

**JUDGMENT SHEET
IN THE PESHAWAR HIGH COURT,
MINGORA BENCH (DAR-UL-QAZA), SWAT
(Judicial Department)**

Cr.R No. 56-M/2019

*Abdar son of Shah Sultan resident of Nokara, Tehsil Matta,
District Swat.*

(Petitioner)

Versus

The State and one other

(Respondents)

Present:

Mr. Munir Ahmad, Advocate for State.

*Muhammad Haq Nawaz, Assistant A.G. for
State.*

Respondent No.2. alongwith his father in person.

Date of hearing: **08.10.2019**

Date of Announcement: **15.10.2019**

JUDGMENT

SYED ARSHAD ALI, J.- Through this criminal revision petition, the petitioner namely Abadar, who is accused in case F.I.R No. 163 dated 11.03.2019 u/s 377 P.P.C read with section 53 of the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010, has challenged the order of the learned trial Court dated 21.05.2019 whereby his application for deletion of Section 7 of the Anti-Terrorism Act, 1997 from the aforesaid F.I.R and sending of the case to regular Court under Section 23 of the said Act was dismissed.

2. The present petitioner, whose age, according to the record, is 25 years, is charged for committing rape of minor victim namely Fawad, aged about 11 years, inside the house of the petitioner/accused.

3. The learned counsel for the petitioner has argued that for the offences relating to child abuse a separate law has been enacted known as the Khyber Pakhtunkhwa Child Protection and Welfare Act, 2010 and according to Section 15 of the said Act, the Provincial Government may notify the Courts which can take cognizance of the like matters. In support of his arguments, he produced the case law reported as **2018 MLD 314 [Gilgit-Baltistan Chief Court]**, **2017 YLR 936 [Gilgit-Baltistan Chief Court]**, **2017 P Cr. L J Note 246 [Sindh (Sukkur Bench)]**, **PLJ 2016 Cr.C (Lahore) 155** and **1999 YLR 1716 [Lahore]**.

4. The learned A.A.G. has argued that in the present case the act of the accused has created terror in the entire society as it has put the security of all the teenagers at stake, hence, the offence in question squarely falls within the mischief of the Anti-Terrorism Act, 1997 ("Act") and is triable by the Anti-Terrorism Court. He placed reliance on

PLD 2009 Supreme Court 11, PLD 2006 Supreme Court 524, 2019 P Cr.L J 57 [Gilgit-Baltistan Chief Court], 2016 GBLR 199 [Supreme Appellate Court], PLD 2012 Baluchistan 122, 2007 P Cr.L J 11 [Northern Areas Chief Court] and PLD 2000 Lahore 449.

5. Messers Aurangzeb Advocate and Asad-ur-Rehman, Barrister-at-Law, were appointed as *amicus curie* to assist this Court on the aforesaid issue. The learned counsels have referred to "Allah Wasaya V/s. The State and 06 others" (2001 YLR 3309 [Lahore]) and "The State V/s. Abdul Malik alias Malkoo" (PLD 2000 Lahore 449) and stated that although there was an earlier view that the matters relating to child molestation and gang rape were exclusively triable by the special Court established under the Act, however, later the august Supreme Court of Pakistan has held in various judgments that the striking feature for attracting the jurisdiction of the special Court is that the impugned act must have caused terror in a particular section of the society. Reliance has been placed on 2017 SCMR 1572, PLD 2016 Supreme Court 17, PLD 2016 Supreme Court 1. The learned counsel also referred to the Criminal Law (Amendment)

(Offences Relating to Rape) Act, 2016 (Act XLIV of 2016) whereby certain offences in the Pakistan Penal Code (ACT XLV OF 1860) ("PPC") relating to rape were amended and Section 376-(1A) was introduced in the PPC whereby the law was made more harsh on the accused who are involved in child molestation or rape cases. He has further maintained that if the legislation had the intention to bring the offence of rape within the scheduled offences, it would have done so by making specification thereof in the Act to be a scheduled offence.

6. We have heard the arguments of learned counsel for the parties as well as of the learned *amicus curie* and perused the record with their able assistance.

7. The case of the present petitioner is that the offence for which he is charged is neither a schedule offence nor is punishable under Section 7 of the Act, hence, the same is triable by ordinary Court of law. The learned trial Court, while turning down application of the petitioner has relied upon "The State V/s. Abdul Malik alias Malkoo" (PLD 2000 Lahore 449) wherein it was held that child molestation being not only heinous in nature but would also constitute a "terrorist act" as defined in



Section 6 of the Act, hence, the same offence is to be tried by Anti-Terrorism Court.

