IN THE HIGH COURT OF SINDH BENCH AT SUKKUR

C.P. No.D-623 of 2020
(Haji Muhammad Siddique vs. The Province of Sindh through Home Secretary, Karachi and 04 others)

C.P. No.D-1272 of 2020
(Mst. Salma @ Ume-Salma vs. Province of Sindh, through Secretary Home Department Sindh Secretariat, Karachi and 04 others)

Present:
Mr. Nazar Akbar, J.
Mr. Muhammad Faisal Kamal Alam, J.

Date of hearing : 16.03.2021.

C.P. No.D-623 of 2020

Petitioner
[Haji Muhammad Siddique] : Through Mr. A. R. Farooque Pirzada, Advocate.

Respondent No.1
[The Province of Sindh through Home Secretary, Karachi].

Respondent No.2
[The Senior Superintendent of Police, Naushahro Feroze].

Respondent No.3
[The Investigation Officer/SHO PS Bhirya City].

Respondent No.5
[Anti-Terrorism Court N/Feroze] : Through Syed Sardar Ali Shah Rizvi, Deputy Prosecutor General.

Respondent No.4
[Ali Raza son of Mahi Khan] : Nemo.

C.P. No.D-1272 of 2020

Petitioner
[Mst. Salma @ Ume-Salma] : Through Mr. Achar Khan Gabol, Advocate.

Respondent No.1 :
[Province of Sindh, through Secretary Home Department Sindh Secretariat, Karachi]

Respondent No.2
[The Senior Superintendent of
Police, District N/Feroze].

Respondent No.3
[The Investigation Officer/SHO
PS Bhiria].

Respondent No.5
[Anti-Terrorism Court N/Feroze] : Through Syed Sardar Ali Shah Rizvi, Deputy Prosecutor General.

Respondent No.4
[Ali Raza son of Mahi Khan]. : Nemo.

O R D E R

Muhammad Faisal Kamal Alam, J: Common question is involved in both the above Constitutional Petitions, therefore, they are decided by this single order.

2. The learned trial Court has dismissed both the Applications of present Petitioners, filed under Section 23 of the Anti-Terrorism Act, 1997, seeking transfer of case in Crime No.15 of 2020 [FIR No.15 of 2020] holding that the incident of murder of Shahnaz Ansari, who was sister of Complainant/Respondent No.4 [Ali Raza], does fall under the ambit of an act of terrorism as mentioned in Sections 6 and 7 of the Anti-Terrorist Act, 1997, thus, the above case cannot be transferred to the Court of Session.

3. Both learned Advocates for the respective Petitioners have argued that the learned Court while passing the impugned Order has not considered the latest decision of the Hon'ble Supreme Court handed down in Ghulam Hussain case, reported in **PLD 2020 Supreme Court page-61** (Ghulam Hussain and others *versus* The State) and the subsequent Judgment of the Apex Court in the case of Sadiqullah and another versus The State-**2020 SCMR page-1422.** Contended that FIR itself suggests that there was enmity between the Complainant and

accused party on the issue of inheritance and thus the incident in which the above lady lost her life does not attract Sections 6 and 7 of the Anti-Terrorism Act, 1997, **(the said Act)**. Contended that the alleged incident happened in a room and hence there is no question of spreading panic or insecurity in public, which is one of the basic elements to invoke above provisions of the said Act.

4. The learned Deputy Prosecutor General has supported the impugned Order by contending that it was a gruesome incident where an elected representative (Member of Provincial Assembly-MPA), was gunned down in front of other persons, which has created a sense of fear and spread panic amongst people of the locality. He has cited the following two unreported decisions of learned Division Bench of this Court in support of his arguments_

i. Criminal Misc. Applications No.D-17 and D-31 of 2020 [date of hearing and order 24.02.2021].

ii. Criminal Revision Application No.D-11 of 2020 [date of hearing and announcement, viz. 17.11.2020 and 08.12.2020, respectively].

