
Post-Remand Case Transfer to Ordinary Court



RESEARCH CENTER, HIGH COURT OF BALOCHISTAN



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FOR: HON'BLE PAZIR AHMED BALOCH MEMBER INSPECTION TEAM

SUBJECT: CRIMINAL LAW

DATE: 28TH SEPTEMBER 2024

BY: WASEEM AHMED RESEARCH OFFICER

Query:

Whether the Anti-Terrorism Court had the authority to transfer the case to an ordinary court in terms of section 23 of ATA, after it was remanded by the Appellate Court for taking up and deciding the case of the accused in terms of Chapter XXXIV?

Short Answer:

In the case at hand, after the High Court set aside the ATC's initial judgment, the ATC complied with the remand order by referring to the provisions of Chapter XXXIV of the Cr.P.C. and passed an order based on medical board opinions. The ATC then transferred the case to an ordinary court under Section 23 of the ATA, having formed the opinion that the offenses do involved terrorism or schedule offense.

Since the case reverted to its pre-judgment status upon remand, the ATC had the authority to reconsider its jurisdiction. Therefore, the transfer of case to an ordinary criminal court was valid, and there is no legal obstacle to further proceedings by the ordinary court.

The ATC acted within its authority under Section 23 of the ATA in transferring the case to an ordinary court after remand. This decision aligns with established legal precedents and the dictates of law. Accordingly, further proceedings in an ordinary criminal court are legally sound.

Detail Response:

In response to the above query, it is submitted as follows:

- **Exclusive jurisdiction of Anti-Terrorism Court:** Under Section 12 of the Anti-Terrorism Act 1997 ("**the Act**"), Anti-Terrorist Courts ("**ATC**") have exclusive jurisdiction to try offenses listed in the third schedule of the Act. They may also try non-scheduled offenses if they are connected to scheduled offenses, as per Sections 17 and 21-M of the Act. However, the ATC has the power to try non-scheduled offence only when it is trying a scheduled offence, i.e., scheduled and non-scheduled offences can be tried together in one and the same trial-

--Such power shall not be available to the Anti-Terrorism Court when it is not trying any scheduled offence¹.

- **Transfer Authority under section 23:** Section 23 of the ATA states that if the ATC, after taking cognizance of an offense, determines that it is not a scheduled offense, it must transfer the case to an ordinary court with the appropriate jurisdiction. ***This authority remains with the ATC throughout the trial until a judgment is announced^{2,3}.***
- **Matter of Jurisdiction:** the matter of jurisdiction is critical and the legality or validity of any actions taken or orders/judgments issued hinges on the jurisdiction conferred by law; otherwise, such actions or orders/judgments would be rendered void⁴. The jurisdiction of the ATC extends to the offenses classified as acts of terrorism under section 6 and to the offenses listed in the Third Schedule of the Anti-Terrorism Act, 1997, even if such offenses do not constitute terrorism but no other offenses irrespective of the gravity and heinousness of the offense⁵.

Case Laws:

1- Muhammad Sharif vs. Judge Anti-Terrorism Court (2012 YLR 2448):

The Lahore High Court held that the ATC must transfer a case to an ordinary court if it finds that a scheduled offense is not made out. The court emphasized that the ATC loses jurisdiction to pass any final judgment in such cases and must transfer the case as per Section 23 of the Act. Following the excerpt of relevant paragraph of the case:

"9. Section 17 of the Anti-Terrorism Act; 1997 provides for the powers of Anti-Terrorism Court in respect of other offences, which reads as under:

"When trying any scheduled offence, (Anti-Terrorism Court) may also try any offence other than the scheduled offence with which the accused may, under the Code, be charged at the same trial"

*According to the apparent meaning of section 17 of the Anti-Terrorism Act, 1997, **the Anti-Terrorism Court has got a power to try non-scheduled offence only when it is trying scheduled offence i.e. scheduled and unscheduled offence can be tried together in one and the same trial. The said power under section 17 of the Anti-Terrorism Act, 1997 shall not be available to the Anti-Terrorism Court when it is not trying any scheduled offence. Once the Anti-Terrorism Court has tried the offence and has formed the opinion that the scheduled offence is not made out, then in the terms of section 23 of the Anti-Terrorism Act 1997, it will have no jurisdiction to pass any judgment and it will have to transfer the case to the ordinary Court.** Section 23 ibid reads as under: -*

