JUDGEMENT SHEET
IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Writ Petition No. 3719 of 2019

Arshad Mehmood
VS
Special Judge-I, Anti-Terrorism Court, Islamabad, etc.

PETITIONERS BY:	M/s Azam Nazir Tarar, Abdul Wahid Qureshi and Ansar Mehmood, Advocates in W.P No. 3719/2019. Mr. Muhammad Zafar Khokhar, Advocate in W.P No. 3738/2019. Mr. Qaiser Imam Chaudhry and Mr. Shujaullah Gondal, Advocates in W.P No. 60/2020.
STATE BY	Mr. Zohaib Hassan Gondal, State Counsel.
RESPONDENT No.2 BY:	Mr. Faisal Siddiqui, Advocate.
DATE OF DECISION:	19-04-2022.

BABAR SATTAR, J.- Through this judgment we will dispose of Writ Petitions No. 3719/2019, 3738/2019 and 60/2020, wherein the order under section 23 of Anti-Terrorism Act, 1997 **("ATA")** passed by the learned Anti-Terrorism Court **("ATC")** dated 23.10.2019 **("Impugned Order")** has been challenged. Through the Impugned Order the learned ATC dismissed the application of the petitioner under section 23 of ATA and held that the offence that the petitioners have been charged falls within the definition of terrorism and is triable by learned ATC.

2. The incident in relation to which the petitioners have been charged under section 7 of ATA read with sections 302, 324, 148 and 337-F(iii) PPC transpired on 15.08.2016 and FIR No. 239 dated 15.08.2016 was registered. The FIR itself does not include the charge of section 7 of ATA but the complainant subsequently recorded a supplementary statement on the basis of which a charge under section 7 of ATA was included. The brief facts are that on 14.08.2016 an altercation took place between the son of the complainant son and the petitioner in F-11 Markaz. The Police authorities intervened and both parties were brought to Police Station Shalimar. The complainant's sons and his nephew, Barrister Fahad Malik, also arrived at the Police station and reconciliation was purportedly affected between the parties and after which they left the police station. While leaving the police station the petitioner sought a lift from the complainant and sat in the vehicle of the complainant. The complainant's vehicle was followed by a vehicle in which the complainant's son and his nephew a lawyer Barrister Fahad Malik were present. As the vehicles approached street No.3 in F-10/4, two vehicles blocked the vehicle of the complainant as well the vehicle of his son and his nephew Barrister Fahad Malik who were following him. Armed gunmen, who had purportedly arrived on the instruction of the petitioner, together with the petitioner disembarked from the vehicles attacked the complainant and his son and nephew. In the process the complainant was shot in his leg and indiscriminate firing initiated by the petitioner and his accomplices claimed the life of Barrister Fahad Malik.

3. The police authorities after completion of investigation produced the challan before the learned ATC. The petitioner filed an application under section 23 of ATA challenging the jurisdiction of the learned ATC on the basis that the incident on the basis of which FIR had been lodged did not amount to terrorism within the definition of section 6 of ATA. By order dated 21.12.2016 the learned ATC accepted the application and ordered that the case be transferred to the Sessions Court.

4. The complainant challenged the order of the learned ATC accepting application of the petitioners under section 23 of ATA. This Court by judgment dated 12.07.2018 passed in ***W.P No. 178/2017*** ***(Malik Tariq Ayub Vs. The State)*** set-aside the order of the learned ATC and remanded the matter back to the learned ATC with the direction to first record material evidence to be adduced by the parties before deciding the application under section 23 of ATA. The petitioner then challenged the order of this Court before the august Supreme Court in Civil Petition No. 2302 of 2019 which was taken up on 19.09.2019 and was dismissed as withdrawn. The learned ATC decided the application of the petitioners under section 23 of ATA through the impugned order dated 23.10.2019, wherein it concluded that it had jurisdiction to hear the case as it involved an offence under section 7 of ATA.

5. The instant petitions remained pending before various benches of this Court and a number of judges of this Court recused themselves either due to involvement in the

matter prior to their elevation or due to an objection raised by one of the parties. At one point there was no bench in Islamabad High Court available to hear the matter. Pursuant to an order of august Supreme Court the case was transferred to the learned Peshawar High Court. Subsequently by another order of the august Supreme Court the case was transferred back to this Court with the consent of the parties. Meanwhile in C.P No. 45/2019 by order dated 09.01.2020, the apex Court held that while the learned ATC can continue to conduct the trial, but it was barred from passing judgment till such time the challenge to assumption of jurisdiction by ATC pursuant to the Impugned Order was adjudicated by this Court.

