IN THE HIGH COURT OF SINDH AT KARACHI

Criminal Revision Application No.123 of 2016

Present:
Mr. Justice Naimatullah Phulpoto
Mr. Justice Abdul Mobeen Lakho

Applicant:	Pir Deedar Ahmed Jan Sarhandi through Mr. Ghulam Sarwar Chandio, advocate
Respondent:	The State through Mr. Muhammad Iqbal Awan, Deputy Prosecutor General Sindh
Date of hearing:	07.01.2020
Date of order:	07.01.2020

O R D E R

ABDUL MOBEEN LAKHO, J. ---This criminal revision application is directed against the order dated 19.08.2016, passed by learned Additional Sessions Judge-I, Karachi East, in Sessions Case No.1898 of 2015, whereby learned Additional Sessions Judge-I, Karachi East, after hearing the learned counsel for the parties, came to the conclusion that ordinary court had no jurisdiction to try this case under the provisions of the Anti-Terrorism Act, 1997 and returned the same to the investigation officer for want of jurisdiction for presentation before learned Administrative Judge, ATCs, Karachi Division.

2. Brief facts of the prosecution case are that on 12.08.2015, complainant Jameel Ahmed Baloch, Director Estate and Enforcement, KDA Wing, KMC, Karachi along with his subordinate staff and police party went to the Government land, situated at Block-6, Opposite Dubai House, Gulistan-e-Johar, Karachi. It is alleged that applicants/accused had illegally occupied the Government land. As soon as KDA officials and police party reached at the place of incident for discharging their duties, the accused fired upon KDA officials as well as police party with intention to kill. Police party could not arrested any of the culprits as they succeeded in running away. FIR was lodged by Jameel Ahmed Baloch, Director Estate and Enforcement, KDA Wing, KMC, Karachi, at P.S. Gulistan-e-Jauhar, Karachi, it was recorded vide Crime No.451/2015 for offences under sections 147, 148, 149, 353, 324, 34, PPC.

3. After usual investigation, challan was submitted against the accused under sections 147, 148, 149, 353, 324, 34, PPC.

4. Case was sent up to the Court of Sessions. Learned Sessions Judge Karachi East treansferred the case to learned Additional Sessions Judge-I, Karachi East for disposal according to law.

5. Learned trial court after framing the charge under the above referred sections and after hearing the learned counsel for the parties, for want of jurisdiction returned the case to the investigation officer for presentation before learned Administrate Judge, ATCs, Karachi for proceeding with the case under the provisions of Anti-Terrorism Act, 1997 vide order dated 19.08.2016. Through this criminal revision aforesaid order has been called in question.

6. Mr. Ghulam Sarwar Chandio, learned advocate for applicants/accused mainly contended that learned Additional Sessions Judge-I, Karachi East had exclusive jurisdiction to try this case as the facts and circumstances of the case reveal that this is the case to be tried by the court of ordinary jurisdiction. It is further argued that no serious coercion or intimidation was caused to the public servants in order to force them to discharge or to refrain from discharging their lawful duties. It is further submitted that trial of this case before kearbed Judge, ATC would be coram non judice and the impugned order is not sustainable under the law. In support of his submissions, learned advocate for applicants/accused has relied upon the recent authoritative judgment of the Honourable Supreme Court in the case of Ghulam Hussain and Others vs. The State (Criminal Appeals Nos.95 and 96 of 2019, Civil Appeal No.10-L of 2017 and Criminal Appeal No.63 of 2013) and Criminal Revision Application No.154 of 2018 dated 04.12.2019 decided by this Court.

7. Mr. Muhammad Iqbal Awan, learned Deputy Prosecutor General Sindh, conceded to the contentions raised by learned counsel for the applicants/accused and recorded no objection for allowing the instant revision application and return of the case to the court of ordinary jurisdiction for trial in accordance with law.

