

ORDER SHEET
IN THE LAHORE HIGH COURT, LAHORE.
JUDICIAL DEPARTMENT

Crl. Misc. No.8329-B of 2023

Ali Nawaz

VS.

The State etc.

S.No. of order/ Proceedings	Date of order/ Proceedings	Order with signature of Judge, and that of parties of counsel, where necessary.
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25.05.2023. Sardar Nadeem Abbas Dogar, Advocate for the petitioner.
Rai Akhtar Hussain Kharal, Additional Prosecutor General;
Muhammad Moeen Ali, Deputy Prosecutor General and
Ms. Noshe Malik, Deputy Prosecutor General with Hafeez,
ASI.
Malik Mukhtar Ahmad Ranjha, Advocate for the
complainant.

Through this petition, the petitioner seeks post arrest bail in case FIR No.931 dated 15.09.2021 registered under Sections 324,109,148,149 PPC read with Section 13(2a) Pakistan Arms Ordinance, 1965 amended 2015 at Police Station City Depalpur District Okara.

2. During arguments, it was observed that place of occurrence in this case is the Court premises and injury has been caused with firing. Question arises as to whether jurisdiction of Anti-terrorism Court as per Third Schedule of Anti-terrorism Act, 1997 is attracted in the case though it is not the case of terrorism which seems a product of personal vendetta, therefore, until the question of jurisdiction is settled petition for bail cannot be decided. Therefore, on the last date of hearing notice was given to prosecution to assist the court on the question of law. In response, learned Additional Prosecutor General and Deputy Prosecutors General in unison submitted that pursuant to dictum laid down by Hon'ble Supreme Court in a case reported as "Ghulam Hussain and others versus the State and others" (PLD 2020 SC 61), all the heinous offences which are included in third schedule of Anti-

terrorism Act, 1997 are to be tried by Anti-terrorism Court. On the other hand, learned counsel for the petitioner states that question of jurisdiction has already been settled that is the reason case was put for trial by prosecution before Court of ordinary jurisdiction.

3. Arguments heard; question dilated upon in the light of relevant law and judgment.

4. To better appreciate the contentions, Third Schedule of Anti-terrorism Act, 1997 is reproduced as under for reference;

THE THIRD SCHEDULE

(Scheduled Offences)

[See section 2 (t)]

- (1) Any act of terrorism within the meaning of this Act including those offences which may be added or amended in accordance with the provisions of section 34 of this Act.
- (2) Any other offence punishable under this Act.
- (3) Any attempt to commit, or any aid or abetment of, or any conspiracy to commit, any of the aforesaid offences.]
- (4) Without prejudice to the generality of the above paragraphs, the Anti-terrorism Court to the exclusion of any other Court shall try the offences relating to the following, namely: –
 - (i) Abduction or kidnapping for ransom;
 - (ii) use of firearms or explosives by any device, including bomb blast in a mosque, imambargah, church, temple or any other place of worship, whether or not any hurt or damage is caused thereby; or
 - (iii) firing or use of explosives by any device, including bomb blast in the Court premises;**
 - (iv) Hurt caused by corrosive substance or attempt to cause hurt by means of a corrosive substance; and
 - (v) Unlawful possession of an explosive substance or abetment for such an offence under the Explosive Substances Act, 1908 (VI of 1908)

Emphasize supplied

Entry-4 of above schedule clear indicates that offences mentioned thereunder are **exclusively triable by the Anti-terrorism Court**. Under said entry at serial No. iii, offence of firing in the Court premises is mentioned; therefore, despite the offence being result of personal vendetta where offence of terrorism is not attracted, shall be tried by the Anti-terrorism Court. The above observation

has also been attended in the light of judgment cited supra; for reference relevant excerpt is reproduced as under:-