6. Mr. Azam Nazir Tarar and Abdul Wahid Qureshi, Advocates represented the petitioner in W.P No.1739/2019. They submitted that the evidence as recorded by the learned ATC reflected that the actions attributed to the petitioner in the FIR and through the supplementary statement by the complainant were not coupled with the required mens rea for purposes of section 6 of ATA. That after evidence of all prosecution witnesses had been recorded along with the statements of the accused under section 342 of Cr.P.C, there was no evidence establishing that there was any intent or design on part of the petitioner that constituted mens rea for purposes of section 6(1)(b) & (c) of ATA. That the learned ATC in the Impugned Order had completely misapplied the law as laid down by the august Supreme Court in ***Ghulam Hussain Vs. State (PLD 2020 SC 61)***. That the Impugned

Order was also in conflict with the direction issued by this Court in its order dated 12.07.2018 through which the matter was remanded back to the learned ATC for decision afresh after recording of material evidence, as in such order this Court had contemplated recording of evidence of certain private witnesses who had made statements before the police authorities under section 161 of Cr.P.C to the effect that the incident created fear and panic in a segment of the society. But the evidence of such witnesses was not recoded and even though the private persons had been identified in the order of this Court dated 12.07.2018, but they were given up as prosecution witnesses. Mr. Azam Nazir Tarar, ASC, took this Court through the history of interpretation accorded to section 6 of ATA by the august Supreme Court in successive judgments that culminated in the formation of a seven-member bench that rendered a unanimous view on the meaning of terrorism for purposes of sections 6 and 7 of ATA in ***Ghulam Hussain***. He submitted that after ***Ghulam Hussain*** there was no confusion as to the meaning of terrorism as employed in section 6 of ATA. The view that determination of whether or not an incident amounted to terrorism could be made in view of its effect had been rejected and the august Supreme Court had clarified that in order for an act to constitute terrorism it must be accompanied by necessary criminal intent and design as identified in section 6(1)(b) & (c) of ATA. He submitted that it was now clear that not every criminal act no matter how gruesome its consequences and how disquieting its effect in terms of the creation of fear and in security in the society

could be regarded as terrorism unless the act was undertaken with the motivation to create such effect within the society. That the Apex Court had excluded from the scope of terrorism incidents motivated by personal vendetta or enmity between private parties that resulted in the commission of a gruesome crime. He submitted that in the instant case perusal of the FIR reflected that an altercation took place between the son of the complainant and the petitioner which resulted in the unfortunate loss of life of Barrister Fahad Malik. That while the determination of who was responsible and culpable for the murder of Barrister Fahad Malik could only be made by the trial court after appraisal of the evidence, it was evident that there was neither any intent nor any design on part of the accused to create any sense of fear or insecurity in the society or any segment of the society. He submitted that now the scope of terrorism as defined under section 6 of ATA has been clarified by the august Supreme Court in ***Ghulam Hussain*** there was no room to infer the intent of committing terrorism from any consequences created by the acts for which the accused had been charged. And in such view of the matter even if there were random bystanders who had testified after witnessing the incident in question that they were filled with sense of fear and insecurity, would not transform an altercation due to personal enmity resulting in the murder of a person into an incident of terrorism. He however submitted that notwithstanding such interpretation of law there was also no evidence before the learned ATC that the incident in fact created a sense of fear or insecurity in the society or a segment of the society.

7. Mr. Qaiser Imam Chaudhry, Advocate representing Hashim Khan in Writ Petition No. 60/2020 while adopting the arguments of Mr. Azam Nazir Tarar and Mr. Abdul Wahid Qureshi, Advocates made the following submissions: That the FIR, which was the story presented by the complainant himself, noted that the incident that led to the murder of Barrister Fahad Malik and in which the complainant was injured, was a consequence of personal enmity which was caused by an altercation that had taken place on the eve of 14.08.2016. That in the FIR the complainant had identified witnesses to the incident and had not submitted that there were any other private persons that had seen the occurrence. That the supplementary statement made after 8 days of filing of the complaint and registration of the FIR was an afterthought and a story was concocted by the complainant to attract provisions of ATA through such supplementary statement, which was also in conflict with the account presented by the complainant himself in the FIR. That it was settled law that any improvements made by the complainant through supplementary statement were to be taken with a grain of salt. That no case of terrorism was made out against the accused and consequently the learned ATC had no jurisdiction to try the petitioner.

8. Mr. Faisal Siddiqui, Advocate representing the respondent submitted that the petitioner was essentially seeking reinstatement of the order passed by the learned ATC dated 21.12.2016 in the first round of the challenge to the jurisdiction of ATC, which had already been set-aside by this

Court through the order dated 12.07.2018. That the impugned order was not perverse and had been passed by the learned ATC after recording of evidence in compliance with the direction of this Court. That the assumption of jurisdiction was based on the opinion formed by the learned ATC in view of the evidence recoded and it was not for this Court to sit in review or appeal over such opinion while exercising writ jurisdiction. That the Impugned Order could only be scrutinized during appeal proceedings once the learned ATC had rendered final judgment. That no prejudice would be caused to the petitioner if the learned ATC was allowed to rule and pass a final judgment as all the evidence had been recorded, including the statements of accused under section 342 of Cr.P.C, and nothing remained to be done in the trial other than passing a final judgment. That in order to decide the petition on merit this Court would be required to appraise the evidence that had been appreciated by the learned ATC in deciding the application under section 23 of ATA and such exercise could cause prejudice to either the petitioner or the complainant depending on what this Court decided. That a decision by this Court on the merit of the petition could possibly undermine Article 10-A rights of one of the parties. That the august Supreme Court had always discouraged challenge to interlocutory orders such as the Impugned Order as that led to fragmented decision. And as all the interlocutory orders would be open to challenge in appeal once the final judgment had been rendered it would be advisable for the Court to not rule on the question of jurisdiction when the trial was near conclusion. He submitted

