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**ORDER SHEET
IN THE HIGH COURT OF SINDH, CIRCUIT COURT
LARKANA**

Present:

Mr. Justice Zafar Ahmed Rajput.

Mr. Justice Khadim Hussain Tunio.

Criminal Appeal No. D-36 of 2015

Appellants : 1. Haibat s/o. Peeral, by caste Chandio
2. Wazir s/o. Haji Ahmed, by caste Chandio

Respondent : The State

Criminal Appeal No. D-37 of 2015

Appellant : Haibat s/o. Peeral, by caste Chandio

Respondent : The State

Criminal Appeal No. D-35 of 2015

Appellant : Wazir s/o. Haji Ahmed, by caste Chandio

Respondent : The State

Mr. Athar Abbas Solangi, Advocate,
for the appellants

Mr. Khadim Hussain Khoharo, APG
For the State,

Nemo for the complainant
in Criminal Appeal No. D-36 of 2015

Date of hearing : 14.11.2017
Date of order : 22.11.2017

JUDGMENT

ZAFAR AHMED RAJPUT, J:- By this common judgment, we intend to dispose of above captioned three Criminal Appeals as the same are directed

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against the common judgment, dated 02.04.2015, passed by the learned Judge, Anti-Terrorism Court, Naushero Feroze in Special Cases No. 68, 69 and 70 of 2013, respectively, arising out of F.I.Rs. No. 196, 199 and 198 of 2013, registered at P.S. K. N. Shah, under sections 302, 384, 34 P.P.C. and under section 25 of the Sindh Arms Act, 2013 whereby both the appellants were convicted in Special Case No. 68 of 2013 for the offence under Sections 302 (b) and 34 P.P.C. r/w sections 6/7 of Anti-Terrorism Act, 1997 (*hereinafter the "Act of 1997"*) and sentenced to suffer R.I. for life. They were also convicted in Special Cases No. 69 and 70 of 2013, respectively, for the offence under Section 23(1)(a) of the Sindh Arms Act, 2013 and sentenced to suffer R.I. for five (05) years with fine of Rs.10,000/- or in default thereof, to undergo S.I. for six months. All the sentences awarded to appellants were ordered to run concurrently with benefit of section 382-B of Cr. P.C.

2. Briefly stated facts of the prosecution case are that on 04.11.2013 at 0230 hours, complainant Allah Rakhio lodged F.I.R. No. 196 of 2013 at P.S. K.N. Shah, alleging therein that the appellants had demanded *Bhatta* from his brother Muhammad Mithal, aged about 27/28 years, who ran private clinic at Pori Road, K.N. Shah, but his brother refused them to pay *Bhatta*, on that they issued threats to him for dire consequences. It was further alleged that on 23.11.2013, at 09:00 p.m., the complainant was available along with Barkat Ali, Mumtaz Ali and his said brother at the clinic when accused Dur Muhammad alias Duro, Haji Usman, both sons of Bakhar Khan and appellants, armed with pistols, came there on two motorcycles and started abusing his said brother by saying that since he had refused to pay them *Bhatta*, they would not spare him, and then accused Dur Muhammad

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and appellant Haibat fired on complainant's brother, which hit him on his chest, while fire shots of accused Haji Usman and appellant Wazir hit his head and left arms, respectively and he died at the spot; thereafter, accused they ran away on their motorcycles by making indiscriminate firing.

3. During course of investigation, police arrested the appellants on 16.11.2013 and during interrogation, on 26.11.2013, appellant Haibat produced voluntarily one unlicensed 30 bore pistol and two bullets, while appellant Wazir produced one unlicensed big pistol and three bullets, for that above-mentioned Crime No. 199 and 198 of 2013, under section 25 of the Sindh Arms Act, 2013 were also registered against them, respectively.

4. After completion of investigation, police submitted the charge sheet against the appellants by placing the name of the absconding accused, namely, Dur Muhammad and Haji Usman in column No.2 with red ink, who were later on declared as proclaimed offenders by the trial Court.

5. In view of section 24-M of the Act of 1997, upon the application of prosecution, the learned Court amalgamated the cases corresponding to afore-mentioned three F.I.Rs., vide order dated 09.01.2-14, and framed formal charge against the appellants at Ex.10, to which they pleaded not guilty and claimed to be tried, vide pleas recorded at Ex.11 & Ex.12.

6. In order to substantiate the charge against the appellants, the prosecution examined Allah Rakhio, the complainant, as PW-1 at Ex. 13; he produced receipt of receiving dead body at Ex.13/B. Mumtaz Ali examined as PW-2 at Ex.14. ASI Bashir Ahmed examined as PW-3 at Ex.15, he produced Danishnama at Ex.15/A, memo of injuries at Ex.15/B, memo of

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securing clothes of deceased at Ex.15/C, memo of site incident at Ex.15/D, memo of arrest of both appellants/accused at Ex.15/E. Mazhar Ali Chandio, the Tapedar, examined as PW-4 at Ex.16; he produced sketch of vardat at Ex.16/A. Khadim Hussain Chandio examined as PW-5 at Ex.18. Ranjhan Chandio examined as PW-6 at Ex.19; he produced memo of recovery at Ex.19/A. Inspector Loung Khan examined as PW-7 at Ex.20; he produced copy of FIR No.198/2013 and No.199/2013 at Ex.20/A & Ex.20/B, Chemical Examiner's Report at Ex.20/C, Copies of entries at Ex.20/D and Ex.20/E. Dr. Hafiz Mumtaz Ali Pir examined as PW-8 at Ex.21; he produced postmortem report of deceased Muhammad Mithal at Ex.21/A, police letter at Ex.21/B, lash chakas form of deceased at Ex.21/C. SHO Muhammad Aslam examined as PW-9 at Ex.22.