"Where, after taking cognizance of an offence, (Anti-Terrorism Court) is of the opinion that the offence is not a scheduled offence, it shall,

notwithstanding that it has no jurisdiction to try' such offence, transfer the case 'for trial of such offence to any Court having jurisdiction under the Code, and the Court to which the case is transferred may proceed with the' trial of the offence as if it had taken cognizance of the offence."

10. In this case, the Anti-Terrorism Court tried the offences and formed the opinion that' a case of scheduled offence under section 365-A, P.P.C. had not been made out, as such once the Court had formed a different opinion in terms of section 23 of Anti-Terrorism Act, 1997, the said Court had no jurisdiction to pass any final judgment in the trial. Instead the said Court had the only option to transfer the case to the Court of ordinary jurisdiction, as provided under section 23 *ibid*. It may be observed here that scope of provisions of section 23 of Anti-Terrorism Act, 1997, cannot be limited to a specific point of trial, rather by use of word "cognizance", which includes trial, the legislature was cognizant of the fact in some cases (like the one in hand), the question of jurisdiction may be properly decided after recording of some evidence. As such, no procedural error can be attributed to the impugned order of the learned Judge Anti-Terrorism Court."

2. ALI GOHAR and others vs PERVAIZ AHMED (P L D 2020 Supreme Court 427) the August Apex Court summarized the requirements of authority vested in the ATC in terms of section 23 of the Act, as under:

"33. To sum up the above discussion on the authority vested in the ATC to transfer a case, as envisaged under section 23 of the Act, we may note that:

- I) Both, the Administrative Judge and any other ATC to whom the case is assigned by the Administrative Judge, after taking "cognizance of the case", have the authority to transfer the case under section 23 to an ordinary criminal court for trial under Cr.P.C.
- II) The authority of ATC to transfer the case under section 23 to an ordinary criminal court for trial under Cr.P.C. can take place after taking cognizance of the case, **and this authority to transfer remains with the ATC during the proceedings of the trial till the judgment is announced.**
- III) The condition precedent for ATC to exercise the authority to transfer the case under section 23 of the Act are: firstly when the ATC takes cognizance of the case; and secondly, if ATC is of the opinion that the offences referred to it for trial does not come within the scope of offences triable under the Act.
- IV) The words "cognizance of the case" employed in section 23 of the Act simply means, when the ATC on receipt of the challan takes any step indicative of proceeding with the trial.

3. Mirza SHAUKAT BAIG and others vs SHAHID JAMIL and others (P L D 2005 Supreme Court 530).

"29. After having gone through the entire law as enunciated by this Court in different cases the judicial consensus seems to be that striking of terror is sine qua non for the application of the provisions as contained in section 6 of the Act which cannot be determined without examining the nature, gravity and heinousness of the alleged offence, contents of F.I.R., its cumulative effects on the society or a group of persons and the evidence which has come on record. In so far as the factum of intention is concerned that cannot be evaluated without examining the entire evidence which aspect of the matter squarely falls within the jurisdictional domain of the Court constituted under the Act and such questions cannot be decided by invocation of Constitutional jurisdiction without scrutinizing all the circumstances in a broader prospect by keeping in view the ground realities in mind. There could be no second opinion that where the action of an accused results in striking terror or creating fear, panic, sensation, helplessness and sense of insecurity among the people in a particular vicinity it amounts to terror and such an action squarely falls within the ambit of section 6 of the Act and shall be triable by a Special Court constituted for such purpose. What was the real intention of the offender could only be adjudged on the basis of evidence which cannot be determined by invocation of Constitutional jurisdiction and learned Special Judge who is usually a Senior Sessions Judge can take care of the matter which can be transferred by him if it does not fall within his jurisdictional domain. There is no denying the fact that it was never the intention of legislature that every offender irrespective of the nature of the offence and its overall impact on the society or a section of society must be tried by the Anti-Terrorist Court but the question as to whether such trial shall be conducted or not initially falls within the jurisdictional domain of Anti-Terrorist Court which cannot be interfered with in the absence of sufficient lawful justification which appears to be lacking in these cases. **It is, however, obligatory for such Courts to watch carefully the nature of accusation and examine the entire record with diligent application of mind to determine as to whether the provisions as contained in the Act would prima facie be attracted or otherwise? Where such Courts are of the view after taking cognizance of the offence that the alleged offence does not fall prima facie under the provisions of the Act it must transfer the same to regular Court without loss of time.**"