8. We have carefully heard the learned counsel for the parties, perused the contents of the FIR, material collected during investigation as well as the impugned order. For the sake of convenience, the reasons recorded by learned Additional Sessions Judge-I, Karachi East in the impugned order dated 19.08.2016 are reproduced as under:-

> "7. On perusal of file it appears that police encounter has been taken place on 12.08.2015 at about 1640 hours, Government land situated at

Block No.6, Opposite Dubai House, Gulistan-e-Jauhar, Karachi, in which the force deterrence has been used by the accused persons during the performance of lawful duty by the police party and KDA officials (public servant).

8. Keeping in mind the above circumstances, the accused who have shown serious violence against the members of police leaves me with no other option then to think on the lines that the said act of the accused falls under the provisions of Section 6(2)(N) of the Anti-Terrorism Act, 1997, and tentatively nexus with Sections 6/7 of the Anti-Terrorism Act, 1997 in the light of DB judgment passed by the Honourrable High Court of Sindh in the case Qaiser Baloch & 3 Others vs. the State" duly reported in 2013 PCr.LJ 1259.

For the sake of convenience, I reproduce the relevant law as follows:

(a) The action falls within the meaning of sub-section (2) and subsection (1) of Section 6 of the Anti-Terrorism Act, 1997 is define as under:-

(2) An "Action" shall fall within the meaning of subsection (1) if it:

(m) involves serious coercion or intimidation of a public servant in order to face him to discharge or to refrain from discharging his lawful duties; or

(n) involves serious violence against a member of the police force, armed forces, civil armed forces or a public servant.

9. The above section provides that any person committed serious coercion, intimidation of a public servant in discharge of his lawful duties or serious violence against the members of the police force this act would apply. Accordingly, in the case in hand the present accused committed violence against the members of the police force, made firing upon him, therefore, the case of accused persons falls within the ambit of sub-clauses (m) and (n) of subsection (2) of Section 6 of the Anti-Terrorism Act, 1997, triable by Anti-Terrorism Court.

10. It seems that proper notice was served on the accused and ADPP, as such, they were heard on the point of jurisdiction, hence in my humble view the case of accused is to be tried by Anti-Terrorism Court. I seek reliance in this regard, placed on the judgment reported in 2013 PCr.LJ 1259 Sindh, passed by Honourable Division Bench before Mr. Justice Sajjad Ali Shah and Naimatullah Phulpoto, JJ. In which it was held that:

"Anti-Terrorism Act (XXVII of 1997)---

---Ss.23 and 6(m) – Penal Code (XLV of 1860), Ss. 324, 353, 186, 34 --- Application for transfer of case from Anti-Terrorism Court to Sessions Court, dismissed of --- Act of terrorism --- Serious violence against members of the police force --- scope --- Accused persons had fired upon a police party with automatic weapons in order to deter them from discharging their official duty --- Accused persons submitted an application under S. 23 of the Anti-

> Terrorism Act, 1997 before the Anti-Terrorism Court for transfer of case to an ordinary court, however the same was rejected on the basis that it was not essential that police party received injuries during the occurrence but it was enough that they were intimidated from doing their pubic duty and were refrained from discharging their lawful duties --- Validity --- Record showed that accused persons had fired upon the police party and deterred them from discharging their official duties --- Empties of automatic weapons used by accused persons were recovered from the place of occurrence --- Act of accused clearly showed serious violence against members of police force and created terror in the area --- Offence clearly fell under S.6(n) of the Anti-Terrorism Act, 1997 --- Anti-Terrorism Court had righty rejected application of accused persons for transfer of case --- Revision petition was dismissed accordingly [p.1261]A."
>
> 11. For the reasons discussed above, I am of the firm view that this Court has got no jurisdiction to try the instant case, as such, the charge sheet was inadvertently accepted by the learned Civil Judge/Judicial Magistrate, Karachi East, therefore, the charge sheet and FIR are hereby returned to SHO, P.S. Gulistan-e-Jauhar in order to present before the Court of learned Judge, Anti-Terrorism Court, Karachi."

