only in accordance with the Law and not otherwise.

Mr. Chairman: I agree with you. But if I come to the conclusion that

no.....

دیکھیں ان rules کی interpretation تو میرا کام ہے ناں؛ یعنی یہ ذمہ داری تو مجھے سونپی گئی ہے ناں۔ کہ جو ہاؤس کے rules ہیں۔ یہ اختیارات آپ نے مجھے دینے ہوئے ہیں۔ یعنی یہ میرے اختیارات ہیں۔

these rules are made by the house. and they are not again made in the air. These rules have been made under a power given by the Constitution and then the Constitution further says

کہ جس اتھارٹی کے پاس یہ power ہے

to interpret and implement these rules they are not answerable to a court of law so you can imagine that the status of the Constitution is given to the Parliament and this rule is another thing that passed unanimously

یعنی کسی کو کوئی اعتراض نہیں تھا۔ آج آپ جو argument کر رہے ہیں۔ اس سے تو رول بے معنی ہو جاتا ہے۔ - it means nothing.

جناب حسین شاہ راشدی۔ میں گزارش کرتا ہوں کہ رول بے معنی نہیں ہوتا۔ اس میں یہ ہے کہ چونکہ عدالت ریج میں آگئی ہے تو

where you are convinced that if FIA to that extent it becomes meaningless is holding his custody without order of the court. Now let us.....

Mr. Chairman: FIA is holding the custody in pursuance in accordance of the court and they were also holding their custody before the order of the court and they will continue to hold custody unless he is released on bail by the court.

Mr. Hussain Shah Rashdi: Sir, FIA is holding custody only under authority from the court so therefore, suppose, if you, Mr. Chairman,

order FIA to produce him and the FIA says

جناب چیئرمین۔ ایک میں اور بھی قانون explain کر دوں

further the law places no restriction on the person having custody either to release him on bail by himself or to take him to one place to other by himself without the authority of the Court .

یعنی present rules میں واضح طور پر لکھا ہوا ہے کہ اس کی movement کیسے ہو گی (2) 497 میں اس کی bail ہو سکتی ہے without reference to the court 169 کے تحت اس کو he can release him on executing a bond یعنی عدالت کے پاس جانے کی ضرورت نہیں ہے۔ plain language ہے۔

جناب حسین شاہ راشدی۔ plain language اس میں جو ہے وہ چونکہ لا نے وہ پاور پولیس کو دیا ہے کہ in bailable offence وہ پھوڑ سکتا ہے۔

جناب چیئرمین۔ bailable and nonbailable دونوں میں دیا ہوا ہے یہ اختیار۔ پولیس کو اختیار دیا ہوا ہے bailable میں اور nonbailable میں کہ وہ اگر چاہیں

obviously the conditions are there if they come to the conclusion that there are not sufficient grounds of inquiry اور آپ کو پتہ ہو گا کہ عدالت بھی جب ضمانت پر رہا کرتی ہے خصوصاً قتل کے کیسوں میں تو (2) 497 میں کرتی ہے۔ تو اس لئے جو اختیارات عدالت کو دیا گیا ہے وہی اختیارات پولیس کو دیا ہوا ہے۔

جناب حسین شاہ راشدی۔ نہیں Sir۔

جناب چیئرمین۔ پڑھ لیں پڑھ لیں۔ (2) 497 پڑھیں۔ اور ذرا 169 بھی دیکھ لیں۔ (2) 497 دیکھیں۔ 497 کی heading پڑھ لیں۔

in non bailable cases when bail may be taken in cases of nonbailable offenses.

Mr. Hussain Shah Rashdi: Bail may be taken in cases of nonbailable offense.

جناب چیئرمین۔ ٹھیک جی اور (2) 497 پڑھیں۔

Mr. Hussain Shah Rashdi: Provided that the court may direct that any person in the proviso

جناب چیئرمین۔ یہ کہاں پڑھ رہے ہیں۔ 497۔ you should read

جناب چیئرمین۔ نہیں (2) 497 پڑھیں نا؟

Mr. Hussain Shah Rashdi: If it appears to such officer or court at any stage of

جناب چیئرمین۔ تو پہلے دیکھیں آپ۔ ٹھیک ہے؟ If it appears to such officer or court. Such officer means S.H.O.

