IN THE HIGH COURT OF SINDH, KARACHI

Present:
Mr. Justice Mohammad Karim Khan Agha
Mr. Justice Arshad Hussain Khan,

SPL. CR. A.T. APPEAL NO.196 OF 2020
CONF. CASE NO.08 OF 2020

Appellant:	**Tariq Khan son of Jamshed Khan through M/s. Aamir Mansoob Qureshi and Iftikhar Ahmed Shah, Advocates**
Respondent:	**The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General, Sindh.**

SPL. CR. A.T. JAIL APPEAL NO.204 OF 2020

Appellant:	**Ali Eidan son of Eidan, through Mr. Amir Saeed Channa and Miss. Murik Nizam Shaikh, Advocates**
Respondent:	**The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General, Sindh.**

SPL. CR. A.T. ACQUITTAL APPEAL NO.209 OF 2020

Appellant:	**Sher Muhammad son of Muhammad Fazal through Mr. Muhammad Jibran Nasir, Advocate**
Respondent:	**The State through Mr. Muhammad Iqbal Awan, Additional Prosecutor General, Sindh.**
Amicus Curiae Appointed by the Court in all appeals:	**Mr. Mehmood Akhtar Qureshi, Advocate**
Date of Hearing:	**01.12.2021 and 09.12.2021**
Date of Announcement:	**23.12.2021**

JUDGMENT

MOHAMMAD KARIM KHAN AGHA, J:- The appellant namely Tariq Khan has assailed the impugned judgment dated 21.11.2020 passed by the Anti-Terrorism Court No.XVI, Karachi in Special Case No.562 of 2018 (New Special Case No.22 of 2018) arising out of Crime No.91 of 2018 under Section 302/34 PPC r/w Section 7 ATA 1997 registered at PS Shahrah-e-Faisal, Karachi whereby he

was sentenced u/s.265-H(2) Cr.PC for causing death of the deceased Maqsood by firing, punishable u/s.302 PPC, accused/appellant Tariq Khan was sentenced to death subject to confirmation by this court. He was also ordered to pay compensation of Rs.2,00,000/- (two lac) to the legal heirs of deceased u/s.544-A Cr.PC and in default of such payment he shall undergo SI for six months more. He was extended the benefit of S.382 (B) Cr.PC.

2. Appellant Ali Eidan has filed an appeal from jail impugning the judgment dated 24.11.2019 arising out of FIR No.41 of 2018, under Section 302/324/353/170/171/34 PPC r/w Section 7 of ATA 1997 registered at PS Shahrah-e-Faisal, Karachi whereby the appellant Ali Eidan was convicted for offence u/s.265-H(2) Cr.PC as under:-

i) The accused Ali s/o Eidan is hereby convicted for the offence u/s.324 PPC and he is hereby sentenced to rigorous imprisonment for ten (10) years and with fine of Rs.50000/- and in case of failure to pay the fine, he shall serve SI for six months more;

ii) The accused is hereby convicted for the offence u/s.353 PPC and he is sentenced to undergo rigorous imprisonment for two (02) years and with fine of Rs.10000/- and in case of failure to pay the fine, he shall serve SI for three months more;

iii) The accused is hereby convicted for the offence u/s.400 PPC and he is hereby sentenced to rigorous imprisonment for ten (10) years and with fine of Rs.1,00,000/- and in case of failure to pay the fine, he shall serve SI for six months more;

iv) The accused is hereby convicted for the offence u/s.171 PPC and he is hereby sentenced to rigorous imprisonment for three (03) months;

v) The accused is hereby also convicted for the offence u/s.322 PPC and is liable to pay Diyat amount to the legal heirs of the deceased; he shall remain in custody until the payment of Diyat amount.

vi) The accused is hereby also convicted for the offence u/s.23(I) SAA 2013 and sentenced to undergo rigorous imprisonment for ten (10) years with fine of Rs.50000/- and in case of failure to pay the fine, he shall serve SI for six months more;

The benefit of section 382-B Cr.P.C was also extended in favour of the accused.

3. The complainant Sher Muhammad filed an appeal against acquittal of Respondents/accused persons Tariq son of Jamshed Khan, Akber Khan son of Muhammad Yousuf, Abdul Waheed son of Shabeer Ahmed and PC Shaukat Ali s/o Muhammed Ashraff who were acquitted by the Anti-Terrorism Court No.XVI Karachi for offences under the ATA and PPC (in respect of respondents

Akber Khan, Abdul Waheed and PC Shukat Ali) vide its judgment dated 21.11.2020

4. The brief facts of the prosecution case as per FIR No.91 of 2018 lodged by the complainant Sher Muhammad s/o Muhammad Fazal resident of Lines area, Karachi and permanently resident of Shaiwal stated that on 20.01.2018 his son tailor as profession left the house with his friend Rauf who was Rickshaw driver towards airport and at about 10:30 am brother of Rauf came to his house and informed his daughter that he received a phone call that Maqsood was taken to Jinnah hospital in emergency ward, as such they reached there where one police officer informed him that Maqsood was a dacoit who was killed in police encounter at Shahrah-e-Faisal, as such they also inquired from Rauf who also informed him that Maqsood was killed by the police. At that time the complainant was in Sahiwal and the deceased Maqsood was shifted to Sahiwal where he was buried. On 25.01.2018 accordingly he reached at Karachi and lodged the FIR against the above named police officer.