that there is no cavil with the contention that ***Ghulam Hussain*** has conclusively decided the definition of terrorism for purposes of section 6 of ATA, but what ***Ghulam Hussain*** did not state was how mens rea and the intent for purposes of section 6(1)(b) & (c) was to be inferred. That in view of the law laid down by the august Supreme Court intent is to be inferred from the ordinary consequence of an act, which consequences are deemed to be in the contemplation of the person performing such act. That in the instant case the consequence of acts attributed to the petitioners was to create a sense of fear and insecurity in the society. And it could therefore be inferred that the accused persons had the intent of indulging in terrorism and thus the requirement of mens rea for purposes of section 6 of ATA was satisfied. He submitted that the judgment passed by the august Supreme Court in ***Muhammad Jibran Nasir Versus State (PLD 2018 SC 351)*** was relevant as the facts of the said case were similar to the case in hand and there the august Supreme Court had ruled that it was an incident involving terrorism to be tried by ATC. And that the judgment in ***Muhammad Jibran Nasir*** had not been overruled by the august Supreme Court in ***Ghulam Hussain***. He relied on the judgment of this Court in ***Criminal Revision No. 19 of 2021 (Nadeem Younas Vs. The State and others)*** and submitted that this Court while taking into account ***Ghulam Hussain*** as well the judgment of this Court in ***Malik Tariq Ayub Vs. The State (2018 PCr.LJ 1719)*** while remanding the matter to be decided by the learned ATC held once again that the question of jurisdiction for purposes of section 23

ought to be decided after recording of material evidence. That this Court had thus held that mens rea for purposes of terrorism could be inferred from the consequences of the action on the basis of which charges had brought against an accused. That ***Ghulam Hussain*** in any event would apply prospectively and not retrospectively and relied on the judgment of the learned Sindh High Court in ***Tariq Khan Vs. The State*** ***(2022 PCr.LJ 558).*** That as the incident in question predated the judgment in ***Ghulam Hussain***, its application would be prospective and would not apply any matter in which a decision on the question of jurisdiction had already been reached by the court of competent jurisdiction prior to the announcement of ***Ghulam Hussain***.

9. Let us first address the objection to the maintainability of these petitions on the basis that the trial is near conclusion and statements of accused under section 342 of Cr.P.C have also been recorded and thus this Court ought not entertain the present petitions. Section 23 of ATA states the following:

> ***23. Power to transfer cases to regular Courts****.--- Where after taking cognizance of an offence a Special Court is of 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 the event that ATC renders decision pursuant to section 23 of ATA the statute does not provide the remedy of an

appeal to the party aggrieved by such order. And thus an aggrieved party consequently is forced to avail a remedy under Article 199 of the Constitution. The question of jurisdiction is not a technical one but goes to the heart of the authority that a court or tribunal exercises in seeking to enforce the law of the land. The rule of law as enforced under the Constitution includes within it the doctrine of enumerated powers. All public authority flows from the Constitution, including the power of judging and is only clothed with legitimacy if exercised within the four corners of the authority bestowed by the Constitution and the law. Article 175(2) of the Constitution encapsulates this idea and states that, *"no court shall have any jurisdiction save as is or may be conferred on it by the Constitution or by or under any law."* It is therefore settled principle of law that any objection to the jurisdiction of any tribunal conducting judicial proceedings ought to be decided at the earliest to lay such objection to rest. Due to the peculiar circumstances of the instant case, that need not be recalled and summarized here, the trial of the accused in relation to an incident dated 15.08.2016 is still pending trial and yet the question of jurisdiction of the special court convening the trial lingers. It is therefore the foremost duty of this Court to decide such question.

11. Article 4 of the Constitution declares that, *"to enjoy the protection of law and to be treated as in accordance with law is the inalienable right of every citizen."* And Article 4(2)(a) provides that, "*no action detrimental to life, liberty, body, reputation or property of any person shall be taken except in accordance with law."* ATA prescribes a certain procedure for

trying acts of terrorism and other acts that fall under any scheduled offence under the Third Schedule of ATA. The rights of an accused person being tried under ATA are circumscribed to a certain extent in comparison to rights of an accused being tried by courts of ordinary jurisdiction pursuant to the Criminal Procedure Code, 1898 **("Cr.P.C")**. Thus, the trial of an accused under ATA, who is not otherwise liable to be tried by the ATC under provisions of ATA, would fall foul of the guarantee provided under Article 4 of the Constitution. Thus, merely because the determination of question of jurisdiction of the learned ATC has been delayed to such extent that the trial is now near its conclusion does not mean that this constitutional court can shirk its responsibility to adjudicate the question or that the question of jurisdiction ought to be kept in suspension to enable a tribunal to pass a final verdict regarding the innocence or guilt of the accused even if doubts hang over the competence of such tribunal to try the accused.

