IN THE SUPREME COURT OF PAKISTAN
(Appellate Jurisdiction)

PRESENT:
Mr. Justice Yahya Afridi
Mr. Justice Syed Hasan Azhar Rizvi
Mr. Justice Irfan Saadat Khan

D.J/AFR

Criminal Petition No. 809-L of 2017
(Against the judgment dated 20.04.2017 passed by the Lahore High Court, Lahore in Criminal Appeal No. 248 of 2016)

Muhammad Asjad

...Petitioner

Versus

The State, etc.

...Respondent(s)

For the Petitioner: Mr. Arif Mehmood Rana, ASC
Via video-link, Lahore

For the State: Mr. Muhammad Jaffar, Addl. P.G.
Mr. Imran Baber, Inspector
Mr. Khalid Mehmood, S.I.

Date of Hearing: 10.07.2024

JUDGMENT

Yahya Afridi, J.- Muhammad Asjad **("petitioner")** was booked in case FIR No. 41, dated 18.09.2015, registered at Police Station Counter Terrorism Department, Lahore, for the offences under Sections 4/5 of the Explosive Substances Act, 1908 **("Act")** and Section 7 of the Anti-Terrorism Act, 1997 **("ATA")**. He was alleged to have been found in possession of 2.1 kilograms of explosive substance and an electric circuit. Following a trial, the Anti-Terrorism Court-IV, Lahore convicted the Petitioner under Section 4 of the Act and Section 7(1)(ff) of the ATA, sentencing him to simple imprisonment for life on each count, to run concurrently with the benefit of Section 382-B of the Code of Criminal Procedure, 1898 **("CrPC")**. The convictions and sentences awarded

to the Petitioner were upheld by the High Court in appeal, leading to the present petition before this Court.

2. The learned counsel for the Petitioner in his submissions highlighted the inconsistencies and improvements in the statements of prosecution witnesses, which according to him were overlooked by the courts below. He further argued that the provisions of the ATA do not apply to this case, in view of the judgment of this Court rendered in **Ghulam Hussain v. State** (PLD 2020 SC 61). In addition, he submitted that the prosecution evidence produced did not suffice to saddle conviction under Section 4 of the Act. Finally, he asserted that the sentences awarded are harsh and unduly severe. Conversely, the learned Additional Prosecutor General, appearing for the State, argued that the prosecution had proved its case beyond a reasonable doubt. He further submitted that the provisions of the ATA are clearly applicable to this case, particularly in the light of Section 27A of the ATA. He concluded that the impugned judgment does not warrant interference by this Court.

3. We have heard the learned counsel for the Petitioner and the learned Additional Prosecutor General and have gone through the record.

4. The record shows that the Petitioner was apprehended having in his possession a substantial quantity (2.1 Kilograms) of material, which on examination by the Ballistic Expert was confirmed to be explosive substance, within the contemplation of the Act and the ATA. The eyewitnesses produced by the prosecution, who testified the veracity of the said recovery, were

public servants having no reason to falsely implicate the Petitioner in a case of such a grave nature entailing punishment of life imprisonment. Coupled with the recovery, the prosecution witnesses were consistent in their statements regarding the safe custody and transmission of the recovered material in sealed sample parcel to the Forensic Science Agency. Trace Chemistry Analysis Report confirmed that the representative sample of the recovered material sent for forensic analysis was dynamite, a high explosive. And thereby bringing the case against the Petitioner within the mischief of the Act and the ATA. More importantly, the Petitioner failed to provide any lawful justification for having explosive substance in his possession. He also could not establish the possibility of his false implication in the case.

Charge and conviction under Anti-Terrorism Act, 1997

5. As to the issue of whether the ATA applies to the present case when viewed in the light of the interpretation of the provisions of the ATA, as dilated in the **Ghulam Hussain's case** (*supra*). In that case, a Seven Member Bench of this Court declared that for an action or threat of action to be accepted as "terrorism", within the meaning of Section 6 of the ATA, two conditions must co-exist: (i) the action must fall in Section 6(2) of the ATA; and (ii) the use or threat of such action must be designed to achieve any of the objectives specified in section 6(1)(b) of the ATA or the use or threat of such action must be to achieve any of the purposes mentioned in section 6(1)(c) of the ATA.

