JUDGMENT SHEET
IN THE ISLAMABAD HIGH COURT
ISLAMABAD

CASE NO. : W.P. NO.178-2017
Malik Tariq Ayub & Another
Vs.
The State etc.

Petitioners by	:	Kh. Haris Ahmad, Advocate Mr. Naveed Ahmad Khawaja, Advocate Mr. Muhammad Akram Qureshi, Advocate Mr. Zain Rahmat Qureshi, Advocate
Respondents by	:	Mr. Abdul Wahid Qureshi, Advocate Kh. Ahmad Tariq Rahim, Advocate Raja Zaheer-ud-Din Babar, Advocate Mr. Zafar Khokhar, Advocate Raja Ghaneem Aabir Khan, Advocate Mr. Ilyas Siddiqui, Advocate Mr. Azam Nazir Tarar, Advocate Mr. Sadaqat Ali Jahangir, State Counsel with M. Yousaf, SHO/IO
Date of hearing	:	25.04.2018

AAMER FAROOQ J. Through the instant petition, the petitioners have challenged order dated 21.12.2016 passed by respondent No.2.

2. The facts, leading to filing of instant petition, are that on the complaint of petitioner No.1, FIR No.239 dated 15.08.2016 under sections 302/324, 148/149 & 337-F(III) PPC read with Section 7 ATA, Police Station, Shalimar, Islamabad, was registered. In the referred FIR, respondents No.3 to 5 were nominated as the accused for committing murder of Barrister Fahad Malik and attempted to commit murder of complaint i.e. Malik Tariq Ayub. It was also alleged that on 14.08.2016, at about 12:00 a.m., a scuffle took place between Husnain, the son of petitioner No.1 and accused Raja Arshad at F-11 Markaz, Islamabad. When the complainant reached at the spot, Raja Arshad extended threat to him and his son Husnain. In the meanwhile, the police of P.S. Shalimar reached at the spot and took Raja Arshad to Police Station and also asked the complainant to

come there. At the Police Station, petitioner No.1 and his three sons namely Husnain Malik, Zonain Malik & Bazaib Malik along with his nephew Barrister Fahad Malik, tried to compromise the matter with Raja Arshad. During course of the same, there was exchange of harsh words however apparently the matter was settled at 3:00 a.m. After that, petitioner No.1 and his son Husnain Malik, sat in their car, when Raja Arshad also sat with them, as he wanted to have discussion, whereas Barrister Fahad Malik, Bazaib Malik and Usman Fahad Malik sat in Fahad's car. At about 3:20 a.m. near Street No.3, F-10/3, Islamabad, two Double Cabin Vehicles approached the vehicle of Barrister Fahad Malik and the accused compelled to stop Fahad Malik's car from behind. Raja Arshad walked out of the car and raised 'Lalkara' and Nauman opened the door of driving seat of car of the complaint and aimed Kalashnikov, which he pushed down and as a result, Nauman fired, which hit petitioner No.1 in the leg, whereas other fires, damaged different parts of the car. On seeing other persons coming down, Fahad tried to flee away, but Raja Arshad opened fire from the front and there-after from the right, as a result whereof, vehicle got out of control and collided with the boundary wall of the near house and the accused fled away.

3. The police, during course of investigation and on supplementary statement of petitioner No.1, added section 7 of Anti Terrorism Act, 1997 (the Act) and also recorded statements of some persons of the vicinity to the effect that they were terrified and panic was created. Report under section 173 Cr.P.C. was filed before respondent No.2. During course of proceedings, respondents No.3 & 4 filed applications under section 23 of the Act for deletion of Section 7 ibid. The referred applications were decided through a consolidated order dated 21.12.2016, which has been impugned in the instant petition.

4. On behalf of petitioners, four learned counsels addressed the arguments however their arguments are being reduced jointly.