“A careful reading of the Third Schedule shows that an Anti-terrorism Court has been conferred jurisdiction not only to try all those offences which attract the definition of terrorism provided by the Act but also some other specified cases involving heinous offences which do not fall in the said definition of terrorism. For such latter category of cases it was provided that although those offences may not constitute terrorism yet such offences may be tried by an Anti-terrorism Court for speedy trial of such heinous offences. This distinction between cases of terrorism and cases of specified heinous offences not amounting to terrorism but triable by an Anti-terrorism Court has already been recognized by this Court in the cases of Farooq Ahmed v. State and another (2020 SCMR 78), Amjad Ali and others v. The State (PLD 2017 SC 661) and Muhammad Bilal v. The State and others (2019 SCMR 1362). It has been clarified by this Court in those cases that such specified heinous offences are only to be tried by an Anti-terrorism Court and that court can punish the person committing such specified heinous offences only for commission of those offences and not for committing terrorism because such offences do not constitute terrorism. For the purposes of further clarity on this issue it is explained for the benefit of all concerned that the cases of the offences specified in entry No. 4 of the Third Schedule to the Anti-terrorism Act, 1997 are cases of those heinous offences which do not per se constitute the offence of terrorism but such cases are to be tried by an Anti-terrorism Court because of their inclusion in the Third Schedule. It is also clarified that in such cases of heinous offences mentioned in entry No. 4 of the said Schedule an Anti-terrorism Court can pass a punishment for the said offence and not for committing the offence of terrorism. It may be pertinent to mention here that the offence of abduction or kidnapping for ransom under section 365-A, P.P.C. is included in entry No. 4 of the Third Schedule and kidnapping for ransom is also one of the actions specified in section 7(e) of the Anti-terrorism Act, 1997. Abduction or kidnapping for ransom is a heinous offence but the scheme of the Anti-terrorism Act, 1997 shows that an ordinary case of abduction or kidnapping for ransom under section 365-A, P.P.C. is merely triable by an Anti-terrorism Court but if kidnapping for ransom is committed with the design or purpose mentioned in clauses (b) or (c) of subsection (1) of section 6 of the Anti-terrorism Act, 1997 then such offence amounts to terrorism attracting section 7(e) of that Act. In the former case the convicted person is to be convicted and sentenced only for the offence under section 365-A, P.P.C. whereas in the latter case the convicted person is to be convicted both for the offence under section 365-A, P.P.C. as well as for the offence under section 7(e) of the Anti-terrorism Act, 1997. The same may also be said about the other offences mentioned in entry No. 4 of the Third Schedule to the Act pertaining to "Use of firearms or explosives by any device, including bomb blast in a mosque, imambargah, church, temple or any other place of worship, whether or not any hurt or damage is caused thereby", "Firing or use of explosive by any device, including bomb blast in the

court premises", "Hurt caused by corrosive substance or attempt to cause hurt by means of a corrosive substance" and "Unlawful possession of an explosive substance or abetment for such an offence under the Explosive Substances Act, 1908 (VI of 1908)". Such distinction between cases of terrorism and other heinous offences by itself explains and recognizes that all heinous offences, howsoever serious, grave, brutal, gruesome, macabre or shocking, do not ipso facto constitute terrorism which is a species apart. Through an amendment of the Third Schedule any heinous offence not constituting terrorism may be added to the list of offences which may be tried by an Anti-terrorism Court and it was in this context that the Preamble to the Act had mentioned "Whereas it is expedient to provide for the prevention of terrorism, sectarian violence and for speedy trial of heinous offences".

It clearly speaks that any offence of firing within the Court premises would only be tried by Anti-terrorism Court whereas challan of this case has been put before court of learned Magistrate who though did not have jurisdiction but commenced the trial and entertained the bail petition as well. Article 175(2) of The Constitution of the Islamic Republic of Pakistan, 1973 ordains as under:-

"No court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law."

It was essential to put the challan of such case before the Anti-terrorism Court but now it is pending in the court of magistrate. Learned counsel for the petitioner submits that he would not press this petition provided case may be transferred to Anti-terrorism Court, so that he could move the bail petition before such Court.

5. Transfer of case from a Court of ordinary jurisdiction to Anti-terrorism Court has also been argued before this Court and according to Additional Prosecutor General, under the law, ordinary Court does not possess power to send the case direct to Anti-terrorism Court. The only mechanism is that the challan of the case shall be returned to prosecution for its submission before the Anti-terrorism Court. Ms. Noshe Malik, the learned Deputy Prosecutor General in attendance states that challan should be withdrawn from the Court of ordinary jurisdiction by the High

Court and be entrusted to Anti-terrorism Court which is the right course. Arguments on this point were also heard.