The same view also reflects in "Allah Wasaya V/s. The State and 06 others" (2001 YLR 3309 [Lahore]). The close perusal of the said judgments would show that child molestation was at the relevant time a scheduled offence exclusively triable by special Court, therefore, in the present case it would be appropriate to trace the original text of Sections 6 and 7 of the Act as well as the subsequent amendments therein.

8. The original text of Section 6 in the unamended Act is as following.

"6. Terrorist act.--- Whoever, to strike terror in the people, or any section of the people, or to alienate any section of the people or to adversely affect harmony among different sections of the people, does any act or thing by using bombs, dynamite or other explosive or inflammable substances, or fire-arms, or other lethal weapons or poisons or noxious gases or chemicals or other substances of a hazardous nature in such a manner as to cause, or to be likely to cause the death of, or injury to, any person or persons, or damage to, or destruction of, property or disruption of any supplies of services essential to the life of the community or displays fire-arms, or threatens with the use of force public servants in order to prevent them from discharging their lawful duties commits a terrorist act".



Section 6 of the Act was indeed completely substituted for the first time through Ordinance IX of 1998. The amended text of Section 6 is as under:-

"6. Terrorist act. --- A person is said to commit a terrorist act if he,

- (a) in order to, or if the effect of his action will be to, strike terror or create a sense of fear and insecurity in the people, or any section of the people, or to alienate any section of people, or to adversely affect harmony among different sections of the people, does any act or thing by using bombs, dynamite or other explosive or inflammable substances, or such fire-arms or other lethal weapons as may be notified, or poisons or noxious gases or chemicals, in such a manner as to cause, or be likely to cause, the death of, or injury to, any person or persons, or damage to, or destruction of, property on a large scale, or a widespread disruption of supplies of services essential to the life of the community, or threatens with the use of force public servants in order to prevent them from discharging their lawful duties; or***
- (b) commits a scheduled offence, the effect of which will be, or be likely to be, to strike terror, or create a sense of fear and insecurity in the people, or any section of the people, or to alternate any section of the people, or to adversely affect harmony among different sections of the people; or***
- (c) commits an act of gang rape, child molestation, or robbery coupled with rape as specified in the schedule to the Act.***

This law was once again amended through Ordinance IV of 1999 as following.

"6. Terrorist Act---A person is said to commit a terrorist act if he,

- (a) *in order to, or 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, does any act or thing by using bombs, dynamite or other explosive or inflammable substances, or such fire-arms or other lethal weapons as may be notified, or poisons or noxious gases or chemicals, in such a manner as to cause, or be likely to cause, the death of, or injury to, any person or persons, or damage to, or destruction of, property on a large scale, or a widespread disruption of supplies of services essential to the life of the community, or threatens with the use of force public servants in order to prevent them from discharging their lawful duties; or*
- (b) *commits a scheduled offence, the effect of which will be, or be likely to be, to strike terror, or create a sense of fear and insecurity in the people, or any section of the people, or to adversely affect harmony among different sections of the people; or*
- (c) *commits an act of gang rape, child molestation, or robbery coupled with rape as specified in the Schedule to this Act; or*
- (d) *commits an act of civil commotion as specified in section 7A.*

Through another Ordinance XXXIX of 2001, the Act was almost restructured and Section 6 was completely substituted for the following:-

"6. Terrorism.--(1) *In this Act, "terrorism" means the use or threat of action where:*

- (a) *the action falls within the meaning of subsection (2); and*
- (b) *the use or threat is designed to coerce and 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; or*
- (c) *the use of threat is made for the purpose of advancing a religious, sectarian or ethnic cause.*

- (2) An "action" shall fall within the meaning of subsection (1), if it:
- (a) involves the doing of anything that causes death;
 - (b) involves grievous violence against a person or grievous bodily injury or harm to a person;
 - (c) involves grievous damage to property;
 - (d) involves the doing of anything that is likely to cause death or endangers a person's life;
 - (e) involves kidnapping for ransom, hostage-taking or hijacking;
 - (f) incites hatred and contempt on religious, sectarian or ethnic basis to stir up violence or cause internal disturbance;
 - (g) involves stoning, brick-batting or any other form of mischief to spread panic;
 - (h) 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 worship;
 - (i) creates a serious risk to safety of the public or a section of the public, or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civic life;
 - (j) involves the burning of vehicles or any other serious form of arson;
 - (k) involves extortion of money ("bhatta") or property;
 - (l) is designed to seriously interfere with or 'seriously disrupt a communications system or public utility service;
 - (m) involves serious coercion or intimidation of a public servant in order to force him to discharge or to refrain from discharging his lawful duties; or
 - (n) involves serious violence against a member of the police force armed

forces, civil armed forces, or a public servant.