5. The brief facts of the prosecution as per FIR No.41 of 2018 lodged by complainant Syed Ali Hassan, SHO of Shahrah-e-Faisal, Karachi are that on 20.01.2018 while the complainant was on patrol along with staff received phone call of ASI Tariq about the accused who used to make robbery from the incoming airport passengers in white colour Toyota Corolla car No.BDP-211 who were signaled to stop at Shahrah-e-Faisal, Karachi but they started firing upon the police, the police also fired in retaliation, resultantly tyre of the car in which the suspects was driving was burst and the car hit the footpath at PAF Gate and the accused were trying to flee. On such information the complainant reached the place of incident where constable Shoukat Ali informed that accused were fleeing and ASI Tariq along with staff were following them. The complainant when reached at PAF gate found that one Rickshaw No.D-15-17123 was lying over turned and some persons were also lying there in injured condition. One of the injured lying there told him that he was Rickshaw passenger and when he was going in Rickshaw along with Rickshaw driver Maqsood and his friend, suddenly two persons wearing uniform similar to police uniform, first attempted to stop one motorcyclist who did not stop meanwhile they also tried to stop their rickshaw but rickshaw did not stop, they opened fire upon them resultantly the rickshaw overturned. He pointed out towards the persons who were lying there on the road were the same who stopped their rickshaw and made firing upon them owing to which the Rickshaw driver and his friend received firearm

injuries. The police arrested the accused who disclosed his name as Ali Eidan. The police recovered from his possession one 30 bore pistol without number loaded with one round and from his body search, one black colour OPPO mobile phone and cash Rs.200/- were also recovered. The second injured accused disclosed his name as Babar Ali s/o Jamal Aziz and from his possession the police recovered one 30 bore pistol without number loaded with one round in chamber and two in magazine and on his body search one black colour Q mobile and cash Rs.300/- were also recovered. The accused disclosed name of fleeing away accused as Arfeen. The police also seized two empties of 30 bore and two empties of 32 bore from the place of incident, so also recovered 4 empties of SMG from there. The accused were shifted to hospital. The police also searched the Toyota Corolla car and recovered one 222 rifle without number along with three rounds in magazine and one round in chamber, one black colour torch, one black colour dummy walky-talky set whereat HOM was inscribed, two police uniform shirts, one brown paint, two police caps, two number plates of car No.LED-8948, one white tape, three empties of 30 bore and three empties of 222 rifle were recovered. Accordingly FIRs were lodged against the accused persons. During investigation of the case, Maqsood succumbed to injuries and the accused Babar also died due to firearm injuries.

6. After completing usual investigation charge was framed against the accused persons to which they pleaded not guilty and claimed trial of their cases. At this stage it is worth pointing out that despite all the offences resulting from the same transaction a joint trial was not ordered and the FIR's were challoned and tried separately which lead to two separate judgment arising out of the same incident.

7. The prosecution in order to prove its cases examined 11 witnesses in each case and exhibited various documents and other items. The statements of accused persons were recorded under Section 342 Cr.P.C in which they denied all the allegations leveled against them. After appreciating the evidence on record the trial courts convicted the appellants and acquitted some of the respondents and sentenced those convicted as set out earlier in this judgment vide two separate impugned judgments. Hence, the appellants have filed these appeals against their conviction and the complainant /appellant has filed an appeal against the acquittal of the respondents in his appeal against acquittal.

8. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the impugned judgments dated 21.11.2020 and 24.11.2019 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

9. At the very outset learned counsel for the appellants contended that the Anti-Terrorism Court (ATC) had no jurisdiction to hear these cases and as such both the impugned judgments should be set aside and there appeals allowed.

10. This court therefore vide order dated 01.12.2021 framed the following legal issues for determination;

i) Whether the concerned court had jurisdiction to try the offences and decide their case?
ii) In the event that such Court did not have jurisdiction to try the cases then what would be the legal consequences?

11. We also appointed Mr.Mahmood Akhtar Quershi as amicus curiae to assist us in determining the above two legal issues.

Turning to the first Issue. Whether the ATC had the jurisdiction to try the offences so charged.

12. Learned counsel for the appellants and learned amicus curiae contended that based on the particular facts and circumstances of these cases and the prevailing case law the concerned ATC had no jurisdiction to try and decide these cases as the offences so charged did not fall within Section 6 of the ATA which defined terrorism nor were such offences so charged scheduled offences falling within the purview of the ATA.

13. Learned counsel for the appellants placed reliance on the cases of **Gul Muhammad v. The State and another** (2002 P. Cr.LJ 1374), **Farooq Ahmed v. The State and another** (2020 SCMR 78), **Amjad Ali and others v. The State** (PLD 2017 Supreme Court 661), **Muhammad Bilal v. v. The State and others** (2019 SCMR 1362), **Ghulam Hussain and others v. The State and others** (PLD 2020 Supreme Court 61), **The State v. Muhammad Arif and 3 others** (PLD 2012 Sindh 119), **Muhammad Bilal alias Sulleman v. Federation of Pakistan through the Secretary Ministry of Law, Justice and Human Rights Division and 3 others** (P. Cr.LJ 411) and **Muhammad Sharif v. Judge, Anti-Terrorism Court and 5 others** (2012 YLR 2448).