9. In the present case, there is no serious coercion or intimidation to the public servants / police officials in order to force them to discharge or to refrain from discharging their lawful duties. Record reflects that no grievous damage to the Government property has been caused. It is alleged that there was cross-firing but not a single empty was collected. IO failed to collect any material to satisfy the Court that any terror or insecurity was created. The amended clause (b) of subsection (1) of section 6 now specifies the 'design' and clause (c) of subsection (1) of section 6 earmarks the 'purpose' which should be the motivation for the act and the *actus reus* has been clearly mentioned in subsection (2) of section 6 and now it is only when the *actus reus* specified in subsection (2) of section 6 is accompanied by the requisite *mens rea* provided for in clause (b) or clause (c) of subsection (1) of section 6 that an action can be termed as 'terrorism'. Thus, it is no longer the fear or insecurity actually created or intended to be created or likely to be created which would determine whether the action qualifies to be termed as terrorism or not but it is now the intent and motivation behind the action which would be determinative of the issue irrespective of the fact whether any fear and insecurity was actually created or not. After this amendment in section 6 an action can now be termed as terrorism if the use or threat of that action is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect, etc. or if such action is *designed to* create a sense of fear or insecurity in the society or

the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause, etc. Now creating fear or insecurity in the society is not by itself terrorism unless the motive itself is to create fear or insecurity in the society and not when fear or insecurity is just a byproduct, a fallout or an unintended consequence of a private crime. Learned advocate for the applicants/accused has rightly relied upon unreported judgment of the Honourable Supreme Court in the case of Ghulam Hussain and Others vs. The State (Criminal Appeals Nos.95 and 96 of 2019, Civil Appeal No.10-L of 2017 and Criminal Appeal No.63 of 2013). Relevant paras of the said judgment is reproduced as under:-

> "13. 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 an 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* (PLJ 2017 SC 408), *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 an 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 an 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, PPC 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, PPC 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, PPC whereas in the latter case the convicted person is to be convicted both for the offence under section 365-A, PPC 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".

"14. .....Reading of subsections (1) and (2) of the said section together makes good sense, i.e. all the actions specified in subsection (2) shall constitute terrorism if they are committed with the 'design mentioned in clause (b) of subsection (1) or are committed for the 'purpose' referred to in clause (c) of subsection (1) of that section. Subsection (3) of that section, however, provides that "The use or threat 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" which means that if for commission of the actions mentioned in subsection (2) a firearm, an explosive substance or any other weapon is actually used or a threat regarding use of the same is extended then all such actions are to constitute the offence of terrorism even if the other requirements of clause (c) of subsection (1) of section 6 are not satisfied or fulfilled. The requirements that need to be satisfied for invoking clause (c) of subsection (1) of section 6 are that the use or threat of action should be for "the purpose of advancing a religious, sectarian or ethnic cause" or for the purpose of "intimidating and terrorizing the public, social sectors, media persons, business community" or for the purpose of "attacking the civilians, including damaging property by ransacking, looting, arson, or by any other means, government officials, installations, security forces or law enforcement agencies". If the said requirements and purposes mentioned in clause (c) of subsection (1) of section 6 do not need to be satisfied and if mere use or threat of use of a firearm, an explosive substance or any other weapon for commission of the actions mentioned in subsection (2) of section 6 is to *ipso facto* constitute the offence of terrorism then every murder committed (action under clause (a) of subsection (2) of section 6), every grievous bodily injury or harm caused (action under clause (b) of subsection (2) of section 6), every grievous damage to private property (action under clause (c) of subsection (2) of section 6), doing anything that is likely to cause death or endangers a person's life (action under clause (d) of subsection (2) of section 6)

or creating a serious risk to safety of the public or a section of the public (action under clause (i) of subsection (2) of section 6) even if committed with an ordinary stick, a brickbat or a stone when used as a weapon would constitute the offence of terrorism! Such trivializing of the diabolical offence of terrorism surely could not be the intention of the legislature when framing a law for the offence of terrorism which is a class apart and a species different from any other ordinary crime.