5. At present only facts floating on the surface can be discussed in order to determine the applicability of the cited case law mentioned in the preceding paragraphs, because trial is *sub judice* before the learned Anti-Terrorism Court at Sukkur. Complainant is Respondent No.4 whose above named sister was gunned down in a 'Chehlum' Ceremony. Complainant's another sister Mst. Shabana (**the widow**) was married to Zahid Hussain Khokar and from the wedlock three sons and one daughter are born. The said Zahid Hussain was brother and relative of the accused persons including the present Petitioners, who died on 05.02.2020 and left behind the inheritance, which includes agriculture land. Brother and nephew of (late) Zahid Hussain, namely, Akhtar Khokhar and Waqar Khokhar extended threats (as per contents of

FIR) to the deceased's widow and children and wanted to usurp their share in the inheritance. Mst. Shahnaz Ansari (sister of the widow) allegedly intervened in the matter so that her sister, Mst. Shabana and her children should get there right in the inheritance.

6. The reported decision of Hon'ble Supreme Court handed down in the case of Ghulam Hussain ***(supra)*** has been examined. The second reported decision of *Sadiq Ullah* relied upon by the Petitioners' side has basically reiterated the view mentioned in the Ghulam Hussain case. The Apex Court in the latter case [Ghulam Hussain], *inter alia*, has reconciled the case law developed hitherto concerning the term 'Terrorism' as envisaged in Section 6 of the Anti-Terrorism Act, 1997. The concluding paragraphs of this leading judgment are 15 and 16. It would be advantageous to reproduce herein under the relevant portion of paragraph-15 and the entire paragraph-16.

> ***"15…..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 <u>or the public or a section of the public or community</u> 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…. 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 fall out or an unintended consequence of a private crime."***

> "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 clause (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.***"

7. From the above facts relating to the present Petitions, it is not difficult to observe that there was no personal enmity between the slain lady (Shahnaz Ansari) and accused persons/ in-laws of her sister Mst. Shabana Khokar. Conversely, the dispute about inheritance was between family of the above deceased and his widow [Mst. Shabana Khokar] and children, that is, sister of late Shahnaz Ansari. No injury was caused to the said Widow [Mst. Shabana Khokar] during incident of firing on 15-2-2020; but on that fateful day relatives (accused) of deceased husband of Mst. Shabana, **only targeted the above named lady** at the house of above widow which is situated in village Murad Khokar, that is, the place of accused persons. In FIR the Respondent No.4/Complainant has described specific role of each accused including the present Petitioners.

8. It is also an undeniable irony that when it comes to distribution of inheritance in accordance with the Sharia, female members of a family, particularly in the rural areas, different deceptive methods are adopted to deprive women/female members from their rightful share in the inheritance. In this regard there are numerous reported judgments, including the leading decision handed down by the Hon'ble Supreme Court in the case of *Ghulam Ali and 2 others versus Mst. Ghulam Sarwar Naqvi*, reported in **PLD 1990 Supreme Court page 1.** The Apex Court in this decision has mentioned the historical background of this evil practice while recommending that necessary legislation is required to forestall this menace in the society. The Hon'able Supreme Court has held that this unlawful practice of depriving women of their rightful share in the inheritance is a matter of **public policy.** Eventually legislative amendments were introduced in Pakistan, including 'Criminal Law (Third Amendment) Act, 2011', *inter alia*, introducing **Section 498 A,** in the Pakistan Penal Code, whereby, if through deceitful or illegal means, a woman is deprived of inheritance, then offender will be punished with imprisonment which may extend to ten years but not less than five years or with a fine of one million rupees or both.

