



RESEARCH CENTER, HIGH COURT OF BALUCHISTAN



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COURT: HON'BLE MR. JUSTICE SARDAR AHMED HALEEMI

SUBJECT: CRIMINAL LAW

DATE: 10TH MAY 2025

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Query: *Whether a Sessions Judge Can Transfer/Send a Case to the Anti-Terrorism Court (ATC) upon concluding that an Offence Triable by the ATC is Attracted, or Must Send a Reference to the High Court?*

The query that whether a Sessions Judge, upon forming the view that an offence triable by the Anti-Terrorism Court (ATC) is attracted, can transfer or send the case directly to the ATC, or whether it is necessary to send a reference to the High Court under Section 526(3) of the Criminal Procedure Code (Cr.P.C.) has already been subject of judicial scrutiny. The legal issue has been addressed in two significant judgments: **Muhammad Akbar Khan and others v. SHO P.S. Garhi Khairo (2017 P Cr. L J 1280)** decided by the Sindh High Court, and **Ali Nawaz v. The State (2024 P Cr. L J 658)** decided by the Lahore High Court. A comparative analysis of the two judgment is as below:

In case *Muhammad Akbar Khan Case* (supra) the Hon'ble Sindh High Court held unequivocally that a Sessions Judge or Additional Sessions Judge **cannot transfer a case directly to the ATC**. The Court emphasized that ATCs are special courts constituted under a special statute and do not fall within the administrative or judicial subordination of the Sessions Court. Therefore, Section 528 Cr.P.C., which deals with transfers between subordinate courts, is inapplicable. The Sindh High Court laid down two permissible courses of action for the Sessions Court when it forms the opinion that the offence is triable by the ATC:

- 1. Making a Reference to the High Court: The Sessions Judge may make a reference to the Chief Justice of the High Court under Section 526(3) Cr.P.C. The Chief Justice, after notice to the parties, may pass an appropriate order transferring the case to the ATC.**
- 2. Returning the Challan: Alternatively, after hearing all concerned parties, the Sessions Judge may return the challan to the investigating agency or prosecution for presentation before the competent ATC.**

For the ready reference, the relevant part of the judgment is reproduced as under:-

"7. We have heard learned counsel for the parties and perused the material available on record. The District and Sessions Judge, or Additional Sessions Judge on examining the case and consideration of facts that manner in which alleged crime was committed comes within the purview of Anti-Terrorism Act but being a District and Sessions Judge/Additional District and Sessions Judge is not authorized to declare any offence as scheduled offence. In fact the Anti-Terrorism Court do possess jurisdiction to transfer the case to the Court of ordinary jurisdiction, however, no such powers are conferred on the ordinary courts of criminal jurisdiction to transfer the case from its docket to the Court of Anti-Terrorism Act in a situation where the learned Sessions Court/Additional Sessions Court is of the opinion that alleged offence is triable by the Anti-Terrorism Court as the

commission of the crime has created panic and terror amongst the people and the manner the crime has been committed has developed sense of fear and insecurity in the mind of people or any section of society then two courses are available to the learned Sessions Court firstly, reference may be made to the Chief Justice of High Court in terms of subsection (3) of section 526, Cr.P.C. it will be conducive to read section 526(3), Cr.P.C. which says as under:-

"526. High Court may transfer case or itself try it. (1)

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

Upon such reference, the Chief Justice may after notice to the Prosecutor General Sindh and the accused or the complainant party, as the case may be, pass such orders as may be expedient after taking slack of facts and circumstances of the case ordering transfer of the case from the Court of Session to the Anti-Terrorism Court. Reference can be had from the case of Naseem v. The State (1997 MLD 275) whereby the Single Bench of this Court has held as under:-

"This means, in other words, the accused must be provided an opportunity of having been heard, before an order in regard to the withdrawal of his case from Sessions Court to the Court established under the Special Courts (Suppression of Terrorist Activities) Act, 1975 is passed. During the course of hearing it transpired that neither any notice was given to the accused nor he was heard before passing the impugned order. This being in violation of the principles of natural justice, was illegal. I am fortified in my view by the judgment reported as Anisa Rehman v. P.I.A.C. 1994 SCMR 2232, wherein violation of principles of natural justice have been equated with the violation of principle of law. I am also of the view that principles of natural justice would now have to be considered as a constitutional concept, enshrined in Articles 3 and 4 of the Constitution, which contain the due process clause."

9. The other option to the Sessions Judge/Additional Sessions Judge is that he should issue notice to the Prosecutor General and to the accused/complainant party/any aggrieved, as the case may be and after an opportunity of being heard, comes to a conclusion that the case is of the nature triable by the Anti-Terrorism Court, then may return the challan to the Court/agency/Investigating officer for submitting the same before the Court having jurisdiction in the matter as it is well settled principle of law that Special Courts constituted under special statutes (Special Courts) are neither subordinate to the Sessions Court nor they fall within the hierarchy of the Courts as provided in the Criminal Procedure Code and the Additional Sessions Judge, could not be equated with transfer of case contemplated by section 528, Cr.P.C. or section 4 of the Suppression of Terrorist Activities (Special Courts) Act, 1975 or section 23 of the Anti-Terrorism Act, 1997. It is well settled principle of law that if any case exclusively triable by Special Court is sent before the ordinary court by mistake then the Court either directly or through Sessions Judge would be competent to send back said case to Special Court for want of jurisdiction. Such exercise, however will not be equated with the transfer of a case within the meaning of section 528, Cr.P.C. Reference can be had from the case of Muhammad Iqbal and another v. The State reported in 1992 MLD 287 whereby learned Single Judge of this Court had held in para. No.6 of the judgment as under:-

"Coming now to the second question, whether the Sessions Judge is empowered to transfer a case pending on his file or on the file of any of the Courts subordinate to him, to the Judge, Special Court (Suppression of Terrorist Activities), under the provisions of section 528, Cr.P.C., it must straightaway be conceded that he is not competent to do so. The Judge, Special Court (Suppression of Terrorist Activities) is not a court subordinate to a Sessions Judge within the meaning of section 528, Cr.P.C. At least I cannot find anything in section 528, Cr.P.C. thereby enlarging its scope. Section 4-A of the Suppression of Terrorist Activities (Special Courts) Act, 1975, alone empowers the Government to transfer cases, but that too from one Special Court to other Special Court."