12. We have also taken into account the order of the august Supreme Court dated 09.01.2020 passed in Constitution Petition No. 45/2019, wherein the august Supreme Court barred the learned ATC from pronouncing final judgment till such time that this Court decides the question of jurisdiction in the instant petition. While the august Supreme Court has not issued any direction, the expectation of the Apex Court that this Court would discharge its constitutional obligation to decide the question of jurisdiction of the ATC to conduct the trial in question, is implicit in such order. We are therefore unable to agree with the suggestion of the learned counsel for the

respondent that determination of question of jurisdiction can be left open till such time that it comes before the court as an objection in an appeal filed by any party against the final judgment rendered by the learned ATC. As the court is already seized of the matter it cannot defer judgment on the foundational question of jurisdiction, as in the event that this Court comes to the conclusion that the learned ATC is not vested with jurisdiction to conduct the trial in the instant matter, the ATC would be devoid of jurisdiction even to render final judgment notwithstanding the fact that it has already recorded evidence.

13. Section 23 of ATA contemplates such a situation and provides that any time after taking cognizance of the offence the learned ATC can determine whether or not it is vested with jurisdiction to try the case. Section 23 does not prescribe any period during trial after which such determination cannot be made. The ATC can therefore come to the conclusion while recording evidence that the charge of terrorism is not attracted and that no other schedule offence is attracted in a matter being tried by it and consequently it has no jurisdiction to try the offences that the accused is charged with and that the case is liable to be transferred to a court of ordinary jurisdiction. The last part of section 23 is a saving provision which provides that a court to which the case is transferred is to proceed with the trial of the offence as if it was the court that took cognizance of the offence. Section 23 thus does not contemplate a de novo trial in a case transferred from the ATC to the Sessions Court. The proceedings undertaken before ATC and any evidence recoded

by ATC till such time that it makes a determination regarding its jurisdiction stands protected and the trial continues before a court of ordinary jurisdiction from the stage where the ATC left off. The legislative intent behind section 23 is therefore self-evident. While the trigger for purposes of determining the question of jurisdiction is after the ATC takes cognizance of the offence, there is no outer limit for making such determination. Such question can be determined even at the time of rendering final judgment if the ATC were to conclude at such time that the accused was not liable for the offence of terrorism under section 7 of ATA or for any other scheduled offence. Upon forming such opinion, the ATC would need to still transfer the case to a court of competent jurisdiction to pass judgment in relation to offences which do not constitute an offence of terrorism or a scheduled offence under the ATA.

14. For the aforementioned reasons we find that these petitions are **maintainable** and we are under an obligation to decide the question of jurisdiction in accordance with law.

15. We need not to retrace the dissonant application of sections 6 and 7 of ATA till the confusion surrounding the concept of terrorism was resolved by the august Supreme Court in its unequivocal judgment in ***Ghulam Hussain*** that has clarified what constitutes terrorism for purposes of sections 6 and 7 of ATA. Let us reproduce the relevant paras from ***Ghulam Hussain Vs. The State (PLD 2020 SC 61)*** at some length:

> *13. ... For the purposes of further clarity on this issue it is explained for the benefit of all concerned that the cases of the offences specified in entry No. 4 of the*

Third Schedule to the Anti-Terrorism Act, 1997 are cases of those heinous offences which do not per se constitute the offence of terrorism but such cases are to be tried by an Anti-Terrorism Court because of their inclusion in the Third Schedule. It is also clarified that in such cases of heinous offences mentioned in entry No. 4 of the said Schedule an Anti-Terrorism Court can pass a punishment for the said offence and not for committing the offence of terrorism. ... Such distinction between cases of terrorism and other heinous offences by itself explains and recognizes that all heinous offences, howsoever serious, grave, brutal, gruesome, macabre or shocking, do not ipso facto constitute terrorism which is a species apart.

14. ... Reading of subsections (1) and (2) of the said section together makes good sense, i.e. all the actions specified in subsection (2) shall constitute terrorism if they are committed with the 'design' mentioned in clause (b) of subsection (1) or are committed for the 'purpose' referred to in clause (c) of subsection (1) of that section. Subsection (3) of that section, however, provides that "The use or threat of any action falling within subsection (2) which involves the use of firearms, explosive or any other weapon is terrorism, whether or not subsection (1)(c) is satisfied" which means that if for commission of the actions mentioned in subsection (2) a firearm, an explosive substance or any other weapon is actually used or a threat regarding use of the same is extended then all such actions are to constitute the offence of terrorism even if the other requirements of clause (c) of subsection (1) of section 6 are not satisfied or fulfilled. The requirements that need to be satisfied for invoking clause (c) of subsection (1) of section 6 are that the use or threat of action should be for "the purpose of advancing a religious, sectarian or ethnic cause" or for the purpose of "intimidating and terrorizing the public, social sectors, media persons, business community" or for the purpose of "attacking the civilians, including damaging property by ransacking, looting, arson, or by any other means, government officials, installations, security forces or law

enforcement agencies". ... He has also been found by us to be correct in submitting that if the provisions of subsection (3) of section 6 of the Anti-Terrorism Act, 1997, as they are worded, are to be given effect then the distinction between the peculiar offence of terrorism and most of the run of the mill offences committed in the society in routine would be obliterated. In this backdrop his submission that the provisions of subsection (3) of section 6 may be read down in order to save the main Act and its purposes has been found by us to be meriting serious consideration.