6. There are two situations when the case routes from court of ordinary jurisdiction to Anti-terrorism Court and both have different regimes. If the challan is put before any Court of ordinary jurisdiction and said Court on receiving challan considers that scheduled offence of Anti-terrorism Act is attracted from the facts of the case, it shall return the challan to prosecution for its presentation before Anti-terrorism Court because under section 190 of Cr.P.C. It is the mandate of magistrate to take cognizance of only those offences which he is empowered to try or send to court of sessions for trial. This arrangement is also within the scheme of law because Anti-terrorism Court is authorized to take direct cognizance of the offence triable by such Court without the case being sent to it u/s 190 of Cr.P.C. as mentioned u/s 19(3) of Anti-terrorism Act, 1997, and such Court is authorized to decide the question of jurisdiction as per section 23 of Anti-terrorism Act, 1997. Reference may be made to cases reported as “Rao FAHD ALI KHAN Versus The STATE and another” (2014 P Cr. L J 1071 Islamabad), “MIR ALI Versus The STATE and another” (2020 P Cr. L J 1060 (Kar) “ALI AKBAR and another versus THE STATE” (PL D 1995 Karachi 10).

7. This above scheme of law also finds its place in section 201 of Cr.P.C. a provision Pari Materia to Order VII Rule 10 of Code of Civil Procedure, 1908 (return of plaint) which requires that when any court if have no jurisdiction to entertain the private complaint it should return the same for its presentation to proper Court. For reference section 201 Cr.P.C. is reproduced as under:-

“201. Procedure by Magistrate not competent to take cognizance of the case: (1) *If the complaint has been made in writing to a Magistrate who is not competent to take cognizance of the case, he shall return the complaint for presentation to the proper Court with an endorsement to that effect.*

(2) *If the complaint has not been made in writing, such Magistrate shall direct the complainant to the proper Court.”*

What is to be looked in while deciding question of jurisdiction has been responded by a full Bench of this Court in a case reported as “AZHAR HUSSAIN and others Versus GOVERNMENT OF PUNJAB and others” (1992 P Cr. L J 2308), whereby case was recommended for transfer of case to Special Court while observing as under:-

“The jurisdiction of the Court is to be determined on the basis of the allegations contained in F.I.R. and the case set up by the prosecution. The truthfulness or otherwise of the allegations can only be determined at the time of trial after recording evidence. Moreover, mere fact that the Kalashnikov had not been recovered can hardly justify the conclusion that it was not at all used.”

This course has been approved by the Supreme Court in case reported as “ALLAH DIN and 18 others Versus THE STATE and another” (1994 SCMR 717), while citing above judgment of High Court which is reflected as under:-

“5. For the purpose of deciding the question of jurisdiction, the Court has to rely upon the material which is in the possession of prosecution at the time of presentation of case. Both the Courts below have acted upon the proposition that jurisdiction is to be determined on allegations made in F.I.R. and the case set up by the prosecution. In support reliance is placed on the case of Azhar Hussain and others v. The Government of Punjab and others (1992 PCr. LJ 2308), which is full Court judgment of 3 Judges of Lahore High Court. In the reported case the point involved was identical inasmuch as it was alleged in F.I.R. that Kalashnikov was used but during investigation it was not recovered and on that ground along with allegation of mala fides trial by the Special Court was resisted. Contention was repelled and rightly so, on the ground that non-recovery of Kalashnikov could not justify conclusion that the same was not at all used and mala fides were not proved.

6. We are in agreement with view expressed in the reported judgment mentioned above, and further observe that question of jurisdiction can be determined on the basis of F.I.R. and other material which is produced by the prosecution at the time of presentation of the challan. On the basis of that material the Court has to decide whether cognizance is to be taken or not. In the instant case incident is seen by six eye-witnesses and on our query whether eye witnesses have supported the allegation in F.I.R. about use of Kalashnikov like weapon, learned counsel for the petitioners replied in the affirmative. In the circumstances material available with prosecution in this case is sufficient to justify invocation of jurisdiction by the Special Court. Other contentions raised by

the learned counsel for the petitioners as mentioned above, can be properly appreciated only when evidence is recorded in the trial Court and witnesses are cross-examined. When that stage comes, the law will take its own course and it is open to the parties to take steps as are permitted by the law. For the present we are of the view that no flaw or legal infirmity is pointed out in the judgment of the High Court warranting interference. Leave is refused and the petition being devoid of merits, is hereby dismissed.”

