

IN THE HIGH COURT OF SINDH, KARACHI
Special Criminal Anti-Terrorism Appeal No. 10 of 2023

Present:

Mr. Justice Zafar Ahmed Rajput.
Mr. Justice Amjad Ali Bohio.

Appellants : (1) Muzamil s/o Zakir Hussain (2) Aaraiz s/o Hameed (3) Adeel s/o Abdul Sattar and (4) Subhan s/o. Muhammad Abbas, all through Syed Naimatullah Shah, advocate

Respondent : The State, through Mr. Siraj Ali Khan Chandio, Additional Prosecutor General

Complainant : Javed Ahmed s/o Muhammad Moosa, through Mr. Muhammad Khan Shaikh, Advocate.

Date of hearing : 24.05.2024

Date of order :

JUDGMENT

ZAFAR AHMED RAJPUT, J:- This Special Anti-Terrorism appeal is directed against the judgment, dated 19.01.2023, passed by the Anti-Terrorism Court No. IV, Karachi Division ("**the Trial Court**") in Special Case No. 195 of 2021, arising out of F.I.R. No. 133 of 2021, registered under Section 376(2), 506-B, 34, P.P.C. read with Section 7 of the Anti-Terrorism Act, 1997 ("**Act of 1997**") at P.S. Memon Goth, Karachi-Malir, whereby the appellants were convicted for the said offences and sentenced to suffer life imprisonment and imprisonment for five years. Both the sentences were ordered to run concurrently; however, the benefit of Section 382-B, Cr. P.C was extended to them.

2. It is case of the prosecution that, on 12.01.2021 at about 1700 hours, appellant Adeel, 17, called baby Hadiqa, 12/13, at his vacant house, located at Memon Goth, Malir, Karachi, where appellants Muzamil, 15, Subhan, 15, and Aaraiz, 16 ½, were already present. They in furtherance of

common intention committed rape of said minor baby. Appellant Adeel made video recording and made it viral on WhatsApp group; for that they were booked in the aforementioned F.I.R.

3. After usual investigation, police submitted the charge-sheet against them before the Administrative Judge, Anti-Terrorism Courts ("ATC"), Karachi Division, which was marked to the Trial Court. Having been completed formal proceedings, the Trial Court framed the charge against the appellants, to which they pleaded not guilty and claimed to be tried. The prosecution in order to substantiate the charge examined eleven witnesses, who produced on record relevant documents. The Trial Court also recorded statements of minor appellants under Section 342(1), Cr. P.C, wherein they denied the charges against them and claimed to be innocent. They; however, neither examined themselves on oath under section 340(2), Cr. P.C. nor did they produce any witness in their defence. The Trial Court after hearing the learned counsel for the parties, convicted and sentenced the appellants vide impugned judgment.

4. Heard the learned counsel for the appellants, complainant as well as learned Addl. P.G. and perused the material available on the record.

5. Since the issue of jurisdiction of the Trial Court is prime issue agitated before us, we do not deem it appropriate to evaluate the legality and propriety of the impugned judgment in entirety.

6. We are not impressed with the arguments of the learned counsel for the appellants that the alleged offence is triable by the Juvenile Court concerned established under the Juvenile Justice System Act, 2018 ("Act of 2018") as the appellants were juvenile as defined under clause (h) of

section 2 of the Act of 2018 at the time of committing alleged offence. In this regard, suffice it to say that all the Anti-Terrorism Courts in Sindh are established and designated as Juvenile Courts vide Notification No. SOJI/9-2/2018, dated 1st April, 2019, issued by the Government of Sindh in exercise of the powers conferred under section 4 of the Act of 2018. Hence, if the offence is otherwise triable by the ATC, the ATC can also try the juvenile offender(s) under the Act of 2018.