- (3) *The use or threat of use of 'any action falling within subsection (2), which involves the use of fire-arms, explosives or any other weapon, is terrorism, whether or not subsection 1(c) is satisfied.*
- (4) *In this section "action" includes an act or a series of acts.*
- (5) *In this Act, terrorism includes any act done for the benefit of a proscribed organization.*
- (6) *A person who commits an offence under this section or any other provision of this Act, shall be guilty of an act of terrorism.*
- (7) *In this Act, a "terrorist" means*
 - (a) *a person who has committed an offence of terrorism under this Act, and is or has been concerned in the commission, preparation or instigation of acts of terrorism;*
 - (b) *a person who is or has been whether before or after the coming into force of this Act, concerned in the commission, preparation or instigation of acts of terrorism, shall also be included in the meaning given in clause (a) above."*

(emphasis supplied)

9. The amendment introduced through Act XXXIX Act 2001, has indeed restructured the application of the Act to certain offences. Prior to the said amendment, it was the effect of the criminal act (*actus reus*) which was a deciding factor for applicability of section 6 of the Act that is the "effect of the action", whereas after amendment of 2001 it is the *mens rea* to "cause

terror” is the deciding factor for application of section 6 to any schedule offence.

The close perusal of the amended Section 6 would show that in Clause (a) of sub-section (1) which defines “terrorism” after the semi-colon (;) the word ‘and’ appears. Similarly, the word “or” appears after clause (b) and the aforesaid sub-section (1), which indicates the intention of the Legislation behind the substitution of Section 6 through Ordinance XXXIX of 2001. Thus, the inference would be that whenever the offences as enumerated in sub-section 2 of Section 6 is committed by an accused with an aim to coerce and intimidate or overawe the Government, the public or section of public, community etc. or for advancing religious, sectorial or ethnic cause etc., it is then the provision of Section 6 of the Act which is to be attracted.

The offence of rape although prior to the Anti-Terrorism (Amendment) Ordinance, 2001 was a scheduled offence but after that Section 6 was re-structured and the offence of rape or child molestation does not appear to be a “terrorist act” under Section 6 of the Act. We agree with the learned *Amicus Curie* that if the legislation had the

intention to bring the offence of rape within the scheduled offences then it would have by clear intent described it in sub-section (2) of Section 6 of the Act. However, in order to fully comprehend the issue it would be appropriate to refer to the various judgments of the superior Court, where this issue has been resolved.

10. In "Basharat Ali V/s. The Special Judge Anti-Terrorism Court-II, Gujranwala and others" (PLD 2004 Lahore 199) the Honourable Lahore High Court, Lahore has held that the test to determine whether a particular act is "*terrorism*" or not is the motivation, object, design or purpose behind the act and not the consequential effect created by such act. "*Terrorism*", in this context has to be understood as a species different and apart from terror, horror, shock, fear, insecurity, panic or disgust created by an ordinary crime.

11. In "Bashir Ahmad V/s. Muhammad Siddique and others" (PLD 2009 Supreme Court 11) wherein the case of the complainant party was that they were assaulted by the accused near their haveli duly armed whereby four persons were done to death and some of them sustained serious injuries; thereafter, the accused made their escape good while

making aerial firing, creating terror, insecurity and traumatic effect in the locality. The motive in the said case was blood feud enmity between the parties. In the said judgement, the august Supreme Court of Pakistan has held that the judicial consensus seems to be that striking off terror is sine qua non for the application of the provisions as contained in Section 6 of the Act and since the act complained in the F.I.R has resulted in striking terror and sense of insecurity in a particular vicinity, therefore, the said act of the accused was an act of terrorism.

12. In "Ahmad Jan V/s. Nasrullah and others" (2012 SCMR 59) the august Supreme Court of Pakistan after analyzing the various aspects of the Act has laid down the following rules for trying of an offence by the Special Court established under the Act.

"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”.

13. In “Shahbaz Khan alias Tippu and others V/s. Special Judge Anti-Terrorism Court No. 3, Lahore and others” (PLD 2016 Supreme Court 1), the facts of the case were that there was a dispute over a house between the parties, the accused party alongwith four unknown person duly armed with weapons had opened indiscriminate firing on the complainant party as a result thereof the father of the complainant and his 03 brothers were killed whereas his two cousins were seriously injured. In the said judgment no definite findings were given by the august Supreme Court of Pakistan but it was held that the surrounding circumstances of the case can be interpreted in order to ascertain as to whether the act of accused fell within the ambit of the Act.