Thus, while examining the material, if the Court determines as lacking of jurisdiction, it can return the challan to prosecution for presentation before the proper Court.

8. However, when the case is pending trial and a question of jurisdiction arises then of course challan cannot be returned to the prosecution because by the time certain court processes are on the record including the evidence that become part of judicial record which cannot be handed over to the prosecution nor can be kept in isolation in court record while detaching the challan only because evidence recorded by one Court can be acted upon by the Successor Court. In such situation the right course would be sending the challan directly by the Court of ordinary jurisdiction to the Anti-terrorism Court. Section 12 (1) of Anti-terrorism Act, 1997 states that:-

*“(1) Notwithstanding anything contained in the Code or in any other law, **a scheduled offence** committed in an area in a Province or the Islamabad Capital Territory shall be triable only by the Anti-terrorism Court exercising territorial jurisdiction in relation to such area.”*

In order to respect above mandate of law, it is incumbent upon every other Court to send the case for trial before Anti-terrorism Court.

9. Cases are of two categories, i.e., where offence of terrorism in terms of section 6 of Anti-terrorism Act, 1997 is committed and other which become triable by its inclusion in the third schedule of the Act *ibid*. Though for assessing the applicability of section 6 Anti-terrorism Act, 1997, some brain

storming is required keeping in view the material placed before the Court but for offence under Entry-4 of Third Schedule, the case can on first go be sent to the Anti-terrorism Court. If any case is pending trial before a Court of ordinary jurisdiction or any other Special Court for an offence and by virtue of an amendment such offence is included in the third schedule of Anti-terrorism Act, 1997 the case shall immediately be sent by the Court of ordinary jurisdiction to the Anti-terrorism Court as held by Division Bench of this Court in case reported as “Rana ABDUL GHAFAR Versus ABDUL SHAKOOR and 3 others” (P L D 2006 Lahore 64).

“A change of forum of trial by operation of law is ordinarily applicable to all pending cases and retrospectivity or otherwise of application of such law is not a relevant consideration in that regard. A reference in this respect may be made by us to the cases Liaqat Parvez Khan v. Government of the Punjab through Horne Secretary and 2 others PLD 1992 Lah. 517. (FB) and Muhammad Mushtaq v. Muhammad Ashiq and others PLD 2002 SC 841.”

10. The cases are usually pending trial before the Court of Magistrate, Court of Sessions or before any other Special Court; what course should be adopted for sending the case to Anti-terrorism court is tracked in some provisions of law and precedents. If the case is pending before the Court of Sessions or any Special Court which usually enjoys the status as that of Court of Sessions under the relevant law. The Anti-terrorism Court is also considered as Court of Sessions under Anti-terrorism Act, 1997 for the purpose of trial and it has also power to take cognizance under Section 190 of Cr.P.C. as a Magistrate, therefore, on the information or an application can call for the record of any case pending in another Court in order to ascertain the commission of any offence under Anti-terrorism Act, 1997. A case reported as “Rana ABDUL GHAFAR Versus ABDUL SHAKOOR and 3 others” (P L D 2006 Lahore 64) is referred in this respect. In the cited case on an application when Anti-terrorism Court declined to call for record of case from the Court of Sessions, the Hon’ble Division Bench of this Court has

deprecated such practice and allowed the case to be transferred to the Anti-terrorism Court. On the same analogy when any Court of ordinary jurisdiction suspects commission of an offence under Anti-terrorism Act, 1997, it can send the case directly to the Anti-terrorism Court and Court on determination of its jurisdiction shall proceed with the case from the stage at which it was pending immediately before such transfer and it shall not be bound to recall and re-hear any witness who has given evidence and may act on the evidence already recorded because section 350 of Cr.P.C. has been made applicable for trial by Anti-terrorism Courts by virtue of section 32 of Anti-terrorism Act, 1997, which is reproduced as under:-

