IN THE HIGH COURT OF SINDH, KARACHI

Present:
Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Zulfiqar Ali Sangi,

Spl. Criminal Anti-Terrorism Appeal No.167 of 2018
Spl. Criminal Anti-Terrorism Appeal No.168 of 2018

Shahzad @ Kalay Khan S/o. Ali Akbar appellant through	Mr. Iftikhar Ahmed Shah, Advocate.
Respondent /The State	Mr. Faiz H. Shah, Prosecutor General Sindh a/w Mr. Muhammad Iqbal Awan, Additional Prosecutor General Sindh.

Spl. Criminal Anti-Terrorism Appeal No.169 of 2018
Spl. Criminal Anti-Terrorism Appeal No.170 of 2018

Muhammad Abid Hussain @ Tao S/o. Ghulam Mujtaba appellant through	Mr. Iftikhar Ahmed Shah, Advocate.
Respondent /The State	Mr. Faiz H. Shah, Prosecutor General Sindh a/w Mr. Muhammad Iqbal Awan, Additional Prosecutor General Sindh.
Date of hearing	19.08.2023.
Date of Judgment	29.08.2023.

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The Anti-Terrorism Court No.XII Karachi convicted both the appellants in the above mentioned 04 appeals in (1) Special Case No.1364/2017, (2) Special Case No.1365/2017, (3) Special Case No.1366/2017 and (4) Special Case No.1367/2017 arising out of the FIRs being (1) FIR No.174/2017 U/s. 4/5 Explosive Substances Act, read with Section 7 of ATA, 1997 (2) FIR No.175/2017 U/s. 23(I)-A SAA of 2013, (3) FIR No.176/2017 U/s. 4/5 Explosive Substances Act, read with Section 7 of ATA, 1997 and (4) FIR No.177/2017 U/s. 23(I)-A, SAA of 2013 respectively registered at PS. Landhi, Karachi; whereby both the appellants were convicted and sentenced to suffer R.I. for 10 years

u/s. 23(i)A of Sindh Arms Act, 2013 and Rs.10,000/- as fine. In default of payment of fine, they shall further suffer S.I. for six weeks. They were also convicted and sentenced to R.I. for fourteen years U/s 4/5 of Explosive Substances Act, 1908 read with Section 6(2)(ee) of ATA, 1997. The benefit of Section 382-B Cr.P.C. was also extended to both the appellants.

2. The brief facts of the prosecution case as per FIR are that on 11.06.2017, ASI Jasim Ali of PS Landhi along with P.C. Shakeel Ahmed, Khalid Rehmani and DPC Kashif boarded in police Mobile No.III bearing Registration No.SPB-390 and were busy in patrolling to curb the crime in the area. During patrolling when they reached at Khuramabad diversion 89 Landhi the police party saw two persons in suspicious condition, to whom police arrested, upon which they disclosed their names as Shahzad @ Kalay Khan S/o. Ali Akbar and Muhammad Abid Hussain @ Tao S/o. Ghulam Mujtaba. During search of accused Shahzad @ Kalay Khan, one Awan bomb upon its back side written as 25-85-BMT-K-3144 from right side pocket of his Qameez and from his fold of shalwar one pistol 30 bore rubbed number along with loaded magazine containing 3 live bullets and from front pocket one used Q-Mobile Phone were recovered. Whereas from second accused namely Muhammad Abid Hussain @ Tao, one Awan bomb, upon its back side written as 52-07 VMG-K-55, from left side pocket of his Qameez and from his fold of Shalwar one pistol of 30 bore rubbed number along with loaded magazine containing 3 live bullets and from front pocket of his Qameez one CNIC colour copy of accused, one wrist watch and cash of Rs.8710/- were recovered in presence of mashirs. Hence FIRs/cases under section 4/5 Explosive Substances Act, r/w Section 7 ATA of 1997 & 23(I)-A SAA of 2013 were registered.

3. Charge was framed to which the accused persons plead not guilty and claimed trial.

4. In order to prove it's case the prosecution examined 06 witnesses and exhibited various documents and other items. The appellants in their section 342 Cr.P.C. statements denied the allegations against them, however, they did not give evidence on oath or call any DW in support of their defence case.