6. The main thrust of the learned counsel for the Petitioner was that the case of the prosecution lacked the proof of

the second condition – the design or purpose stipulated in Section 6(1)(b) or 6(1)(c) of the ATA – rendering the impugned conviction and sentence under the ATA unsustainable. When confronted with the above contention, the learned Additional Prosecutor General drew our attention to Section 27A of the ATA, which he submitted was not considered in the **Ghulam Hussain's case** (*supra*), to contend that the provisions of the ATA clearly applied to the present case.

7. Before we review the legal purport of Section 27A of the ATA, one must be mindful that the very criminalization of possessing explosive substance, without lawful justification, as an act of "terrorism" under Section 6(2)(ee) of the ATA, and the insertion of a statutory presumption under Section 27A of the ATA were introduced through the same piece of legislation, the Anti-Terrorism (Second Amendment) Act, 2013 **("Amending Act").** Specifically, the phrase *"or having any explosive substance without any lawful justification or having been unlawfully concerned with such explosive"* was added to Section 6(2)(ee) of the ATA by Section 2(b)(ii) of the Amending Act, while Section 27A, establishing a rebuttable presumption of the 'purpose of terrorism', was inserted by Section 20 of the Amending Act. This legislative move underscores a clear and deliberate intention to link the possession of explosives, in the absence of lawful justification, directly to the purpose of committing acts of terrorism. By establishing a rebuttable presumption of the 'purpose of terrorism' in Section 27A of the ATA, the legislature effectively shifted the burden of proof onto the accused, recognizing the inherent danger and potential for harm posed by the unauthorized possession of these destructive materials.

8. Let us now examine Section 27A of the ATA, it reads:

> **27A. Presumption of proof against accused.** – Any person having in possession any explosive substance with or without explosive devices without lawful justification or having been unlawfully concerned with such explosive substance and devices, shall be presumed, unless contrary is proved, that the explosive substance was for the purpose of terrorism.
>
> (Emphasis added)

A careful reading of Section 27A of the ATA clearly reveals the legislative intent to introduce this provision: to deter the illicit possession of explosive substance and facilitate the prosecution of explosives-related terrorism offences. And thus, the legislature introduced a presumption, *albeit* rebuttable, that possession of explosive substance, without lawful justification or unlawful concern, presumes a 'purpose of terrorism'.

9. A legal presumption, and that too, in a criminal enactment having severe penal punishments, must be viewed and interpreted strictly and with due legal care. For the burden of proof to shift upon the accused to prove the contrary, the prosecution must first prove the factum of the accused's possession of explosive substance. Thus, once this fact of the accused's possession of explosive substance is proved by the prosecution, the onus would shift upon the accused to prove that the possession of explosive substance was for lawful justification or for lawful purpose. And in absence of any evidence produced by the accused in justification thereof, it would prove the contrary; an intention aligned with the requirement of purpose of "terrorism", as stipulated in Section 6(1)(c) of the ATA.

10. For a clearer understanding of the issue in hand, it would be beneficial to refer to Section 6(3) of the ATA and the observations made by this Court regarding this provision in the **Ghulam Hussain's case** (*supra*).

Section 6(3) of the ATA provides:

> (3) The use or threat of use of any action falling within sub-section (2) which involves the use of firearms, explosive or any other weapon is terrorism, whether or not sub-section (1) (c) is satisfied.

11. In the **Ghulam Hussain's case** (*supra*), it was observed that the provisions of Section 6(3) of the ATA do not piece well with the remaining provisions of Section 6 of the ATA. It was suggested that Section 6(3) of the ATA be read down to resolve this conflict. However, the Court ultimately left this issue unresolved and did not actually read down the provision. It is important to note that the examples cited in the **Ghulam Hussain's case** (*supra*), illustrating the potential conflict between Section 6(3) and the broader framework of Section 6 of the ATA, primarily relate to actions involving the use of firearms and other weapons, not explosives. While the inclusion of firearms and other weapons in Section 6(3) raises concerns about inconsistency with the rest of Section 6 of the ATA, the same cannot be said for explosives. Given that the Court did not provide a conclusive interpretation by reading down Section 6(3) to clarify the limited meaning of this provision, the question of how to reconcile Section 6(3) with the remaining provisions of Section 6 of the ATA remains open, and we do not find it necessary render a definite finding in the present case.