9. It has also come on record in the present case that deceased lady (as per the prosecution version) had tried that her widow sister Mst. Shabana and her children should be given their due share in the inheritance, which infuriated the accused persons, resulting in killing of an elected representative of the area and that too a lady. ***Prima facie*** as already observed earlier, that there is no element of enmity between the victim lady and accused persons; but, the murder was committed with a motive and design to intimidate and overawe the community of the victim lady and family of her widow sister Mst. Shabana by conveying a message, that demanding a share in the inheritance can result in such a

horrific incident. One clear aspect of this gruesome incident is that various judicial pronouncements and legislative amendments made so far about inheritance rights of women, have been seriously jeopardized. The act complained of, in our considered view falls within the ambit of clause (b) of section 6 (*supra*), because it has far reaching consequences, at least in the rural areas of Sindh. It has all the characteristics of challenging the public policy concerning the issue of inheritance and rendering legislative amendments ineffective, resulting in grossly disturbing the social order. Admittedly the incident that happened has resulted in the death of the above named lady, who was holding a public office at the relevant time; thus Clause (b) of subsection (2) and clause (a) of sub-section (2) of Section 6 of the Anti-Terrorism Act 1997 is attracted to this incident**.**

10. To the facts of present Petitions the two unreported decisions of this Court, relied upon by the learned Deputy Prosecutor General, is applicable, which are also based on the two decisions of Honourable Supreme Court as mentioned in the aforesaid two decisions. Relevant portion of the Order given in Criminal Revision No.D-11 of 2020, is reproduced herein under_

> **"*8. Without entering much into the merit of the case, lest it may prejudice the same at trial, it is observed that the present case pertains to a triple murder case where several facts need to be ascertained. A perusal of record transpires that the alleged offence was committed inside a house and it is an admitted position that after the submission of challan, the prosecution could not examine any ocular / circumstantial / medical / expert witnesses nor any other material evidence was available to ascertain whether any panic, insecurity or fear had been instilled in the vicinity or whether the people of***

> ***general public had even gotten news of the same and had gotten frightened. In the absence of such evidence, this Court would like to remain discreet while attending to this controversy and is left with no choice but to dispose of the present application while holding that the mentioned points may be raised before the trial Court at the recording of evidence of complainant and eye witnesses and after establishment of the said points, the applicant will be at the liberty to repeat the application for transfer of the case from Anti-Terrorism Court to a Court of plenary jurisdiction.*"**

11. At the same time it is clarified that the trial is pending, therefore, the guilt of accused persons in order to connect them with the commission of the offence, is yet to be proved. After the testimonies of witnesses, if it appears that the case does not have characteristics of Section 6 of the said Act, 1997, then Petitioner would be at liberty to file fresh application under Section 23 of the said Act, for transfer of case, which shall be decided on its own merits by the learned Anti-Terrorism Court.

12. Consequently, the impugned Order does not suffer from any illegality requiring interference in the present proceeding and hence both the subject Petitions are dismissed. It is clarified that any observation made hereinabove is of tentative nature and will not in any way influence the trial, decision of any bail application and the final decision of the learned Trial Court.

JUDGE

ADDITIONAL/ DISSENTING NOTE

NAZAR AKBAR, J.- I have carefully gone through the judgment authored by my learned brother Muhammad Faisal Kamal Alam.J., and

respectfully disagree with the conclusion drawn by my brother on the basis of two unreported judgments of this Court viz (i) Criminal Misc. Application No.D-17 and D-31 of 2020 decided on 24.02.2021 and (ii) Criminal Revision Application No.D-11 of 2020 decided on 08.12.2020.