7. It may be observed that under Section 12 of the Act of 1997, the ATC has jurisdiction to try a scheduled offence. The term “Scheduled offence” has been defined under Section 2(t) (*ibid*) as *an offence as set out in the Third Schedule*. The Third Schedule of the Act of 1997 specifies following offences as Scheduled Offences:-

THE THIRD SCHEDULE

Scheduled Offences

[See section 2(t)]

1. Any act of terrorism within the meaning of this Act including those offences which may be added or amended in accordance with the provisions of section 34 of this Act.
2. *Any other offence punishable under this Act.*
3. *Any attempt to commit, or any aid or abetment of, or any conspiracy to commit, any of the aforesaid offences.*
4. *Without prejudice to the generality or the above paragraphs, the Anti-terrorism Court to the exclusion of any other Court shall try the offences relating to the following, namely:-*
 - (i) Abduction or kidnapping for ransom;
 - (ii) *use of fire arms or explosives by any device, including bomb blast in a. mosque, imambargah, church, temple or any other place of worship, whether or not any hurt or damage is caused thereby; or*
 - (iii) *firing or use of explosive by any device, including bomb blast in the court premises.*

(Emphasis supplied)

8. Term "terrorism" has been defined under section 6 of the Act of 1997, as under:

6. Terrorism.-(1) *In this Act, "terrorism" means the use or threat of action where:-*

- (a) *the action falls within the meaning of sub-section (2); and*
- (b) *the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or a foreign government or population or an international organization or create a sense of fear or insecurity in society; or*
- (c) *the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause or intimidating and terrorizing the public, social sectors, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies.*

Provided that nothing herein contained shall apply to a democratic and religious rally or a peaceful demonstration in accordance with law.

(2) *An "action" shall fall within the meaning of sub-section (1), if it:-*

- (a) *involves the doing of anything that causes death;*
- (b) *involves grievous violence against a person or grievous bodily injury or harm to a person;*
- (c) *involves grievous damage to property including government premises, official installations, schools, hospitals, offices or any other public or private property including damaging property by ransacking, looting or arson or by any others means;*
- (d) *involves the doing of anything that is likely to cause death or endangers person's life;*
- (e) *involves kidnapping for ransom, hostage-taking or hijacking;*

- (ee) *involves use of explosive by any device including bomb blast or having any explosive substance without any lawful justification or having been unlawfully concerned with such explosive;*
- (f) *incites hatred and contempt on religious, sectarian or ethnic basis to stir up violence or cause internal disturbance;*
- (g) *involves taking the law in own hand, award of any punishment by an organization, individual or group whatsoever, not recognized by the law, with a view to coerce, intimidate or terrorize public, individuals, groups, communities, government officials and institutions, including law enforcement agencies beyond the purview of the law of the land;*
- (h) *involves firing on religious congregation, mosques, imambargah, churches, temples and all other places or worship, or random firing to spread panic, or involves any forcible takeover of mosques or other places of worship;*
- (i) *creates a serious risk to safety of the public or a section of the public, or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civic life;*
- (j) *involves the burning of vehicles or any other serious form of arson;*
- (k) *involves extortion of money ("bhatta") or property;*
- (l) *is designed to seriously interfere with or seriously disrupt a communication system or public utility service;*
- (m) *involves serious coercion or intimidation of a public servant in order to force him to discharge or to refrain from discharging his lawful duties;*
- (n) *involves serious violence against a member of the police force, armed forces, civil armed forces, or a public servant;*
- (o) *involves in acts as part of armed resistance by groups or individuals against law enforcement agencies; or*
- (p) *involves in dissemination, preaching ideas, teachings and beliefs as per own interpretation on FM stations or*

through any other means of communication without explicit approval of the government or its concerned departments.

(3) The use or threat of use of any action falling within sub-section (2) which involves the use of firearms, explosive or any other weapon is terrorism, whether or not sub-section (1) (c) is satisfied.

(3A) Notwithstanding anything contained in sub-section (1), an action in violation of a convention specified in the Fifth Schedule shall be an act of terrorism under this Act.

(4) In this section "action" includes an act or a series of acts.

(5) In this Act, terrorism includes any act done for the benefit of a proscribed organization.

(6) A person who commits an offence under this section or any other provision of this Act, shall be guilty of an act of terrorism.