“32. Overriding effect of Act. (1) *The provisions of this Act shall have effect notwithstanding anything contained in the Code or any other law, but save as expressly provided in this Act, the provisions of the Code shall, in so far as they are not inconsistent with the provisions of this Act, apply to the proceedings before an Anti-terrorism Court; and for the purpose of the said provisions of the Code, an Anti-terrorism Court shall be deemed to be a Court of Sessions.*

(2) *In particular and without prejudice to the generality of the provisions contained in sub-section (1), the provisions of section 350 of the Code shall, as far as may be, apply to the proceedings before an Anti-terrorism Court, and for this purpose and reference in those provisions to a Magistrate shall be construed as a reference to an Anti-terrorism Court.”*

This view is supported by a case decided by Division Bench of Peshawar High Court reported as “MIR ZAMAN Versus ZUBAIR and another” (2003 P Cr. L J 1086). In this case 11 prosecution witnesses have been recorded when the case was sought for transfer and Court formulated following questions:-

“16. Questions that would require determination would be:-

(a) *Whether Sessions Judge/Special Judge, Nowshera could have sent the case to ATC?*

(b) *If so, should the ATC to start de novo with the trial or to start with the proceedings from the stage it was received by him?*

(c) *Whether the ATC could convict the appellants without framing any charge of an offence under the Act?”*

The Court after answering such questions in paragraphs 17, 18 and 19 of the above judgment, has held that case has rightly been sent to Anti-terrorism Court by Special Court STA, therefore, after framing Charge u/s 6/7 of Anti-terrorism Act, 1997 Anti-terrorism Court can proceed with the trial; what has finally been concluded by the Court is reflected below:-

“20. Under section 32(2) of the Act the provisions of section 350, Cr.P.C. have been made applicable before ATC.

As through independent sections of the Act i.e. sections 12(3), 13(4) and 28 of the Act protection is given to evidence already recorded by a Court of equal jurisdiction and the ATC would start with the trial from the stage it is sent, therefore, insertion of section 350, Cr.P.C. in section 32 of the Act would be an additional power for proceeding on the basis of evidence already recorded by another Court.

21. Section 350(1) of Cr.P.C. is followed by a proviso where it provides that if conviction is recorded by a Sessions Judge then the High Court is of the opinion that accused has been materially prejudiced may order a new inquiry or trial.

22. While concluding, we hold that initially the Court of STA has taken cognizance and was within its competence. Having realized that the action committed in the offences constitutes act of terrorism it was rightly sent to ATC and ATC has rightly proceeded with the case on the basis of evidence already recorded but it was incumbent upon the ATC to have reframed the charge under section 6 read with section 7. of the Act so to make offence triable by itself.”

Similarly in a case reported as “FIDA HUSSAIN Versus ADDITIONAL SESSIONS JUDGE, JAMPUR, DISTRICT RAJANPUR and another” (2006 P Cr. L J 1551), this court has declared the act of Additional sessions Judge as legal when he sent the case to Anti-terrorism Court for trial of an offence mentioned under entry-4 of third schedule of Anti-terrorism Act, 1997.

11. There is a consensus on the point of law that on the eve of transfer of case from Court of ordinary jurisdiction or any Special Court to Anti-terrorism Court, it still has power to decide its jurisdiction in terms of section 23 of the Act *ibid* and can transfer it back to the Court having jurisdiction.

12. Now turning to the situation, if the case is pending before the Court of a Magistrate, as in the present case, then a slight shift in the procedure is the requirement of law. Magistrates though assume jurisdiction on a report submitted u/s 173 Cr.P.C. however, they are subordinate to the Session Judge and work is distributed among them as per section 17 of the said Code, therefore, though they are authorized to return the challan before the cognizance is taken as explained above, yet they cannot send the case directly to the Anti-terrorism Court when the case has crossed the stage of cognizance. Section 346 of Cr. P.C. explains somewhat like procedure as under:-

“346. Procedure of Magistrate in cases, which he cannot dispose of: (1) If, in the course of an inquiry or trial before a Magistrate in any district, the evidence appears to him to warrant a presumption that the case is one which should be tried or sent for trial to the Court of Session or the High Court, by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to the Sessions Judge or to such other Magistrate, having jurisdiction, as the Sessions Judge, directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself, or send the case for trial to the Court of Session or the High Court.”