14. Learned amicus curie placed reliance in respect of jurisdiction on the cases of **Ghulam Hussain and others v. The State and others** (PLD 2020 Supreme Court 61), **Ali Gohar and others v. Pervaiz Ahmed and others** (PLD 2020 Supreme Court 427), **Farooq Ahmed v. The State and another** (2020 SCMR 78), **Muhammad Bilal v. The State and others** (2019 SCMR 1362), **Amjad Ali and others v. The State** (PLD 2017 Supreme Court 661), **Ali Nawaz and 5 others v. The State and 2 others** (2021 P Cr.LJ 909), **Murad Ali Bagalani and 5 others v. The State** (2019 P Cr.LJ 95) and **Shahbaz Khan alias Tippu and others v. Special Judge Anti-Terrorism Court No.3, Lahore and others** (PLD 2016 Supreme Court I).

15. Learned Addl. Prosecutor General Sindh appearing on behalf of the State has contended that although the ATC did not have jurisdiction to hear the cases as they did not fall within the purview of the ATA it could still pass judgment in respect of the PPC offences which it has done. In support of his contentions he placed reliance on the cases of **Nadeem Butt v Special Courts Constituted under Anti Terrorism Act, 1997 (Presided by Sardar Mashkoor Ahmed), Camp At Dharampura, Lahore** (2000 SCMR 1086), **Ijaz Ahmad v The State** (2009 SCMR 99), **Syed Mushahid Shah v Federal Investigation Agency** (2017 SCMR 1218), **Waris Ali v The State** (2017 SCMR 1572), **Tahir Mehmood @ Achoo v The State** (2018 SCMR 169), **Shah Nawaz v The State** (2020 MLD 466) and **Sararish Ali v The State** (2020 MLD 474).

16. Learned counsel for the appellants in the appeal against acquittal of the respondents however has contended that based on the particular facts and circumstances of the case the learned trial judge in both impugned judgments has wrongly concluded that the offences so charged based on the particular facts and circumstances of the case do bring them within the purview of section 6 of the ATA and that the ATC did have the jurisdiction to hear and decide the cases. In support of his contentions he placed reliance on the cases of **The State v. Muhammad Arif and 3 others** (PLD 2012 Sindh 119), **Munawar Hussain v. Judge ATC II, Lahore** (2017 P Cr.LJ 46), **Abdur Rab alias Ali Akber and others v. The State and others** (2018 P Cr.LJ 1313), **Afaq Shafqat v. The State and 2 others** (2018 P Cr.LJ Note 22), **Muhammad Umer Mangrio v. The State** (2014 MLD 1813), **Muhammad Bilal alias Sulleman v. Federation of Pakistan through the Secretary Ministry of Law, Justice and Human Rights Division and 3 others** (P. Cr.LJ 411), **Muhram Ali and others v. The State and others** (2016 P Cr.LJ 961), **Shahbaz Khan alias Tippu and others v. Special Judge Anti-**

Terrorism Court No.3, Lahore and others (PLD 2016 Supreme Court I) and **Sadiqullah and another v. The State and another** (2020 SCMR 1422).

17. Having heard the parties, perused the record and considered the relevant law including that cited at the bar we find that the ATC was **extremely unlikely** to have jurisdiction to hear and decide these cases for the following reasons;

18. At the outset we find that although the appellants application under Section 23 of the Anti Terrorism Act 1997 (ATA) to transfer the case from the ATC court to the court having ordinary jurisdiction as this was not an ATC case remained undecided (such application being filed shortly after the latest decision by the Supreme Court in the case of **Ghulam Hussain V State** (PLD 2020 SC 61) as what amounted to terrorism under the law) it is well settled that the question of jurisdiction can be raised at any stage of the proceedings especially in the case of a criminal appeal which is a continuation of the trial proceedings. In this respect reliance is placed on the case of **Shaikh Muhammed Amjad V State** (2002 P.Cr.LJ 1317 (Kar) which held as under at P.1353 and 1354 whilst relying on a number of Supreme Court Judgments;

> *"45. On the other hand, Mr. Raja Qureshi, learned Advocate-General, Sindh, and Mr. Ilyas Khan, learned Special Public Prosecutor, submitted that the appellant could submit an application before the A.T.C. under section 23 of the A.T.A. for transfer of the case to the Court having jurisdiction but it was not done, and therefore, the appellant cannot be allowed to take this plea at the appellate stage.* ***We are not persuaded to agree with the submission because the question of jurisdiction is a question of law and can always be raised by any party at any stage including the appeal. However, if the objection to the jurisdiction is taken at appellate stage it should not involve recording of further evidence and should be on the basis of material already available on record.*** *We are, further of the opinion that so far, the question of jurisdiction of a Court is concerned, a Court itself is required before proceeding with the case to examine whether it has jurisdiction in law to proceed with the case or not. Merely because a party to the proceedings has not taken any objection to the jurisdiction, out of ignorance or for want of proper advice, shall neither debar a party from taking such objection at the appellate stage nor the silence of a party or even waiver shall confer jurisdiction on a Court not vested in it in law"* (bold added)

19. The latest law on what amounts to the offence of terrorism as defined under Section 6 of the ATA was laid down by a larger Bench of the Supreme Court in the recent case of **Ghulam Hussain** (Supra) which held at P.131 Para 16 as under;

"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 purpose 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."*** (bold added)

