ORDER SHEET

IN THE HIGH COURT OF SINDH AT KARACHI

SPL. CR. A.T. APPEAL NO.33/2012
SPL. CR. A.T. APPEAL NO.04/2013

Date | Order with signature of Judge

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1. For hearing of case.
2. For hearing of MA No.8675/2012.

12.04.2017

Mr. Ghulam Rasool Mangi advocate for appellants.
Mr. M. Iqbal Awan, APG.

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At the outset learned counsel for appellant while referring judgment dated 20.03.2017 passed in Criminal Appeals No.20-K to 22-K of 2015, added that no ransom was paid and circumstances show that appellants were wrongly arraigned, however he contends that he would not press instant appeals if sentence awarded is reduced to already served sentence; as per jail roll dated 11.04.2017 appellants Danish Javed and Shahbaz have served sentence of 7 years 8 months and 1 day including remission of 11 months and 20 days while Muhammad @ Faqir Muhammad has served 7 years 9 months and 17 with remission of 1 year 1 month and 6 days.

2. We have examined the judgment of the apex Court, relevant paragraph No.3 whereof is reproduced as under:-

> "Insofar as the act of kidnapping of Muhammad Junaid is concerned, the evidence on record is confidence inspiring which shows that the appellants had kidnapped Muhammad Junaid and then confined him in their unlawful custody for 61 days. However, a doubt has been created as to the real motive behind such kidnapping. This doubt has been created by certain inconsistencies that have come in the depositions of the

> complainant and the abductee Muhammad Junaid respectively. The abductee in his deposition has clearly stated that *"accused arranged my talk with my father and they threatened me that I should ask my father for payment of ransom otherwise they will kill me."* On the other hand, the complainant, the father of the abductee in his deposition while narrating the factum of phone call made to him did not state that any conversation was arranged by the kidnappers with his abducteed son. All that has been stated was that the caller demanded ransom of rupees the million for the release of the abductee and then negotiation went on for two months and finally Rs.27,00,000/- were finalized for the release. So, there exists conflicting versions in the statements of the abductee and the complainant. The other piece of evidence with regard to the demand of ransom was that the complainant in his deposition stated that the ransom was paid in the presence of his friend Mushtaq Solangi but the said Mushtaq Solangi was not examined as witness. In presence of such doubts and/or deficient evidence, it would not be safe to award punishment of life imprisonment to the appellants, which is awarded **only when kidnapping is coupled with a demand for ransom**. In the circumstances, the case of the appellant does not fall within the ambit of Anti-Terrorism Act and **falls only within the purview of section 365 PPC."**

From above, it is quite evident that a case of *kidnapping* if is not coupled with a demand of *ransom* then it would not fall within ambit of Anti-Terrorism Act. Such a case, even if *kidnapping* is proved yet it would not be *safe* to award punishment for *life imprisonment.*

3. Keeping in view the above *touch-stone,* we have examined the evidence of Mst. Rani, admittedly allegation of ransom is not substantiated by prosecution hence in absence whereof (*ransom)* , the

proved *kidnapping* even will bring the case one within of Section 365 PPC which provides punishment as:

> ".. shall be punished with imprisonment of either description for a term which **may extend** to seven years, and shall also be liable to fine."

Besides jail roll shows accused Danish, Shahbaz and Muhammad @ Faqir Muhammad at present aged about 27, 29 and 44 years respectively; and even have served more than seven *(07)* years in jail. There is no criminal history of the appellants. Accordingly, we convert the sentence under section 365 PPC for the period which the appellants have already undergone. Instant appeal is dismissed. Appellants shall be released forthwith if not required in any other case.

4. With regard to sentence under section 13(d) of Pakistan Arms Ordinance, 1965, record reflects that appellants were convicted for 3 years and there was categorical direction that all sentences shall run concurrently hence, per *jail-roll,* the appellants have served such sentence *too.*

5. The conviction under section 7(e) of ATA, 1997, being *legally* not maintainable, is set aside on *two* counts i.e 'in absence of ransom *mere* established kidnapping will bring the offence out of the ambit of *Anti Terrorism Act* and on consideration of the *legal* position that when in independent sections sentence is provided then punishment under section 7(e) of ATA, 1997 is not maintainable *unless* offence is *otherwise* established to be an act of *terrorism* within meaning of Section 6 of the Act. Reference can be made to judgment

of this Court in Special Criminal A.T. Appeal Nos.129 and 220 of 2016, relevant paragraphs whereof are reproduced:-

> "6. As per prosecution case, the appellant was arrested in the night time with the allegation that he was possessing pistol and riffle grenade but it was never proved by prosecution that such allegedly recovered *articles* were either *used* prior to alleged date of offence nor it is established that appellant was intending to use the same at *subsequent* date. In short, the prosecution *though* established recovery but never established that such recovery was *in fact* an act of **'terrorism'** for which the object, design or purpose behind the said act (offence) is also to be established so as to justify a conviction under Section 7 of the Act. Reliance can safely be placed on the case of *Kashif Ali v. Judge, ATA Court No.II* (PLD 2016 SC 951)wherein it is held as:-
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> > **'12. ……** In order to determine whether an offence falls within the ambit of Section 6 of the Act, it would be essential to have a **glance over the allegations leveled in the F.IR, the material collected by the investigating agency and the surrounding circumstances, depicting the commission of offence. Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind the said act has to be seen.** The term "design", which has given a wider scope to the jurisdiction of the Anti-terrorism Courts excludes the intent or motives of the accused. In other words, the motive and intent have lost their relevant in a case under Section 6(2) of the Act. What is essential to attract the mischief of this Section **is the object**, for which the act is designed.'
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> Let us, be *specific* a little further. The appellant has been convicted under Section 5 of Explosive Substance Act so also under 7 sub-section (1) (ff) of Anti-Terrorism Act, 1997 i.e second part of Section 6(2)(ee) which reads as :
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> > "6(2)(ee) involves use of explosives by any device including bomb blast (….)"
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> If one is convicted for one offence i.e '*merely* possessing explosive' *twice* i.e one under Explosive substance Act and under the Arms Act, it shall seriously prejudice the guarantee, provided by Article 13 of the Constitution., therefore, it would always be obligatory upon prosecution to *first* establish '**object'**thereby bringing an act of 'possessing explosive' to be one within meaning of second part of Section 6(2)(ee) of the Act, as held in the case of *Kashif Ali* supra. In absence whereof

> the punishment under section 7(1)(ff) would not be *legally* justified particularly when accused is convicted *independently* for such act (offence) under Explosive Substances Act. In such circumstances, the conviction, awarded against the appellant under section 7(i) (f) is hereby set-aside."

With above modification(s), the convictions are maintained. In consequence whereof, the appeals alongwith pending applications are disposed of.

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IK/PA