(Emphasis supplied)

9. It may be observed from perusal of aforementioned definitions of the term "terrorism" provided under Section 6 of the Act of 1997 that the offence of rape does not fall within the prescribed definitions. It; however, appears from perusal of the entry No. 4 (i) of the Third Schedule and clause (e) of sub-section (1) of the Section 6 of the Act of 1997 that only those offences of abduction and kidnaping for ransom fall in the Scheduled offence and the definition of "terrorism" provided in the Act of 1997. In the instant case, it is an admitted position that the alleged offence(s) was not committed for ransom; hence, the same does not fall within the "Scheduled Offence" of the Act of 1997 and; thus, the same was not triable by the ATC. Section 23 of the Act of 1997 stipulates the power of ATC to transfer cases for trial of such offences to regular Courts having jurisdiction under the Code of Criminal Procedure, 1898 ("**the Code**").

10. Learned counsel for the complainant as well as learned Addl. P.G. have vehemently argued, with reference to Preamble of the Act of 1997,

that being "heinous" the alleged offence(s) falls within the jurisdiction of the ATC. The Preamble to the Act of 1997 reads as follows:

"An Act to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences;

WHEREAS it is expedient to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences and for matters connected therewith and incidental thereto;

11. In this regard, a seven-member Bench of Hon'ble Supreme Court of Pakistan in the case of *Ghulam Hussain and others vs. The State and others (PLD 2020 SC 61)* has observed and held, as under:

13. *We understand, and we observe so with all the respect at our command, that in the above mentioned cases falling in the second category this Court had, wittingly or otherwise, detracted or moved away from the principle of nexus so painstakingly carved out by it in the case of Mehram Ali and others v. Federation of Pakistan and others (PLD 1998 SC 1445). As already noticed above, one of the reasons for such drifting away from the principle of nexus was the effect-based definition of "terrorist act" provided in the repealed Suppression of Terrorist Activities (Special Courts) Act, 1975. Another reason for the lack of clarity in this respect was an incorrect understanding of the words "speedy trial of heinous offences" contained in the Preamble to the Anti-Terrorism Act, 1997. In many of the judgments referred to above those words appearing in the Preamble were mentioned and relied upon for holding that commission of heinous offences also amounted to terrorism even if the 'design' or 'purpose' mentioned in clauses (b) and (c) of subsection (1) of section 6 of the Anti-Terrorism Act, 1997 did not stand attracted to a case. For removal of any confusion in that respect the scheme of the Anti-Terrorism Act, 1997 needs to be understood and appreciated in its correct perspective...*

A careful reading of the Third Schedule shows that an Anti-Terrorism Court has been conferred jurisdiction not only to try all those offences which attract the definition of terrorism provided by

the Act but also some other specified cases involving heinous offences which do not fall in the said definition of terrorism. For such latter category of cases it was provided that although those offences may not constitute terrorism yet such offences may be tried by Anti-Terrorism Court for speedy trial of such heinous offences. This distinction between cases of terrorism and cases of specified heinous offences not amounting to terrorism but triable by an Anti-Terrorism Court has already been recognized by this Court in the cases of Farooq Ahmed v. State and another (2020 SCMR 78), Amjad Ali and others v. The State (PLD 2017 SC 661) and Muhammad Bilal v. The State and others (2019 SCMR 1362). It has been clarified by this Court in those cases that such specified heinous offences are only to be tried by Anti-Terrorism Court and that court can punish the person committing such specified heinous offences only for commission of those offences and not for committing terrorism because such offences do not constitute terrorism. For the purposes of further clarity on this issue it is explained for the benefit of all concerned that the cases of the offences specified in entry No. 4 of the Third Schedule to the Anti-Terrorism Act, 1997 are cases of those heinous offences which do not per se constitute the offence of terrorism but such cases are to be tried by an Anti-Terrorism Court because of their inclusion in the Third Schedule. It is also clarified that in such cases of heinous offences mentioned in entry No. 4 of the said Schedule Anti-Terrorism Court can pass a punishment for the said offence and not for committing the offence of terrorism. It may be pertinent to mention here that the offence of abduction or kidnapping for ransom under section 365-A, P.P.C. is included in entry No. 4 of the Third Schedule and kidnapping for ransom is also one of the actions specified in section 7(e) of the Anti-Terrorism Act, 1997. Abduction or kidnapping for ransom is a heinous offence but the scheme of the Anti-Terrorism Act, 1997 shows that an ordinary case of abduction or kidnapping for ransom under section 365-A, P.P.C. is merely triable by an Anti-Terrorism Court but if kidnapping for ransom is committed with the design or purpose mentioned in clauses (b) or (c) of subsection (1) of section 6 of the Anti-Terrorism Act, 1997 then such offence amounts to terrorism attracting section 7(e) of

