504

IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Justice Ahmed Ali M. Shaikh
Mr. Justice Mohammed Karim Khan Agha

Cr. Revision Application No. 61 of 2015

Muhammad Rashid @ Master & another

Vs.

The State

Date of hearing:	25.04.2016.
Date of Order	06.05.2016
Appellant:	Through Mr. Muhammad Lateefuddin Pasha, Advocate for both appellant.
Respondents:	Through Mr. Zafar Ahmed Khan, A.P.G. for the State along with complainant Muhammad Shoaib.

ORDER

Mohammed Karim Khan Agha, J. By this order, we propose to dispose of the above criminal revision application filed under Section 526 and 561 A Cr.PC on behalf of the appellants (Mohammed Rashid @ Master and Zahid Abbas @ Zaidi) challenging therein the order dated 25.02.2015 passed by the learned Anti-Terrorism Court (ATC) No.III, Karachi, in Special Case No.341 (III)/2014, whereby the applications under section 23 of Anti Terrorism Act 1997 (ATA) of the appellants were dismissed (the impugned order).

2. The facts of the case as disclosed in FIR No.198/2013, under section 302/109/34 PPC read with Section 7 ATA registered at Police station Gizri, lodged by the complainant SHO Sohail Ahmed Khan alleging therein that on 18.5.2013 at about 2205 hours he along with his subordinate staff were busy in patrolling when he received information on emergency 15 pursuant to which he reached behind the street of Gizri Avenue situated at Jam Sadiq bungalow where he came to know that in Bungalow No.16J/I, 9th Gizri Street Phase-4, DHA, Karachi two unknown accused persons made firing upon Mst. Zehra Shahid Hussain who was injured and was taken by ambulance to National Medical Centre Kala Pull for treatment where she later succumbed to her injuries. It is further stated that the SHO asked about lodging of the FIR from

the relatives of the deceased but they did not give any response thereto, therefore, the FIR was registered and the SHO was made the complainant in this FIR.

3. It was further stated in the FIR that on 18.5.2013 Mst. Zehra Shahid Hussain while returning home from Defence Club Phase II DHA Karachi in car bearing registration No.AEHJ-212 Suzuki Cultus, driven by driver Ghulam Rasool at about 2205 hours, when she arrived at home being bungalow No.16-J/I, 9th Gizri Street, Phase-IV, DHA, Karachi she was entering into the bungalow when two young accused persons riding on motorcycle, wearing black shirt (Kameez) came there. One of them remained on the motorcycle whereas the second accused aged about 20/22 years duly armed with pistol entered into the bungalow and aimed his pistol at deceased Mst. Zehra Shahid Hussain, when she was standing at carporch of said bungalow. On seeing the pistol she attempted to hand over her purse to the accused but the accused pushed away her purse and started firing upon her and as a result thereof she received two bullet injuries under her chin and shoulder. Thereafter both accused persons fled away from the spot on their motorcycle while making firing in order to spread fear, harassment and terror, hence they have committed offence punishable under section 302/34 PPC read with Section 7 ATA.

4. The appellants were charged with the above offense and are facing trial before the ATC.

5. It was inter-alia contended in the criminal revision application that the impugned order is based on false presumptions, conjectures and surmises which do not have sustainability on the important question of facts and law and has therefore no legal effect. Learned counsel submitted that an order must lay out reasons in consonance with Section 24-A General Clauses Act, 1897 as even public functionaries are bound to decide the case after application of mind with cogent reasons and in line with legal justification which is missing in the instant case hence it cannot be treated as speaking order and should be set aside.

6. He next argued that under the circumstances dismissal of the application under section 23 of ATA 1997 was unlawful as the ingredients of section 6, 7, and 8 of ATA 1997 were missing in the instant case. He further argued that where similar offences of a much more heinous nature than the instant one took place within the

boundary walls of a complainant's house the case was transferred by the Anti-Terrorism Court to the court of ordinary jurisdiction and the High Court did not interfere with such order of transfer and that it had been held by the superior courts that the heinousness of the offence did not mean that the same is qualified to be a terrorist act within the contemplation of sections 6, 7 and 8 of Anti Terrorism Act, 1997 or have any nexus with the schedule thereto especially when the act had not occurred at a public place. He submitted that whether a particular act is terrorism or not, the motivation, object, design or purpose behind the said act is to be seen, and in absence of such proof from the prosecution it precluded the offence from falling within the ambit of section 6 of Anti Terrorism Act, 1997.