4. KHYBER TRACTORS (PVT.) LTD. vs. PAKISTAN through Ministry of Finance, Revenue and Economic Affairs, Islamabad (P L D 2005 Supreme Court 842)

- (a) Jurisdiction---

----Question of jurisdiction of a forum is always considered to be very important and any order passed by a Court or a forum, having no jurisdiction, even if it is found to be correct on merits, is not sustainable-

--**Jurisdiction of a Court lays down a foundation stone for a judicial or a quasi-judicial functionary to exercise its powers/authority and no sooner the question of jurisdiction is determined in negative, the whole edifice, built on such defective proceedings, is bound to crumble down.** Pearey Lal v. Nanak Chand AIR 1948 PC 108; Pervez Iqbal v. Muhammad Hanif 1979 SCMR 367 and Chief Settlement Commissioner v. Muhammad Fazil PLD 1975SC 331 ref.

5. Ghulam Hussain v. The State (PLD 2020 SC 61), the Hon'ble Supreme Court elaborated the definition of "terrorism" under Section 6 of the Anti-Terrorism Act, 1997, emphasizing the distinction between heinous offenses and acts constituting terrorism. The Court held that not all heinous crimes automatically fall within the purview of terrorism unless they are committed with the intent to coerce, intimidate, or overawe the government or public to advance political, religious, or ideological objectives. The mere brutality or shocking nature of a crime does not suffice for it to be classified as terrorism. The Court further clarified that offenses listed in the Third Schedule of the Act are triable by Anti-Terrorism Courts (ATCs) based on their inclusion, but if the motive behind such offenses does not meet the criteria of terrorism as defined in Section 6, the jurisdiction of ATCs is limited to those specific offenses, and the ATCs cannot punish for terrorism per se

Application of law to the present case.

In this case, the ATC had passed a judgement on 29th May 2014, however, said judgment was reversed/set aside by the Hon'ble High Court in Criminal Appeal with the observation that the trial Court passed judgment in violation of substantive provisions of law, that is to say, provisions contained Chapter XXXIV of the Code of Criminal Procedure 1898 vide judgment 28th November 2016. Consequently, the Appellate Court ordered that the trial Court would now take up the cases of the appellant to decide the same in terms of the above statutory provisions contained in Chapter XXXIV of the Cr. P.C.

It appears that the trial Court/ATC-II Quetta, complied remand order and, in the light of Medical Board opinions, passed an order as envisaged under section 466 of the Cr. P.C. Afterwards, the accused, having been produced before the trial Court/ATC-II Quetta in terms of section 487 of the Cr. P.C, the presiding officer of the trial Court/ATC-II Quetta, instead of making any opinion about the fitness of the accused for making his defense or otherwise, formed opinion that the alleged offenses do not fall within the ambit of terrorism or any scheduled offense, proceeded to pass order dated 15th January 2021 for transferring the case to ordinary Court, while exercising powers bestowed under section 23 of the Anti-Terrorism Act 1997 **which is still in field.**

Since after remand, ***the status of the case reverted back to a case pending trial, so all questions before the trial/Court including the question of jurisdiction and transfer power section 23 of the Act, were open, as such the said move of the trial Court/ATC was dictate of the law and the precedents cited above.*** Consequently, there is no legal hitch if further proceedings are conducted by ordinary Criminal Court.