5. It was contended that learned trial court failed to understand the matter and the manner, in which, the accused persons committed the offence and decided the applications in a whimsical manner; that the offence was committed on Main Margalla Road, Islamabad by blocking the road, which is a busy thoroughfare. In this behalf, it was contended that the way, the offence was carried out through automatic weapon, is a result of preplanned intent; that the design of creating fear and panic was prepared not only for the complainant but also for the general public. It was also contended that learned trial court failed to take into account various pronouncements by the Hon'ble Supreme Court of Pakistan, which reflected the interpretation of the provisions of the Act. Reliance was placed on case reported as 'Shahbaz Khan alias Tippu and others Vs. Special Judge, Anti-Terrorism Court No.3, Lahore and others' (PLD 2016 Supreme Court 1). It was also contended that deceased Barrister Fahad Malik was a practicing lawyer and had come to the Police Station as Legal Advisor to petitioner No.1 and his mother and due to his murder sense of fear amongst the legal fraternity was created. It was contended that in the way, the offence was committed, is gruesome inasmuch as after blocking complainant's car, the fire was shot not only at the complainant's car and the deceased Fahad Malik but also three cars as well and there was aerial firing too. It was also submitted that respondent No.2, while deciding the matter, has erroneously reached to the conclusion that the occurrence took place at 3:00 a.m. hence no sense of panic and fear could have created, whereas on the contrary, it was concluded that the offence took place on the preceding night of 14th August i.e. Independence Day when celebrations continue till late. It was

also submitted that since the deceased Fahad Malik is a dual National i.e. he holds nationality of Pakistan as well as nationality of Great Britain therefore his killing received coverage on media as well as social media due to which, fear and sense of panic amongst the public spread. It was also submitted that learned trial court erroneously concluded that where there is a previous enmity, it takes away the case out of jurisdiction of Anti-Terrorism Court. It was observed that it was contrary to the decision of Hon'ble Sindh High Court in case reported as 'Shah Rukh Jatoi Vs. The State' (2013 MLD 1588). It was further submitted that respondents Nos.3 & 4 are hardened criminals and there are number of cases pending against them.

6. Kh. Haris Ahmad, Senior Advocate Supreme Court of Pakistan took the Court through the case law on the subject and evolution of Section 6 of the Act from its inception in 1997 till to date. Learned counsel initially read the judgments, in which, cases were not categorized as terrorist acts. The cases, which were cited, were 'Ch. Bashir Ahmad Vs. Naveed Iqbal' (PLD 2001 SC 521),'Mohabbat Ali and another Vs. The State and another' (2007 SCMR 142), 'Tariq Mahmood Vs. The State and others' (2009 SCMR 1631) & 'Bashir Ahmed Vs. Muhammad Siddique and others' (PLD 2009 SC 11). Learned counsel then cited cases, in which, the acts were held to be tri-able by the Anti-Terrorism Court. The cases cited were 'Mst. Raheela Nasreen Vs. The State and another' (2002 SCMR 908), 'Muhammad Mushtaq Vs. Muhammad Ashiq and others' (PLD 2002 SC 841), 'Mst. Najam-un-Nisa Vs. Judge, Special Court constituted under Anti-Terrorism Act, 1997' (2003 SCMR 1323), 'State through Advocate-General NWFP, Peshawar Vs. Muhammad Shafiq' (PLD 2003 SC 224), 'Abdul Ghafoor Bhatti Vs. Muhammad Saleem and others' (2003 SCMR 1934), 'Sh. Muhammad Amjad Vs. The State' (PLD 2003 SC 704), 'Mirza Shaukat Baig

and others Vs. Shahid Jamil and others' (PLD 2005 SC 530), 'Nazeer Ahmed and others Vs. Nooruddin and another' (2012 SCMR 517), ''Shahbaz Khan alias Tippu and others Vs. Special Judge, Anti-Terrorism Court No.3, Lahore and others' (PLD 2016 Supreme Court 1) & 'Kashif Ali Vs. The Judge, Anti-Terrorism, Court No.II, Lahore and others' (PLD 2016 SC 951).

7. Mr. Akram Qureshi, Senior Advocate Supreme Court of Pakistan, *inter alia,* contended that in order to decide the question regarding jurisdiction, learned trial court has to decide the matter with the application of mind. In this behalf, it was contended that statement of eye-witnesses and evidence recorded by the Investigation Officer, clearly shows that the offence in question falls within the domain of section 7 of the Act. Learned counsel took the Court through the statements of eye-witnesses Husnain Maalik, Zonain Malik, Bazaib Malik, Usman Ali & Faisal Zafar to show that the way the offence was committed, was to terrify not only the complainant but also the people of the vicinity. Learned counsel also took the Court through the statements of Ahmad Sherjil, Muhammad Ajmal as well as Azmat Mumtaz Saqib. Learned counsel also placed reliance on case reported as 'Zahid Sohail Sattar Vs. The State' (1998 P.Cr.LJ 1795 Lahore). In this behalf, it was contended that witnesses of the offence could not be the eye-witness but any person whose statement is recorded in the case diary which comes within the provision of section 161 Cr.P.C. and the accused is entitled to its copy. Reliance was placed on cases reported as 'Nasrullah Vs. The State' (1980 P. Cr.LJ 5) & 'Ch. Noor Muhammad Vs. The State' (1969 P.Cr.LJ 568). Learned counsel also emphasized on the recent judgment of the Hon'ble Supreme Court of Pakistan in cases reported as 'Muhammad Jibran Nasir and others Vs. The State and others' (PLD 2018 Supreme Court 351) & 'The Province of

