

**THE HIGH COURT OF SINDH,
CIRCUIT COURT, HYDERABAD.**

C.P No.D-1484 of 2012
Cr. Rev. Appln. No.D-60 of 2013

DATE	ORDER WITH SIGNATURE OF JUDGE
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Present:

Mr. Justice Aqeel Ahmed Abbasi,
Mr. Justice Habib-Ur-Rahman Shaikh,

Mr. Jawaid Choudhry, Advocate for Petitioners in the petition
and for Complainant in Criminal Revision Application.

Mr. Tahseen Ahmed H. Qureshi, Advocate for Applicant in
Criminal Revision Application.

Mr. Muhammad Iqbal Kalhoro, Additional Prosecutor General
Sindh.

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ORDER

AQEEL AHMED ABBASI,J:- By this common order we intend to dispose of aforesaid C.P No.1484/2012 treated as Criminal Revision Application and Criminal Revision Application No.D-60 of 2013 filed against the two impugned orders dated 12.07.2012 and 14.03.2013 passed in Special Case No.03/2012 and Special Case No.02/2012 respectively by learned Anti-Terrorism Court Mirpurkhas whereby applications filed under Section 23 of the Anti-Terrorism Act, 1997 seeking transfer of aforesaid cases from the Court of learned Judge of Anti-Terrorism Court Mirpurkhas to the Court of Session Judge, Mirpurkhas were dismissed, as the facts and legal issue involved in both the matters are same, which proceedings otherwise are the outcome of two counter FIRs of the same alleged incident.

2. Brief facts of Criminal Revision Application No.D-60/2013 as stated in FIR bearing Crime No.64/2012 registered at Police Station Town Mirpurkhas U/s 302, 364, 324, 337-F(ii), 147, 148, 149 PPC R/W Section 6/7 Anti-Terrorism Act, 1997 on 04.05.2012 at 1530 hours, are that on 03.05.2012 at night the Complainant namely Muhammad Arshad son of Abdul Rahim along with his friends named in the FIR were sitting in Muhajir Colony ground when at about 2300 hours

brother of Complainant namely Muhammad Usman and Umair were coming towards Muhajir ground from Hirabad then accused namely Afaque Ahmed , Shahbaz Ahmed, Faheem Abbas, Syed Muzamil Shah, Umair Ajmeri, Shamroz and 4/5 other unknown persons armed with deadly weapons came and insisted the brother of Complainant namely Muhammad Usman that he shall not work with Ahl-Sunnat Jamayat, however, on his refusal, the accused persons made straight shots as a result of which Muhammad Umair was seriously injured whereas the other brother of Complainant namely Muhammad Usman also sustained arms injury on his back and was also kidnapped by the accused persons. Injured Muhammad Umair was taken to Civil Hospital for treatment whereas on search of the brother of Complainant namely Muhammad Usman who was kidnapped by the accused persons, at about 2355 hours his dead body was found near the gate of ground beside cattle pond of Nazeer Qureshi. Thereafter the matter was reported by the Complainant to the police.

3. Similarly, the brief facts of C.P No.D-1484/2012, treated as Criminal Revision Application, as stated in FIR bearing Crime No.65/2012 registered at Police Station Town Mirpurkhas U/s 364, 324, 337-H(ii), 147, 148, 149 PPC R/W Section 6/7 Anti-Terrorism Act, 1997 on 05.05.2012 at 1600 hours, are that on 03.05.2012 the Complainant namely Adnan Ahmed along with Faheem Abbas, Abid, Sabir Hussain, Muhammad Shakeel, Din Muhammad along with others members of MQM were available in the Sector-A Office, Muhajir Colony Ground when at 2220 hours there was heavy firing out of the office, upon which Complainant along with others went outside and saw that Attaullah Shaikh, Zafar Baloch, Shehbaz, Umer Farooque, Waqasuddin, Iqbaluddin and 6/7 unknown persons armed with deadly weapons were making firing, who forcibly caught hold of Faheem Abbas and Abid and directed them to remove flags of their political party and allow the accused party to put their flags, and abducted