Mr. Hussain Shah Rashdi: No Sir, for the duration of investigation only.

Mr. Chairman: No, No, No, any stage of the investigation or trial

دیکھیں تو سی۔ پڑھ لیں۔

Hussain Shah Rashdi: If it appears to such officer or court at any stage of investigation inquiry or trial in case may be.

جناب چیئرمین۔ ٹھیک۔ انکوائری کوئی ہو گی trail کوئی ہو گی۔ investigation

کے بعد۔ انکوائری کے بعد

trail at any stage of the trial also the officer can release him on bail if the officer comes to the conclusion that there is not sufficient ground.

Mr. Hussain Shah Rashdi: For that interpretation, I respectfully differ with you Mr. Chairman. If it were so then everyone would pay money to the police officer and get bail: then there will be no case.

Mr. Chairman: Whether the police officer would oblige him or not on the sufficient question.

قانون تو یہ کہتا ہے کہ اختیار ہے۔ وہ تو علیحدہ بات ہے جب جیسے آجائیں تو پھر کیا ہو گا۔
Cr.P.C. there is no interpretation to the contrary یہ اختیارات پولیس کو دیئے گئے ہیں۔
میں موجود ہیں though I would agree with you that under normal circumstances
پولیس کی ہمت نہیں ہوتی کرنے کی۔ یہ صحیح ہے لیکن اختیار دکھیں کہ not only at any stage
of the investigation یعنی investigation کے آخر میں investigation کے شروع میں
trail کے دوران میں یعنی جب ٹرائل ہو رہا ہے، پالان داخل ہو گیا ہے، باقاعدہ شہادت ہو رہی
ہے اس وقت بھی اختیار دیا گیا ہے۔

Mr. Hussain Shah Rashdi: Sir, in my career, I have never come a cross when a trial is proceeding, the policeman would release the accused person.

جناب چیئرمین۔ نہیں، وہ علیحدہ بات ہے لیکن آپ دکھیں کیا اس میں کوئی رکاوٹ
ہے، اختیار میں کوئی رکاوٹ ہے۔ اب کرتا ہے کہ نہیں کرتا وہ تو پتہ نہیں دیکھنا پڑے گا۔
جناب حسین شاہ راشدی۔ No Sir یہ جو ہے یہ ہو ہی نہیں سکتا، یہ

unbelievable

جناب چیئرمین۔ پڑھیں لیں ناں جی،

جناب حسین شاہ راشدی۔ سر، میں باطل

it has been interpreted by, if it appears to such officer or court at any stage of investigation, enquiry or trial as the case may be

جناب چیئرمین۔ اچھا پھر paragraph 3 دکھیں، an officer or a court

officer کا لفظ بار بار آتا ہے

an officer or a court releasing any person on bail under sub section 1 or sub

section 2, shall record in writing his or its reason for doing so.

Mr. Hussain Shah Rashdi: Right Sir, now when can the police release him? If it appears to such an officer at any stage of an enquiry as the case may be that there are not reasonable grounds for believing that accused has committed a non bailable offence, so only....

Mr. Chairman: And there are grounds for believing there are further enquiry

ہونی چاہیے اس میں۔ یعنی لفظ یہ ہیں۔۔۔۔۔

Mr. Hussain Shah Rashdi: Or further the enquiry but my submission is that only in the wisdom of police, if they feel that he has not committed a nonbailable offence, only they can release.

Mr. Chairman: Correct, but without reference to court

اصل بات تو یہ ہے۔ one his own judgment

Mr. Hussain Shah Rashdi: No sir, it says, it has to record its reasons like.

جناب چیئرمین۔ reason کرے گا، میں بھی reason کرتا ہوں جب میں بات

کروں گا کہ جی اس کو بلاؤ، تو لکھوں گا کہ I consider it necessary

Mr. Hussain Shah Rashdi: It is reason of the.....