Punjab through Secretary Punjab Public Prosecution Department and another' Vs. Muhammad Rafique and others' (PLD 2018 SC 178).

8. Mr. Azam Nazir Tarar Advocate, appearing on behalf of one of the respondents, contended that by any stretch of imagination, the offence in question does not fall within the scope and domain of section 7 of the Act. It was contended that at the best, the alleged occurrence is a result of enmity between the parties and took place, as per contents of FIR, at 3:00 a.m. in a deserted street. It was also submitted that no sense of panic or fear was created in any manner and the media hype given to any incident is not a yardstick for determining the fact that alleged occurrence falls within the Act. Reliance was placed on cases reported as 'Waris Ali and 5-others Vs. The State' (2017 SCMR 1752), 'Amjad Ali Vs. The State' (PLD 2017 SC 661), 'Chaudhry Shaukat Ali Vs. Haji Jan Muhammad and others' (2017 SCMR 533), 'Sajid Rasheed Qureshi Vs. Munawar Ahmad' (2017 SCMR 162), 'Khud-e-Noor Vs. The State' (PLD 2016 SC 195), 'Sagheer Ahmad Vs. The State' (2016 SCMR 1754) & 'Muhammad Yaqoob and others Vs. The State' (2009 SCMR 527).

9. Khawaja Ahmad Tariq Rahim, Senior Advocate Supreme Court, *inter alia,* contended that instant petition is the one under Article 199 of the Constitution, in which, the Court has to see whether there is any error of law or jurisdictional defect in the impugned order and is not to replace the findings of facts in any way.

10. Mr. Muhammad Azhar Siddique, learned counsel for the respondents, read various provisions of Anti-Terrorism Act, 1997 as well as the Code of Criminal Procedure, 1898 and contended that on the basis thereof, the offence is not the one falling under the Act.

11. The arguments advanced by learned counsels for the parties have been heard and the documents placed on record examined with their able assistance.

12. The petitioners are aggrieved of acceptance of applications under section 23 of the Act filed by respondents No.3 & 4, whereby section 7 of the Act was deleted from the report under section 173 Cr.P.C. and the FIR and on the basis thereof it was ordered that challan/report under section 173 Cr.P.C. be filed before the court of ordinary jurisdiction.

13. The provisions of the Act, especially Section 6 has received considerable judicial interpretation. Before examining the recent pronouncements of the august Apex Court discerning the criteria for trial of a case before the Special Court i.e. Anti-Terrorism Court, it is just and proper that relevant provisions of law be reproduced: -

> ***[6. Terrorism.-(1) In this Act, "terrorism" means the use or threat of action where:- (a) the action falls within the meaning of sub-section (2); and***
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> ***(b) the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect 5[or a foreign government or population or an international organization] or create a sense of fear or insecurity in society; or***
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> ***(c) the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause [or intimidating and terrorizing the public, social sectors, media persons, business community or attacking the civilians, including damaging property by ransacking, looting, arson or by any other means, government officials, installations, security forces or law enforcement agencies:]***
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> ***[Provided that nothing herein contained shall apply to a democratic and religious rally or a peaceful demonstration in accordance with law.]***
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> ***[7. Punishment for acts of terrorism.- [(1)] Whoever commits an act of terrorism under section 6, whereby- (a) death of any person is caused, shall be punishable, on conviction, with death or with imprisonment for life, and with fine; or***
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> ***(b) he does anything likely to cause death or endangers life, but death or hurt is not caused, shall be punishable, on conviction, with imprisonment of either description for a terms which shall he not less than [ten years] but may extend to [imprisonments for life] and with fine; or***
>
> ***(c) grievous bodily harm or injury is caused to any person, shall be***

punishable, on conviction, with imprisonment of either description for a term which shall not be less than [ten years] but may extend to imprisonment for life and shall also be liable to a fine; or

