Form No: HCJD/C-121.

JUDGEMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Jail Appeal No. 77 of 2017

Muhammad Sikandar
Vs
The State

DATE OF HEARING: 12-03-2019.

APPELLANT BY: Malik Riaz Advocate.

RESPONDENT BY: Malik Awais Haider Advocate.

ATHAR MINALLAH, CJ.- This Jail Appeal has been preferred by Muhammad Sikandar son of Muhammad Maalik (hereinafter referred to as the "***Appellant***") challenging his conviction and sentence handed down by the learned trial Court vide judgment, dated 11-05-2017.

2. The facts, in brief, are that on 16-08-2013, at about 5:00 p.m., an attempt was made by police officials to stop a vehicle from being driven on the wrong side of the road on

Jinnah Avenue, Islamabad. The vehicle was driven by the Appellant and the latter's wife, namely Ms Kanwal Bibi and two minor children, namely Maalik Abdul and Um-e-Farwa, respectively, were accompanying him as passengers. The Appellant ignored the police officials and opened fire with a fire arm weapon. He stopped the vehicle in the middle of the road and started randomly firing, which spread terror in the area. The police officials of the Islamabad Capital Territory rushed to the crime scene. Malik Abdul Rehman, Inspector (PW-18) who at that time was posted as Incharge of Police Station Kohsar, Islamabad, reached the crime scene on receiving information. The Appellant, in disregard to the safety of his wife, two children and members of the general public, used fire arm weapons at will by keeping the Jinnah Avenue closed till he was ultimately overpowered. Senior police officials tried to negotiate with the Appellant and the latter made demands which were essentially political in nature. It appears from the record that the administration and law enforcing agencies were handling the matter with care keeping in view the safety of the two innocent children and the apprehension that the Appellant may also be in possession of explosives. However, without the consent of the police officials, a private person, risking his life, over powered the Appellant and in the process the latter fired from the fire arm weapon in his possession which led to causing injuries to his wife. In this mayhem, the Appellant also suffered fire arm

injuries and, therefore, alongwith his wife he was rushed to the Pakistan Institute of Medical Sciences (hereinafter referred to as the "***Hospital***"). Both were medically examined and admitted for treatment. The Investigating Officer (PW-18) drafted a written complaint (Exh.PA) which was sent to the Police Station and pursuant thereto FIR No. 398, dated 16-08-2013 (Exh.PA/1) was registered on 16-08-2013. The Investigating Officer prepared a rough site plan (Exh.PW-18/1). He took two fire arm weapons i.e. rifles into possession vide recovery memo (Exh.PW-18/2). Fourteen shell casings were also taken into possession vide recovery memo (Exh.PW-18/3). The vehicle, bearing registration No. RLD/1705, which was in the use of the Appellant, was also taken into possession vide recovery memo (Exh.PW-18/4). The Investigating Officer also took into possession sixty nine unused/live bullets. The Investigating Officer then proceeded to room no. 230 of Global Hotel, Islamabad where the Appellant and his family had stayed the night before and had not checked out. The Investigating Officer collected and took into possession, vide respective recovery memos, various items belonging to the Appellant and the other family members. Ms Kanwal Bibi, wife of the Appellant, was discharged from the Hospital on 17-08-2013 and was arrested in the instant case. The Appellant, during the course of investigations, had disclosed that he had purchased the fire arm weapons from one Akhtar Ali who was arrested on 20-

08-2013. The Appellant was discharged from the Hospital on 29-10-2013. The Investigating Officer submitted an incomplete report under section 173 of the Cr.P.C on 31-08-2013, followed by a supplementary report on 01-11-2013. The recovered fire arm weapons and the empties were sent to the Punjab Forensic Science Agency (hereinafter referred to as the"***Agency***"). The latter submitted its report, dated 27-09-2016 (Exh.PZ) which was positive, by observing that the fire arm weapons had matched with the empties. A charge was framed against the Appellant, Ms Kanwal Bibi and Akhtar Ali vide order, dated 18-01-2014. They did not plead guilty and thus a trial ensued. The prosecution produced nineteen witnesses. The Appellant and the other co-accused preferred not to be examined under oath and, therefore, their respective statements were recorded under section 342 of the Code of Criminal Procedure, 1898 (hereinafter referred to as the "***Cr.P.C.***"). After recording of evidence and affording the parties an opportunity of hearing, the learned Judge, Special Court Anti Terrorism, Islamabad, vide judgment dated 11-05-2017, acquitted Ms Kanwal Bibi and Akhtar Ali of the charge, whereas the Appellant was convicted and sentenced in the terms mentioned in paragraph 34 thereof. It is noted that a lesser sentence was handed down.