15. ... The legislature had probably realized by then that an effect of an act may not always be a correct indicator of the nature of such an act as every crime, especially of violence against person or property, does create some sense of fear and insecurity in some section of the society and a definition of terrorism based upon the magnitude or potential of an effect created or intended to be created or having a potential of creating would necessarily require a premature, speculative and imaginary quantification of the effect so as to determine the nature of the act in order to decide about the jurisdiction of a criminal court to try such an act. ... The earlier emphasis on the speculative effect of the act has now given way to a clearly defined mens rea and actus reus. The amended clause (b) of subsection (1) of section 6 now specifies the 'design' and clause (c) of subsection (1) of section 6 earmarks the 'purpose' which should be the motivation for the act and the actus reus has been clearly mentioned in subsection (2) of section 6 and now it is only when the actus reus specified in subsection (2) of section 6 is accompanied by the requisite mens rea provided for in clause (b) or clause (c) of subsection (1) of section 6 that an action can be termed as 'terrorism'. Thus, it is no longer the fear or insecurity actually created or intended to be created or likely to be created which would determine whether the action qualifies to be termed as terrorism or not but it is now the intent and motivation behind the action which would be determinative of the issue irrespective of the fact whether any fear and insecurity

was actually created or not. After this amendment in section 6 an action can now be termed as terrorism if the use or threat of that action is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect, etc. or if such action is designed to create a sense of fear or insecurity in the society or the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause, etc. Now creating fear or insecurity in the society is not by itself terrorism unless the motive itself is to create fear or insecurity in the society and not when fear or insecurity is just a byproduct, a fallout or an unintended consequence of a private crime.

16. For what has been discussed above it is concluded and declared that for an action or threat of action to be accepted as terrorism within the meanings of section 6 of the Anti-Terrorism Act, 1997 the action must fall in subsection (2) of section 6 of the said Act and the use or threat of such action must be designed to achieve any of the objectives specified in clause (b) of subsection (1) of section 6 of that Act or the use or threat of such action must be to achieve any of the purposes mentioned in clause (c) of subsection (1) of section 6 of that Act. It is clarified that any action constituting an offence, howsoever grave, shocking, brutal, gruesome or horrifying, does not qualify to be termed as terrorism if it is not committed with the design or purpose specified or mentioned in clauses (b) or (c) of subsection (1) of section 6 of the said Act. It is further clarified that the actions specified in subsection (2) of section 6 of that Act do not qualify to be labeled or characterized as terrorism if such actions are taken in furtherance of personal enmity or private vendetta.

16. Mr. Faisal Siddiqui, ASC argued before us that ***Ghulam Hussain*** has not explained that how mens rea is to be inferred. We agree with him that intent is to be deciphered from the natural consequences of actions in ordinary criminal cases by assuming that such consequences were within the contemplation

of the person who carried out the action and that such natural consequences were intended. We, however, do not agree that this very broad principle of imputing to an accused the intent of creating the effects caused by his actions can be imported and applied to the subject of terrorism. This was precisely the question that had come before the august Supreme Court in ***Ghualm Hussain***. The difference of opinion in various judgments related to whether it was the mens rea that defined whether an act qualified as an act of terrorism or whether mens rea could be inferred from the consequences created by the acts in question to qualify them as acts of terrorism. And it was this controversy and difference of opinion that was finally laid to rest in ***Ghulam Hussain***. If we were to agree with the contention of Mr. Siddiqui and hold that notwithstanding ***Ghulam Hussain*** mens rea for purposes of section 6(1)(b) & (c) of ATA is to be inferred from the effect or consequences created by the actions that form the actus reus of the offence we would essentially be reverting back to the state of confusion that the august Supreme Court sought to dispel in ***Ghulam Hussain***, and we would be sneaking back in the effects doctrine as a manifestation of terror which was buried by the Apex Court in ***Ghulam Hussain***. Mr. Siddiqui proposed that the murder of a high-ranking state official would create grievous consequences and due to the effect of such action in creating fear and insecurity in the society, such murder would fall within the domain of terrorism. We are unable to subscribe to such view. The end indented to be achieved by an action, the means applied to attain such end, and the consequences of the actions or means employed (whether or not intended) are all different things. What the august Supreme