5. After hearing the parties and appreciating the evidence on record the trial court convicted and sentenced the appellants as mentioned earlier in this judgment, hence the appellants filed appeals against their convictions.

6. That after re-assessing the evidence on record and hearing from the parties and considering the relevant law including that cited at the bar this Court vide judgment dated 01.11.2019 dismissed the appeals and upheld the impugned judgment passed by the trial court and maintained the convictions and sentences handed down to the appellants.

7. The appellants approached the Supreme Court in Jail Petitions No.674 to 677 of 2019 in appeal against the aforesaid judgment of this Court and Vide order dated 01.12.2022 the Hon'ble Supreme Court passed the following order:-

> *"Through these jail petitions, the judgment of the learned High Court has been impugned before us. We find that the judgment of the learned Trial Court has arisen out of four different FIRs bearing No.174/2017, 175/2017, 176/2017 and 177/2017 and the learned Trial Court while applying the provisions of Section 21-M of the Anti-Terrorism Act, 1997 has made a consolidated judgment arising out of four separate FIRs which is against the dictates of justice. Even the evidence recorded in one crime report cannot be read in the other. The learned High Court while handing down the judgment as Appellate Court has altogether ignored this aspect of the case.*
>
> *In view of the facts and circumstances, we deem it appropriate to remand the matters to the learned Trial Court to decide the lis afresh after recording evidence in each case separately and decide the same according to the dictates of justice. During the pendency of these trials, the petitioners would be treated as under trial prisoners. Accordingly, these petitions are converted into appeals, allowed and the impugned judgments are set-aside".*

8. Being aggrieved and dissatisfied with the aforesaid order of the Hon'ble Supreme Court the State filed Criminal Review Petition 11 of 2023 whereby the Supreme Court vide order dated 13.06.2023 passed the following order in review modifying in part its earlier order which is reproduced below in material part:-

> *"Accordingly, this review petition is allowed in terms that, the order under review passed by this Court on 01.12.2022*

> *is modified. Jail Petitions No.674 to 677 of 2019 are converted into appeals and partly allowed to the extent that the matter is remanded back to the High Court of Sindh, Karachi instead of the Judge, Anti-Terrorism Court, Karachi where the Special Criminal Anti-Terrorism Appeals No.167, 168, 169 and 120 of 2018* ***shall be deemed pending before the High Court, and after hearing the parties, the same be decided afresh, addressing the directions rendered by this court in its order under review, and also whether in the peculiar facts and circumstances of the present case, section 21-M of the Anti-Terrorism Act, 1997 was correctly applied by the trial court. We are sanguine that the learned High Court would expeditiously proceed with the matter and conclude the same".*** (bold added)

9. In essence this Court has been directed by the Supreme Court after hearing the parties to decide the appeals afresh and in particular determining whether more than one FIR could be decided in a consolidated judgment keeping in view the particular facts and circumstances of the case and section 21-M of the ATA.

10. Accordingly pursuant to the Supreme Court order in review notices were issued to the counsel for the appellants and learned Prosecutor General Sindh.

11. With regard to the legal question as mentioned above learned counsel for the appellants contended that this court had rightly held that a joint trial was permissible in respect of the 4 separate FIR's pursuant to Section 21 (M) ATA based on the particular facts and circumstances of the case. He contended that Section 17 of the ATA allowed the ATC to also try other cases when trying a scheduled offence which when read with Section 21 (M) ATA specifically provided for joint trials under the ATA where the scheduled offence under the ATA were **connected** with other offences and that based on the particular facts and circumstances of this case where the two accused had been arrested on the spot with an unlicensed pistol each and an Awan bomb each since one of the offences fell under the ATA namely the possession of the Awan bomb under Section 4/5 Explosives Substances Act 1908 and Section 6(2) (ee) ATA the other offence , in this case, the offence under the S.23 (1) (a) of the Sindh Arms Act was directly connected with the offence under the Section 6 (2) (ee) ATA and despite not being an ATA offence itself being under the SAA it was connected with the ATA offence under the S.6(2) (ee) ATA