them on motorcycle. The Complainant party went on searching for the abductees when one Hafiz Attaullah Shaikh came behind and made straight firing with his Kalashnikov at the back of Faheem Abbas with intention to kill him while Zafar Baloch made straight firing with his Kalashnikov at Abid with intention to kill him. Thereafter above accused persons went away whereas Faheem Abbas and Abid were taken to Civil Hospital wherefrom Faheem Abbas was referred to Hyderabad and thereafter the matter was reported to the police.

4. After investigation, the challan in the aforesaid cases were submitted before the Anti-Terrorism Court Mirpurkhas. However, during proceedings in both the aforesaid cases, both the parties filed applications U/s 23 of the Anti-Terrorism Act, 1997 wherein it was prayed that matters may be transferred to the Court of ordinary jurisdiction on the grounds that the Anti-Terrorism Court has no jurisdiction in the instant matters as no element of terrorism as defined in terms of Section 6 & 7 of the Anti-Terrorism Act, 1997 is involved. Such applications of both the parties have duly been dismissed by the Special Judge, Anti-Terrorism Court Mirpurkhas vide impugned orders dated 12.07.2012 and 14.03.2013 respectively. Being aggrieved and dissatisfied with such orders passed by the learned Anti-Terrorism Court, both the parties have filed aforesaid Criminal Revision Application and Constitutional Petition which is treated as Criminal Revision Application at the request of learned Counsel, with the prayer to set aside the impugned orders passed by the learned Judge, Anti-Terrorism Court Mirpurkhas, whereby he has declined to transfer both the cases to the Court of ordinary jurisdiction.

5. Both the learned Counsel have argued that impugned order(s) passed by the Anti-Terrorism Court Mirpurkhas, declining to transfer the cases to ordinary Court of jurisdiction are erroneous in law and facts as none of the ingredients of Section 6 & 7 of Anti-Terrorism Act,

1997 are attracted in the instant Crimes as neither alleged offences were committed in the daylight or some thickly populated area nor it could possibly create any terror among the public at large. Per learned Counsel for the parties, as per mashirnama prepared by the police, no recovery of Kalashnikov or repeater has been effected from accused persons whereas 30 bore pistol has been shown to have been allegedly recovered by the police. It is further contended that even from the plain reading of the contents of FIR and after examination of the material available with the police, it can be ascertained that provisions of Section 6 & 7 of the Anti-Terrorism Act, 1997 are not attracted in the instant case. It has been further argued that number of Prosecution Witnesses including eye witnesses of the alleged crime have been examined, who did not support the case of Complainant(s). Whereas, per learned Counsel, it has also come on record that neither any Kalashnikov or Repeater has been used in the alleged incident nor indiscriminate firing has been made which could have created terror in the public at large, whereas, only four empties of 30 bore pistol have been allegedly recovered from the site of alleged crime. Learned Counsel for the parties have also drawn the attention of this Court to contents of both the FIRs to show that nothing has been alleged with regard to creation of any terror in the public at large hence, prosecution was not justified in the first place to insert the sections relating to Anti-Terrorism Act, 1997. However, per learned Counsel, when the matter was investigated in detail, the prosecution came to the conclusion that offence falling U/Ss 6 & 7 of Anti-Terrorism Act, 1997, is not made out on record whereafter, prosecution filed application for return of both the FIR(s) before the learned Judge of Anti-Terrorism Court with permission to file the same before the Court of ordinary jurisdiction, however, such request of the prosecution was declined by the learned Anti-Terrorism Court, whereas, per learned Counsel, no valid reasons in this regard were assigned by the learned