7. In support of his contentions he placed reliance on **Bashir Ahmed V Muhammed Siddique** (PLD 2009 SC 11)

8. For all the above reasons he contended that the impugned order should be set aside and the case of he appellants be transferred from the ATC to the ordinary criminal courts having jurisdiction in murder cases for trial.

9. Learned A.P.G. appearing on behalf of the State supported the impugned order while submitting that the learned trial court has not committed any irregularity and in-competency in deciding the application under section 23 of the ATA, 1997, which is a well reasoned order and that based on the facts and circumstances of the case the ATA was fully attracted and as such the criminal revision application should be dismissed.

10. We have perused the record, considered the submissions of the learned counsel for the parties, the relevant law and the authorities cited by them at the bar.

11. Turning to the first issue namely whether the impugned order complies with S.24 (A) of the General Clauses Act 1897. Having carefully reviewed the order we are of the view that it is a detailed, well reasoned and fully speaking order which shows that there has been an application of judicial mind before passing the same and as such this contention is rejected.

12. In our view however the main issue before us is whether based on the facts of the incident and nature of the offense the offense was one which fell within the ambit of the ATA and thus could be tried by an ATC as opposed to an ordinary criminal court.

13. It is apparent from the definition of terrorism in S.6 ATA that a case of murder does not automatically become an act of terrorism under the ATA. In addition to the murder the other ingredients which form a part of S.6 also need to be satisfied based on the facts and circumstances of each case. Such additional ingredients include whether the act was 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 necessary intent.**

14. In this respect reliance is placed on the case of **Bashir Ahmed V Muhammed Siddique** (PLD 2009 SC 11) where at P.14 Para 6 onwards it was held as under:

> Para 6. **In order to determine as to whether an offence would fall within the ambit of section 6 of the Anti-Terrorism Act, 1997, it would be essential to have a glance over the allegations made in the F.I.R. record of the case and surrounding circumstances. It is also necessary to examine that the ingredients of alleged offence have any nexus with the object of the case as contemplated under section 6, 7 and 8 thereof. Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind the said act is to be seen. It is also to be seen as to whether the said act has created a sense of fear and insecurity in the public or any section of the public or community or in any sect. Examining the case in hand on the above touchstone, it is manifest on the face of it that the alleged offence took place because of previous enmity and private vendetta.** A perusal of the record would reveal, that occurrence has taken place in front of the 'haveli' of the respondents, situated in village 'Fatoowala'. **The motive for the occurrence is enmity inter-se the parties on account of some previous murders. In this view of the matter, we are of the opinion that since motive was enmity inter-se the parties, the application of section 7 of the Act, which primarily requires the spread of sense of insecurity and fear in the common mind is lacking in the present case.** The occurrence neither reflects any act of terrorism nor it was a sectarian matter instead the murders in question were committed owing to previous enmity between the two groups. **The present case, as observed above, does not fulfill the requirements laid down in the judgment titled as "Basharat Ali v. Special Judge Anti-terrorism Court-II, Gujranwala (PLD 2004 Lag. 199), wherein it was held that fear or insecurity must not be a by-product, fall out or unintended consequence of a private crime. As such, creation of fear and insecurity in the society**

is not itself terrorism unless the same is coupled with the motive. The gist of the citation is that act of terrorism desires to be determined from the yardstick and scale of motive and object, instead of its result or after effect. From the facts of case, the definition of terrorism is not attracted as the said offence has neither created any threat to coerce or intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society. Reference in this regard can be made on Ch. Bashir Ahmed v. Naveed Iqbal and 7 others (PLD 2001 SC 521), Muhammad Mushtaq v. Muhammad Ashiq and others (PLD 2002 SC 841) and Basharat Ali v. Special Judge, Anti-Terrorism Court-II, Gujranwala (PLD 2004 Lah. 199).

15. In the most recent ruling of the Hon'ble Supreme Court on the question of intent and mens rea in ATA cases it was held as under in the case of **Shahbaz Khan V Special Judge Anti Terrorism Court Lahore** (PLD SC 2016 1) at P.6.

> "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.

16. In dealing specifically with the question of mens rea the Hon'ble Supreme Court at P.9 found as under:

> "11. Primarily, the rule laid down in **Bashir Ahmed's** case *ibid* requiring the ascertainment of the design, intention and *mens rea* of an act for establishing the jurisdiction of a learned ATC rests on dicta given **Mehran Ali's** case *ibid*. However, **Bashir Ahmed's** case *ibid* does not consider the ways and means by which the design, intention or *mens rea*, for an act of terrorism, requiring in essence the proof of an assailant's state of mind, should be ascertained by a Court of law. Whether the Court should mechanically consider the motive alleged by a complainant in the FIR to be decisive or should it also scrutinize other aspects of an occurrence to assess if the culprits had any design, intention or *mens rea* to commit a terrorist act?