20. Based on a glance of the FIR's and considering the particular facts and circumstances of this case we find that the learned trial court has correctly found in both the impugned judgments that the cases did not fall within the ambit of section 6 of the ATA so as to make them acts of terrorism which could be tried by the ATC. This has been acknowledged in both the impugned judgments in similar terms. For example the impugned judgment dated 21.11.2020 finds as under at para's 48 and 49

"48. Admittedly the accused is not previous criminal they are police officials and committed the offence of murder by exaggerating the use of force illegally. As far jurisdiction of this court regarding the offences discussed above whether fall under ATA or not, the answer of the same in absence of motive, design and intention of accused regarding terrorism as stipulated in Section-6(1)(a)(b) which is ***sine qua non*** *for attracting the jurisdiction of ATA 1997 is missing in this case; hence in the light of definition of terrorism as given by honorable Supreme Court in case of Ghulam Hussain reported in* ***PLD 2020 SC 61****, the instant case does not fall under the offences of ATA, 1997. In the light of the case of Ghulam Hussain (supra) even the cases not falling under the definition of terrorism, are yet to be triable by ATC Courts, but such courts cannot convict the accused under Special Law as has been held in Ghulam Hussain case in para-13 at page-125 as under:-*

> *"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 (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 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".*

> *49. In case of* ***Amjad Ali & Others reported in PLD 2017 SC 661*** *the capital sentence was maintained u/s 302 PPC while conviction u/s 7(a) of ATA, 1997 was set aside with observation that the case was rightly tried by Anti-Terrorism Court, same view was taken by honourable Supreme Court while maintaining capital sentence u/s 302 PPC by setting aside sentence under section 7 of ATA, 1997 in cases reported in* ***2020 SCMR 78*** *and* ***2019 SCMR 1362.***

21. It appears that the learned ATC has come to the correct conclusion that the offences so charged did not fall within the purview of Section 6 of the ATA by placing reliance on **Ghulam Hussain's case** (Supra) but appears to have erred in finding that it had jurisdiction to try the cases and render a judgment under the PPC even if the case did not fall within the purview of Section 6 of the ATA based on the fact that the offences so committed fell within the definition of a *scheduled offence* (which the learned trial court referred to as specified cases involving heinous offences) under the ATA by relying on 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).

22. The trial court rightly concluded that other types of heinous offences/cases not falling within the definition of Section 6 of the ATA could still be tried by the ATC under the ATA and sentence handed down on conviction under the ordinary law (not under the ATA) and the ATC would have the jurisdiction to try these heinous offences which are referred to in the ATA as *scheduled offences.*

23. The question therefore arises whether the offences/cases which the ATC convicted the appellants under the PPC did fall under the definition of a *scheduled offence* under the ATA which would give the ATC the jurisdiction to try and decide such cases.

24. A *scheduled offence* under the ATA as per Section 2(t) ATA is defined as an offence as set out in the third schedule of the ATA. The Third schedule is set out below for ease of reference:

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 of 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 explosives by any device, including bomb blast in the Court premises.

25. Thus, the ATC court has rightly found that it can decide cases falling within the Third Schedule of the ATA even if they do not amount to terrorism however we find the reliance of the learned trial court on the authorities mentioned above to be misplaced keeping in view the particular facts and circumstances of this case and the particular facts and circumstances of the cases relied upon when read with the Third Schedule at serial No.4 (1,2 and 3 having already been ruled out as Section 6 is not applicable to the instant case by both the trial court itself and this court in this judgment).

26. This is because the offences referred to in the judgments relied upon fell squarely within the ambit of the Third Schedule at serial No.4. Namely, they were offences committed in religious places or court premises (***Farooq Ahmed*** *(Supra) concerned firing at a Court premises,* ***Amjad Ali*** *(Supra) concerned firing at a mosque and* ***Muhammad Bilal*** *(supra) concerned firing at a court premises.* However the case before us does **not** meet any of the situations mentioned in the Third schedule at serial No's 1, 2, 3 or 4 and as such it appears **extremely unlikely** that the learned ATC had **jurisdiction** to decide these cases.

Having found that the learned ATC was extremely unlikely to have jurisdiction to decide the cases the next issue is what are the legal consequences which follow.

27. On the basis that this court found that the concerned ATC had no jurisdiction to hear the instant cases all learned counsel including the learned amicus curiae submitted that the legal consequences which should follow was the remand of the case to the ordinary trial courts **except** learned APG who contended that based on the cases which he had relied upon the ATC could still hand down judgments under the PPC. They all conceded with upmost deference and respect, **including the learned APG**, that the cases cited by them **including the learned APG** concerning the knocking out of the ATA convictions when the cases were tried by an ATC court and thereafter sentencing the accused under the ordinary law were all passed **prior** to **Ghulam Hussain's case** (Supra) which has now changed this jurisdictional position and the ability to hand down sentences for offences under the PPC only as it **specifically restricted** the jurisdiction of ATC's to offences under the ATA.

28. They also conceded with upmost deference and respect that in those cases no serious challenge had been made to the ATA provisions **and in particular when they were found inapplicable no arguments had been heard or considered on what would be the legal consequences of the ATC hearing the case and passing a judgment despite having no lawful jurisdiction.** Following **Ghulam Hussain's case** (Supra) it seems to be with upmost deference and respect quite apparent that the ATC cannot hear and decide a case **unless** it falls within Section 6 of the ATA or is a scheduled offense and right up to the time when it hears final arguments it **can and must** (especially as the language used in section 23 ATA is mandatory and not directory) transfer the case to an ordinary court for decision if based on the particular facts and circumstances of the case and evidence so recorded it neither falls within the ambit of section 6 ATA or is a scheduled offense under the ATA.