based on the particular facts and circumstances of the case. The key according to him for section 21 (M) ATA to apply for joint trials was that the ordinary offence e.g. under PPC etc was connected to an offence under the ATA. In support of his contentions he placed reliance on the cases of **Azam Shah v. The State** (1990 SCMR 1360), **Ramesh M. Udeshi v. The State** (2002 P Cr.LJ 1712), **State through Deputy Prosecutor-General, Camp Office, Karachi v. Ramesh M. Udeshi, Ex-Secretary, Board of Revenue (Land Utilization), Sindh and others** (PLD 2003 Supreme Court 891), **Shah Nawaz v. The State** (1968 SCMR 1379), **Nawazish Ali and another v. The State and others** (2010 SCMR 1785), **Muhammad Jaffar Shah and another v. The State** (1972 SCMR 216), **Munawar Hussain v. Judge, ATC II, Lahore and 2 others** (2017 P Cr.LJ 46), **Imam Bux alias MAMA alias Akhtar and another v. The State** (2003 P Cr.LJ 643), **Naimatullah & others v. The State** (SBLR 2014 Sindh 484) and **Nawab Siraj Ali and others v. The State through A.G. Sindh** (2023 SCMR 16).

12. Learned Prosecutor General Sindh and Additional Prosecutor General Sindh also contended that this court had rightly held a joint trial in respect of the 4 separate FIRs was permissible pursuant to Section 21 (M) ATA based on the particular facts and circumstances of the case. They contended that the concept of a joinder of charges in a joint trial was recognized in Sections 233 to 239 Cr.PC in respect of cases under the ordinary law and in this case especially in terms of Section 239 which was an exception to Section 233 which provided for separate charges for distinct offences. The key to them was whether the offences formed part of the same transaction and in this regard Article 19 of the Quanoon-e-Shahdaat Ordinance 1984 provided guidance. They also contended that although Sections 233 to 239 Cr.PC set out the concept of joinder of charges /joint trial the ATA was a special law and its provisions regarding joint trial would over ride that of the Cr.PC. In support of his contentions he placed reliance on the cases of **The State v. Muhammad Arif and 3 others** (PLD 2012 Sindh 119), **Nawazish Ali and another v. The State and others** (2010 SCMR 1785), **The State through Advocate General, Khyber Pakhtunkhwa, Peshawar v. Saeed Khan and 6 others** (2021 P Cr.LJ 608), **Ghulam Abbas Niazi v. Federation of Pakistan and others** (PLD 2009 Supreme Court 866), **The State through Deputy Prosecutor-General, Camp Office, Karachi v. Ramesh M. Udeshi, Ex-Secretary, Board of**

Revenue (Land Utilization), Sindh and others (PLD 2003 Supreme Court 891), **Nadir Shah v. The State** (1980 SCMR 402), **Afzal-ur-Rehman v. The State** (2021 SCMR 359), **Imam Bux alias MAMA alias Akhtar and another v. The State** (2003 P Cr.LJ 643), **Shah Nawaz v. The State** (1968 SCMR 1379) and **Naimatullah & others v. The State** (SBLR 2014 Sindh 484).

13. We have heard learned counsel for the appellants and learned Prosecutor General and considered the relevant law including the case law cited at the bar and find as under in respect of the above mentioned legal issue.

14. Under the Cr.PC (general law) Section 233 provides that for every distinct offence committed by an accused there shall be a separate charge and a separate trial. However this is subject to some exceptions as mentioned in 234, 235 and 239. Section 233 is set out below for ease of reference:

> *"233. **Separate charges for distinct offences.** For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, **except** in the cases mentioned in sections 234, 235 and 239".*

15. Thus, the stating point in cases under the PPC is that for every offence there should be a separate charge and separate trial **unless** certain exceptions exist. These exceptions are found in Section 234, 235 and 239.

16. Section 234 enables offences of the same kind within a year to be charged and tried jointly subject to a maximum of three offences.

17. Section 235 enables the trial for more than one offence by the same person which form a part of the same transaction to be tried together. This is not relevant for our purposes as based on the particular facts and circumstances of this case more than one person committed the offences. However, the exception found in Section 239 is applicable which is set out below.

> 239. **What persons may be charged jointly.** The following persons may be charged and tried together, namely:
>
> (a) persons accused of the same offence committed in the course of the same transaction;

(b) persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;

(c) persons accused of more than one offence of the same kind, within the meaning of section 234 committed by them jointly within the period of twelve months.