12. In most cases, the nature of the offences, the manner of their commission and the surrounding circumstances demonstrate the motive given in the FIR. However, that is not always the case. **When offences are committed by persons with impunity disregarding the consequence or impact of their overt action, the private motive or enmity disclosed in the FIR cannot be presumed to capture their true intent and purpose. In such cases, it is plain that action taken and offences committed are not instigated "solely" by the private motive alleged in the FIR.** It is settled law that intention, motive or *mens rea* refer to the state of mind of an offender. It is equally well established that a state of mind cannot be proven by positive evidence or by direct proof. **The intention of an accused for committing an offence is to be gathered from his overt acts and expression.** It has been held in the case of **State v. Ataullah Khan Mangal** (PLD 1967 SC 78) **that an accused person "must be deemed to have intended the natural and inevitable consequences of his action."** Thus apart from the overt acts of the accused, the injuries caused by him or consequences ensuing from his actions, and the surrounding circumstances of the case are all relevant to ascertain the design intention or *mens rea* that instigated the offences committed. These principles are enunciated in **Zahid Imran v. The State** (PLD 2006 SC 109) and **Pehlwan v. Crown** (1969 SCMR 641). **Intention is presumed when the nature of the act committed and the circumstances in which it is committed are reasonably susceptible to one interpretation. In such event, the rule of evidence that the natural and inevitable consequences of a person's act are deemed to have been intended by him is applicable**: **Jane Alam v. The State** (PLD 1965 SC 640). In **Muhammad Mushtaq v. The State** (PLD 2002 SC 841) the inevitable consequence of an act was considered as its design.....

13. **When wanton overt acts committed by an accused lead to horrendous consequences then the motive given in the FIR merely indicates the background. The presumption that the natural and inevitable consequences of the acts of an accused are deemed to be intended, provides a reliable touchstone for gathering the design, intention or *mens rea* of an assailant in the context of Section 6(1)(b) of ATA.** (bold added)

17. Thus, as a can be seen from the latest judgment of the Hon'ble Supreme Court it is not necessarily the brutality or scale of the crime which elevates it to fall within the purview of the ATA but to an extent the intention behind the act which can be inferred from the particular facts and circumstances of each case and may even include personal disputes and enmities which escalate to

such an extent that the act can be inferred as per para 6(b) ATA as being 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 as per S.6 (c) is made for the purpose of advancing a religious, sectarian or ethic 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.

18. In our view therefore based on the latest Supreme Court authority it is still the *intent/mens rea,* although perhaps wider/more liberal in interpretation, behind the act which can be inferred from the facts and circumstances of the particular case which is one of the many factors for determining whether or not a case of murder is an ordinary case of murder to be tried by the ordinary criminal courts or a case of murder which would amount to terrorism and which would come within the ambit of the ATA.

19. The main thrust of the appellant's case is that the attack took place at night, only one lady was killed in an isolated place and that no member of the public was present and as such it could not have spread any insecurity in the minds of the public especially as it concerned only one lady and only two or three bullets were fired. It was a simple case of murder which should be tried under the ordinary law

20. In this case it does not seem to be disputed by either party that Ms Zehra Shahid Hussain was murdered. The dispute lies over which Court has jurisdiction to proceed with the trial. Namely the ATC or the ordinary criminal courts.

21. The fact that Ms Zehra Shahid Hussain was murdered would bring the case within S.6 (2) (a) ATA since it was an act which caused death. The question then arises whether the act was 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 necessary intent.

22. Now if we look to the facts of the present case the deceased Ms Zehra Shahid Hussain, it appears reached at her home from Defence Club at night when suddenly two accused persons came there, one was on his motorcycle while the other armed with a pistol did not demand anything from the deceased despite the fact that she attempted to hand over her purse to him but the accused pushed away her purse and then started firing upon her with the sole intention to kill her.

23. The facts indicate that it was not a case of robbery but a case of cold bloodied murder. Prima facie it would therefore appear that the case ought to be heard by the ordinary criminal courts as opposed to the ATC.

24. However, we are required to look into all the facts and circumstances of the case in order to reach our conclusion on jurisdiction. In this case it appears that Ms Zehra Shahid Hussain was an active senior leader of a major political party and that she was murdered shortly after the 2013 general elections but just prior to the much disputed re election to be held in NA 250 Karachi which she was campaigning for on behalf of her political party and which was being fiercely contested by the other political parties in Karachi. Under these circumstances since there was no attempt of robbery and no material to suggest that she had any particular enmity with any one the only reasonable inference for her murder was to frighten potential voters away from voting for the candidate of the political party which she was campaigning for in the up coming re election for NA 250 and thereby give advantage to another political party.