Court held in ***Ghulam Hussain*** was that the mens rea must be appreciated in terms of the end to be achieved by an action and the actus reus would be the means employed to achieve such end. Where the end to be achieved satisfies the requirements of section 6(1)(b) in terms of design or section 6(1)(c) in terms of purpose, the act employed to achieve such end would qualify as actus reus. However where the end to be achieved is to realize some person vendetta or settle a private secure and not to realize a design or purpose as identified in section 6(1)(b) & (c) of ATA, notwithstanding how heinous, gruesome or shocking the consequences or effects created by such action and notwithstanding the contribution of such action cultivating a sense of fear or insecurity in the society, the offence would not constitute the offence of terrorism for purposes of sections 6 and 7 of ATA. The imposition of sanction that claims the life of an individual, whether by a private party or by the State, endangers a sense of fear in the society. When such sanction is backed by the command of law and imposed by the State it is clothed with legitimacy, but it nevertheless creates a sense of fear which the state hopes would deter criminals from engaging in violent. The cultivation of fear as deterrence is the effect of the action of claiming a human life. But what distinguishes the imposition of sanction by the State and the imposition of sanction by a private party is the intent behind such act. The cultivation of fear in and of itself can thus not be the determinant of whether an action qualifies as terrorism.

17. The relevant intent for purposes of defining an act of terrorism is the intent that predates the act in question. Mens

rea, in other words, is the motivation that drives the action. During a mugging incident a criminal may shoot the individual being mugged. If it later turns out that the individual mugged and shot was a high state functionary, which fact the criminal was oblivious to, the effect of such incident due to the attention it would attract would in all likelihood create a sense of fear and insecurity in the society. But the motivation behind the act being to rob the individual as opposed to creating a sense of fear and insecurity in the society, such act, notwithstanding the fear and insecurity that it cultivates, would not constitute the offence of terrorism.

18. In view of the above discussion, we find that ***Ghulam Hussain*** leaves no room open to infer mens rea, for purposes of an action being qualified as terrorism, from the effect produced by such action or the creation of fear and insecurity in the society as a consequence of such action. What is to be determined by the court is whether the driving force or motivation behind the action was to create a sense of fear and insecurity in society or any of the other designs identified in section 6(1)(b) of ATA or whether such action was driven by a purpose identified under section 6(1)(c) of ATA. The relevant mental state that constitutes mens rea is that which predates the actus reus. Merely because an altercation takes place in a busy market place leading to exchange of heated words and a gun fight ensues claiming human life, which terrorizes bystanders and other witnesses to such incident would still not qualify as the act as that of terrorism by virtue of its location and collateral effect. The necessary mens rea would be found if the

court comes to the conclusion that execution of the actions in question was designed to be carried out in a busy market for purposes of inculcating fear and insecurity within the society.

19. The law laid down in ***Ghulam Hussain*** has most recently been reiterated by the august Supreme Court in ***Muhammad Akram Vs. State (2022 SCMR 18)*** wherein the Apex Court explained the ratio in ***Ghulam Hussain*** by stating that, *"this Court has categorically held that only creating fear or insecurity in the society is not by itself terrorism unless the motive itself is to create fear or insecurity in the society and not when fear or insecurity is just a byproduct, a fallout or an unintended consequence of a private crime and mere shock, horror, dread or disgust created or likely to be created in the society does not transform a private crime into terrorism."*

20. The question what material is to be taken into account while determining the question of intent and motive was addressed by the august Supreme Court in ***Allah Ditta Vs. The State (1994 SCMR 717)*** wherein it was held that, *"the question of jurisdiction can be determined on the basis of FIR and other material produced by the prosecution at the time of presentation of the challan. On the basis of that matter the court has to decide whether cognizance is to be taken or not."* The basis for determination of jurisdiction under sections 12, 17 and 23 of ATA is no different. In ***Muhammad Iqbal Vs. The State (KRL 1992 Criminal Cases 285***) it was held in relation to section 4 of Suppression of Terrorist Activities (Special Courts) Act, 1975, that the jurisdiction of Special Courts constituted under the said Act was restricted to offences listed in the

schedule and that ordinary courts ought not readily surrender their jurisdiction to special courts constituted under the said Act. In ***Ghulam Shabbir Vs. Punjab Special Courts (Suppression of Terrorist Activities) No.5*** ***(1992 PCr.LJ 1932)*** a larger bench of the learned Lahore High Court held that a special court was a creation of statute could not extend its jurisdiction beyond the scope provided in law that created it.

21. In ***Mst. Sughran Bibi Vs. The State*** ***(PLD 2018 SC 595)*** the august Supreme Court clarified that it was not the account of the complainant that controlled the offences that were attracted in relation to the action complained of but that such determination had to be made by the police authorities investigating the matter and subsequently by the court trying the matter. Merely because the complainant seeks to charge an accused with a certain offence is not determinative of whether such offence is attracted. In ***Sughran Bibi*** the august Supreme Court in explaining the law in relation to the scope of Section 154 of Cr.P.C had, *inter alia*, held the following:

> *27. …(ii) If the information received by the local police about commission of a cognizable offence also contains a version as to how the relevant offence was committed, by whom it was committed and in which background it was committed then that version of the incident is only the version of the informant and nothing more and such version is not to be unreservedly accepted by the investigating officer as the truth or the whole truth*.
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> *(v) During the investigation the investigating officer is obliged to investigate the matter from all possible angles while keeping in view all the versions of the incident brought to his notice and, as required by Rule 25.2(3) of the Police Rules, 1934 "It is the duty of an investigating*

> *officer to find out the truth of the matter under investigation. His object shall be to discover the actual facts of the case and to arrest the real offender or offenders. He shall not commit himself prematurely to any view of the facts for or against any person."*

The dicta in ***Sughran Bibi*** very clearly provides that the offences that are attracted in a case do not depend on the version of the incident reported by the complainant but the charges are to be determined in view of the investigation undertaken by the police authorities during which the police authorities ought to investigate the matter from all possible angles, of course while keeping in view the version of the complainant recorded within the FIR.

