

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Criminal Misc. Application No.D-52 of 2015

Present:

Mr. Justice Mahmood A. Khan

Mr. Justice Mohammad Karim Khan Agha

Applicant

Dilshad

Through Mr. Sohail Ahmed Kosho,  
Advocate.

Respondent

The State

Through Mr. Saleem Akhtar Burino,  
Addl. Prosecutor General.

Date of Hearing:

15-02-2017

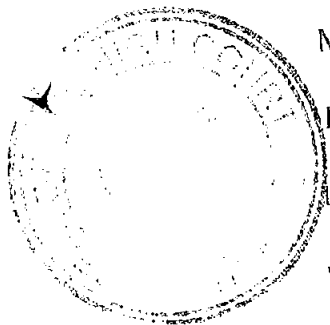
Date of Order:

08-03-2017

**ORDER**

Mohammed Karim Khan Agha, J. By this order we propose to dispose of Cr.Misc Application U/S 561-A Cr.PC through which the applicant (Dilshad) has prayed that this Hon'ble Court set aside order dated 12-01-2015 whereby the learned Anti Terrorism Court (ATC) Khairpur had declined transferring his case from the Anti Terrorism courts to the ordinary courts and for this court to transfer the case to the ordinary court.

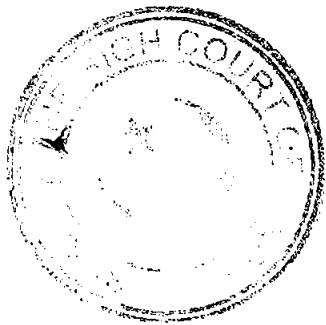
2 The applicant has been booked under section 324, 353, 402, 399 PPC, section 7 Anti Terrorism Act 1997 (ATA), section 23(i) (a) in crime No.50/2014 at PS Tando Masti. The brief facts of the case as per F.I.R are that the F.I.R was lodged on behalf of the State by complainant SIP Dariya Khan Jatoi SHO PS Tando Masti Khan who along with his subordinate staff duly armed and in uniform on 16.04.2014 were patrolling in a police mobile when they received spy information that notorious dacoit Muhammad Ramzan alias Madoo along with 8/9 accomplices were present at Rashdi minor near the national highway fully armed and were



preparing to kidnap any passerby on the road. The police proceeded to the site and also called for backup at approximately 0630 hours where they saw and identified the accused along with Muhammad Ramzan alias Madoo and his accomplices who were fully armed. When the police party ordered them to drop their weapons and to surrender the accused started firing at the police party with intention to murder them. The police retaliated in self defence and were reinforced by backup from PS Gumbat. During the encounter the accused fired at the police in order to create terror and the encounter lasted for about 15 minutes wherein one of the accused was wounded. After the encounter the accused were arrested and various fire arms along with ammunitions were recovered from them. None of the fire arms were licensed, empties were recovered from the scene and some of the accused managed to flee.

3. After registration of the F.I.R and usual investigation the police submitted the challans before Special Judge ATC, Khairpur which were registered as special case No.48/2014. The applicant moved an application under section 23 of the (ATA) (Application No.2/2015) in the Court of Special Court ATC Khairpur seeking the transfer of the case from the ATC to the ordinary court since in essence the case was not one which fell under the purview of ATA. The learned ATC Judge by order dated 12.01.2015 rejected the aforesaid application (the impugned order) which the applicant has challenged before this court.

4. Learned counsel for the applicant submitted that no encounter took place with the police whatsoever and that the F.I.R has been concocted by the police in order to show their efficiency in the ongoing Karachi operation against criminals. Even otherwise he submitted that the case did not fall within the purview of the ATA as no one was present at the place of the encounter which was near the National Highway which did not terrorize any member of the public. In support of



his contentions he placed reliance on two similar cases in which the ATC court had allowed the transfer of the case from the ATC court to the ordinary court. He also placed reliance on the case of **Wahid Bux alias Wahidoo v/s The State** (2016 P.Cr.L.J 989), **Muhammed Arshad Latif V Special Judge Anti Terrorism** (2001 P.Cr.L.J) and **Liaquat Ali V Special Judge Anti terrorism Court No.1 Gujranwalla** (2007 YLR 1222).

5. On the other hand learned APG fully supported the impugned order and submitted that the application under section 561-A Cr.P.C was not maintainable as the matter had to be through a constitutional petition. In support of this contention he placed reliance on **State V Dr.Khalid Moin** ( 2000 YLR 2668).

6. Even otherwise according to learned APG based on the F.I.R the provisions of the ATA were fully attracted as the applicant had fired upon police officers while performing their lawful duty and in doing so had created a sense of fear and insecurity in society.

7. We have heard learned counsel for the parties, considered the relevant law and the cases cited by them at the bar.

8. At the outset it is submitted that this court always has the power in appropriate cases in the interests of justice to convert a section 561-A Cr.P.C application into a constitutional petition based on the facts and circumstances of that particular case and accordingly we do so in this case or even use its inherent jurisdiction. If any further authority is required on this point reference may be made to the recent ruling of the Hon'ble Supreme Court in the case of **Muhammed**





Akram V DCO, Tahim Yar Khan (2017 SCMR 56) which held as under at P.59.Para 7.