2. Briefly, the Petitioners have challenged an order of dismissal of their respective applications under **Section 23** of the Anti-Terrorism Act, 1997 (ATA 1997) by the Anti-Terrorism Court, Naushehro Feroze in Crime No.15/2020. In the two unreported judgments my brothers have also referred to the latest judgment of the Hon'ble Supreme Court on the controversy of "terrorism" as defined in **Section 6** of ATA, 1997 in the case of Ghulam Hussain vs. the State (**PLD 2020 SC 61**) but the dictum laid down in the said case has not been followed. In my humble view, the Hon'ble Supreme Court has left no room for High Court to allow anti-terrorism court to exercise its jurisdiction to try an offence under **Section 6** of the ATA, 1997 when the action complaint of is **not** designed to achieve any objective specified under **Section 6(1)(b) and (c)** of the ATA, 1997. In the case of Ghulam Hussain, a larger bench of Supreme Court has examined series of case laws in which the Hon'ble Judges have dealt with the meaning and scope of the term "terrorism" and redefined it to be followed by all the counts in terms of **Article 189** of the Constitution of Pakistan, 1973. A larger bench of 7 Member Hon'ble Judges of Supreme Court was constituted with specific purpose to reconcile the different views expressed by various Courts on the term "terrorism". The judgment begins with the following observations:-

> The meanings, scope and import of the term 'terrorism' defined in section 6 of the Anti-Terrorism Act 1997, as amended from time to time, have been a subject of controversy in this Court for some time and different Honourable Benches of varying strength deciding different cases have differed with each other in the past and have understood and interpreted the said term differently. It is in this backdrop that the present Larger

Bench has been constituted so as to put an end to that controversy.

3. In Ghulam Hussain's case seven Members Bench of the Hon'ble Supreme Court has distinguished about 20 case laws and held not to be followed and relied upon and referred other 20 case laws for giving final authoritative definition of terrorism summed up in paras- 15 and 16 of the said judgment. Relevant paras-15 and 16 from the Hon'ble Supreme Court judgment are reproduced below:-

> 15. The resume of our legislative developments in the field of terrorism shows, as already observed in the case of Basharat Ali (supra), that with different laws and definitions of terrorist act or terrorism the emphasis has been shifting from one criterion to another including the gravity of the act, lethal nature of the weapon used, plurality of culprits, number of victims, impact created by the act and effect of fear and insecurity brought about or likely to be created in the society by the action. The last definition of a 'terrorist act' contained in section 6 of the Anti-Terrorism Act, 1997 squarely focused on the effect of fear and insecurity intended to be created by the act or actually created by the act or the act having the potential of creating such an effect of fear and insecurity in the society. **It, however, appears that subsequently the legislature did not feel convinced of the aptness or correctness of that definition and resultantly the erstwhile definition of a 'terrorist act' contained in section 6 of the Anti-Terrorism Act, 1997 was repealed and a totally fresh and new definition of 'terrorism' was introduced through an amended section 6 of the Anti-Terrorism Act, 1997.** The legislature had probably realized by then that an effect of an act may not always be a correct indicator of the nature of such an act as every crime, especially of violence against person or property, does create some sense of fear and insecurity in some section of the society and a definition of terrorism based upon the magnitude or potential of an effect created or intended to be created or having a potential of creating would necessarily require a premature, speculative and imaginary quantification of the effect so as to determine the nature of the act in order to decide about the jurisdiction of a criminal court to try such an act. That surely was an unsure test and the result of such a premature, speculative and presumptive test could vary from court to court and from Judge to Judge reminding a legal scholar of the Star Chamber and the early days of a Court of Equity in England where equity was said to vary with the size of the Chancellor's foot. 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. The international perception is also becoming clearer on the point that a violent activity against civilians that has no political, ideological or religious aims is just an act of criminal delinquency, a felony, or simply an act of insanity unrelated to terrorism. This metamorphosis in the anti-terrorism law in our country has brought about a sea change in the whole concept as we have understood it in the past and it is, therefore, of paramount importance for all concerned to understand this conceptual modification and transformation in its true perspective.

> 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. (Emphasis provided).