12. On review of the evidence produced by the parties, we have found that: the prosecution has been able to prove through reliable evidence the recovery of the explosive substance from the direct possession of the petitioner thereby exposing him to the mischief of Section 27A of the ATA – presumption of a 'purpose of terrorism'. The failure of the Petitioner to produce any evidence, leave alone of credence, of his lawful justification for the possession of explosive substance, shows that he was unable to rebut the presumption drawn against him. Accordingly, we note that both the courts below undertook an exhaustive analysis of the evidence available on the record and concurred in their conclusion that the guilt of the Petitioner to have committed the offence of "terrorism" within the contemplation of Section 6(2)(ee) of the ATA had been proved to the hilt and upon our own independent evaluation of the evidence, we have not been able to take a view different from that concurrently taken by the courts below.

Charge and conviction under Explosive Substances Act, 1908

13. In addition to the charge under the ATA, the Petitioner was also charged and convicted under Section 4 of the Act. All three provisions of law – Sections 4 and 5 of the Act and Section 6(2)(ee) of the ATA – criminalize the act of possessing explosive substance, though under different circumstances. To appreciate the subtleties of the said offences, one must understand their essential ingredients, as provided under the law.

Section 4 of the Act reads:

> **4. Punishment for attempt to cause explosion, or for making or keeping explosive with intent to endanger life or property. –** Any person who unlawfully and maliciously–

(a) does any act with intent to cause by an explosive substance, or conspires to cause by an explosive substance, an explosion in Pakistan of a nature likely to endanger life or to cause serious injury to property; or

(b) makes or has in his possession or under his control any explosive substance with intent by means thereof to endanger life, or cause serious injury to property in Pakistan, or to enable any other person by means thereof to endanger life or cause serious injury property in Pakistan;

shall, whether any explosion does or does not take place and whether any injury to person or property has been actually caused or not, be punished with imprisonment for life or any shorter term which shall not be less than seven years.

Section 5 of the Act provides:

> **5. Punishment for making or possessing explosives under suspicious circumstances. –** Any person who makes or knowingly has in his possession or under his control any explosive substance, under such circumstances as to give rise to a reasonable suspicion that he is not making it or does not have it in his possession or under his control for a lawful object, shall, unless he can show that he made it or had it in his possession or under his control for a lawful object, be punishable with imprisonment for a term which may extend to fourteen years.

A joint reading of Sections 4 and 5 of the Act, clearly sets out that: the former relates to possession of explosive substance shall be accompanied with a malicious intent to endanger life or cause serious injury to property; while the latter, on the other hand, criminalizes the mere possession of explosive substance, without there being any condition of the same being with a malicious intent to endanger life or cause serious injury to property. Notably the difference between Section 4 and Section 5 of the Act lies in malicious intent.

14. In the present case, though an electric circuit was recovered from the possession of the Petitioner, but the prosecution failed to produce in evidence any ballistic opinion to

confirm that the same was functional to trigger an explosive substance. This being so, the prosecution has not been able to establish that the Petitioner had a malicious intent to endanger life or cause serious injury to property. Therefore, Section 4 of the Act is not applicable and attracted in the circumstances of the present case against the Petitioner, and he could only be convicted for possessing the explosive substance under Section 5 of the Act.

15. Accordingly, as prosecution has proved that the Petitioner was in possession of explosive substance under suspicious circumstances and he could not show that he was in possession of explosive substance for a lawful object, the offence under Section 5 of the Act stands established. We, therefore, convict the Petitioner under Section 5 of the Act.

Quantum of sentence

16. Turning to the quantum of sentence to be awarded to the Petitioner for committing the offences under ATA and the Act, we must take into consideration that the prosecution has been able to establish only recovery of the explosive substance without any live electric circuit from the direct possession of the Petitioner, while he was present at a road junction, and that too, coupled with the fact that the Petitioner lacks any prior criminal history. These are mitigating circumstances that warrant reduced sentences.

Conclusion

17. Accordingly, we convict the Petitioner for the commission of the offence under Section 5 of the Act, and award him simple imprisonment for seven years under Section 5 of the

Act; and while upholding his conviction under Section 7(1)(ff) of the ATA, we exercise our discretion to reduce the sentence of simple imprisonment for life awarded to simple imprisonment for fourteen years under Section 7(1)(ff) of the ATA. Both the sentences shall run concurrently and the benefit of Section 382-B of the CrPC shall also be granted. The petition is converted into appeal, the impugned judgment is modified in the above terms and the appeal is partly allowed, accordingly.

Announced in Open Court on 12.8.24 *2024.*

Approved for reporting.
Arif