22. We are conscious of the fact that the jurisdiction we exercise under Article 199 of Constitution is limited to correcting any illegality or perversity in the judgment that is impugned before us. In the instant matter it is the complainant's own account that altercation between the complainant, his son and the accused resulted from exchange of hot words in the evening of 14.08.2016 in F-11 Markaz. All of them were then escorted to police station where the son of the complainant as well as his nephew, Barrister Fahad Malik, arrived after being informed about the incident. It is stated in the FIR that there was an exchange of hot words between the principal accused and Barrister Fahad Malik in the premises of the police station. It is not the complainant's case or the prosecution's case that there was a prior design on part of the accused to entangle the complainant, his son and Barrister Fahad Malik into an altercation leading to a gun fight that would claim their lives and

create a sense of fear and insecurity in the society or in a segment of the society. It is evident from the story narrated in the FIR, which is also supported by the statements of PW-13 (complainant) and PW-14 (complainant's son) which have also been reproduced in the Impugned Order, that the gunfire purportedly initiated by the principal accused was a consequence seething anger for being brought to the police station, which the principal accused considered as an act that dishonored him. The principal accused, to settle his score, summoned his accomplices ultimately leading to the incident in which he and his accomplices indiscriminatory fired upon the complainant, his son and Barrister Fahad Malik, injured the complainant claiming the life of Barrister Fahad Malik.

23. The part of the testimony of PW-13 ad PW-14 that the learned ATC has relied on would at best be seen as an account of the fear that was cultivated due to the incident amongst private witnesses or passersby. As we are only concerned with the question of jurisdiction, we are conscious about not making any observations that could one way or the other influence the learned trial court in appreciating the evidence and forming its judgment regarding the guilt or innocence of the accused persons. We do note however that the part of the testimony referred to by the learned ATC relates to the effect of actions taken by the accused as opposed to evidence of any motivation, design or purpose inspiring such actions. As the august Supreme in ***Ghulam Hussain*** has already held that effects and consequences of an act, no matter how gruesome, are of no consequence for purpose of categorizing

such action as terrorism, we find that the learned trial court misdirected itself while appreciating the evidence that it relied on as evidence of mens rea for purposes of section 6(1)(b) & (c) of ATA. We find that no material has been produced before us which establishes that the actions of the accused were driven or motivated by any design or purpose that falls within the scope of section 6(1)(b) of section 6(1)(c) of ATA. No material has been produced before us to suggest that the actions were driven by the design or purpose of creating a sense of fear and insecurity within any segment of the society that lives in the neighborhood where the incident occurred or motivated by the design or purpose of creating a sense of fear or insecurity amongst lawyers as a segment of the society to deter them from assisting complainants in criminal matters for example.

24. Mr. Faisal Siddiqui had brought to our attention the judgment of august Supreme Court in ***Muhammad Jibran Nasir Versus State*** ***(PLD 2018 SC 351)*** for the proposition that even in a case of personal vendetta or involving the murder of an individual the matter could fall within the domain of terrorism as defined under section 6 of ATA. We have reviewed the said judgment and found that the august Supreme Court in ***Muhammad Jibran Nasir*** has not interpreted section 6 of ATA. In the said matter, the august Supreme Court had taken suo motu cognizance of an incident that resulted in the murder of Shah Zeb Khan and Shah Rukh Jatoi along with his accomplices were accused of the same. In suo motu proceedings in exercise of authority under section 184(3) of the Constitution the august Supreme Court had declared that the case would be tried by the

Anti-Terrorism Court. The said judgment of the Apex Court attained finality as no one sought its review. Subsequently the decision of Anti-Terrorism Court was appealed before the learned Sindh High Court, which decided that Anti-Terrorism Court was devoid of jurisdiction as the offence under section 7 of ATA was not made out and the learned Sindh High Court remanded the matter to the court of ordinary jurisdiction for trial. The august Supreme Court set-aside the judgment of the learned Sindh High Court and remanded it back to the High Court for decision afresh. The ratio of the judgment in ***Muhammad Jibran Nasir*** is that a judgment rendered by the august Supreme Court under Article 184(3) of the Constitution is binding on all courts to the extent that said judgment had attained finality. While the august Supreme Court had framed various questions in the leave granting order, including the scope of terrorism as defined under section 6 of ATA, such questions were not addressed and the august Supreme Court held that addressing the said question was not necessary to resolve the controversy at hand and that such questions would be attended in an appropriate case. The august Supreme Court subsequently decided ***Ghulam Hussain*** addressing some of the questions identified in the leave granting order of ***Muhammad Jibran Nasir***, including the meaning of terrorism for purposes of section 6 of ATA. Consequently, the ratio in ***Muhammad Jibran Nasir*** does not take away from the law laid down in ***Ghulam Hussain***.