that Act. In the former case the convicted person is to be convicted and sentenced only for the offence under section 365-A, P.P.C. whereas in the latter case the convicted person is to be convicted both for the offence under section 365-A, P.P.C. as well as for the offence under section 7(e) of the Anti-Terrorism Act, 1997. The same may also be said about the other offences mentioned in entry No. 4 of the Third Schedule to the Act pertaining to "Use of firearms or explosives by any device, including bomb blast in a mosque, imambargah, church, temple or any other place of worship, whether or not any hurt or damage is caused thereby", "Firing or use of explosive by any device, including bomb blast in the court premises", "Hurt caused by corrosive substance or attempt to cause hurt by means of a corrosive substance" and "Unlawful possession of an explosive substance or abetment for such an offence under the Explosive Substances Act, 1908 (VI of 1908)". Such distinction between cases of terrorism and other heinous offences by itself explains and recognizes that all heinous offences, howsoever serious, grave, brutal, gruesome, macabre or shocking, do not ipso facto constitute terrorism which is a species apart. Through an amendment of the Third Schedule any heinous offence not constituting terrorism may be added to the list of offences which may be tried by an Anti-Terrorism Court and it was in this context that the Preamble to the Act had mentioned "Whereas it is expedient to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences".

17. Before parting with this judgment we may observe that the definition of 'terrorism' contained in section 6 of the Anti-Terrorism Act, 1997 as it stands at present is too wide and the same includes so many actions, designs and purposes which have no nexus with the generally recognized concept of what terrorism is. Apart from that including some other heinous offences in the Preamble and the Third Schedule to that Act for trial of such offences by an Anti-Terrorism Court when such other offences do not qualify to be included in the definition of terrorism puts an extra and unnecessary burden on such courts and causes delay in trial of actual cases of terrorism. It is, therefore, recommended that

the Parliament may consider substituting the present definition of 'terrorism' by a more succinct definition bringing it in line with the international perspectives of that offence and focusing on violent activities aimed at achieving political, ideological or religious objectives. We further recommend that the Parliament may also consider suitably amending the Preamble to the Act and removing all those offences from the Third Schedule to the Act which offences have no nexus with the offence of terrorism.

(Emphasis supplied)

12. The dictum laid down by the Apex Court in the above cited case-law elucidates that the offences specified in entry No.4 of the Third Schedule to the Act of 1997 are those heinous offences that do not inherently qualify as terrorism. Such offences are to be tried by an ATC due to their inclusion in the Third Schedule, and the ATC can impose a punishment appropriate for the specific offence, rather than for the offence of terrorism itself. However, not all heinous offences, regardless of their seriousness, brutality, or shocking nature, automatically qualify as acts of terrorism, which is a distinct category of crime. Nonetheless the Third Schedule can be amended by the legislature to include any heinous offence, even if it does not constitute terrorism, thereby making it subject to trial by an ATC. Consequently, alleged offence of rape under section 376(2), P.P.C. though is of serious and brutal nature, yet being not included in entry No. 4 of the Third Schedule to the Act of 1997 is not triable by the ATC as a “heinous offence”.