25. As has rightly been observed in the impugned order it is less relevant that the act did not take place in public because of today's prompt and vigorous media coverage(both print and electronic) of such events. Her murder was highlighted on both the electronic and print media immediately after its occurrence and shortly before the re election to NA 250. Thus under these circumstances her murder in our view would have achieved its purpose of spreading fear in potential voters of the party which she was campaigning for in the NA 250 re election and other supporters of

(517)

the party which she was campaigning for who wanted to speak out against other political parties who were contesting the NA 250 re-election. Reliance in this respect is placed on the case of **Najam Un Nisa V Judge Special Court Constituted under Anti Terrorism Act 1997** (2003 SCMR 1323) which held as under on P.1324.

> "3. The venue of the commission of a crime; the time of occurrence, the motive which had led to the commission of a crime and the fact whether the said crime had or had not been witnessed by the public at large are not the only factors determining the issue whether a case did or did not fall within the parameters of the ATA of 1997. **The crucial question** is whether the said crime had or had not the effect of striking terror or creating a sense of fear and insecurity in the people or any section of the people. **Needless to mention here that a crime of the kind in hand committed even in a remote corner does not remain unnoticed in the area in which is committed or even in the country on account of the print and electronic media. Seven persons being butchered in a house at night is not the kind of occurrence which would not create terror and horror in the people or any section of the people.**" (bold added)

26. Based on these facts and circumstances as narrated above we are of the view that the only reasonable inference is that the deceased was killed because she was a senior activist of a major political party and her murder was intended to spread fear amongst other members/potential voters of that political party shortly before the NA 250 re election and would have done so and as such the offense of murder in this case does fall within the ambit of S.6 ATA as the other ingredients of that section have also been met.

27. As such the impugned order is up held and criminal revision application No. 61 of 2015 is dismissed.

Dated: 06.05.2016

JUDGE

JUDGE

Bail : Sales Tax Act. - Upheld by SCP 14-11-16 (DB)

(39)

(513)

CERTIFICATE OF THE COURT IN REGARD TO REPORTING

Spl. Cr. Bail A. No. 28/2016.
Ali Shan. Vs. The Director of Intelligence & Investigation (IRS) Karachi

SINDH HIGH COURT

Composition of Bench. ~~Single~~/D.B.

Hon'ble Mr. Justice Ahmed Ali M. Shaikh &
Hon'ble Mr. Justice Muhammad Karim Khan Agha.

Dates of hearing: 26/4/2016.

Decided on : 19/5/2016

(a) Judgment approved for reporting. Yes ~~No~~

CERTIFICATE

Certified that the judgment */Order is based upon or enunciates a princip-le of law */decides a question of law which is of first impression/distinguishes/ over-rules/ reverses/explains a previous decision.

*Strike out whichever is not applicable.

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NOTE:—(i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Rerder must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

SGP., Kar.—L (iii) 1459—5,000—6-93—T.S.S.

(515)

IN THE HIGH COURT OF SINDH AT KARACHI

Before: Mr. Justice Ahmed Ali M. Shaikh
Mr. Justice Mohammed Karim Khan Agha

Cr. Bail Application No. 28 of 2016

Ali Shan

Vs.

The Directorate of Intelligence
& Investigation (IRS) Karachi

Date of hearing:	26.04.2016.
Date of Order	19.05.2016
Applicant:	Through Mr. Zia-ul-Haq Makhdoom Advocate for applicant.
Respondent:	Through Syed Mohsin Imam, Advocate for Respondent.

ORDER

Mohammed Karim Khan Agha, J. Being aggrieved and dis-satisfied with the impugned order dated 12.02.2016 passed by a single bench of this Hon'ble Court, the applicant Ali Shah prefers this post arrest bail application in FIR No. 2/2015-16 under section 2(37), 3, 6, 7, 8, 10, 22, 23, 26 and 73 of the Sales Tax Act, 1990.

2. Precisely, the facts of the case are that the respondent Directorate, on receipt of credible information with regard to involvement of M/s. Azhaan Enterprises (NTN 3599257-3) in claiming bogus sales tax refunds against dubious purchases and exports, conducted scrutiny of monthly sales tax returns and other available record of the subject registered person which shows that the said business was registered for sales tax on 30.09.2010 with principle business activity as wholesale on a fee or contract basis and other activity as exporter/importer. Since its registration the registered person has claimed sales tax refunds of an aggregated amount of Rs. 48.858 million out of which refund of Rs.41.48 million has been allowed to the registered person.