(d) grievous damage to property is caused, shall be punishable on conviction, with imprisonment, of either description for a term not less than ten year and not exceeding 1[but may extend to imprisonment for life] and shall also be liable to a fine; or

(e) the offence of kidnapping for ransom or hostage-taking has been committed, shall be punishable, or conviction, with death or imprisonment for life 2 * * ; or*

(f) the offence of hijacking, has been committed, shall be punishable, on conviction, with death or imprisonment for life 2 * * and fine;*

[(ff) the act of terrorism committed falls under section 6 (2) (ee), shall be punishable with imprisonment which shall not be less than fourteen years but may extend to imprisonment for life;]

(g) the act of terrorism committed falls under section 6 (2) (f) and (g), shall be punishable, on conviction, with imprisonment of not less than [two years] and not more than [five years] and with fine; or

(h) the act of terrorism committed falls under clauses (h) to (n) of sub-section (2) of section 6, shall be punishable on conviction, to imprisonment of not less than 1[five years] but may [extend to imprisonment for life] and with fine;

(i) any other act of terrorism not falling under clauses (a) to (h) above or under any other provision of this Act, shall he punishable, on convection, to imprisonment of not less then [five years] and not more then [ten years] or with fine or with both.

[(2) An accused, convicted of an offence under this Act shall be punishable with imprisonment of ten years or more, including the offences of kidnapping for ransom and hijacking shall also be liable to forfeiture of property.]

12. Jurisdiction of [Anti-terrorism Court].— (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.

(2) Notwithstanding anything contained in sub-section (1), if, in respect of a case involving a scheduled offence committed in any area, the Government, having regard to the facts and circumstances of the case, is satisfied that in order to ensure a fair trial, or for the protection and safety of witnesses, that such offence should be tried by [an Anti-terrorism Court] established in relation to any other area, the Government may make a declaration to that effect.

Explanation.- Where [an Anti-terrorism Court] is established in relation to two or more areas, such [Anti-terrorism Court] shall be deemed, for the purpose of this sub-section, to have been established in relation to each of such areas.

(3) Where a declaration is made in respect of an offence committed in an area in a Province [or the Islamabad Capital Territory] any prosecution in respect of such offence shall be instituted only in the

> ***[Antiterrorism Court] established in relation to such area, and , if any prosecution in respect of such offence is pending immediately before such declaration in any other court, the same shall stand transferred to such [Anti-terrorism Court] and such [Anti-terrorism Court] shall proceed with such case from the stage at which it was pending at the time without the necessity of recalling any witnesses.***
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> ***23. Power to transfer cases to regular courts. Where, after taking cognizance of an offence, 2[an Antiterrorism 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.***

14. In case reported as 'Mirza Shaukat Baig and others Vs. Shahid Jamil and others' (PLD 2005 SC 530), the Hon'ble Supreme Court of Pakistan observed as follows:-

> ***"The words "designed to" are equated to that of wilfully, knowingly and deliberately. It would have no substantial bearing on the impact of section 6 of the Act whether the words knowingly, deliberately and wilfully have been mentioned specifically or otherwise as it would have no impact on the meaning, aim, scope and objects of the provisions of section 6 of the Act. `Mens rea' (guilty intention) is an important ingredient of offences made punishable under the Act but specific use of the word `mens rea' in the enactment is not necessary, if this expression can be conveyed by any other word as has been done by the Legislature in section 6 of the Act by using the words "designed to".***
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> ***Even in the case of a statutory offence the presumption is that mens rea is an essential ingredient unless the statute creating the offence by express terms or by necessary implication rules it out. The mere omission of the word "knowingly" or "intentionally" is not sufficient to rebut this presumption for all that such words do is to say expressly what is normally implied. Thus where the words used in the statute are not clear or unambiguous an examination of the general scheme and object of the statute becomes necessary to determine whether the general rule of liability has been departed from. In some cases even the quantum of the punishment has been taken into account for determining this question, though this by itself cannot, be conclusive.***
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> ***Where a criminal act is designed to create a sense of fear or insecurity in the mind of the general public that can only be adjudged by keeping in view the impact of the alleged offence and manner of the commission of alleged offence. The Anti-Terrorism Act was brought into force for the prevention and elimination of terrorism, sectarian violence and for expeditious dispensation of justice in the heinous offences as stipulated in the Act itself. So far as the concept of "terrorism" is concerned there is no substantial change between the Suppression of Terrorism Activities (Special Courts) Act (XV of 1975) and the Anti -Terrorism Act (XXVII of 1997) except a few minor changes having no bearing on the meaning and scope of terrorism.***