29. Furthermore, with upmost deference and respect to allow offences which did not fall within the ATA to be tried and decided by an ATC might defeat the purpose of establishing an ATC as distinct from the ordinary courts and would not have lead to the necessity of the Supreme Court clarifying the sort of case which can be heard by the ATC in **Ghulam Hussain's case** (Supra).

30. The question might also arise in terms of Articles 4 and 25 of the Constitution why a case triable under the ordinary law was tried by a special court (ATC) under a special law (ATA) especially when offences under the ATA are not compoundable and debar remission. It might be argued that no harm has

been done/prejudice caused to the accused by passing sentence under the ordinary law by an ATC but then what would be the purpose of Section 23 ATA or why not make all courts in which PPC offences have been committed additionally ATC courts and have no ordinary courts so as to enable ATC to try both PPC cases and ATC cases and then hand down a sentence based on whether the offence was found to fall within the ATA or PPC. This was clearly **not** the legislative intent. In this respect it is notable that offences not falling within the ATA can be tried by the ATC **provided that** they are part of the same transaction as an offence falling within the ATA. For example, a murder is committed which falls within the purview of the ATA and at the same time an unlicensed firearm is recovered from the accused from his arrest on the spot after the murder. Under these circumstances it makes complete sense to try both the offences together in a joint trial one being an ATA offence (murder with design, purpose and intent to create terror) and the other being a non ATA offence i.e possession of an unlicensed firearm under the Sindh Arms Act 2013 (SAA) as this will serve the ends of justice by assisting the court in ascertaining the true facts and circumstances of the case to enable it to reach a just and fair decision after appreciating the evidence on record as contemplated by Section 21 (M) ATA which ties in with Sections 17 and 19 of the ATA in terms of the procedure to be followed and powers to be exercised by the ATC whilst hearing such cases. The ATC can then convict for the murder under the ATA and also convict for an offense for the unlicensed weapon under the SAA which is not an offence falling within the purview of the ATA. For offences under the ATA also being tried along side non ATA offences but **linked/connected** to the offence under the ATA reliance is placed on the cases of **The State V Muhammed Asif** (Supra) and **Munawar Hussain** (Supra). **Significantly**, there is no provision in the ATA for a non ATA offence to be tried **exclusively** by an ATC i.e an offence not falling within the purview of Section 6 ATA or being a *scheduled offence* under the ATA.

31. Learned counsel for the appellants contended that the case should be remanded back to an ordinary trial court which should conduct a de novo trial especially as according to learned counsel for appellant Tariq Khan the appellant was not initially charged under the ATA but under the ordinary law by the ATC which then apparently switched the charge and surreptitiously added the ATA section to the charge. He produced a certified photo copy of this so called earlier charge without the ATA sections which had been replaced unbeknownst to the

appellant and as such the appellant did not know the charge which he had to defend himself against.

32. Learned APG, learned amicus curiae and learned counsel for the appellant in the appeal against acquittal contended that the case should be remanded back to the ordinary trial court which should only hear fresh arguments in the matter and then re write the judgment based on the evidence on record whilst ignoring any question and answer (if any) in the appellant's S.342 Cr.PC statements concerning any acts of terrorism since it has already been decided by this court that these were not cases which the ATC had the jurisdiction to try. Learned amicus curiae in support of his contentions in this respect has placed reliance on the cases of **Muhammad Yaqoob v. The State** (PLD 2019 Supreme Court 580), **Tahir Mehmood @ Achoo v. the State and another** (2018 SCMR 169), **Waris Ali and 5 others v. The State** (2017 SCMR 1572), Kashif **Ali v. The Judge, Anti-Terrorism Court No.II, Lahore and others** (PLD 2016 Supreme Court 951), **Ch. Shaukat Ali v. Haji Jan Muhammad and others** (2017 SCMR 533) and **Khuda-e-Noor v. The State** (PLD 2016 Supreme Court).

33. We have given careful and anxious consideration to the contentions of the parties to which stage the cases should be remanded to or otherwise dealt with.

34. With regard to the contention that the original charge had been tampered with we do not find that this would legally justify a de novo trial. Firstly we find this contention as some what of an after thought as no original of the so called "original charge" from which the certified copy allegedly came not mentioning the ATA was found with the R@P's and even otherwise the appellant never made any objection to this so called tampering with the charge throughout the trial despite it happening at the very outset of the trial. Even if it were the case that the charge was tampered with (which we do not find to be the case) we do not find such tampering to be of any particular significance based on the particular facts and circumstances of the instant case. This is because secondly the so called original charge apparently did **not** include the ATA however in our view this makes little, if any, difference as the appellant was **not** convicted under the ATA. Thirdly, even if there was no mention of the ATA in the so called tampered with charge all other parts of the charge remained exactly the same and as such the appellant was on full notice of the case in which he had to defend himself and thus no prejudice was caused to him. Fourthly when the charge was

amended to change the date of occurrence it made specific reference to offences under the ATA.