3. The learned Counsel for the Appellant has contended that; the Appellant is innocent and that he was falsely

implicated in this case; the prosecution had failed to prove its case beyond reasonable doubt; the Appellant had not intended to harm any person and that he was provoked by the harsh treatment by the police officials; the Appellant was abused and humiliated in the presence of his family members, which was the cause of the provocation; the fire arm weapons were not recovered from the Appellant; in the facts and circumstances of the case the sentence handed down is harsh and not warranted.

4. The learned State Counsel, on the other hand, has argued that; the Appellant through his violent acts had attempted to create a sense of insecurity amongst the general public; the prosecution had established its case beyond reasonable doubt; the occurrence was telecast by national as well as international media; for more than three hours the main Avenue of the Federal Capital Territory had to be closed because of the violent actions of the Appellant; the demands made by the Appellant during the course of negotiations with the senior police officials had established beyond doubt that he had come to the crime scene with the intention to create fear amongst the general public.

5. The learned Counsel for the Appellant and the learned State Counsel have been heard and the record perused with their able assistance.

6. The admitted facts are that the Appellant was present on the fateful day with his wife and two children at the crime scene. He was in possession of fire arm weapons and live bullets in large quantities. The prosecution had proved beyond reasonable doubt the recovery of fire arm weapons, live bullets and empties from the crime scene. The main boulevard of the Federal Capital i.e. Jinnah Avenue remained closed for hours because of the wanton and violent acts of the Appellant. The latter, besides threatening officials of the law enforcing agencies and the general public, had also put the lives of his wife and two children at risk by virtually using them as shields for perpetrating the crime. He had entered into negotiations with senior officers of the law enforcing agencies for a long time and had made demands which were political in nature. This melodrama continued for hours and had generated pronounced interest of the national as well as international media. The time, place and situation created by the Appellant, particularly when the country was vulnerable to terrorist attacks, definitely had an impact on the general public. There is nothing on record that appeals to a prudent mind that his reckless and violent actions had been provoked because he was treated harshly by police officials. The context and evidence brought on record unambiguously shows that the Appellant had virtually brought the capital of Pakistan to a standstill and consequently created fear

amongst the general public as the result of a well thought plan.

7. There is no force in the argument raised by the learned Counsel for the Appellant that the latter had come to the Federal Capital on a family excursion and that the events that took place on 16-08-2013 on Jinnah Avenue were not intended by him. No prudent or reasonable person would travel to the capital for a family excursion while in possession of more than one unlicensed fire arm weapon and large quantities of ammunition. Assuming for the sake of argument that the Appellant had been provoked by the officials of the traffic police, there can be no explanation for blocking the main boulevard of Federal Capital for hours or entering into negotiations and making demands which were political in nature. There seemed to be no hope of an end to the reckless and violent actions of the Appellant had he not been overpowered by a private person. There is also no plausible explanation for risking the lives of two innocent children by virtually using them as human shields. The testimonies of all the witnesses who had entered the witness box were consistent and the prosecution successfully established the guilt of the Appellant by bringing unimpeachable evidence.

8. The learned trial Court has handed down a lesser sentence but has not recorded reasons for doing so, nor has it

referred to any mitigating circumstances. The acts of the Appellant did not deserve a lenient sentence. The prosecution has also not sought enhancement of sentence. While deciding the appeal we cannot on our own enhance the sentence handed down by the learned trial Court. The prosecution appears to have taken this matter lightly and this indifference is deprecated.