(d) **Persons accused of different offences committed in the course of the same transaction;**

(e) Persons accused of an offence which includes theft, extortion, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by such offence committed by the first named persons, or of abetment of or attempting to commit any such last-named offence;

(f) persons accused of offences under sections 411 and 414 of the Pakistan Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence; and

(g) persons accused of any offence under Chapter XII of the Pakistan Penal Code relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence

and the provisions contained in the former part of this Chapter shall, so far as may be apply to all such charges.

18. Based on the particular facts and circumstances of this case Section 239 (d) is relevant which in effect enables persons to be charged and tried together who are accused of **different offences (e.g Section 324 PPC, Section 4/5 Explosive Substances Act 1908 and Section 23 (1) (a) of the Sindh Arms Act which are committed** ***in the course of the same transaction.***

19. With regard to the interpretation of the words, "the same transaction" guidance can be taken from Article 19 of the Quanoon-e-Shahdat Ordinance 1984 which states as under:

> **19. Relevancy of facts forming part of same transaction.---** *Facts, which though not in issue, are so connected with a fact-in-issue as to form part of the same transaction, are*

relevant, whether they occurred at the same time and place or at different times and places.

20. So for example, in the case in hand, where the two accused were arrested on the spot with an Avon bomb which is an offence u/s 4/5 Explosives Substances Act 1908 and an unlicensed pistol which is an offence u/s 23(1) (a) of the SAA at the same time date and location they could be tried jointly for the separate offences u/s 239 Cr.PC.

21. This interpretation is also completely logical and in line with the intention of the legislature in order to avoid conflicting judgments which would under mine the public's confidence in the judicial system. For example, if no exceptions e.g with sections 234, 235 and 239 in section 233 Cr.PC the result could be as follows in the instant case. The accused will be charged and tried separately for offences under Section 4/5 Explosives Substances Act and the SAA. Despite the accused each being caught together at the same time and place with an Awan bomb and unlicensed pistol each at one trial under the Explosive Substances Act they could be acquitted and in the other separate trial under the SAA they could be convicted on the same set of evidence which would be an absurd outcome.

22. Turning to the ATA 1997 this is a special law and it is well settled by now that a special law will prevail over a general law e.g the Cr.PC if in conflict.

23. It is quite apparent to us that the legislature used Section 233 to 239 as the genesis of the joinder of charges/joint trial provisions in the ATA which will trump those in the Cr.PC in so far as they are in conflict.

24. Section 17 of the ATA sets the scene for enabling joint trial which section is set out below;

> **"17. Powers of (Anti-Terrorism Court) with respect to other offences.-** *When trying any scheduled offence, an Anti-terrorism Court may also try any offence other than the scheduled offence with which the accused may, under the Code, be charged at the same trial".*

25. In our view section 17 ATA seeks to allow the joinder of **offences** if an ATA offence has been committed along with any other offence on the

same lines as in Section 233 to 239 Cr.PC. with the minor word variation of the other offence falls within the same transaction or connected with an offence under the ATA.

26. Section 21 (M) ATA specifically provides for joint trials under the ATA in certain circumstances when read with section 17 which was reproduced above and which (S.21(M) reads as under;

> "**Joint Trial. –** *(1) While trying any offence under this Act, a Court **may also try any other offence with which an accused may, under the Code of Criminal Procedure, 1898, be charged, at the same time trial if, the offence is connected with such other offence.***
>
> *(2) If, in the course of any trial under this Act of any offence it is found that the accused person has committed any other offence under this Act or any other law for the time being in force, the Court may convict an accused for such other offence and pass any sentence authorized by this Act or, as the case may be, such other law, for the punishment thereof."*

27. The key here is that an offence under the ATA must have been committed and the other offence connected to it as opposed to being a part of the same transaction. Although in reality there appears to be little different between the two situations. For instance, if an accused committed a robbery and had an encounter with the police whereby they became injured and fell down with unlicensed weapons in their possession potentially offences u/s 353, 324, 302/34 PPC and S.23 (1) (a) SAA along with offences under the ATA might have been committed. In the example given above all the offences can be said to be either a part of the same transaction or connected to the specific ATA offence and could thus be tried u/s 21 (M) ATA.**There must however be a specific ATA offence which has been committed for the other (non ATC) offences to be tried along with the ATA offences u/s 21 (M) ATA.**