> ***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 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.***

In case reported as ‘Shahbaz Khan alias Tippu and others Vs. Special Judge, Anti-Terrorism Court No.3, Lahore and others’ (PLD 2016 Supreme Court 1), the Hon’ble Supreme Court, while relying on two earlier judgments on the subject reported ‘Bashir Ahmed Vs. Muhammad Siddique’ (PLD 2009 SC 11) and ‘Ahmed Jan Vs. Nasruallah’ (2012 SCMR 59), observed as under:-

> ***“6. A bare reading of the F.I.R. indicates that four accused, one armed with a pistol, one with knife and the remaining with sticks, attacked the complainant party in consequence of which Sher Jan died and Naseeb Ullah received injuries. No motive was alleged and the police after due investigation submitted challan/report under section 173, Cr.P.C. before the learned Court of Session and the same***

was entrusted to an Additional Sessions Judge who transmitted it to the Special Court established under the Anti-Terrorism Act, 1997. To assume jurisdiction under the afore-referred Act, the Court has to examine the mandate of the relevant penal provision which is section 6 of the Anti-Terrorism Court and it reads as under:--

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

(a) the action falls within the meaning of subsection (2) and;

(b) the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society; or

(c) the use or threat is made for the purpose of advancing a religious, sectarian or ethnic cause [or intimidating and terrorizing the public, social sectors, business community and preparing or attacking the civilians, government officials, installations, security forces or law enforcement agencies.]

(2) An "action" shall fall within the meaning of subsection (1), if it:

(a) involves the doing or anything that causes death;

(b) involves grievous violence against a person or grievous bodily injury or harm to a person;

(c) involves grievous damage to property;

(d) involves the doing of anything that is likely to cause death or endangers a person's life;

(e) involves kidnapping for ransom, hostage-taking or hijacking; (ee) involves use of explosives by any device including bomb blast;

(ee) incites hatred and contempt on religious, sectarian or ethnic basis to stir up violence or cause internal disturbance;

(f) involve stoning, brick-batting or any other form of mischief to spread panic;

(g) involves firing on religious congregations, mosques, Imam Bargahs, churches, temples and all other places of worship, or

(h) random firing to spread panic, or involves any forcible takeover of mosques or other places of worship;

(i) creates a serious risk to safety of public or a section of the public, or is designed to frighten the general public and thereby prevent them from coming out and carrying on their lawful trade and daily business, and disrupts civic life;

(j) involves the burning of vehicles or any other serious form of arson;

(k) involves extortion of money (Bhatta) or property;

(l) is designed to seriously interfere with or seriously disrupt a communication system or public utility service;

(m) involves serious coercion or intimidation of a public servant in order to force him to discharge or to refrain from discharging his lawful duties; or

(n) involves serious violence against a member of the police force, armed forces, civil armed forces, or a public servant.

(3) The use or threat or use of any action falling within subsection (2), which involves the use of fire-arms, explosives or any other weapon, is terrorism, whether or not subsection 1(c) is satisfied.

(4) In this section "action" includes any act done for the benefit of a proscribed organization.

(5) In this Act, terrorism includes any act done for the benefit of a proscribed organization.

(6) A person who commits an offence under this section or any other provision of this Act, shall be guilty of an act of terrorism.

(7) In this Act, a "terrorist" means;

(a) a person who has committed an offence of terrorism under this Act, and is or has been concerned in the commission, preparation or instigation of acts of terrorism;

(b) a person who is or has been, whether before or after the coming into force of this Act, concerned in the commission, preparation or instigation of acts of terrorism, shall also be included in the meaning given in clause (a) above."