4. In view of the above authoritative pronouncement of the definition of "terrorism" all the Anti-terrorist Courts throughout Pakistan while taking cognizance of a case on receiving challan are required to first examine the facts of the case narrated in the FIR and the challan to appreciate that whether the action reported was an action designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect, etc. or such action was designed to create sense of fear or insecurity in the society or not. In my humble view the facts of the case in hand as spelt out from the FIR itself were not pointing toward such design/motive. The contents of FIR are reproduced below:-

> "Complaint is that the marriage of my sister Mst. Shabana was solemnized with Zahid Hussain Khokhar. From the said wedlock, she has three sons and one daughter. **Zahid Hussain has died on 05.2.2020** and his original village is Murad Khokhar, who left house, otaq and agricultural land there. **His brother Akhtar Ali Khokhar & nephew Waqar Khokhar and others in order to digest the said property have issues threats to my sister Mst. Shabana and her children & said to leave the house & agricultural land. My sister Mst. Shabana made such complaint to us where-upon my sister MPA Mst. Shahnaz Ansari was preventing them to avoid from digesting the property of orphans nor to occupy the same. Accused Akhtar**

Khokhar & Waqar Khokhar had issued threats of dire-consequences to her by saying that she should to interfere in their personal matter of property so also not to come in village Murad Khokhar. On 15.2.2020 the 'Chehlum' programme of my brother-in-law namely Zahid Hussain was scheduled as to why my sister MPA Shahnaz Ansari took me alongwith my brother Altaf Hussain Dongh, nephew Sarang S/o Ashique Dongh and her daughters Dr. Fatima & Dr. Aamna & came in the house of our sister Mst. Shabana in her house situated in village Murad Khokhar where there was also programme of 'Majlis'. After completing the said programme we were available in the house of my sister Mst. Shabana Khokhar; when at about 3:00 p.m (noon) we saw that accused each (1) Mst. Salima D/o Akhtar Khokhar armed with pistol, (2) Waqar S/o Akhtar Khokhar armed with pistol, (3) Akhtar S/o Shah Bux Khokhar armed with K.K, (4) Muhammad Siddique S/o. Haji Muhammad Hassan Khokhar empty handed, all of sudden entered into the house. **Accused Akhtar asked my sister Mst. Shahnaz Ansari aged about 50 years that they had prevented her not to come in the village or to interfere into our property matter but you are still not avoiding hence today they will not spare her**. At that time accused Muhammad Siddique Khokhtar R/o Naushahro Feroze instigated the remaining accused to murder MPA Shahnaz Ansari. On his instigation accused pointed their weapons upon us and said to keep quite. Due to fear, we remain mum, meanwhile accused Mst. Salma Khokhar with intention to commit murder of my sister Mst. Shahnaz Ansari made pistol fire which hit her in her chest, accused Waqar Khokhar made straight fires of pistol upon my sister Shahnaz Ansari which hit her in her stomach and other parts of the body with the result she was collapsed from the chair and the children had started weaping. Accused Akhtar & Muhammad Siddique dragged her daughters Dr. Fatima & Dr. Aamna & other children from their arms and locked them under wrongful confinement. After that accused made hard firing just to create terror and while raising slongans went away to their houses. After their departure, we took out the daughters of our sister from the room and had also seen fires in the abdomen, chest left arm of my sister from the room and had also seen fires in the abdomen, chest, left arm of my sister Mst. Shahnaz Ansari, she was seriously injured and sufficient blood was oozing from her. We took her with the help of P.Ws named-above for her immediate treatment tO PMCH Nawabshah and proceeded there while informing the police station. Due to injuries she was died. After conducting her post mortem her dead body was handed over to us. After completing the formalities of her funeral ceremony, **I have come today for report that accused named-above due said dispute in collusion with each other duly armed with weapons at the instigation of accused Muhammad Siddique Khokhar, the accused Mst. Salma & Waqar Khokhar caused pistol fires to my sister MPA Mst. Shahnaz Ansari within sight of P.Ws**. The remaining accused locked my sisters daughters in the room under wrongful confinement so also to create 'terror'

> they have made hard firing and raised slogans. Complaint is to do investigation".