15. ……..The new definition of 'terrorism' introduced through the amended section 6 of the Anti-Terrorism Act, 1997 as it stands today appears to be closer to the universally understood concept of terrorism besides being easier to understand and apply. The earlier emphasis on the speculative *effect* of the act has now given way to a clearly defined *mens rea* and *actus reus*. The amended clause (b) of subsection (1) of section 6 now specifies the '*design*' and clause (c) of subsection (1) of section 6 earmarks the '*purpose*' which should be the motivation for the act and the *actus reus* has been clearly mentioned in subsection (2) of section 6 and now it is only when the *actus reus* specified in subsection (2) of section 6 is accompanied by the requisite *mens rea* provided for in clause (b) or clause (c) of subsection (1) of section 6 that an action can be termed as 'terrorism'. Thus, it is no longer the fear or insecurity actually created or intended to be created or likely to be created which would determine whether the action qualifies to be termed as terrorism or not but it is now the intent and motivation behind the action which would be determinative of the issue irrespective of the fact whether any fear and insecurity was actually created or not. After this amendment in section 6 an action can now be termed as terrorism if the use or threat of that action is *designed to* coerce and intimidate or overawe the Government or the public or a section of the public or community or sect, etc. or if such action is *designed to* create a sense of fear or insecurity in the society or the use or threat is made *for the purpose of* advancing a religious, sectarian or ethnic cause, etc. Now creating fear or insecurity in the society is not by itself terrorism unless the motive itself is to create fear or insecurity in the society and not when fear or insecurity is just a byproduct, a fallout or an unintended consequence of a private crime. In the last definition the focus was on the action and its result whereas in the present definition the emphasis appears to be on the motivation and objective and not on the result. Through this amendment the legislature seems to have finally appreciated that mere shock, horror, dread or disgust created or likely to be created in the society does not transform a private crime into terrorism but terrorism as an 'ism' is a totally different concept which denotes commission of a crime with the design or purpose of destabilizing the government, disturbing the society or hurting a section of the society with a view to achieve objectives which are essentially political, ideological or religious. This approach also appears to be in harmony with the emerging international perspective and perception about terrorism.

16. For what has been discussed above it is concluded and declared that for an action or threat of action to be accepted as terrorism within the meanings of section 6 of the Anti-Terrorism Act, 1997 the action must fall in subsection (2) of section 6 of the said Act and the use or threat of such action must be designed to achieve any of the objectives specified in clause (b) of subsection (1) of section 6 of that Act or the use or threat of such action must be to achieve any of the purposes mentioned in clause (c) of

> subsection (1) of section 6 of that Act. It is clarified that any action constituting an offence, howsoever grave, shocking, brutal, gruesome or horrifying, does not qualify to be termed as terrorism if it is not committed with the design or purpose specified or mentioned in clauses (b) or (c) of subsection (1) of section 6 of the said Act. It is further clarified that the actions specified in subsection (2) of section 6 of that Act do not qualify to be labeled or characterized as terrorism if such actions are taken in furtherance of personal enmity or private vendetta."

10. For what has been discussed above, we have come to the conclusion that alleged offence was not result of a design to achieve any of the objectives specified in clause (b) of sub-section (1) of Section 6 of the Anti-Terrorism Act, 1997, as such, this case is triable by the court of ordinary jurisdiction. Learned Judge, ATC has no jurisdiction to try it under the provisions of Anti-Terrorism Act, 1997.

11. Consequently, impugned order dated 19.08.2016 is set aside. Case is withdrawn from the file of concerned Judge, ATC Karachi and transferred to learned Additional Sessions Judge-I, Karachi East, with direction to proceed with the case expeditiously, in accordance with law.

Instant criminal Revision Application is accordingly disposed of.

J U D G E

J U D G E

Gulsher/PS