3. It is further stated that during inquiry about genuineness of the refund claims of the said registered person it was found that the subject unit has claimed input from steel sector and P, scrap.

During further investigation it revealed that the illustration shows that the registered person has been claiming input of steel related raw material and plastic scrap from various suppliers and then claimed refund of sales tax on the basis of inputs. However, since the registered person is not engaged in any manufacturing activity, therefore, in order to substantiate consumption of inputs/raw material in exported goods and in support of refund claims as exporter, the registered person submitted fabricated/dummy cash memos/bills of so called processing charges from unregistered/unverifiable persons which have no indication that what goods have been processed/produced out of which inputs/raw materials.

4. It is also stated that during further investigation it revealed that during September 2013 to June 2015 registered person has been filing sales tax returns with no sale/purchase activity but suddenly from July 2015 to September 2015 made heavy imports of textile related goods/accessories worth Rs.242.00 million without declaring any sale of goods. The applicant Ali Shah disclosed that he used to purchase steel sheets and get it processed from market to convert it into steel racks and table round stands and then export the same but he could not explain satisfactorily about export of machinery and caterpillar wheel loader and claiming refunds against steel raw materials on the basis of such exports. On account of the above mentioned FIR the applicant was arrested on 11-11-2015 and has remained in custody for approximately six months

5. Learned counsel submitted that the impugned order is opposed to law and facts and is liable to be set-aside and the applicant/accused is innocent and has been falsely involved in this case by the complainant party with the connivance of the police due to enmity and none of the provisions of the Sales Tax Act 1990 invoked in the FIR and interim challan are attracted in this case. Learned counsel further submitted that the learned Single Judge of this Court has failed to consider that all the G.D.'s on which export was made, is verifiable from the Customs, PRAL data, and allegations against the applicant/accused for providing false documents to the concerned authorities is baseless. Learned counsel also submitted that the learned Single Judge of this Court failed to consider the ground for grant of bail that form "E"

submitted in respect of the export made is also verifiable from the concerned issuing bank and the remittance of foreign exchange proceeds amounting to US $3,792,152/-.

6. In summary he argued that the case did not fall within the prohibitory clause of section 497 Cr.P.C.; that the maximum sentence is three years for an offence under section 33(II) of Sales Tax Act, 1990, and five years for an offence under section 33(13) of Sales Tax Act, 1990; that it is a case of further inquiry; that the entire case is based on documentary evidence which has been collected by the prosecution and there is no chance for the applicant to tamper or destroy the evidence and the genius of invoices is yet to be determined at trial; that the applicant is behind the bars since the last 6 months and the order in appeal is in his favour and the final liability of Sales Tax has yet to be determined; that the assessment order dated 16.11.2015 is not final because an Appeal has been filed against it and the same is pending for adjudication; that the case in hand is not a crime against society and for all the above reasons the applicant is entitled to be granted post arrest bail.

7. In support of his contentions learned counsel placed reliance on the following authorities; **Tariq Bashir & others v. The State** (P.L.D. 1995 SC 34), **Syed Amir Ahmed Hashmi v. The State** (PLD 2004 Karachi 617), **Abdul Wahid Bandkukda & others v. The State** (SBLR 2008 Sindh 274), **Akhtar Zaman Khan v. The State** (2010 YLR 804), **Arshad Farooq Siddiqui v. The State** (SBLR 2005 Sindh 1435), **The State v. Muhammad Ashfaq Ahmed & others** (2006 PTD 286), **Khawaja Shabaz Ahmed v. Deputy Director, Directorate General of Intelligence and Investigation, Range Office Gujranwala**, (2012 P. Cr. L.J. 1378), **M/s. G.M.H. Traders and Manufactures v. Deputy Director/Investigation Officer, Directorate of Intelligence/Investigation, Lahore** (PTCL 2010 CL. 118), **Ashraf Steel Mills v. Director Intelligence & others**, (2014 PTD 1506) and **Zaigham Ashraf v. The Sate** (2016 SCMR 18).