28. So if we look to the facts and circumstances of this particular case where the accused were each caught with an Avon Bomb and a pistol it is clear that the possession of an Avon bomb falls within the ambit of Section 6(2) (ee) ATA which states as under;

> "involves use of explosives by any device including bomb blast *or having any explosive substance without lawful justification* or having been unlawfully concerned with such explosive"

29. And that the offence of possessing an unlicensed pistol although not an ATA offence is connected to that ATA offence(Section 6(2) (ee) ATA).

30. As such we find that in the instant case the trial court was legally justified in holding a joint trial for separate offences under section 21 (M) ATA.

31. In fact the plethora of case law cited by both parties supports this position.

With regard to merits.

32. We were directed that this appeal remained pending and was to be decided afresh.

33. It is note worthy that the original decision of this court was in 2019 and 4 years have now passed. At the time when the appeal was originally heard the appellants did not raise the question of whether the offences fell within the purview of the ATA as the law of when the ATA would be applied was very much different. This law however, especially in terms of mens rea, was finally settled by a larger bench of the Supreme Court in 2020 in the case of **Ghulam Hussian v State** (PLD 2020 SC 61) where in essence it was held that there needed to be an intent, purpose or design to create terror and if people were terrorized as a result of the act, however gruesome, this would not convert the act into one of terrorism.

34. Learned counsel for the appellant submits that due to this further enunciation on the law of terrorism the offences do not fall with in the purview of the ATA. When confronted learned PGA and APG have not been able to rebut this contention. Thus, we find these offences do not fall within the purview of the ATA and hereby acquit the accused of the ATA offences.

35. Learned counsel for the appellants, under instructions, has not contested their convictions with respect to the other offences on merits and has only sought a reduction in sentence to some reasonable extent keeping in view the following mitigating circumstances;

(a) The appellants were first time offenders and capable of reformation.

(b) The appellants are young men with large families to support.

(c) The appellants by not contesting there case on merits have shown genuine remorse and saved the time of the court.

(d) That as per jail role the appellants have each served out more than 7 years in jail.

36. Based on the above mitigating factors learned PG and APG had no objection to a reduction in sentence to some reasonable extent.

37. We have once again gone through the evidence on record and find that the appellants were caught red handed on the spot with an Avon bomb and an unlicensed pistol by police officials who had no enmity or ill will against the appellants and had no reasonable to falsely implicate them in this case and as such we believe their evidence which was on the same footing, given in a natural manner and was not dented during cross examination. Positive FSL and BDU reports are also on record and thus we find that the prosecution has proved its case beyond a reasonable doubt against the appellants for offences u/s 4/5 Explosive Substances Act 1908 and u/s 23 (1) (a) of the Sindh Arms Act and uphold there convictions in respect of these offences.

38. With regard to sentencing based on the mitigating factors raised by the appellants and the no objection given by the PG to a reasonable reduction in sentence based on those mitigating factors having already acquitted the appellants of any offences under the ATA we hereby modify the sentences of each of the appellants in respect of their convictions under S.23(1)(a) SAA to time already under gone in jail and waive off any fine and u/s 4/5 Explosive Substances Act 1908 to time already under gone in jail and waive off any fine. The accused shall be released unless wanted in any other custody case.

39. Before parting with this judgment we have noted that when offences are challoned and charged the expression R/W Section 7 of the ATA is used.In our view Section 7 ATA is the punishment section for the offence committed under the ATA and as such in order to make the charge clearer and more precise the exact offence allegedly committed,

under the ATA should be included in the charge, for example, offence under S.6(2) (a) to (p) ATA as applicable.

40. Both the prosecution and trial court judges when framing a charge which includes sections under the ATA 1997 should also satisfy themselves that the criteria as laid down in **Ghulam Hussain's case** (Supra) is satisfied before including ATA offences in the charge rather than simply blindly adding them.

41. A copy of this Judgment shall be sent by the office to the PG Sindh for dissemination to all his prosecutors before the ATA courts and all ATC Judges for information.

42. The appeals stand disposed of in the above terms.