35. We must also consider this aspect of the case from a practical as well as legal perspective. For example, if after recording all the evidence in the instant cases but before hearing final arguments the trial court could have transferred this case under the ATA to the ordinary court for hearing if the learned trial judge came to the conclusion that he had no jurisdiction to hear this case and the case then on such transfer to the ordinary courts it would have proceeded before the ordinary court **at the stage of final arguments**. There would have been no need to conduct a de novo trial or re record any evidence. The ordinary court having competent jurisdiction would have simply heard final arguments and pronounced judgment.

36. In capital cases when a certain material witness is not cross examined by one of the defense counsel of the accused this court on occasion sets aside the impugned judgment and remands the case back to the concerned trial court for the **limited purpose** of re recording the evidence (evidence in chief, cross examination and re examination) of that witness before the accused defense counsel and thereafter rewriting the judgment without commencing a de novo trial as in such circumstances the convicted accused has been prejudiced in respect of only one witness whereas in the instant case the appellants have not been prejudiced at all. There is neither any need or justification for ordering a de novo trial in such cases.

37. In this case once we find the charge conveys to the accused what he has to defend himself against which we find it has done and that the evidence was recorded in accordance with law as it would have been before an ordinary court we find that the accused has not been prejudiced at trial and has been guaranteed his full due process rights as laid down under Article 10 (A) of the Constitution and as such there is no legal justification for remanding the case back for a do novo trial which if taken as a precedent would only leave the accused in jail longer and completely clogg up the work of the trial courts and delay trials being heard which would not be in the interests of justice and as such we find that both the cases should, **unless any other legal way out can be found**, be remanded to the concerned trial court for the purpose of hearing final arguments.

38. In this respect in the case of **Muhammed Bilal V Suleman** (2011 P,Cr.LJ 411) which was decided by a Division Bench (DB) of this court in a case where it was found that the ATC had no jurisdiction to hear the case but still handed down a conviction under the PPC it was held as under at P.415;

> *"9. Once the Anti-Terrorism Court has tried the offence and has formed an opinion that the case of scheduled offence is not made out, in terms of section 23 it will have no jurisdiction to pass any judgment in the case rather the same will have to be transferred to the Court having jurisdiction under the Code who will proceed with the trial of the offence as if it had taken cognizance of the offence.*
>
> *10. **In the present case, though the Anti-Terrorism Court was trying offence under section 6 of the Act but at the final conclusion came to an opinion that the offence under section 6 of the Act has not been proved and thus dropped the charge under the said section. The Court, however, came to conclusion that charge of section 507, PPC has been proved against the petitioner and by invoking the provision of section 17 of the Act proceeded to convict the petitioner under section 507, PPC, it ought not to have proceeded to convict and sentence the petitioner for the reason that section 23 of the Act itself does not give jurisdiction to the Anti-Terrorism Court to pass judgment on case of a non-scheduled offence.** In the case of Nasir Masih v. The State and another (2008 PCr.LJ 713), a Full Bench of Lahore High Court has observed that mere commencement of trial is not a ground for disallowing the prayer of the petitioner as under section 23 of the Act, Anti-Terrorism Court in case of non-scheduled offence is duty bound to transfer in to the Court of ordinary jurisdiction.*
>
> *11. In view of this legal position, only result that can follow from it is that the impugned judgment is without jurisdiction and nullity in the eye of law and cannot be maintained.*
>
> *12. **Having come to such conclusion the next point that needs to be considered is as to what is to be done about impugned judgment, which as discussed above, has been found to be without jurisdiction and nullity in the eye of law. The remedy against the judgment of Anti-Terrorism Court is by way of an appeal to the High Court under Section 25 of the Act for which the limitation period is fifteen days from the passing of sentence. Thus, in order to do complete justice between the parties and to give effect to mandate of law, we convert this Constitutional Petition into Special Anti-Terrorism Appeal. Though the appeal is time-barred but as the very judgment of Anti Terrorism Court is without jurisdiction and nullity in the eye of law, no limitation against such judgment will run against the appellant. In this respect reference is made to the case of Muhammad Sharif v The State (2005 PCr.LJ 941) (supra).***
>
> ***13. We, therefore, allow this appeal, set aside the impugned judgment and remand the matter back to the Anti-Terrorism Court-I, Karachi for transmitting the case to the Court of Sessions Judge, Karachi-South for trial in accordance with law."*** (bold added)

39. Another DB of this court recently in the case of **Muhammed Ahmed Siddiqui V Abdul Abid** (PLD 2021 Sindh 1) albeit in a civil case where it found that the concerned court had no jurisdiction to hear and decide the case rejected the idea of a de novo trial and instead sent the case to the correct court to decide without the need of re recording any evidence at P.13. para 16 in the following terms;

> *"16. The judgment is based on erroneous reasoning and incorrect exposition of law therefore the impugned judgment and decree dated 31-05-2018 are set side.* ***Since the evidence has already been recorded therefore to save time and avoid further protracted litigation, we do not deem it appropriate to direct de novo trial, however, the matter is remanded back to the learned District and Sessions Judge, Karachi, Central to consign the matter to the concerned Senior Civil Judge as an ordinary suit for decision on merits after considering the pleadings and evidence lead by the parties."*** (bold added)