13. We are also of the considered view that the alleged offence under section 376(2), P.P.C. even does not fall within the jurisdiction of regular Court under the Code in view of promulgation of the Anti-Rape (Investigation and Trial) Act, 2021 (“Act of 2021”), which came into force

on 03.12.2021 to ensure expeditious redressal of rape and sexual abuse crimes in respect of women and children through special investigation teams and Special Courts providing for efficacious procedures, speedy trial, evidence and matters connected therewith or incidental thereto. It is a significant legislative measures aimed at addressing sexual violence. It establishes Special Courts and introduces new mechanisms for the investigation and prosecution of rape cases and also mandates the protection of the privacy and dignity of survivors during legal proceedings. Sections 2(g) & (j), 3, 10, 16, and 23 and Schedules 1& 2 of the Act of 2021 being relevant are reproduced as under:

2. Definitions.- (1) *In this Act, unless there is anything repugnant in the subject or context, -*

(g) *"scheduled offences" means offences as set out in the Schedules against a "victim" or a "child" as defined in this Act;*

(j) *"Special Court" means the Court established under section 3 of this Act;*

3. Establishment of Special Courts, etc. - (1) *The Federal Government, in consultation with the Chief Justice of the High Court concerned, shall establish as many Special Courts throughout the country, as it may deem necessary, to try the scheduled offences.*

(2) -----

(3) -----

Provided that where gender based violence (GBV) courts or juvenile courts or child protection courts have already been designated, they shall be deemed to be the Special Courts under this Act:

Provided further that where more than one Special Court is designated or established in one jurisdiction, the concerned Courts of Sessions shall allocate the case.

10. Connected offences not in the Schedules. *The investigation officer or the joint investigation team (JIT), as the case may be, under section 9, may also take cognizance of offences, not*

listed in the schedules, committed in connection with the scheduled offences, as if those offences were scheduled offences.

16. Trial. (1) The Court upon taking cognizance of a case, under this Act, shall decide the case expeditiously, preferably within four months.

(2) -----

(3) -----

(4) A Special Court may also try offences, not listed in the schedules, committed in connection with the scheduled offences, as if those offences were scheduled offences.

Explanation. It is clarified that sub-section (4) shall also be applicable where the provisions of the Anti-Terrorism Act, 1997 (Act XXVII of 1997) are invoked or invocable in respect of offences under this Act.

23. Jurisdiction and transfer of cases, etc. (1) The scheduled offences shall be exclusively triable by the Special Court.

(2) Subject to sub-section (3), upon commencement of this Act, the trial of scheduled offences pending in any court shall stand transferred to the Special Court having jurisdiction under this Act and such Court shall proceed with the case from the stage at which it was pending immediately before such transfer and it shall not be bound to recall or re-hear any witness who has given evidence and may act on the evidence and procedures already recorded and complied with, respectively.

(3) Each time when a new offence is inserted into any of the Schedules to this Act, sub-section (2) shall come into operation, *mutatis mutandis*, from the date of such insertion.

SCHEDULE-I

1. Offences under sections 34, 292A, 292B, 292C, 354, 365, 365A, 368, 369, 369A, 498B, 498C, 511 of the Pakistan Penal Code, 1860 (Act XLV of 1860).

2. Offences mentioned in Chapters V and V-A of the Pakistan Penal Code, 1860 (Act XLV of 1860).

3. Offences under sections 21 and 22 of the Prevention of Electronic Crimes Act, 2016 (Act XL of 2016).

4. Offences under the Anti-Terrorism Act, 1997 (Act XXVII of 1997) which are committed along with the offences in this Schedule

Explanation. It is clarified that offences under sections 34, 365, 365A, 368, 369, 369A, 498A, 498C and 511 of the Pakistan Penal Code, 1860 (Act XLV of 1860) and offences mentioned in items Nos. 2 and 4, above, shall only be cognizable and triable as offences falling under this Schedule, if they are connected with offences under sections 292A, 292B, 292C and 354 of the Pakistan Penal Code, 1860 (Act XLV of 1860) and offences mentioned in item No. 3 above.