5. A bare perusal of the FIR reproduced above shows that the design/motive to commit a single murder of Ms. Shahnaz Ansari was to prevent her from interfering in the personal and private dispute between the complainant and the accused party regarding the inheritance opened on the sad demise of one Zahid Hussain Khokhar, who was brother-in-law of the victim Shahnaz Ansari. The occasion and the place of incident was *Chehlum* of late Zahid Hussain Khokhar at the residence of Shabana widow of late Zahid Hussain situated at village Murad Khokhar. The target of the action was not the public at large nor any particular community or Sect etc. Both the victim and the aggressor belong to the same sect. Therefore, we cannot presume that the action was intended to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect, etc.

6. The Hon'ble Supreme Court in the case of Ghulam Hussain while resolving the controversy on the definition of terrorism has referred and with approval relied on the case of Waris Ali and other vs. the State (**2017 SCMR 1572**) for discussion on *mense rea* as essential ingredient for every crime and referred to the exclusive existence of *mense rea* for the act of terrorism in addition to the existence of mense rea for commission of ordinary crime. In the context of an offence of terrorism in the case of Ghulam Hussain, the larger bench with approval has relied on the observations of Supreme Court in the case of Waris Ali (supra) to identify existence of a distinct and separate mense rea for charging an accused of ordinary crime along with the offence of terrorism. Such observations from the case of Waris Ali (supra) are reproduced below:-

> "Under the jurisprudence, "mens rea" is an essential ingredient of every crime, needs to be attended first by the Courts of law however, **in cases of terrorism or**

terrorist activities the "mens rea" becomes twofold, i.e. the first object is to commit a crime, while the primary object of "mens rea" in the second fold speaks of terrorism related ideology, purpose and object, the most nefarious and detestable designs to commit crimes, creating sense of fear, insecurity and instability in the society and community with the ultimate object to destabilize the State as a whole. The true and perceivable object of this second "mens rea" is to create chaos, large scale disturbances, widespread sense of insecurity in the society/public and to intimidate and destabilize the State as a whole by means of terrorist activities.

10. ……..
……..

11. ……..……
……..

12. ……..
……..…

13. ……..
……

14. Albeit, murder, attempted murder, causing bodily harm or hurt and damage to property and some other offences have been included in the Third Schedule, appended to the Anti-Terrorism Act however, on plain reading, it becomes apparent that these offences are triable by the Special Courts, constituted under the Special Act but, there is no reference either expressed or implied in the Schedule that the Special Court shall award punishment under section 7 read with section 6 of the Act to accused persons charged for such crimes. There is another category of offences, which are squarely mentioned in the substantive provision of section 7 read with section 6 of the Special Act, which are specifically described to be acts of terrorism and shall fall within that definition **however, the qualifying words, attached thereto, create a subtle distinction between the ordinary crimes, committed out of personal revenge, enmity or private motive and those committed for the object of creating terror. This aspect needs to be interpreted and construed in a meaningful and objective manner so that the two categories of crimes i.e. ordinary crimes and those related to terrorism, are neither mixed up nor intermingled because construction placed on it at random without judicial thoughts, the cardinal principle relating to construction of Statute, would be defeated and ordinary crimes having no nexus with terrorism or terrorist activities would be incorrectly or wrongly placed in the grey category of crimes, which is not the object and intent of the Legislature.** If ordinary crimes committed due to personal revenge or motive are given the colour of terrorism or terrorist activities, hundreds

> and hundreds of Criminal Courts (Sessions Courts) and other Courts would be rendered inoperative and their vested jurisdiction would be taken away for no justifiable reason. The Prosecution and disgruntled complainants have been noticed making crude attempts to paint an ordinary crime as an act of terrorism so that the rival/opposite party is put to maximum mental agony. Here, **it becomes the duty of the Court of law to draw a fine distinction between two kinds of crimes, which are definitely pole apart.**"