25. In the instant case we find that the actus reus was not supported and accompanied by the required mens rea that would result in classifying the actions in question as terrorism for

purposes of sections 6 and 7 of ATA. We are also not impressed by the arguments of Mr. Faisal Siddiqui, ASC that the law laid down in ***Ghulam Hussain*** is to be applied prospectively and would not be applicable to the incident that had already transpired before the announcement of the judgment in ***Ghulam Hussain*** or in relation to a case in which the question of jurisdiction had been decided by a court of competent jurisdiction prior to the announcement of ***Ghulam Hussain***. We are not convinced that the principle of retrospectivity, against which Article 12 of the Constitution provides a guarantee, is attracted in the instant matter in favour of the respondent. Judges while adjudicating cases lay down what the law is and not what it ought to be. The system of precedent that common law relies on acknowledges the fact that courts interpret what the law is and do not declare what the law shall be. While according meaning to the words used in a statute the court undertakes an interpretive exercise and what the court is essentially stating is the meaning that is attributable to the words used in the statute from the time when the such statute was promulgated. In ***Ghulam Hussain*** the august Supreme Court has delineated the legislative history of section 6 of ATA. The meaning accorded to section 6 is the meaning according to the version of section 6 that was incorporated through Anti-Terrorism Amendment Ordinance, 2001 promulgated on 15.08.2001. It can therefore not be said that the august Supreme Court in ***Ghulam Hussain*** changed the meaning of the term "terrorism" as employed in section 6 of ATA effective at some point after 15.08.2001. What it did was clarify the meaning of the word as employed by the legislature when it amended the provisions of section 6 through

Anti-Terrorism Amendment Ordinance, 2001. The Apex Court felt the need to do so because courts had been according different interpretation to the word terrorism for purposes of sections 6 and 7 of ATA and consequently the august Supreme Court constituted a larger bench to clarify the meaning of terrorism as used in ATA, which interpretation is binding on all courts in terms of Article 189 of the Constitution. The Apex Court has therefore held in ***Ghulam Hussain*** that the term terrorism means actus reus coupled with mens rea identified in section 6(1)(b) & (c) of ATA and that the scope of terrorism was such since the promulgation of section 6 in its present through the Anti-Terrorism Amendment Ordinance, 2001. Consequently, the law as clarified by ***Ghulam Hussain*** would be applicable for purposes of deciding a jurisdictional question under section 23 of ATA, but also whenever any question in relation to the scope of sections 6 and 7 of ATA comes up before a court in its appellate jurisdiction. Holding the contrary would surely fall foul of the guarantee under Article 12 of the Constitution as the law clarified by the august Supreme in ***Ghulam Hussain*** is with effect from 15.08.2001 when the section 6 was stated by the legislature in its present form and to such extent that any act was done after such time, it is liable to be judged in view of the law as laid down by the august Supreme Court in ***Ghulam Hussain.***

26. Before concluding we must note our concern that the practice of prosecution to give expansive meaning to terrorism in order to push a greater number of cases before ATCs, motivated by some misguided notion of allegiance to a form of rule of law

that celebrates stricter punishments and circumscribes the rights of accused pending trial and judgment. It has been borne out by various studies that it is the certainty of punishment and not the severity of punishment that deters crime and it is expeditious disposal of cases by ordinary courts that cultivates public faith in rule of law. Misclassifying of gruesome crime as terrorism to seek trial before ATC's does more harm than good.

27. For the aforementioned reasons we find that the Impugned Order is perverse in terms of its reasoning, and the conclusions drawn in view of the evidence led by two prosecution witnesses with regard to the effect of actions attributed to the accused. The Impugned Order has been rendered by misapplying section 6 of ATA as elucidated by the august Supreme Court in ***Ghulam Hussain***. We find in view of the material placed before us that no offence in terms of sections 6 and 7 of ATA is made out in the present case. We therefore **allow** these writ petitions and set-aside the Impugned Order dated 23.10.2019 passed by the learned ATC. We allow the petitioners' applications under section 23 of ATA and order that the case be transferred to the learned Sessions Court, which will proceed with the trial of the accused from the stage where the learned ATC left off.

28. We are conscious that the incident that claimed the life of Barrister Fahad Malik transpired on 15.08.2016 and the trial is yet to conclude. We therefore direct the learned ATC to transfer the entire record of the case to the learned Sessions Judge West-Islamabad immediately, who will entrust it to a court of competent jurisdiction, which will also ensure that first hearing in this matter is convened on **27.04.2022**. We further

direct that the court seized of the matter shall continue to proceed with the trial on a day-to-day basis and conclude the proceedings expeditiously and render a judgment no later than thirty (30) days from the date of first hearing before the court.

29. We would also like to express our gratitude to the learned counsel for the parties for their able assistance.

(ARBAB MUHAMMAD TAHIR)
JUDGE

(BABAR SATTAR)
JUDGE

Approved for reporting.

Saeed.