Judge, Anti-Terrorism Court. It has been further contended that neither the contesting parties nor the prosecution has alleged creation of any terror in the public at large out of alleged incident, nor there is any material on record which may possibly suggest occurrence of an offence falling under Sections 6 & 7 of the Anti-Terrorism Act, 1997. It has been argued by the learned Counsel that from the conduct of the learned Judge, Anti-Terrorism Court Mirpurkhas, it appears that he has already made up his mind to convict the accused persons under Anti-Terrorism Act, 1997 and there is no likelihood that both the parties may get justice in accordance with law applicable to the parties of these cases. It has been further prayed that an opportunity of fair trial and due process of law may be extended to the accused persons and both the matters may be directed to be transferred to the learned Sessions Judge of Ordinary jurisdiction for decision in accordance with law. In support of their contention, learned Counsel have placed reliance on the following case law:-

1. *Muhammad Hafeez V. Special Judge, Anti-Terrorism Court, Mirpurkhas and 2 others* (2001 P.Cr.L.J 199),
 2. *Ch. Bashir Ahmed V. Naveed Iqbal and 7 others* (PLD 2001 Supreme Court 521),
 3. *Taj Muhammad V. Judge, Anti-Terrorism Court and another* (PLD 2003 Lahore 588),
 4. *Mohabbat Ali and another V. The State and another* (2007 SCMR 142)
 5. *Bashir Ahmed V. Muhammad Siddique and others* (PLD 2009 Supreme Court 11)
6. Conversely, learned Additional Prosecutor General Sindh though could not controvert the arguments advanced by the learned Counsel for the Applicants, however, submitted that the manner in which the alleged offence has been committed, it might have created terror in the public at large, hence both the cases are triable by Anti-Terrorism Court and not by the Court of ordinary jurisdiction. In support of his contention learned Additional Prosecutor General Sindh

has placed reliance on the case of *Nooruddin V. Nazeer Ahmed and 4 others* (2011 P.Cr.L.J 1370).

7. We have heard both the learned counsel for the parties as well as learned A.P.G. and perused the record. From tentative assessment of the record, it appears that the alleged incident took place in the late hours of night on account of some dispute between the workers of two political parties over installation of their party flags. As per contents of FIR(s), firearms were used and as a result, some of the members of the complainant party reportedly received injury whereas one of them succumbed to injuries and died. Thereafter, both the parties got the counter FIRs registered against each other about the same alleged incident at PS Town Mirpurkhas. Initially, police inserted sections 6/7 of the Anti-Terrorism Act, 1997 in both the F.I.Rs, however, after further investigation into the matter, prosecution filed applications before the learned Anti-Terrorism Court, Mirpurkhas with a prayer to return both the F.I.Rs for presenting the same before ordinary Court of jurisdiction, as according to prosecution, after proper investigation and examination of the material available on record, the cases were not covered under section 6/7 of Anti-Terrorism Act, 1997. Such request was declined by the learned Anti-Terrorism Court, Mirpurkhas vide order dated 19-05-2012 in both the cases. Where-after both the parties in the aforesaid F.I.Rs moved application under section 23 of the Anti-Terrorism Act, seeking transfer of the cases from the Court of Anti-Terrorism Court to the ordinary Court of Sessions having jurisdiction, which request has also been declined vide impugned order(s) passed by learned Anti-Terrorism Court.

8. From perusal of the impugned order(s) passed by learned Anti-Terrorism Court, it appears that contents of the F.I.Rs and the evidence of the prosecution witnesses in both the cases has not been taken note by the learned Judge of Anti-Terrorism Court at Mirpurkhas with particular reference to application of the provisions of Anti-