7. In Bashir Ahmed v. State (PLD 2009 SC 11) by considering the law laid down in Basharat Ali v. Special Judge, Anti-Terrorism Court-II (PLD 2004 Lahore 199), a judgment authored by one of us (Asif Saeed Khan Khosa, J), Bashir Ahmed v. Naveed Iqbal and others (PLD 2001 SC 521) and Muhammad Mushtaq v. Muhammad Ashiq and others (PLD 2002 SC 841), the case in question was held not to be triable by a Special Court established under the Anti-Terrorism Act, 1997 because "The motive for the occurrence is enmity inter se the parties on account of some previous murders. In this view of the matter, we are of the opinion that since motive was enmity inter se the parties, the application of section 7 of the Act, which primarily requires the spread of sense of insecurity and fear in the common mind is lacking in the present case. The occurrence neither reflects any act of terrorism nor it was a sectarian matter instead the murders in question were committed owing to previous enmity between the two groups."

The criteria for assuming jurisdiction by the Anti-Terrorism Court received authoritative pronouncement by the Hon'ble Supreme Court of Pakistan in case reported as 'Kashif Ali Vs. Judge, Anti-Terrorism Court' (PLD 2016 SC 951). It was observed as under:-

"11. The term "design" has been defined in the Words and Phrases, Permanent Edition - Vol.12 as under:-

"Act is done "designedly" when done by design, on purpose,

> ***intentionally; "design" is plan or scheme conceived in mind and intended for subsequent execution, preliminary conception of idea to be carried into effect by action, contrivance in accordance with pre-conceived plan; and "to design" is to form plan or scheme of conceive and arrange in mind, originate mentally, plan out, contrive."***
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> ***12. The term "design" now used in Section 6 of the Act has widened the scope of the Act and the terms "intention" and "motive" previously used have been substituted with the sole object that if the act is designed to create a sense of fear or insecurity in society, then the Anti- Terrorism Court will have the jurisdiction. From the above definition of the term "design" it is clear that it means a plan or scheme conceived in mind and intended for subsequent execution. In order to determine whether an offence falls within the ambit of Section 6 of the Act, it would be essential to have a glance over the allegations levelled in the F.I.R, the material collected by the investigating agency and the surrounding circumstances, depicting the commission of offence. Whether a particular act is an act of terrorism or not, the motivation, object, design or purpose behind the said Act has to be seen. The term "design", which has given a wider scope to the jurisdiction of the Anti-terrorism Courts excludes the intent or motive of the accused. In other words, the motive and intent have lost their relevance in a case under Section 6(2) of the Act. What is essential to attract the mischief of this Section is the object for which the act is designed.***
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> ***17. The judgment relied upon by the learned High Court in the case of Basharat Ali v. Special Judge, Anti-Terrorism Court-II, Gujranwala (PLD 2004 Lahore 199) was overruled by this Court in the case of Mirza Shaukat Baig and others v. Shahid Jamil and others (PLD 2005 SC 530), which is the correct law. It was held by this Court in the case of Mirza Shoukat Baig (supra) that 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 tried by a Special Court constituted for such a purpose. Moreover, in State through Advocate General v. Muhammad Shafiq (PLD 2003 SC 224) it was held by this Court that the Courts are only required to see whether the terrorist act was such that it would have the tendency to create sense of fear or insecurity in the minds of the people or any section of the society, as well as the psychological impact created on the minds of the society, Whereas a strictly narrow interpretation of the term "design" in Section 6 of the Act is undoubtedly one where a premeditated plan to create terror is the object behind the said act, we cannot simply rule out from the ambit of Section 6 an individual's action which is implemented in a setting where a creation of feeling of fear in the society was an inevitable consequence of the said act.***

In a recent judgment of the Hon'ble Supreme Court of Pakistan in case reported as 'Muhammad Jibran Nasir and others Vs. The State and others' (PLD 2018 Supreme Court 351), the Hon'ble Supreme Court had initiated suo-moto proceedings through Suo-Moto Case No.1 of 2018, which was

finally disposed of on 01.02.2018. The operative part of the judgment of apex court is as follows: -