جناب چیئرمین۔ reason کے بغیر تو ہم بھی نہیں کریں گے۔

Mr. Hussain Shah Rashdi: But in order to overcome all this, would it not be proper for the distinguished Senator, to apply to the court and the government will not oppose.

جناب چیئرمین۔ دیکھیں جی، وہ تو ان کی بات ہے، اگر آپ rule میں یہ کچھ دیتے

کہ جی یہ سینیٹر کا اختیار ہے یا اس کو privilege ہے یا اس کو آپ نے دیا تو وہ کر دیتا ہے تو آپ نے چیئرمین کو دیا ہے کہ if he considers it necessary اور اس کو کیوں دیا ہے کیوں دیا ہے because some time the man may be in custody, we may not be in communication with him تو اس لیے آپ نے اور مجھے نہیں دیا صرف چیئرمین کمیٹی کو بھی دیا ہے آپ نے اختیارات یہ دینے ہیں کہ جی اگر چیئرمین یہ محسوس کرے کہ یہ ضروری ہے یا چیئرمین کمیٹی یہ محسوس کرے کہ ضروری ہے تو اس کو آپ بلا سکتے ہیں یعنی اگر آپ rule میں یہ کچھ دیتے کہ نہیں if the Senator makes an application to the court he has right to attend وہ اور بات ہوتی۔

جناب حسین شاہ راشدی۔ Sir اس میں دوسری بات یہ ہو جاتی ہے کہ

suppose if a Senator assuming for arguments, does not want to apply to the court then the Chairman, to my mind, can't order the court to produce him. Now assuming, Sir, that the magistrate has transferred the custody, physical custody of detained person to Superintendent Jail. Would you sir, direct the Superintendent of Police, without going through the process of getting permission from the court to produce him in this House. The Superintendent under the law is not empowered to do that

جناب چیئرمین۔ دیکھیں جی ہم نے تو یہ کرنا ہوتا ہے کہ

Superintendent of Jail would get in directions of the Government, so we will ask the government, and Zardari's case says that there is no law preventing the Government from producing him if he so desires.

ہم تو گورنمنٹ کو کہیں گے۔

Mr. Hussain Shah Rashdi: To that, I mean, I would say that it is within the power of the government to withdraw the case altogether.

Mr. Chairman: Not only withdraw, but also to produce him

wherever they want to because Asif Zardari's case they have said in fact parting

میں جب وہ بات کرتے ہیں تو وہ بلب بلب جو ہوتا ہے ناں عرق نکال کے کہ جی

before parting you want to clarify, what? That there is no law which prevents a provincial government from producing him in the National Assembly, if they want to do so. Now, they don't want to do so

اب یہ آگیا کہ ہم ان کو direct کر دیتے ہیں کہ جی آپ ان کو پیش کریں۔

جناب حسین شاہ راشدی۔ سر، اس میں جو ہے وہ آصف زرداری والے کیس میں

آپ یہ جو passage آخری ہے وہ میں سمجھتا ہوں کہ out of context پڑھ رہے ہیں۔ اوپر
میسے امارنی جنرل صاحب نے پڑھ کے سنایا ہے کہ the court has held that, yes, he has to
go to court to get permission to attend.

جناب چیئرمین۔ نہیں جی، دیکھیں ناں اس میں full bench تھا اگر ان کے ذہن

میں یہ ہوتا تو وہ یہ لکھتے کہ there is no impediment in the way of the magistrate's

They have said, no impediment-in the way of court to allow him آجاتی
because the custody court اور اس کی بات سمجھ آتی ہے provincial government, why?

جب دیتا ہے یعنی کورٹ نے تو آرڈر کرنا ہوتا ہے ---remanded so and so (مداخلت)

جناب چیئرمین۔ جی دیکھیں نہ اس میں full bench تھا۔ اگر ان کے ذہن میں یہ

ہوتا تو وہ یہ لکھتے کہ there is no impediment in the way of the Magistrate's court to

allow him وہ تو سمجھ آجاتی ہے۔ They have said no impediment in the way of the

because the custody court اور اس کی بات سمجھ آتی ہے Provincial Government. Why?