14. In the case of “Muhammad Mumtaz Qadri V/s. The State and others” (PLD 2016 Supreme Court 17), when Muhammad Mumtaz Qadri, the appellant/convict, was charged for the murder of the then Governor of Punjab, the august Supreme Court of Pakistan while upholding his conviction u/s 7 of the Act by the trial Court has

held that action of the accused for killing the deceased and the intention, design or purpose behind such action fully attracted the definition of terrorism contained in Section 6 of the Act as his *mens rea* was evident from his statement u/s 342, Cr.P.C wherein he has stated that the murder of deceased was a "lesson for all the apostates, as finally they have to meet the same fate".

15. In "Waris Ali and 5 others V/s. The State" (2017 SCMR 1572) the Hon'ble apex Court has very elaborately dealt with the matter. The facts of the said case were that 4 person including a child were killed whereas eight other persons were seriously injured by the accused and the crime was committed with a previous motive. In this judgment the august Supreme Court of Pakistan has mentioned the history and the purpose for which the Act was enacted and, while disapproving the conviction u/s 6 & 7 of the Act, held that:-

"24. True, that in section 6 read with section 7 of the Special Act, offences of murder, attempted murder or causing bodily hurt or injury have been made cognizable by the Special Court, however, from the qualifying words, preceding the description of offences under subsection (1) of section 6 read with the provisions of section 7 the intention of the Legislature becomes perceivable/visible that in

committing these crimes essentially the element of "terrorism" shall be persuasive factor however other category of crimes duly specified and listed in Special Act shall fall within the ambit of provision of same being act of terrorism in that regard. The manifest intent of the Legislature does not leave behind any doubt for debate.

25. In certain circumstances, offences of murder or bodily harm, committed by the individuals in a sudden fight, even at public places, due to sudden flare up where the reason preceding such fight is concealed by both the parties, shall also not fall within the definition of terrorism because the object to be achieved is not terrorism or to carry out terrorist activities, therefore, courts shall not hurriedly jump at the conclusion that any such offence(s) are acts of terrorism in all open and shut cases of ordinary crimes where object is not terrorism nor the culpable act committed is directed to carry out terrorist activities, shall not be forcibly brought within the ambit of the provisions of Special Act.

26. The famous Jurists on construction and interpretation of Statute are almost in agreement that whenever Penal Statute requires interpretation then, it shall be so interpreted, which favours the accused person and not the State. Reference may be made in this regard to the case of Brig.(Retd.) F.B. Ali and another v. The State (PLD 1975 SC 506) and the case King v. Aung Nyum [(Q.B) 42 Crl.L.J.125]. In the above cited precedents the principle that Penal Statute has to be strictly construed was adopted. Question of carrying forward any legal fiction does not arise in such cases and whenever there is a room where a Penal Statute is susceptible to two interpretations, then it

must be interpreted in favour of the accused.

27. If the Legislature intended to bring the crimes of routine murder, attempted murder or causing bodily hurt within the ambit of the provisions of the Special Act then, it would have not employed the word of terrorism or terrorist activities. The comprehensive list of terrorism related offences against the public at large/society and in particular places of worship and educational institutions, offences against law enforcing agencies, armed forces, is the clear manifestation of intent of the law givers. This fact by itself signifies the intention of the Legislature what it actually intended to achieve. Although, incidentally, in ordinary crimes sometimes, the damage caused to human life might be devastating, gruesome and heart sickening, however, this by itself would be not sufficient reason to bring the crime within the fold of terrorism or to attract the provision of section 6 or section 7 of the Special Act, unless the object intended to be achieved was falling within the category of crimes, clearly perceivable to create terror in people or/and sense of insecurity”.

16. In “Kashif Ali V/s. The Judge, Anti-Terrorism, Court No. II, Lahore and others” (PLD 2016 Supreme Court 951), the petitioner in the case, was charged by the complainant for the murder of his brother who was a contesting candidate for the seat of Provincial Assembly and was mercilessly killed at a public place by the accused and his accomplice. In the said case, the august Supreme

Court of Pakistan, while considering all the case law on the subject, has laid certain guidelines for the Anti-Terrorism Courts to assume jurisdiction in the case where the act complained of amounts to terrorism in the society. Para 12 of the said judgment is worth perusal which is reproduced as under:

"12. 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".