9. The learned Counsel for the Appellant has argued that the ingredients of terrorism under the Terrorism Act, 1997 (hereinafter referred to as the "***Act of 1997***") are not fulfilled in this case and, therefore, conviction could not have been handed down there under. In order to answer the question raised by the learned Counsel it would be beneficial to survey the relevant provisions of the Act of 1997 and the law enunciated relating thereto.

9. The Act of 1997 was promulgated through Act No. XXVII of 1997. It is a self contained and comprehensive special statute and it was promulgated with the object and for the purpose of providing for the prevention of terrorism and sectarian violence and the speedy trial of heinous offences for matters connected therewith and incidental thereto. Section 2 defines various expressions. Clause (x) of section 2 defines "terrorism" or "act of terrorism" as the meaning as assigned to it in section 6. Clause (t) of section 2 defines "scheduled

offence" as meaning an offence set out in the Third Schedule. "Terrorist" is defined in clause (y) as the meaning assigned to it under sub section (5) of section 6. Section 6 defines and describes the acts that would constitute the definition of terrorism while section 7 provides for punishment for such acts. Likewise, section 8 prohibits acts intended or likely to give rise to sectarian hatred, which have been described in clauses (a) to (d) thereof.

10. The august Supreme Court, in the judgment rendered by five Hon'ble Judges in the case titled "Mehram Ali and others v. Federation of Pakistan and others" [PLD 1998 S.C. 1445], while considering the vires of the Act of 1997 has observed, inter alia and held that the offences mentioned in the schedule must have nexus with the object of the statute and the offences covered under sections 6, 7 and 8 thereof. It was further observed that if an offence included in the Schedule of the Act of 1997 has no nexus with sections 6,7 and 8 then in such an eventuality a notification including such an offence to that extent would be ultra vires.

11. In the case titled "Ch. Bashir Ahmad v. Naveed Iqbal and 7 others" [PLD 2001 S.C. 521] the apex Court has observed and held that a person would commit a terrorist act if the effect of his actions will be to strike terror or create a sense of fear and insecurity in the people or any section of

the people. It was further held that perusal of the Schedule of the Act indicates that the element of striking terror or the creation of a sense of fear and insecurity in the people or any section of the people by doing an act or thing by using bombs, dynamite or other explosive or inflammable substances etc is a sine qua non for the attraction of the provisions of section 6 of the Schedule to the Act of 1997. It was further held that the provisions of the Act of 1997 would not be attracted solely because of the nature of offences being heinous unless the offences in the Schedule has nexus with the object of the promulgation of the Act of 1997 and the offences covered under sections 6 to 8.

12. In the case titled "Mst. Raheela Nasreen v. The State and another" [2002 SCMR 908] the august Supreme court has held and observed as follows:

> **"**From a bare reading of section 6(b) of the Act, it is manifest that it is not necessary that the offence as alleged had in fact, caused terror as the requirement of the said provision of law could be adequately satisfied if the same was likely to strike terror or sense of fear and insecurity in the people.**"**

13. In the case titled "Muhammad Mushtaq v. Muhammad Ashiq and others" [PLD 2002 S.C. 841] the

august Supreme Court has enunciated the principles as follows:

> **"**It would thus appear that ordinary crimes are not to be dealt with under the Act. A physical harm to the victim is not the sole criterion to determine the question of terrorism. What is to be seen is the psychological effect produced by the violent action or with the potential of producing such an effect on the society as a whole or a section thereof. There may be a death or injury caused in the process. Thus where a criminal act is designed to create a sense of fear or insecurity in the minds of the general public disturbing even tempo of life and tranquility of the society, the same may be treated to be a terrorist act. There may be just a few killings, random or targeted, resorted to with single mindedness of purpose. But nevertheless the impact of the same may be to terrorise thousands of people by creating a panic or fear in their minds.**"**

14. In the case titled "State through Advocate-General, N.-W.F.P., Peshawar v. Muhammad Shafiq" [PLD 2003 S.C. 224] the august Supreme Court has held and observed as

follows:

> **"**A reading of the above provision of the Act demonstrates that it is not necessary that the commission of murder must have created panic and terror among the people. The Courts have only to see whether the terrorist act was such which would have the tendency to create sense of fear, or insecurity in the minds of the people or any section of the society. We have to see the psychological impact created upon the minds of the people. It is also not necessary that the said act must have taken place within the view of general public so as to bring it within the encompass of the Act. Even an act having taken place in a barbaric and gruesome manner, if it had created fear and insecurity, would certainly come within the purview of the Act.**"**

The august Supreme Court reiterated the above principles and law in the case titled "Naeem Akhtar and others v. The State and others" [PLD 2003 S.C. 396] and has held and observed that in general terms a fright, dread or an apprehension in the mind of a person induced by a horrible act of a person or causing fear and terror to the people is terrorism and if an act done by a person which is a source of

terror amongst any section of people, it would be a terrorist act and thus an offence under the Act of 1997.

15. In the case titled "Sh. Muhammad Amjad v. The State" [PLD 2003 S.C. 704] the august Supreme Court has held as follows:

> **"**Condition precedent for applicability of ATA is that the offences mentioned in the Schedule should have nexus with the objects mentioned in sections 6, 7 and 8 of the ATA. If sense of fear, insecurity in the people at large or any section of the people or disturbance of harmony amongst different sections of the people is created, above quoted subsection will be attracted. Even if by act of terrorism actual terror is not caused, yet, above quoted subsection (b) will be applicable if it was likely to do any harm contemplated in said subsection. It is the cumulative effect of all the attending circumstances which provide tangible guidelines to determine the applicability or otherwise of said subsection.**"**

16. In the case titled "Muhammad Farooq v. Ibrar and 5 others" [PLD 2004 S.C. 917] the august Supreme Court has eloquently held as follows:

> "The very object to promulgate Anti-Terrorism Act, 1997 was to control the acts of terrorism, sectarian violence and other heinous offences as defined in section 6 of the Act and their speedy trials. To bring an offence within the ambit of the Act, it is essential to examine that the said offence should have nexus with the object of the Act and the offences covered by its sections 6, 7 and 8. On bare perusal of sub-clauses (b), (d), (h) and (i) of subsection (1) of section 6 of the Act, it is abundantly clear that the offence which creates a sense of fear or insecurity in society, causes death or endangers a person's life, involves firing on religious congregations, mosques, imambargahs, churches, temples and all other places of worship, or random firing to spread panic, or involves any forcible takeover of mosques or other places of worships, falls within its ambit."

17. The above principles and law were reaffirmed in the cases tiled "Mohabbat Ali and another v. The State and another" [2007 SCMR 142], "Bashir Ahmed v. Muhammad Siddique and others" [PLD 2009 S.C. 11], and "Nazeer Ahmed and others v. Nooruddin and another" [2012 SCMR 517].

18. In the case titled "Shahbaz Khan alias Tippu and others v. Special Judge Anti-Terrorism Court No. 3, Lahore and others" [PLD 2016 S.C. 1] the august Supreme Court has held as follows:

> "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."

The august Supreme Court succinctly highlighted and further clarified the principles and law in the case titled "Malik Muhammad Mumtaz Qadri v. The State and others" [PLD 2016 S.C. 17] and the relevant portion is reproduced as follows:

> "A plain reading of section 6 of the Anti-Terrorism Act, 1997 shows that while defining

'terrorism' the said section bifurcates the same into two parts, the mens rea for the offence falling in section 6(1)(b) or (c) and the actus reus of the offence falling in section 6(2) of the Act and in order to attract the definition of terrorism in a given case the requisite mens rea and actus reus must coincide and coexist. The provisions of section 6(5), (6) and (7) of the Act also indicate that there may be some other actions of a person which may also be declared or recognized as acts of terrorism by some other provisions of the same Act."