40. Another DB, except this time from the Peshawar High Court, in the case of **Muhammed Faizan V The State** (2016 P.Cr.LJ 897) in similar circumstances to the instant cases where it was argued that a de novo trial should be held the court came to the conclusion that this was not necessary and that the case be transferred to the ordinary courts to be continued from the at the stage of final arguments without re recording any evidence at P.882 in the following terms at para's 5, 6 and 8;

> ***"5. The word 'shall' used in the section leaves no discretion with the Anti-Terrorisms Court once it forms opinion that the offence is not a scheduled offence. In this case, there is no doubt that the learned Anti-Terrorism Court formed the opinion that the offences were not scheduled offences, therefore, it was incumbent upon the learned Judge Anti-Terrorisms Court to transfer the case for trial to the Court of ordinary jurisdiction. The language of the section is also clear with regard to the stage when the case can be transferred under the provision, which is after taking cognizance of the offence by the Anti-Terrorisms Court. Obviously, not only cognizance was taken by the Anti-Terrorisms Court, but trial was also conducted and judgment was rendered on the conclusion of trial.***
>
> *6. Having said that, we found no second opinion about remand of the case to the Court of ordinary jurisdiction under the Cr.P.C. for proceeding with trial of the offences as if it had taken cognizance of the case. It may not be out of place to point out here that the learned Judge, ATC, proceeded on wrong premise while holding that superior Courts had decided cases under ordinary law without de novo trials, as there was difference in decision of cases in appeal and decision at the trial stage.* ***Anyhow, it is an established principle of law that a judgment passed without jurisdiction is nullity in the eye of law. There was also consensus that the learned Judge, ATC, arrived at the conclusion***

that the offences with which the accused were not scheduled offences while recording judgment, therefore, there was no need of de novo trial, and the ordinary Court was to proceed with the case from the stage of final decision.

7. There were, however, heated arguments whether the accused would enjoy the pre-judgment status i.e. to remain on bail or confine in jail, or their conviction in the case and sentence awarded to them would have any bearing on their erstwhile status, but the arguments ended on the agreed note that with setting aside the judgment, conviction and sentence, the accused would revert back to their pre-judgment position.

8. In view of the forgoing discussion, the impugned judgment dated 05.03.2015 of the learned Judge, ATC, Abbottabad is set aside, together with the conviction and sentences thereunder; ***and the case stands transferred to the Court of learned Sessions Judge, Mansehra, for decision afresh after providing opportunity of hearing to the parties."*** (bold added)

41. In the cases in hand even at the time of final arguments the ATC *could* have transferred these cases to the ordinary courts if it was of the view that the cases did not fall under the ATA and they would have continued at the stage of final arguments without the need to re record any evidence thus to us it is quite logical that having held that it was **extremely unlikely** that the cases fell within the ambit of the ATA **and unless another legal way out can be found** ,the cases ought to have been transferred to the ordinary courts for the limited purpose of hearing final arguments and then rewriting fresh judgments.

A Legal Alternative to remand.

42. There might yet be another legal alternative, as opposed to remand, of dealing with such type of cases where an ATC has tried a person and convicted him for an offence under the PPC which prima facie did not fall under the ambit of the ATA and which prima facie the ATC had no jurisdiction to hear and decide keeping in view the following factors;

(a) On account of the definition of an offence falling under Section 6 of the ATA since **Ghulam Hussain's case** (Supra) it has become in many cases increasingly difficult for the ATC to determine whether the case is one which falls within the purview of the ATA unless it is a scheduled offense not in the Third Schedule and not falling within Section 6 ATA. Thus, if the ATC convicts an accused under section 6 of the ATA or for a scheduled offence the situation may arise, **as in this case,** of the appellant first arguing on the point of jurisdiction i.e whether the offence fell within the purview of the ATA. If this court on appeal was to find that the offence so convicted was not an ATA offence but only an offence under the PPC which could not be tried by the ATC as it lacked jurisdiction then in a number of appeals this would result in the case being remanded back to the ordinary courts to re hear arguments and then re write the judgment.

(b) This would result in the already huge back log of criminal cases growing further before the trial courts which would further delay the deciding of criminal cases which would leave the accused rotting in jail for even longer before there appeal was decided.

(c) The reality it appears is that in a majority of cases where the ATA offences were knocked out of the charge by this court on appeal and which were sent back to the ordinary courts to re hear final arguments and then re writing the judgments the judgment is extremely likely to be the same **except** the conviction would only be under the ordinary law (i.e PPC) and not under the ATA since logically if an accused is acquitted of the ordinary offence then it would have most probably followed that he would also have been acquitted under the ATA however when an accused is convicted under the ATA he is usually convicted under the ordinary law for PPC offences **read with** the ATA as well so logically if he is convicted of the ordinary PPC offences he will still be convicted of the same once the case is remanded **except** not being read with the ATA. This is because in essence the actus reus and mens rea of the ordinary offence have already been proven but the additional special mens rea/requirements (design, purpose and intent) for terrorism will simply be lacking as defined in the ATA as interpreted by the Supreme Court in **Ghulam Hussain's case** (Supra)

(d) The question then emerges of what useful purpose or benefit will such remand serve for the appellant who will remain behind bars during this period of remand and will most likely be convicted for the PPC offences for which he was charged. **The answer appears to be very little, if any, and will in fact be extremely likely to only serve to prejudice him further as he is likely to be again convicted in respect of the ordinary PPC offences and his appeal further delayed.**

(e) In our view we find that it would be more practical for the speedy and efficient administration of criminal justice in this country **and benefit the appellant** if this court took a dynamic approach and in the interests of justice and decided ATA appeals whilst considering the jurisdictional aspects as well as merits at the same time.