Terrorism Act, 1997, as no finding has been recorded to the effect as to whether the alleged incident struck terror and created any sense of insecurity in the public at large. Nothing has been stated in both the F.I.Rs by the Complainant(s), which could suggest that the alleged incident, which reportedly took place at late hours at night, was witnessed by large number of people of the vicinity, hence, created terror and the sense of insecurity in the public or society. It has also come on record that no lethal weapons i.e. Kalashnikov and Repeater as alleged in the F.I.Rs were used in the alleged incident whereas, few empties of 30 bore pistol have been recovered from the place of incident. The learned Judge of the Anti-Terrorism Court at Mirpurkhas, while passing the impugned order(s) has also failed to examine as to whether the ingredients of the alleged offence have any nexus with the object of the case as contemplated under section 6, 7 & 8 of Anti-Terrorism Act, 1997. No finding has been recorded by the learned Judge of Anti-Terrorism Court with regard to gravity and heinousness of the alleged crime nor the motive, object, design or purpose behind alleged offence has been discussed in the impugned order(s) on the contrary, it has been merely observed that the alleged crime had the tendency to create terror and fear in the society. Whereas, neither any reason has been given nor reference to any material or evidence has been made by the learned Judge of Anti-Terrorism Court, Mirpurkhas, for such conclusion.

9. We are of the view that for the purpose of attracting the provisions of any section or schedule to the Anti-Terrorism Act, 1997, the element of striking terror or creation of the sense of fear and insecurity in the public at large by doing any act or thing is sine qua non. Reference in this regard can be made to the judgments of the Hon'ble Supreme Court of Pakistan in the case of *"Ch. Bashir Ahmad v. Naveed Iqbal and 7 others"* reported in PLD 2001 Supreme Court 521 and in the case of *"Mohabbat Ali and another v. The State and another"* reported in 2007 SCMR 142.

10. We may further observe that the provisions of Anti-Terrorism Act, 1997 are required to be construed strictly and the benefit, if any, arisen in that regard, has to be extended to the accused whereas, in the absence of the element of terrorism, sense of insecurity in public at large and gravity and seriousness of the offence as detailed in various Sub-Sections of Section 6, the provisions of section 6,7 & 8 of Anti-Terrorism Act 1997 could not be attracted in each and every case. Reference in this regard can be made to the Judgment of the Hon'ble Supreme Court of Pakistan in the case of "*Bashir Ahmed v. Muhammad Siddique and others*" reported in PLD 2009 Supreme Court 11 and to the Judgment of Lahore High Court in the case of "*Taj Muhammad v. Judge, Anti-Terrorism Court and another*" reported in PLD 2003 Lahore 588. The case law relied upon by the learned Additional Prosecutor General Sindh is not attracted to the instant cases as the same is distinguishable on facts.

11. The learned Anti-Terrorism Court while passing the impugned order(s) has further held that since the applicants/accused have surrendered before the Anti-terrorism Court by filing bail application hence, they have accepted the jurisdiction of the Anti-Terrorism Court, which amounts to bar to challenge such jurisdiction. We are not inclined to agree with such finding of the learned Judge of Anti-Terrorism Court at Mirpurkhas as the point of jurisdiction which goes to the very route of the proceedings, can be raised at any stage. Merely filing bail application for the release of an accused before Anti-Terrorism Court would not debar him from raising an objection with regard to jurisdiction of the Anti-Terrorism Court and to seek transfer of the case to Court of ordinary jurisdiction under Section 23 of Anti-Terrorism Act, 1997.

12. In view of hereinabove facts and the ratio of the judgments of the Honourable Supreme Court and High Courts as referred to above, we are of the view that aforesaid cases are not triable by the learned

Anti-Terrorism Court as the ingredients of the sections 6 and 7 of the Anti-terrorism Act, 1997 are not attracted to the facts of these cases. Accordingly, both the impugned orders dated 12-07-2012 and 14-03-2013, passed by the Anti-Terrorism Court, Mirpurkhas in the aforesaid cases are not sustainable in law, which were set order vide our short order dated 23-05-2013. These are the reasons of our short order.

Before parting with the order, we may clarify that the observations made hereinabove are tentative in nature and the learned Trial Court shall not be influenced by such observations and shall decide the cases strictly in accordance with law and on the basis of material made available on record.

JUDGE

Dated: -06-2013.