The apex Court further held and observed as under:

"The provisions of section 6(1)(b) of the Anti-Terrorism Act, 1997 quite clearly contemplate creation of a sense of fear or insecurity in the society as a design behind the action and it is immaterial whether that design was actually fulfilled or not and any sense of fear or insecurity was in fact created in the society as a result of the action or not. It is the specified action accompanied by the requisite intention, design or purpose which constitutes the offence of terrorism under section 6 of the Anti-Terrorism Act, 1997 and the actual fallout of the action has nothing to do with determination of the nature of offence.**"**

19. In the case titled “Khuda-e-Noor v. The State” [PLD 2016 S.C. 195] it was held as follows:

> **“**The provisions of section 6 of the Anti-Terrorism Act, 1997 which define "terrorism" clearly show that the said section is divided into two main parts, i.e. the first part contained in section 6(1)(b) and (c) of the said Act dealing with the mens rea mentioning the "design" or the "purpose" behind an action and the second part falling in section 6(2) of the said Act specifying the actions which, if coupled with the mens rea mentioned above, would constitute the offence of "terrorism".**”**

20. In the judgment reported as “Kashif Ali v. The Judge, Anti-Terrorism, Court No. II, Lahore and others” [PLD 2016 S.C. 951] rendered by five Hon’ble Judges of the apex Court it has been held and observed as follows:

> **“**The term "design" now used in Section 6 of the Act has widened the scope of the Act and the terms "intention" and "motive" previously used have been substituted with the sole object that if the act is designed to create a sense of fear or insecurity in society, then the Anti-

> Terrorism Court will have the jurisdiction. From the above definition of the term "design" it is clear that it means a plan or scheme conceived in mind and intended for subsequent execution. 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 levelled in the F.I.R, 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 motive of the accused. In other words, the motive and intent have lost their relevance 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.**"**

21. Finally, reference is made to "Waris Ali and 5 others v. The State" [2017 SCMR 1572] wherein the august Supreme Court interpreted the expression terrorism in the context of the Act of 1997 as follows:

> **"**In cases of this nature, "mens rea" is essentially with an object to accomplish the act of terrorism and carrying out terrorist activities to overawe the State, the State Institutions, the public at large, destruction of public and private properties, make assault on the law enforcing agencies and even at the public at large. The ultimate object and purpose of such acts is to terrorize the society or to put it under constant fear while in ordinary crimes committed due to personal vengeance/blood feud or enmity, the element to create fear or sense of insecurity in the society, public by means of terrorism is always missing.**"**

22. It is, therefore, obvious from the survey of the provisions of the statute and the precedent law that no matter how gruesome, violent or heinous an act or the commission of an offence may be, it would not constitute an act of terrorism within its meaning contemplated under the Act of 1997 unless the mens rea and actus reus explicitly mentioned therein coincides and co exists. The most gruesome murder in a crowded public place with lethal firearm weapons due to personal enmity or at the spur of the moment would definitely create a sense of fear and insecurity

amongst the general public, society or part thereof but may not necessarily amount to terrorism within the meaning contemplated under the Act of 1997. The essential ingredients relating to mens rea and actus reus explicitly mentioned in section 6(1)(b) or (c) and section 6(2) respectively must coexist and coincide. The pre condition is existence of design to intimidate, overawe and create scare and insecurity amongst the general public, society or a section thereof. The action must be one contemplated in section 6(2) of the Act of 1997. The offence of terrorism would be constituted if the design was to create the physiological impact of creating a sense of fear and insecurity relatable to the general public, society or a section thereof. The offences mentioned in the schedule must have nexus with the object of the statute and contemplated under sections 6 to 8. For the offence of terrorism to be constituted it is not necessary that victims are actually harmed or that terror was caused. It would be sufficient if the design of the intended act was likely to create terror, a sense of fear and insecurity amongst the general public, society or a section thereof. In the facts and circumstances of the case in hand, the *mens rea* and *actus reas* contemplated in the Act of 1997 coexists.

24. For the above reasons we hold that the prosecution had proved the charge against the Appellant beyond reasonable doubt and that there were no mitigating

circumstances for handing down a lesser sentence. Nonetheless, the sentence has not been challenged by the State. The appeal preferred by the appellant has been found to be without merit and is, therefore, accordingly *dismissed*.

(CHIEF JUSTICE)

(MIANGUL HASSAN AURANGZEB)
JUDGE

Announced, in open Court, on *11-06-2019*.

JUDGE CHIEF JUSTICE

Approved for reporting.

Tanveer Ahmed.