7. I am also unable to persuade myself to concur with my brother on the preposition that since the trial is pending and the testimonies (evidence) of witnesses is to be recorded to connect them with the commission of offence, therefore, after testimonies of witnesses, if it appears that the case does not have characteristics of **Section 6** of the said Act, then the Petitioners would be at liberty to file fresh application under **Section 23** of the said Act for transfer of case, which shall be decided on its own merits by the learned Anti-Terrorism Court. In my humble view the material for decision on the question of jurisdiction in criminal cases is not the evidence to be produced by the prosecution after framing of charge rather it is the material placed before the Court in terms of **Section 173** of the Cr.P.C in the form of a challan before the competent Court to take the cognizance. If any authority is required, one may refer to the latest judgment of the Hon'ble Supreme Court in the case of Ali Gohar and others vs. Parvaiz Ahmed and others (**PLD 2020 SC 427**). Relevant observations of the Hon'ble Supreme Court from the said judgment at page-449 are reproduced below:-

> **<u>Step II Cognizance of the case by ATC</u>**
>
> I). In cases where ATC, on receipt and consideration of the challan and the material placed therewith, forms an opinion that the offences mentioned therein do not come within the scope of offences triable under the Act, transfers the case under section 23 to an ordinary criminal court to proceed with the trial under Cr.P.C. **The judicial precedents endorse the view that challan and the material placed therewith by the prosecution would suffice for the ATC to decide**

> **whether to proceed with the case or to transfer the same under section 23 of the Act.**
> (Emphasis provided).

The judicial precedents on which the above observations have been made by the Hon'ble Supreme Court in the case of Ali Gohar are (1) Shahbaz Khan alias Tappu and others v. Special Judge Anti-Terrorism Court No.3, Lahore and others (**PLD 2016 SC 1**); (2) Nasir Abdul Qadir and others v. The State (**2003 SCMR 472**) and Allah Din v. The State (**1994 SCMR 717**).

8. In the case of Ali Gohar (supra) the Hon'ble Supreme Court was seized of an appeal against the order of High Court of Sindh whereby the High Court has reversed an order of Anti-terrorist Court to transfer a case of triple murder to the ordinary Court under Section 23 of the ATA, 1997 and held that case should continue to be tried by the Anti-terrorism Court. The said finding of High Court in triple murder case were set aside and order of ATC was restored by the Hon'ble Supreme Court in Ali Gohar case by following the dictum laid down in the case of Ghulam Hussain on the ground that it was a case of rivalry over the chiefdom of Chandio tribe, and thus essentially it was a private dispute between two families within a tribe. The relevant para-37 of the Ali Gohar's case in the context of the case of the petitioners before us is reproduced below:-

> 37. It is the case of the prosecution, as reported by Pervaiz Ahmad, the complainant in FIR No.20, that Burhan son of Shabbir Ahmad Chandio, while seated in his vehicle, instigated the six-armed person, including the present petitioners that, the complainant party "have created mutiny against Sardar Khan and were restrained so many times but not turned away and committed their murder and finished them, on the instigation of Burhan and Sardar Khan accused opened faces of weapons and to spread terrorism made firing and spread harassment in common people", which led to the death of complainant's father and his two brothers. **However, when we revert to what prompted the crime, as recorded in the FIR No. 20, it is noted that it was a rivalry over the chiefdom**

> **of Chandio tribe, and thus essentially a private dispute between two families within a tribe. Needless to mention, that admitted, the present petitioners and the complainant are closely related to each other through marriage. Moreover, we hold no doubt, that the facts recorded in the FIR No.20 depict a shocking, brutal, and gruesome crime leading to a triple murder case. But given the ratio of Ghulam Hussain's case (supra), the very design and purpose leading to the crime being a private dispute relating to tribal ascendency would to our mind result in keeping the same outside the scope of the term "terrorism" within the contemplation of the Act.** It appears that the High Court erred by misconstruing the fact and thereby failing to correctly apply the principles in appreciating the true purport of the term "terrorism" under the Act. (Emphasis provided).