(f) To take any other approach might cause chaos in the hearing of ATC appeals whereby cases might continually be remanded which also may raise issues under Articles 10(A) and 13 of the Constitution.

(g) If this court heard such cases the result would most likely be as follows;

(i) If this court found that the ATA was attracted and the PPC offences proven the conviction would be maintained and the appellant could then **without delay** move the Supreme Court in appeal.

(ii) If this court found that the ATA was not attracted but the PPC offences had been proven then this court would acquit the appellant in respect of the ATA offences but maintain his conviction in respect of the PPC offences and then the appellant could **once again without delay** move the Supreme Court in appeal

(iii) If this court found that the ATA was not attracted and the PPC offences had not been proven then this court would acquit the

accused of the PPC offences and he would be released unless wanted in any custody case.

43. We find that the above approach as mentioned in para 42 to be preferable for all concerned (the appellant, the State and the efficient administration of the criminal justice system). The question is under the Constitution and the law can this court proceed in this manner? We find that we can based on the following reasons;

(a) We have already found that if we were to remand the cases it would be at the stage of final arguments and re writing of the judgment and thus in effect we have already found that all the evidence already recorded remains in tact.

(b) That appeals under the ATA are moved under section 25 ATA to the High Court.

(c) That appeals to the High Court are regulated by section 423 Cr.PC which is set out below for ease of reference;

"Section 423 Cr.PC. **Powers of Appellate Court in disposing of appeal.**---(1) The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears, and the Public Prosecutor, if he appears, and, in case of an appeal under section 411-A, subsection (2) or section 417, the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering dismiss the appeal, or may –

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be retired or sent for trial to the Court of Session or the High Court, as the case may be, or find him guilty and pass sentence on him according to law;

(b) in an appeal from a conviction, (1) reverse the finding and sentence and acquit or discharge the accused, or order him to be retired by a Court of competent jurisdiction subordinate to such Appellate Court or sent for trial, or

(2) alter the finding, maintaining the sentence, or , with or without altering the finding, reduce the sentence, or

(3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of section 106, sub-section (3), not so as to enhance the same.

(c) in an appeal from any other order, alter or reverse such order;

(d) make any amendment or any consequential or incidental order that may be just or proper.

44. A plain reading of section 423 Cr.PC appears to indicate that this court on appeal has the power to knock out the ATC conviction whilst maintaining a conviction under the PPC or acquit the appellant completely. The only restriction appears to be on enhancement of such sentences. This appears to the view adopted by the Supreme Court prior to the **Ghulam Hussian's case** (Supra) as shown through the cases cited by the learned APG and ***even after* Ghulam Hussains's case** (Supra) it appears that the Supreme Court is sticking to this approach. i.e when an appeal passed by an ATC comes before it it can and does some times set aside the ATC conviction but instead of remanding the case for arguments on the PPC offences and ordering the re writing of the judgment either convicts or acquits the appellant for the PPC offence so charged. For example, in the recent case of **Hadi Bux V State** (Criminal Appeal No.348 of 2020) dated 29.11.2021 the Supreme Court whilst hearing an appeal against conviction **passed by an ATC** and upheld by this court upheld the conviction under section 365 (A) PPC but acquitted the appellants under the ATA in the following terms at para's 2, 3 and 4 as set out hereunder in material part;

> *"2.....Both the courts below had rightly appraised and reappraised the entire evidence and found that prosecution had proved the case against the appellants and also concurrently concluded regarding the guilt of the appellants. We on our independent evaluation of the evidence available are not able to differ with the said conclusion so far offence under section 365-A PPC is concerned.* ***Consequently, this appeal to the extent of conviction under section 365-A PPC read with section 34 PPC is maintained and sentence of imprisonment for life*** *and forfeiture of property to the extent of rupees fifty thousand each and in case of default to further undergo six months rigorous imprisonment with benefit of section 382-B, Cr.P.C., is maintained and the appeal to this extent is dismissed.*
>
> *3.* ***However, we observe that there is nothing on record to prove that this occurrence has any nexus with terrorism nor any witness said so. In that eventuality, in view of a larger Bench judgment of this Court reported as Ghulam Hussain v. the State (PLD 2020 SC 61), the conviction under section 7(e) of the Act 1997 is not sustainable. Consequently, the said conviction and sentence under section 7(e) of the Act, 1997 is set aside and the appellants are acquitted only to the extent of 7(e) of the Act 1997. However, as already stated their conviction and sentence under section 365-A PPC is maintained.***
>
> *4. With the above modification in the conviction and sentence, this appeal is* ***partly allowed".*** (bold added)

45. Thus, based on the above discussion and being fortified by the above referred recent Supreme Court judgment in the interests of justice and for the benefit of the appellants we hereby hold that this court can hear and decide the

appeals before us even if *prima facie* the jurisdiction of the ATC's to hear such cases might have been extremely doubtful.

46. Before parting with this judgment we would like to express our gratitude to all the learned counsel for their able assistance especially that of learned amicus curiae Mr.Mahmood Akhtar Quereshi.

47. The office shall fix the appeals for regular hearing on merits on **26.01.2022 at 10:00 a.m** with notice to all concerned.