8. Learned counsel for the respondent has vehemently opposed the bail application on the ground that the learned Single Judge has rightly rejected the bail application after going through the material placed before him and as such he supported the impugned order and prayed for dismissal of the bail application. In

518

particular he contended that even if the offense was a bailable one falling within the non prohibitory clause of S.497 Cr.PC since the nature of the crime e.g tax fraud, amounted to a crime against society then as per the case of **Imtiaz Ahmed V the State** (PLD 1997 SC 545) it could also fall into an exception where bail could be declined to an accused even if the case did not fall within the prohibitory clause of S.497 Cr.PC. He also in this respect placed reliance on the case of **Muhammed Siddique V Imtiaz Begum** (2002 SCMR 442), and the following judgments of the following High Courts:

1) Zaheer Hussain v. the State (PLD 2006 Kar 397).
2) Rizwan Latif v. the State (Lhr dated 17th March, 2008- unreported).
3) Chaudari Shabbir Hussain v. the State (2014 MLD 384 (Sindh))
4) Arshad Ali Khan v. the State (Kar. dated 25th May, 2015-unreported).
5) Owais v. the State (Kar. dated 7th November, 2015-unreported).

9. Learned Counsel also produced various documents indicating the seriousness of white collar crimes and that in certain jurisdictions such as the USA particularly heavy sentences had been handed down to those involved in white collar crimes, as in this case, and as such the perpetrators of such crimes should not be treated with any leniency.

10. We have perused the record, considered the submissions (both written and oral) of the learned counsel for the parties, the relevant law and the authorities cited by them.

11. We would like to make it clear that as per settled law on the grant of bail we have only made a tentative assessment of the material placed before us and that this order shall not prejudice the case of any party at trial whose case shall be decided on merits based on the evidence produced before the trial court.

12. We have observed that in essence this is the third bail application of the applicant. His first application for bail was rejected on 13-01-2016 by the Special Judge (Customs and Taxation) Karachi and his second bail application was rejected by a single judge of this Hon'ble Court by the impugned order.

519

13. In both the above orders rejecting bail it was found that there was sufficient material on record to connect the accused to the commission of the offense, it was a white collar crime and as such he was denied bail. We have reviewed those two earlier bail orders especially the impugned order and after reviewing the record are also of the view that there are sufficient grounds to connect the accused to the offense and thus prima facie his application for bail should be declined.

14. However we have also observed that the applicant has been charged for offenses under section 2(37), 3, 6, 7, 8, 10, 22, 23, 26 and 73 of the Sales Tax Act, 1990 punishable under S.33 (11) and (13) of the Sales Tax Act 1990 which provide for a maximum sentence of 3 and 5 years respectively so even if the applicant was convicted and punished under both of these sections and the sentences were ordered to run consecutively as opposed to concurrently the maximum of the combined sentences would be 8 years. As such the offenses fall within the non prohibitory clause of S.497 Cr.PC.

15. In the classic case of **Tariq Bashir V State** (PLD 1985 SC 34) which dealt, amongst other things, with the distinction in the granting of bail in bail able and non bailable offenses it was held as under at P.40 in respect of offenses which did not fall within the prohibitory clause i.e. were bailable.

> **"It is crystal clear that in bailable offences the grant of bail is a right and not favour**, whereas in non-bailable offences the grant of bail is not a right but concession/grace. Section 497 Cr.P.C. divided non-bailable offences into two categories i.e. (i) offences punishable with death, or imprisonment for life or imprisonment for ten years; and (ii) offences punishable with imprisonment for less than ten years. **The principle to be deduced from this provision of law is that in non-bailable offences falling in the second category (punishable with imprisonment for less than ten years) the grant of bail is a rule and refusal an exception. So the bail will be declined only in extraordinary and exceptional cases, for example---**

(a) where there is likelihood of abscondence of the accused;

(b) where there is apprehension of the accused tampering with the prosecution evidence;

(c) where there is danger of the offence being repeated, if the accused is released on bail; and

(d) where the accused is previous convict."

16. Since the sentence in this case is bailable prima facie following the decision in Tariq Bashir's case (Supra) the applicant is entitled to bail as of right provided that it does not fall within one of the exceptions mentioned in that case which, at first glance, it appears not to do so.

17. However it may be observed that the exceptions as laid down in Tariq Bashirs case(Supra) are not exhaustive as indicated by the word, **"for example"** and as such there may be other **extraordinary and exceptional cases** which would justify bail being refused for an offense which was otherwise bailable. This possibility was recognized in the case of **Imtiaz Ahmed V the State** (PLD 1997 SC 545) which was decided only two years after Tariq Bashir's case (Supra).