جب دیتا ہے یعنی کورٹ نے نو order کرنا ہوتا ہے کہ remanded to so and so وہ یہ بھی

کہتے کہ کہاں رکھو۔ وہ یہ بھی نہیں کہتے کہ جب تھانیدار جاتا ہے they just pass an order of

remand. کہ تھانہ اے میں رکھو تھانہ بی رکھو۔ They don't who is to investigate?

say Mr. A will investigate or B will investigate۔ normally وہ تو پھر پتا ہے

Mr. Hussain Shah Rashdi: 'Sir, the Magistrate granting remand

always specifies the place where the person is to be remanded.

جناب چیئرمین - وہ صرف یہ کہتا ہے کہ in the custody of the Police یا Judicial Custody یا فلاں - کر سکتا ہے - میں یہ نہیں کہتا کہ نہیں کر سکتا - لیکن جو لا ہے اور جو practice ہے اس میں کرتے نہیں ہیں - Because it is not necessary - کر سکتا ہے Magistrate can say I direct that he should be kept in place so and so. Fine, he has the power قانون نے دیا ہوا ہے اختیار - کر سکتا ہے اس میں کوئی اعتراض نہیں - سوال یہ ہے کہ practice کیا ہے -

Mr. Hussain Shah Rashdi: Sir, I have tried to assist you and present my point of view.

Mr. Chairman: You see for me as I have said, this is the power which you have entrusted to me. And one of the basic duties of the Chairman and Speaker are to preserve the rights of the members.

یعنی میں یہ سمجھتا ہوں کہ اولین فرض ہوتا ہے چیئرمین کا سپیکر کا کہ ہاؤس کے اختیارات ہیں یا کسی ممبر کے اختیارات ہیں اگر وہ دینے ہوئے ہیں - اگر نہیں ہیں تو پھر obviously نہیں ہیں - لیکن اگر آپ نے مجھے دینے ہیں اور اب situation آئی ہے جہاں کہ آپ نے دینے ہیں اور وہ situation آئی ہے کہ exercise کرنے ہیں تو پھر کیسے؟ یا تو پھر بات ہونا قانون میں ایسی رکاوٹ ہے تو would recognize it. کہ ہاں جی یہ رکاوٹ ہے یہ فلاں قانون کہتا ہے کہ custody is with the

court. There is no Law which has been cited so far which says specifically کورٹ کی ہے - صرف اتنا ہے کہ جی Court may remand in such custody یعنی اگر اپنی custody ہوتی تو کہہ دیتا ہوں کہ جی - court will take over the custody, fine.

جناب حسین شاہ راشدی - میجرٹ تو prisoner کو ساتھ لے نہیں پھرتا ہے

نہیں -

جناب چیئرمین - جی تو میں کہ رہا ہوں -

مگر وہ custody جو ہے امانت ہوتی ہے عدالت کی اس authority

for half an hour to enable me to pass some orders in this case.

[THE HOUSE ADJOURNED FOR HALF AN HOUR]

[THE HOUSE REASSEMBLED AFTER HALF AN HOUR]

Mr. Chairman: As you know, we have elaborate arguments and it is

not possible for me to give a detailed order at this stage. So, I am passing a short order today. Senator, Ch. Shujaat Hussain was arrested by the FIA on

22-11-1994 in pursuance of FIR No. 11 of 1994, dated 10th November, 1994. According to the FIR, the Senator has been accused of offences punishable

under sections 420, 468, 471, 477-a, 109 ppc read with section 5, 247 of Prevention of Corruption Act. The Senate is currently in session and has been

so since 17-11-1994. On the request of seven Senators an order was sent to Secretary, Interior, Government of Pakistan, under rule 72-a of the Rules of

Procedure and Conduct of Business in the Senate, 1988, directing the Federal Government to produce Senator Shujaat Hussain to attend the sitting of the

Senate. Copies of the order were also sent to the Director General, FIA and the Inspector General of Police, Islamabad. On 23rd November, 1994, when the

House met, Senator Shujaat Hussain had not Produced.