"7. The Courts are sanctuaries of justice, and in exercise of authority to do *ex debito justitiae*, that is to say remedy a wrong and to suppress a mischief to which a litigant is entitled. No fetters or bar could be placed on the High Court and or this court to convert and treat one type of proceeding into another type into another and proceed to decide the matter either itself provided it has jurisdiction over the lis before it in exercise of another jurisdiction vested in the very court or may remit the lis to the competent authority/forum or court for decision on merits. Courts have been treating and or converting appeal into revisions and vice versa and Constitution Petitions into appeal or revision and vice versa. Even time consumed pursuing remedy before a wrong forum in appropriate cases could always be condoned (*see Shamsul Haq and others v. Mst. Ghoti and 8 others (1991 SCMR 1135)*).

9. Terrorism is defined in S.6 of the ATA which reads 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);
- (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". (bold added)

10. Thus, ordinarily there are 2 limbs which need to be made out before an act can be classified as one of terrorism and fall within the purview of the ATA. i.e S.6 (1) (a) and S.6 (1) (b) or (c). Based on the facts and circumstances of this case it would appear that it is necessary to satisfy S.6 (1) (a) and (b) along with the additional element of showing the requisite mens rea i.e intent.





11. The Hon'ble Supreme Court in the recent of case of **Shahbaz Khan V Special Judge Anti Terrorism Court Lahore** (PLD SC 2016 1) at P.6 held as under .

"7. It is clear from a textual reading of Section 6 of ATA that an action categorized in subsection (2) thereof constitutes the offence of terrorism when according to Section 6(1)(b) *ibid* it is "designed" to, inter alia, intimidate or overawe the public or to create a sense of fear or insecurity in society. **Therefore, the three ingredients of the offence of terrorism under Section 6(1) (a) and (b) of ATA are firstly, taking of action specified in Section 6(2) of ATA; secondly, that action is committed with design, intention and mens rea; and thirdly, it has the impact of causing intimidation, awe, fear and insecurity in the public or society.**

12. Sub Clause 2(n) ATA provides as under:

**"involves serious violence against a member of the police force, armed forces, civil armed forces, or a public servant".**

13. Thus, in our view S.6 (1) (a) ATA has been satisfied.

14. The issue is now therefore whether S.6 (1) (b) has been satisfied namely whether the use or threat of action, **"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"; along with the requisite mens rea.**

15. The facts and circumstances of this case, although disputed, as per the police version is that an encounter involving at least 7 to 10 police officers took place involving 8 to 10 criminals both armed with heavy and sophisticated weapons which lasted for about 15 minutes. No body from the police side was injured and nor was any damage caused to any police mobile during this encounter which





makes this a case of ineffective firing vis a vis the police and tends to cast doubt on their version of events.

16. There are no independent eye witnesses or Mashirs.

17. The incident took place in an isolated area near the national highway where very few members of the public, if any, were present.

18. Thus, when we consider the above facts and circumstances we find that we are unable to agree with the finding in the impugned order that the encounter, "created panic terror and sense of insecurity in the mind of persons of the locality and the element of terrorism as defined in S.6 of the ATA 1997 is fully attracted"

19. On the contrary, based on the facts and circumstances of the case we find that the action does **not** fall within the definition of S.6 ATA since it has not been shown to have been committed with design, intention and mens rea; and it has **not** had the impact of causing intimidation, awe, fear and insecurity in the public or society for the simple reason that the incident occurred in an isolated place where no body apart from the police and alleged dacoits were present.

20. Although we may be passing through dangerous and difficult times as a State in connection with the so called militants attacking the lives and property of innocent citizens we cannot use such circumstances as an excuse to blindly brand any act of violence as one of terrorism simply because it is convenient for us to do so. As a State we must endeavour, even in the most testing of times, to ensure that the appropriate legal ingredients are present in each offense that the State charges a citizen with as we must also ensure that the rights of the citizens to be treated in accordance with the law and the Constitution are not sacrificed at the altar of the so



called "war on terror" or "Karachi operation." It is also observed that notwithstanding such testing times the Law Enforcement Agencies (LEA's) are required to act strictly in accordance with the Constitution and the law in performing their functions and in the event that members of LEA's are found to be involved in false encounters or extra judicial killings or otherwise injuring suspects/accused while detained by them they shall also face the full force of the law. It is in such testing times that we need to show our maturity as a State and a functioning democracy by strictly adhering to the Constitution and ensuring that the rule of law and due process rights are upheld in respect of all citizens (even those suspected of the most heinous crimes)

21. The office is directed to renumber this matter as a constitutional petition

22. Thus, we set aside the impugned order, allow the application and direct that the ATC hearing this case return the case to the concerned ordinary criminal court with immediate effect in accordance with law.

23. These are the reasons for our short order dated 15.02.2017.

Sd/-  
MO HAMMAD KARIM KHAN AGHA,  
JUDGE.

Sd/-  
MAJMOOD A. KHAN,  
JUDGE.

SUKKUR  
DATED: 08-03-2017

CERTIFIED TO BE TRUE COPY

TYPED BY

COMPARED BY

READ BY

ASSISTANT REGISTRAR.