9. In the given facts of the case in hand there is hardly any material showing a distinct and exclusive mense rea to commit an offence punishable under **Section 7** of ATA, 1997, therefore, in my humble view the ATC has no authority to even record evidence in a case of an orthodox murder caused on account of private rivalry between the two parties. The trial to whatever stage before the ATC would be an exercise of power not vested in the Anti-terrorism Court. It would also be in violation of the petitioners' right to be treated in accordance with law guaranteed to every citizen under **Article 4(1)** of the Constitution of Pakistan, 1973 as an inalienable right. This constitutional and legal preposition in relation to the rights of the accused to be tried by ordinary Court or under Special Law has very eloquently been dealt with by the Hon'ble Supreme Court in para 28 and 29 in the case of **Waris Ali** (supra) which are reproduced below:-

> 28. Another crucial aspect which cannot be lightly ignored, the provisions relating to "Qisas and Diyat Laws" (now the integral part of the P.P.C.). These rights based on Islamic Injunction are personal rights of the legal heirs of a deceased person (wali) or the victims, while the State is placed next to it. These vested rights of individuals cannot be lightly disturbed or taken away by the provisions of Special Act in crimes, not related to terrorism or terrorist activities. Bringing these crimes at random within the mischief provisions of Anti-Terrorism Laws, (Special Act) would certainly deprive the legal

heirs of the deceased of taking "Qisas" in the case of "Qatl-i-amd" or "Diyat" and the victims of hurt from the right of "Qisas, Diyat, Arsh or Daman". In the event of conviction under the penal provisions of the Special Act, the fine imposed along with other similar penalties shall go to the public exchequer and in this way these rights recognized by the Islamic injunctions as indefeasible and unavoidable would be defeated for no justifiable reason. For this reason too, crimes against human body or property not clearly falling within the definition of terrorism and terrorist activities shall not be construed as such because by adopting that course these rights would be infringed, which are of overriding and superimposing effects.

29. The provision of **Article 4(1)** of the Constitution in commanding language, directs as follows:-

> "To enjoy the protection of law and to be treated in accordance with law is the inalienable right of every citizen, wherever he may be, and of every other person for the time being within Pakistan."

The phrase used "to be treated in accordance with law" includes that every citizen must be dealt with according to law applicable to him, subject, of-course, to the facts and circumstances of the case. **If any citizen is triable under the ordinary penal law of the land, then, treating him harshly under special law, not clearly applicable to him would be a violation of the command of the Constitution**.

Under **Article 227** of the Constitution, "all existing laws shall be brought in conformity with the injunction of Islam as laid down in the Holy Quran and Sunnah, in this part referred to as the Injunctions of Islam, and no law shall be enacted which is repugnant to such Injunctions." Thus, **the combined effect would be that the two categories of crime, the one committed in an ordinary manner due to personal vengeance/ revenge/ private motive or due to sudden fight where the essential ingredient of terrorism is not involved, shall in no manner affect the personal right of Qisas, Diyat, Arsh or Daman of the legal heirs of the deceased (wali) or the victims of the assault as the case may be superimposing the provision of Anti Terrorism Act, i.e. sections 6 and 7 thereof, because it will also defeat the prohibitory language contained in the above Article of the Constitution and to that extent any such order of any Court shall be deemed to void and be inoperative**.

10. The crux of the above discussion is that petitioners' application under Section 23 of the ATA, 1997 are allowed and the impugned order is set aside. Consequently, special case No.4 of 2020 arising out of FIR

No.15/2020 under Sections, 302, 324, 114, 516/2 read with Section 7 of ATA, 1997 registered at P.S Darya Khan Mari is transferred from the Court of ATC Naushehro Feroze to the ordinary Court of Sessions Judge Naushehro Feroze to continue the trial from the stage it was before the AATC, Naushehro Feroze.

JUDGE

In view of the above dissenting Note, Office should place the above Order before the learned Senior Judge at Sukkur Bench.

JUDGE

JUDGE

Dated: 05.05.2021

Ayaz Gul