5.12

Thus, the grounds asserted in the case were not considered for deletion of section 7 of the Act from the case and the issue was elaborately answered in Para 16 of the judgment as following.

“16. The contention of the Counsel for the Respondents that the parties have personal enmity is also insignificant, as the personal enmity between the deceased and the Respondent No.2 could have been settled on any day and it is intriguing as to why the Respondents chose that particular night before the dawn of the day of elections to settle his score with a popular running candidate in the elections by eliminating him from this world. To say that the mere reason that a motive of personal rivalry existed in this particular case does not rule out the fact that anyone could have foreseen the impact of such an act on the supporters of the deceased candidate. It is important to notice that according to the F.I.R, cars and people present at the back started fleeing from the area of incident in fear. More importantly, the sudden murder of the deceased, on the night before the Election day, not just with a single bullet but with indiscriminate firing on him and his companions was something that had to be all over the news and media channels for weeks to come. The disturbed mental condition of voters, who were taken aback to know on the day of the polling that their chosen candidate was no longer alive, was a foreseeable and inevitable impact of the Respondents' action. It was not a sudden reaction to a provocation that resulted in the deceased's murder but a premeditated act, where Respondents found out the precise location of the deceased on the very busy night before the Election Day,

and got him murdered. It was no doubt, a message to the general public conveying the lethal consequences of any opposition to the murderers”.

However, in Para 18 of the said judgment, the august Supreme Court has observed that this Court (the august Supreme Court) cannot lay down any hard and fast rule while interpreting section 6 of the Act in order to conclude that which the cases are triable by the Anti-Terrorism Court as in many criminal cases facts of the case are also one of the factors in determining the jurisdiction of a criminal Court.

17. In “Ch. Shaukat Ali V/s. Haji Jan Muhammad and others” (2017 SCMR 533), the facts of the case were that when after winning the election the complainant side in a procession were passing in front of the house of Haji Jan Muhammad accused where they had an altercation which resulted into the unfortunate incident wherein several persons were injured. The august Supreme Court of Pakistan in Para 9 of the said judgment has observed that in view of the police report u/s 173, Cr.P.C, prima facie it appears that the altercation between the parties had occurred all of a sudden when the procession of the complainant side on

winning the election was passing in front of *Dera* of Haji Jan Muhammad and there was no prior 'object/design'.

18. The perusal of the aforesaid case law and history of legislation relating to introduction and promulgation of the Act one can reach at the conclusion that the purpose and aim of the Act was to provide a complete mechanism for curbing and speeding trials of those offences which were committed either to promote religious hatred or to create insecurity, horror and terror in the society or a larger segment thereof or to overawe or intimidate the government or its agencies. All the acts mentioned in sub-section (2) of Section 6 of the Act if committed with design/motive to intimidate the government, public or a segment of the society or surrounding circumstances collected by the prosecution in the form of evidence which could suggest that the aforesaid aim is either achieved or being a by-product of the said terrorist activities; are to be tried by the special Court being punishable under section 7 of the Act. Needless to mention that there might be a number of offences which might have the impression of terror in the society, the same

would not attract the penal provision of the Act in absence of *mens rea* or surrounding circumstances of the case manifesting the *mens rea* because in such eventuality even street crimes like snatching of mobile phones etc. would fall within the purview of the Act which indeed is not the purpose of the Act. It would be important to note that u/s 12, the Act has empowered the Special Court to try other scheduled offences, however, the Court will not render any finding on the same issue as the act complained in this case is neither a scheduled offence nor the same is an issue for determination before this Court.

19. In the context of the present case, committing rape of a teenager aged about 10/11 years within the boundary wall of the house has neither the element of creating terror in the society nor the same is an offence under sub-section (2) of section 6 of the Act, therefore, its trial by the Anti-Terrorism Court is not warranted.

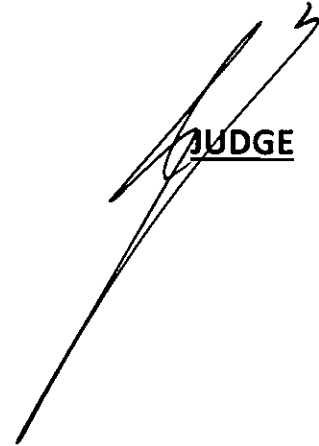
20. In view of the above discussion, this revision petition is allowed, the impugned order of the learned Anti-Terrorism Court is set aside and the case is transferred u/s 23 of the Act to the learned

Sessions Judge, Swat, for further proceedings in the
case in accordance with law.

Announced.

Dt: 15.10.2019


JUDGE


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