18. Indeed, in the case of **Shameel Ahmed V State** (2009 SCMR 174) the Hon'ble Supreme Court emphasized that bail could be declined in other wise bailable offenses by observing as under at P.176

> "With regard to the contention that the bail should always be granted in cases not falling within the domain of prohibition clause of proviso to section 497, Cr.P.C. **It is observed that it is not a rule of universal application. Each case has to been seen through its own facts and circumstances.** The grant of bail, no doubt, is discretion granted to a Court, yet the exercise of it cannot be arbitrary, fanciful or perverse." (bold added)

19. Since Tariq Bashir's case(Supra) and with the march of time we have seen a number of other categories of offenses which have been regarded as extraordinary and exceptional and despite being bailable have justified the refusal of bail on this count.

20. For example, in the 2011 case of **Mian Arif Hussain V State** (2011 P.Cr.LJ 1944) the sale of soft drinks which were unfit for human consumption was found to be a crime against society which lead to the refusal of bail in an other wise bailable offense.

21. Then in the 2012 case of **Ameen Saquib V State** (2012 P.Cr.LJ 577) stealing secret examination papers and assisting cheating was found to be a crime against society which lead to the refusal of bail in an other wise bailable offense

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22. Then again in the 2015 case of **Mian Tariq Aziz V State** (2015 PCr.LJ 1066) it was found that the pilferage of gas was a crime against society which lead to the refusal of bail in an other wise bailable offense

23. More recently on 31-3-2016 a Divisional Bench of this Court in the case of **Muhmammed Siddique V State** (Cr.BA 2001/16) found that the manufacturing or selling of drugs or medicines which fall within S.23 of the Drugs Act 1976 amounts to a crime against society and would be one of those exceptions which would justify the refusal of bail in cases which do not fall within the prohibitory clause of S.497 (1) Cr.PC.

24. The question therefore seems to be whether tax fraud falling under the Sales Tax Act 1990 could be seen as a crime against society and one of those **exceptional cases** as indicated in Tariq Bashirs case (Supra) and followed in the cases mentioned above to bring it within the class of case which due to its very nature would justify the refusal of bail despite it being a bailable offense.

25. The reference by learned counsel for the respondent to USA law and heavy sentences imposed thereunder for white collar crime although helpful in assessing global attitudes to this type of crime is in our view not of huge assistance to us. This is because the USA legislature has most probably laid down the maximum sentence for the commission of such offenses as has the Pakistani legislature. Furthermore, in the USA examples, it appears that heavy sentences were given based on sentencing guidelines which are not present in our criminal justice system. As an aside however we would observe that the creation of such sentencing guidelines may be of immense value in the Pakistani criminal justice system especially where a sentence is said to be up to a given maximum number of years. This is because in our view the use of such guidelines would most probably lead to a greater consistency in sentencing throughout the country based on the particular facts and circumstances of the case and would avoid criticism of arbitrariness or discrimination in sentencing and thereby hopefully enhance the public's confidence in the criminal justice system and the administration of justice.

26. We would also like to observe that based on the Pakistani system of Governance as per our Constitution which envisages a

trichotomy of powers it is not for the Courts to make appropriate sentences for particular offenses. This role lies within the domain of the legislature and not the judiciary one of whose roles is to interpret that law if called upon to do so. In this case the Hon'ble Supreme Court in bailable offenses has already found that there may be exceptional cases where bail cannot be given as of right. The question is as noted above whether tax fraud is one of those offenses.

27. In determining this issue in our view we need to consider the environment in which we live. In Pakistan at the moment precious few people, proprietorships, partnerships or companies pay tax. The emphasis is either on tax avoidance (legal) or mainly tax evasion (illegal) by simply not paying tax. Despite promises made by successive Governments to increase/broaden the tax base it appears that little head way has been made in this respect.

28. Now if we consider Pakistan's economic and financial position it appears that it is in a poor shape with the Government of the day often resorting to loans from the IMF etc. Perhaps if more tax was paid and collected this would not be the position and the State would not find it itself in the position of constantly taking loans which will need to be repaid and potentially will hang around the neck of future Governments.

29. If more tax was paid it is likely that more money could be put into the important but neglected areas of education and health for the people of this Country which budgetary allocation remains very small compared to its need.

30. Although learned counsel for the respondents, in the above environment, has made out a good case for uplifting tax fraud to a crime against society it appears to us that when deciding whether a fiscal crime is a crime against society the law must also be practical, workable and most importantly enforceable. As such to find all non income tax payers, non income tax filers or persons who commit tax fraud as committing a crime against society may be a step too far at this juncture.