7. Statements of accused Haibat Chandio and Wazir Chandio were recorded under section 342, Cr. P.C at Ex.24 and Ex.25, respectively wherein they denied the prosecution case against them and claimed to have been implicated falsely in the cases at the instance of complainant. They also deposed that no proof of demanding *Bhatta* has been produced before the Court. They; however, neither examined themselves on oath nor produced any witness in defence.

8. We have heard learned Counsel for the respective parties and have perused the material available on record.

9. Mr. Athar Abbas Solangi, learned counsel for the appellants, has contended that from the prosecution story as set out in the F.I.R., so also, from the evidence on record, no scheduled offence seems to have been committed by the appellants/accused attracting the provisions of sections 6

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(2) (k) & 7 (a) (h) of the Act of 1997. He added that even the said provisions of Act of 1997 were not inserted in the F.I.R., but the challan was submitted by the police by adding section 6 (2) (k) of the Act of 1997 and the trial Court framed the charge and convicted the appellants/accused under sections 6/7 (a) (h) of the Act of 1997, ignoring the fact that even after recording the evidence of prosecution witnesses, the alleged murder of deceased Muhammad Mithal does not quantify to an act of "terrorism" as contemplated by the section 6 of the Act of 1997; hence, learned Anti-Terrorism Court had no jurisdiction to try the case, as such, the impugned judgment is liable to be set-aside.

10. Conversely, Mr. Khadim Hussain Khoharo, learned A.P.G. has maintained that the appellants, in furtherance of their common intention, committed *Qatl-i-amd* of Muhammad Mithal due to non-payment of *Bhatta* by causing fire arms injuries and made indiscriminate firing in order to create sense of fear and insecurity in the locality. As such, learned trial Court has rightly exercised its jurisdiction. He further argued that the question of jurisdiction was not taken at initial stage by the appellants; therefore, same cannot be taken at appellate stage.

11. It is settled law that a question of law can be raised at any stage as the point of jurisdiction goes to the very root of the case and renders the entire proceedings *Coram non judice*; therefore, it could be taken even at appeal stage, as such, the objection raised by learned A.P.G. on the point of jurisdiction is untenable. In this respect, we are fortified by a dictum laid down in the case of *Amanullah and others v. The State* (PLD 2003 Quetta

11). So far as jurisdiction of the Court in this case is concerned, in the case

of *Sagheer Ahmed v. The State and others* (2016 SCMR 1754), the Honorable Supreme Court of Pakistan upheld the observations of this High Court (Bench at Sukkur) passed in C.P. No. D-4710 of 2015 that in absence of any tangible material, mere allegation^s of demanding Bhatta do not attract section 6 (2)(k) of the Act of 1997. It has also been observed in aforementioned case; so also, in the case of *Nazir Ahmed and others v. The State* (2012 SCMR 517) that for bringing the case within the ambit of section 6 of the Act of 1997 neither a motive nor intention for commission of the offence is relevant for the purpose of conferring jurisdiction on Anti Terrorism Court but it is the act which is designed to create a sense of insecurity and to destabilize public at large, which attract the provisions of Act of 1997.

12. In the case in hand, prosecution version is that on 23.11.2013, at 09:00 p.m., the appellants committed *Qatl-i-amd* of Muhammad Mithal in his clinic due to non-payment of *Bhatta* by causing fire arms injuries and made aerial firing in order to create sense of fear and insecurity in the locality. However, the averments of F.I.R. are silent regarding the financial status and source of income of the complainant against which appellants have been demanding *Bhatta*. Complainant has also did not disclose the specific dates, times and places of demanding *Bhatta* by appellants nor any such evidence was produced before the investigating officer to prima facie establish such allegations. It is also not brought on record if the deceased was a qualified registered medical practitioner. Even no previous record of appellants has been produced to establish that the appellants are involved in such like cases. Similarly, the allegations of aerial firing have not appeared to us to be a case of terrorism. From the entire resume, it is manifest from record that intention

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of accused was not at all to create sense of insecurity or destabilize the public-at-large, thus the design or purpose of the offence as contemplated under section 6 of the Anti-Terrorism Act, 1997 is not attracted.

13. In view of the above principle laid down by the Hon'ble Supreme Court of Pakistan, we are of the considered opinion that the Anti-Terrorism Court had no jurisdiction to try the instant case, as such, the trial is vitiated and the impugned Judgment is untenable. As a consequence thereof, the captioned appeals are allowed, impugned conviction and sentence awarded to appellants, vide judgment passed by Judge, Anti-terrorism Court, Naushero Feroze are hereby set-aside. The case is remanded to the said Court to remit it to the ordinary Court having jurisdiction for its disposal in accordance with law.