On enquiry, I was informed by the Law Minister, the order under Rule

72 (a) could not be complied with as it amounted to interference in the functioning of the judiciary. According to him, the custody of an accused

person was with the court and that he would not be produced unless an application was moved before the court. I have heard arguments on this question

addressed by the Law Minister, the Attorney General and several other honourable Senators. For reasons, to be recorded in detail later on, I have come

collect everything and go to court and produce a challan to give names, the caller of witnesses, the gist of evidence that is available against him with all those Mashimamas and every thing. Then it is for the court. So, this is my submission.

جناب محترم جج - جی جی بی بی ای. Thank you.

Jam Karraruddin: Sir I would only for clarification of mind. If anybody thereafter sitting in that habeas corpus the High Court asks the Advocate General of the Province to produce that particular man for which the habeas corpus petition has been filed before us. The Advocate General being the representative of the Provincial Government produces that man inspite of the fact in whose custody that man is, whether he in police custody or he is in court custody or he is in any FIA custody or CIA custody. Similarly, under Section 72 Sub section 2 similar powers have been conferred upon you unanimously by the entire august House. Therefore, you can also procure the attendance, the presence of a particular Senator to participate in the proceedings. That is why there is no ambiguity at all. So far as, Rule 72 is concerned whether High Court can, then Advocate General cannot write down to the Deputy Commissioner or to anybody or to any particular court with whom that man's custody lies but he only produces that man where ever he is, with whose custody he is. He produces that man before the High Court. Similar powers have been conferred upon you by the entire august House under Section 72 part 2. Therefore, you are fully empowered to procure the attendance of a particular Senator for participating in the proceeding of the House. And there is no ambiguity at all.

Authority to detain him to hold custody derives from the order of the Magistrate

of the Court.

If that is correct then how can the Police release him

without the Magistrate's order.

Mr. Hussain Shah Rashdi: No Sir, the Magistrate orders only for

the purpose of investigation. Now in this case also, let us wait when the Police might arrive at the conclusion that there is no case against him. It is the power of the Police for the purpose of investigation. Because obviously when a person is challaned before a court, the police has to get evidence and only then go to the court in order to prove his case with the evidence that police has collected during the course of investigation. The statement of the accused, the statement of the witnesses under section 161, 164 Cr. P. C. and what not circumstantial evidence, the Mashitnamas and all that they have collected. But suppose the police holding custody of the person for the purpose of investigation comes to decision that there is no case, to hold him. Suppose, I am arrested and I just say that such and such person was also with me, my accomplice, the Police on that information goes and arrests the accused person, the other person, who is supposed to be my accomplice. But then ultimately the police draws conclusion that I had told a lie or that the person is innocent or that I had in order to victimize him, in order to falsely implicate him in the case, taken his name, it is prerogative of the Police. So, therefore, you Mr. Chairman, should not confuse this one with that of the power under section 169 of the Police to release a person during the course of investigation. So obviously, it is the police who has to

to the following conclusion:-

- (a) that the word 'custody' used in rule 72 (a) of the Rules of Procedure and Conduct of Business in the Senate 1988, means 'physical custody'. In the present case, the said 'physical custody' is with the FIA.
- (b) That this House has the highest respect for the judiciary and that nothing in rule 72 (a) is in conflict with the jurisdiction conferred on courts of Law. It is clarified that when a Senator is called to attend a sitting of the Senate under rule 72(a), he is brought in custody and given back to the same custody at the end of the sitting.
- (c) That as held by the Karachi High Court in the case of Mr. Asif Ali Zardari PLD 1992 Karachi 430, "there is no Law prohibiting the Provincial Government from producing a Member before the House, if it proposes to do so," on the same reasoning, there is no Law which prohibits the Federal Government from producing a Member before the Senate, if it proposes to do so.
- (d) That rule 72 (a) of the Rules of Procedure is a valid piece of legislation, having been framed under Article 67(1), of the Constitution, it is not ultra vires of the Constitution.

That, accordingly, the order already passed, under rule 72 (a) for the production of Senator Shujaat Hussain is a valid order and should be complied with. So, now the House is adjourned to meet again on Monday, the 28th November, 1994 at 10 a.m.

[The House then adjourned to meet again at ten O' clock in the morning on Monday,

28th of November, 1994].