31. It is true that a number of single benches of this Court have declined to grant bail in tax fraud cases. For instance in the cases of **Zaheer Hussain v. the State** (PLD 2006 Kar.397) **Chaudri**

Shabbir Hussain v. the State (MLD 2014 384 (Sindh)) **Owais v. the State** (Karachi dated 7th November, 2015) and the impugned order. However, with full respect and deference to our learned brothers sitting in single benches, we are of the considered view that when the Sales Tax Act 1990 is read as a whole it becomes apparent that its primary objective is one of recovery rather than being of a penal nature (although of course it does have penal sections which in our view our secondary to the primary objective of collection, payment and recovery of Sales Tax).The fact that the legislature has also in its wisdom decided that the maximum sentence for the offenses in hand should be 3 and 5 years respectively also clearly indicates that the offense was intended to fall within the non prohibitory clause. In this respect we are fortified by a Divisional Bench decision of this Court in the case of **Syed Amir Hashmi V The State (PLD 2004 Kari 617)** where although the amount of sales tax had been repaid in that case, and in this respect is distinguishable for the present case, it was held as under at P. 619.

> "During the arguments it was consistently asserted that loss to Government revenue, if any, has already been met as the amounts have been deposited even in excess. This position could not be rebutted. **No doubt, payment of amount to Government exchequer by a defaulter would not per se wash out the criminality of the act, if any committed in violation of rules/law, but we have noted that, while introducing the scheme of adjudication under section 45 of Sales Tax Act a situation arising out of erroneous refund under the Sales Tax and the rules made hereunder was amenable to adjudication through different officers mentioned therein. This process was aimed at catering for the civil liability arising out of sales tax evasion or refund and eventually, looking to such aspect, while dealing with the criminality of the tax fraud the Legislature has provided a lighter sentence in respect of the offences. For instance, an offence under section 37-A(3) of the Sales Tax Act is punishable with imprisonment for 5 years, or with fine, or with both indicating thereby possibility of punishment by way of fine only. Section 36 of the Act provides a mechanism for recovery of tax, inter alia, erroneously refunded. Section 33 also provides penalties in terms of money.**
>
> In the instant case it is not disputed that the apparent loss to Government revenue has already been paid up. The contention that the consignments had actually been exported and, therefore, the exporter was entitled to refund of sales tax paid, while purchasing the goods from local market, could also not be controverted in precise terms, perhaps, inter alia, for the reason that the final challan has not yet been submitted. **Besides, we agree with the learned counsel that entire case depends on documentary**

524

evidence, which has already been collected and is in possession of prosecution. The prosecution side has so far submitted only an interim challan and the commencement of trial is not yet in sight. The maximum punishment in terms of imprisonment is 5 years. The case law cited at the Bar also lends support to the bail plea.

The prime question as to whether the invoices were fake or not is yet to be determined at the trial, but for the time being in view of the foregoing discussion we are of the considered view that the applicants are entitled to concession of bail" (bold added)

32. No doubt the offense charged in the instant case is a serious one but, on balance, we do not feel inclined at this point in time to upgrade the offense to a crime against society. In our view not all white collar crimes are crimes against society and likewise not all crimes against society are white collar crimes. Each offense must be judged on its own particular facts and circumstances and existing background to determine its effect on society and whether it qualifies as a crime against society. As noted earlier the practicality, workability and most importantly the enforceability of making certain fiscal crimes as crimes against society must also be considered in the light of the current environment viz a viz paying tax in Pakistan.

33. Based on the particular facts and circumstances of this case it is particularly observed that the entire case is based on documentary evidence, there is little, if any, chance to tamper or destroy evidence, the genius of the invoices is yet to be determined, the final sales tax liability is yet to be worked out, the assessment order has not yet become final and the applicant has already been behind bars for 6 months when a maximum sentence of 5 years would be applicable and the applicant would also be entitled to remission.

34. Furthermore, it would appear that the applicant is a first offender who has not indulged in similar acts in the past, the Department is busy in the recovery proceedings which are yet to be determined and the case does not fall within the non prohibitory clause of S.497 Cr.PC and we have not found the offense to be a crime against society or another type of crime so as to make it an exceptional case which would fall outside the general rule

525

regarding bail in cases which fell outside the non prohibitory clause as laid down in Tariq Bashir's case (Supra).

35. As such for the reasons mentioned above we hereby enlarge the applicant on post arrest bail subject to him furnishing solvent surety of RS 1,000,000 (One million) with PR bond in the like amount subject to the satisfaction of the Nazir of this Court.

36. The learned trial court however is directed to complete the trial of the applicant within six months of the date of this order. The office shall immediately send a copy of this order to the concerned trial court for compliance.

Dated: 19.05.2016