SCHEDULE-II

1. *Offences under sections 34, 336A, 336B, 354A, 364, 364A, 365B, 366A, 366B, 367A, 371A, 371B, 375, 375A, 376, 377, 377A, 377B, 511 of the Pakistan Penal Code, 1860 (Act XLV of 1860).*

2. *Offences mentioned in Chapters V, V-A and XVI of the Pakistan Penal Code, 1860 (Act XLV of 1860).*

3. *Offences under the Anti-Terrorism Act, 1997 (Act XXVII of 1997) which are committed along with the offences in this Schedule.*

Explanation. It is clarified that offences under sections 34, 364, 364A and 511 of the Pakistan Penal Code, 1860 (Act XLV of 1860) and offences mentioned in items Nos. 2 and 3, above, shall only be cognizable and triable as offences falling under this Schedule, if they are connected with offences under sections 336A, 336B, 354A, 365B, 366A, 366B, 367A, 371A, 371B, 375, 375A, 376, 377, 377A and 377B of the Pakistan Penal Code, 1860 (Act XLV of 1860).

(Emphasis supplied)

14. It reflects from the perusal of above-mentioned provisions that under entry No.3 and 4 of the Schedule-I of the Act of 2021, offences under sections 21 and 22 of the Prevention of Electronic Crimes Act, 2016; the offences under the Act of 1997, which are committed along with the offences in the said Schedule, and under entry No.1 of the Schedule-II of the Act, an offence under Section 376, P.P.C., are scheduled offences of the Act of 2021 and are triable by the Special Court established under the said Act. It may also be seen that the first proviso to sub-section (3) of section 3 of the Act of 2021 specifies that where the gender-based violence (GBV) courts or juvenile courts or child protection courts have already been

designated, they shall be deemed to be the Special Courts under this Act. Under Section 16 of the Act, a Special Court may also try offences, not listed in the Schedules, committed in connection with the scheduled offence, as if those offences were scheduled offences. Under Section 23 of the Act of 2021, the scheduled offences are exclusively triable by the Special Courts. Under sub-section (2) (*ibid*), upon commencement of the Act of 2021, the trial of scheduled offences pending in any court stood transferred to the Special Court having jurisdiction under the Act of 2021.

15. It is a matter of record that after promulgation of the Act of 2021 on 03.12.2021, the Federal Government, vide Notification No. S.R.O. 2029(I)/2022, dated 11th October, 2022, in exercise of the power conferred by sub-section (3) of Section 3 of the Act of 2021 and in consultation with the Chief Justice of the Sindh High Court, designated 27 Courts of the Additional District and Sessions Judges as Special Courts in the Province of Sindh to exercise jurisdiction under the Act of 2021 within their territories specified in the said Notification.

16. As per FIR, the alleged offence was committed on 12.01.2021. The charge was framed by the trial Court on 04.06.2021. The Special Courts under the Act of 2021 were notified in the province of Sindh on 11.10.2022. The impugned judgment was passed on 19.01.2023. Meaning thereby, on the day of Notification of Special Courts under the Act of 2021, the trial of scheduled offence of the Act of 2021 was pending in the ATC, which ought to have been transferred to the Special Court having jurisdiction under the Act of 2021 i.e. Additional District & Sessions Judge-V, Malir, which has the territorial jurisdiction to try the alleged offence as per Notification (*supra*).

17. For the foregoing facts, discussion and reasons, we are of the considered view that since the Trial Court i.e. Anti-Terrorism Court No. IV, Karachi Division had no jurisdiction to try the case; the appellants could not be tried, convicted and sentenced by it. Accordingly, the conviction and sentence awarded under the impugned judgment is set-aside with direction to Trial Court to transfer the case to Special Court established and notified under the Act of 2021, having territorial jurisdiction of District Malir for trial in accordance with law. The appellants were on bail before the Trial Court on the date of passing of impugned judgment; they may file bail application(s) before the transferee Special Court, which shall be decided on its own merit.

18. Consequently, the instant appeal is allowed in the above terms.

19. Learned Registrar of this Court is directed to circulate this judgment among the Judicial Officers of District Judiciary and Judges of all Special Courts in Province of Sindh.

JUDGE

JUDGE

Athar Zai