This section clearly mandates to raise hands if the Magistrate lacks jurisdiction or is not empowered to try the case due to some other reasons, or decides that case should or ought to be tried by Court of Sessions, he can send the case to the Court of Sessions. Cases reported as ***“MUHAMMAD HANIF Versus THE CROWN” (PLD 1956 Lahore 394)***; ***“GHULAM HUSSAIN and others Versus THE STATE” (1985 P Cr. L J 2334)***, are referred. Section 347 Cr.P.C. is also a support to above legal provision. Though by virtue of section 32 of Anti-terrorism Act, 1997, an Anti-terrorism Court is deemed to be a Court of Sessions but as the case is entrusted to the Magistrate by the Sessions Judge u/s 17 of Cr.P.C. and is also empowered to withdraw a case from the Court of Magistrate u/s 528 of Cr.P.C, therefore, Magistrate shall stay the proceedings and submit case, with a brief report explaining its

nature, to the Sessions Judge for onward transmission to the Anti-terrorism Court for its opinion. An Anti-terrorism court for this purpose is deemed as Magistrate authorized u/s 190 which gives powers to take cognizance of an offence on police report, private complaint and upon his own information. For cognizance upon his own information a judgment of Division Bench of this Court is cited passed in case reported as “Y.K. LEE Versus DIG SARGODHA and 4 others” (2007 Y L R 1554); therefore, on taking cognizance by the Anti-terrorism Court, it can decide the jurisdiction either to assume it u/s 19(3) of Anti-terrorism Act, 1997 or take action u/s 23 for transfer of case back to Court of ordinary jurisdiction and thereafter concerned Court of Magistrate can recommence the trial from the stage it was stayed u/s 346 Cr. P.C.

13. Attending to submissions made by Ms. Noshe Malik, Learned Deputy Prosecutor General, a course for transfer of case u/s 526 Cr.P.C. is also available, if the case is being tried by a Magistrate or Court of Sessions. High Court u/s 526 (3) Cr. P.C. is empowered to transfer the case from Court of ordinary jurisdiction to Anti-terrorism Court, and this would be done in following manner as mentioned in above section:-

“(3) The High Court may act either on the report of the Lower Court, or on the application of a party interested, or on its own initiative.”

The authority of High court particularly for transfer of case from Court of ordinary jurisdiction to Anti-terrorism Court has been acknowledged in case reported as “MUHAMMAD AKBAR KHAN and 3 others Versus SHO P.S. GARHI KHAIRO, DISTRICT JACOBABAD and others” (2017 P Cr. LJ 1280) (SINDH). Under Section 526 Cr. P.C. High Court can transfer the case inter se subordinate courts only, therefore, question arises whether Anti-terrorism Court is also subordinate to High Court. This has been settled in case reported as “MUHAMMAD JAWAD HAMID Versus

Mian MUHAMMAD NAWAZ SHARIF and others” (PLD 2018 Lahore 836), by a full Bench of this Court whereby Anti-terrorism Court has been declared as inferior/ subordinate court to the High Court.

14. Considering the facts of case, the offence was committed as a result of firing in court premises, therefore, being scheduled offence under entry-4 of third schedule of Anti-terrorism Act, 1997, it is essential that case should be tried by Anti-terrorism Court concerned; therefore, while exercising revisional jurisdiction read with section 526 (3) of Cr.P.C., the case registered through FIR No.931/21 dated 15.09.2021 u/s 324, 109, 148, 149 PPC; u/s 13(2a) Pakistan Arms Ordinance, 1965, amended 2015 P/S City Depalpur, District Okara is withdrawn from the Court of Magistrate Section 30, Depalpur and is transferred for trial before the Anti-terrorism Court, Sahiwal in accordance with law. On assuming jurisdiction Anti-terrorism Court, Sahiwal shall proceed with the case from the stage at which it was pending immediately before such transfer. Accused/petitioner can move bail petition before the Anti-terrorism Court which shall be decided on its own merits. This petition is disposed of in the above terms.

(MUHAMMAD AMJAD RAFIQ)
JUDGE

This order was announced on
25.05.2023 and after dictation and
preparation and it was signed on
06.06.2023.

APPROVED FOR REPORTING

JUDGE

*Jamshaid**