10. Reverting to the contention whether the Additional Sessions Judge was competent or not by means of section 526(3), Cr.P.C., obviously, learned Additional Sessions Judge was not competent to send back the case straightaway and decide the fate of the case without hearing to the petitioners/accused and other side.

11. The sum up total of the above discussion is that the Anti-Terrorism Courts do possess jurisdiction to transfer the case to the Court of ordinary jurisdiction, however no such powers are conferred on the ordinary Courts of criminal jurisdiction to transfer the case from its docket to the Anti-Terrorism Court in a situation where learned Sessions Court is of the opinion that alleged offence is triable by the Anti Terrorism Court if he comes to the conclusion that commission of the crime has created panic and terror amongst the people and the manner in which the crime has been committed has developed sense of fear and insecurity in the mind of the people or any section of the society then the learned Sessions Judge has to make reference of the case to the honourable Chief Justice of High Court in terms of subsection (3) to section 526, Cr.P.C.

In case of **Ali Nawaz Case** (*supra*) the Lahore High Court recognized that a **Sessions Judge may send a case to the ATC**, particularly when evidence has been recorded and the trial is ongoing. However, it **also acknowledged the reference mechanism** under Section 526(3) Cr.P. C., treating it as a legitimate and available course. The judgment categorized two scenarios:

- 1- **Before Cognizance:** *If the challan is placed before a Magistrate or a Sessions Judge who finds that the offence falls within the purview of the Anti-Terrorism Act, 1997, the court should return the challan to the prosecution for presentation before the ATC. This is consistent with Sections 190 and 193 Cr. P.C., and Section 19(3) of the Anti-Terrorism Act, 1997, which permits the ATC to take direct cognizance.*
- 2- **After Cognizance or During Trial:** *If cognizance has already been taken and proceedings have commenced—such as framing of charges or recording of evidence—the Sessions Judge may forward the case to the ATC. In such instances, returning the challan to the prosecution is not feasible due to the existence of a judicial record. Section 12(1) of the Anti-Terrorism Act mandates that scheduled offences are exclusively triable by the ATC. Hence, respecting this mandate, the Sessions Court may directly transmit the case to the ATC to avoid jurisdictional illegality.*

The Lahore High Court thus permits a Sessions Judge to directly forward a case to the ATC in appropriate circumstances, particularly after the trial has commenced, **while also acknowledging the validity of the reference mechanism under Section 526(3) Cr.P.C.** The judgment in paragraph No. 6, 8 and 13 reads that:

"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 under section 190 of Cr.P.C. as mentioned under section 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 v. The State and another" (2014 PCr.LJ 1071 Islamabad), "Mir Ali v. The State and another" (2020 PCr.LJ 1060 (Kar.) and "Ali Akbar and another v. The State (PLD 1995 Kar. 10).

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.

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 under section 173, Cr.P.C. however, they are subordinate to the Sessions 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:-

.....

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 Session, he can send the case to the Court of Session. Cases reported as "Muhammad Hanif v. The Crown" (PLD 1956 Lahore 394); "Ghulam Hussain and others v. The State" (1985 PCr.LJ 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 under section 17 of Cr.P.C. and is also empowered to withdraw a case from the Court of Magistrate under section 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 under section 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 v. D.I.G. Sargodha and 4 others" (2007 YLR 1554); therefore, on taking cognizance by the Anti-Terrorism Court, it can decide the jurisdiction either to assume it under section 19(3) of Anti-Terrorism Act, 1997 or take action under section 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 under section 346, Cr.P.C.

13. Attending to submissions made by Ms. Noshe Malik, Learned Deputy Prosecutor General, a course for transfer of case under section 526, Cr.P.C. is also available, if the case is being tried by a Magistrate or Court of Session. High Court under section 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 v. S.H.O. P.S. Garhi Khairo, District Jacobabad and others" (2017 PCr.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 v. 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".

The *Sindh High Court* emphasized the necessity of making a **reference to the High Court under Section 526(3) Cr. P.C.**, recognizing that the Sessions Judge, being bereft of supervisory authority over the ATC, cannot unilaterally transfer a case thereto. On the other hand, the *Lahore High Court*, also affirmed the availability of the reference mechanism under Section 526(3) Cr. P.C., while introducing **a situational nuance**. Thus, the two rulings are **not mutually exclusive but rather contextually reconcilable**. Both judgments converge on two key jurisprudential principles:

1. **Where no cognizance is taken**, or at the pre-trial stage, the Magistrate or the Sessions Judge should return the challan to the prosecution for submission for the special judge of ATC.
2. **And should invoke the mechanism under Section 526(3) Cr.P.C. by making a reference to the High Court Where cognizance has been taken and trial has commenced.**

In sum, the jurisprudential weight lies in favor of requiring a reference to the High Court as a matter of general rule during post-cognizance stage of the case while direct forwarding **after cognizance** remains a grey area and the safest and most legally defensible course is to make a reference to the High Court under Section 526(3) Cr.P.C in such situation as Despite procedural differences, both judgments acknowledge the validity of a reference to the High Court.