> ***"4. In view of the above, we are of the opinion that the challan has been submitted, therefore, the trial has to take place independently, without being influenced in any manner from the present proceedings, in terms of the provisions of Anti Terrorism Act, particularly, Section 19(7), which provides that the cases have to be decided within a period of seven days by holding day-to-day hearing and also in accordance with the guidelines, which have been provided by this Court to monitor the trial proceedings in the case of Sh. Liaqat Hussain and others v. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs and others (PLD 1999 SC 504). The relevant guidelines have been incorporated in the following paras of the short order:-***
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> ***"(iii) The concerned Special Court should proceed with the case entrusted to it on day to day basis and pronounce judgment within a period of 7 days as already provided in A.T.A. or as may be provided in any other law;***
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> ***(viii) That the Chief Justice of Pakistan may nominate one or more Judges of the Supreme Court to monitor the implementation of the above guidelines. The Judge or Judges so nominated will also ensure that if any petition for leave/or appeal with the leave is filed, the same is disposed of without any delay in the Supreme Court;***
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> ***(ix) That besides invoking aid of the Armed Forces in terms of sections 4 and 5 of the A.T.A. the assistance of the Armed Forces can be pressed into service by virtue of Article 245 of the Constitution at all stages including the security of the Presiding Officer, Advocates and witnesses appearing in the cases, minus the process of judicial adjudication as to the guilt and quantum of sentence, till the execution of the sentence."***
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> ***5. Copy of this order be sent to the learned Monitoring Judge, appointed by the Hon Chief Justice of High Court of Sindh as well as to the learned Monitoring Judge of this Court for information and for ensuring that the trial of this case is concluded, strictly in accordance with law, within the period as stipulated by the above provisions.***
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> ***6. Raja Muhammad Ibrahim Satti, learned Sr. ASC, has submitted a Civil Misc. Application No. 765/2012 and stated that as the challan has been submitted and the court had made observation that the trial shall be held independently, without being influenced in any manner, from the instant proceedings, therefore, his application be disposed of. Order accordingly.***
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> ***7. The learned Monitoring Judge of the High Court of Sindh shall submit report to the learned Monitoring Judge, appointed by the Supreme Court of Pakistan, through the Registrar, for his perusal in Chambers."***

The august Apex Court, cited with approval, the view taken in its earlier decisions PLD 2005 SC 530 as well as PLD 2016 SC 951 supra. The decision of the Hon'ble Sindh High Court in Criminal Revision Application No.43 of 2013 decided on 24.04.2013 reported as 'Shah Rukh Jatoi Vs. The State' (2013 MLD 1588) reads as follows:-

> ***"9. Section 6 of the Anti-Terrorism Act, 1997 provides the definition of "terrorism". In order to better appreciate the legal position, section 6(b) of the said Act which defines a "terrorist act" is reproduced as under:***
>
> ***"6. Terrorism.---(1) In this Act, "terrorism" means the use or threat of action where:***
>
> ***(a)***
>
> ***(b) the use or threat is designed to coerce and intimidate or overawe the Government or the public or, a section of the public or community or sect or create a sense of fear or insecurity in society:"***
>
> ***10. A bare reading of the above quoted provision of law makes it crystal clear that Courts have only to see whether the "terrorist act" was such which would have the tendency to create sense of fear and insecurity in the minds of the people or any section of the society. The Honourable Supreme Court in a case reported as The State through Advocate General, N.W.F.P. Peshawar v. Muhammad Shafiq PLD 2003 SC 224 has held as under:***
>
> ***"We have to see the psychological impact created upon the minds of the people. It is also not necessary that the said act must have taken place within the view of general public so as to bring it within the encompass of the Act.***
>
> ***Even an act having taken place in a barbaric and gruesome manner, if it had created fear and insecurity, would certainly come within the purview of the act."***
>
> ***11. In the present case of accused Shah Rukh Jatoi, offence was committed on the road. By said act of the accused, young boy was shot dead by automatic weapon over a petty matter. It was terrorist act of the accused Shah Rukh, proudly saying to be son of Sikandar Jatoi with sole object to set example for public at large, more particularly the parents of young daughters not to object to the act of the accused or their employee(s) for teasing their young daughter. The further statement of the complainant recorded on 25.12.2012, manifests that Miss Maha was teased by servant of accused Siraj Talpur, she made telephone call to her mother, the later asked deceased Shahzaib to go for rescue of his sister. By such act the accused created a sense of helplessness in minds of people. Impact of the act was such that people of the area protested, came on roads, news flashed in print and electronic media, Honourable Supreme Court of Pakistan took suo-motu notice. Accused Shah Rukh being influential person without joining the investigation succeeded to leave the country. It is clear in this case that the act of accused Shah Rukh Jatoi was designed to create a sense of fear and insecurity and***

helplessness in the minds of general public disturbing the tempo of the life and tranquility of the society. Provisions of section 6 of the Anti-Terrorism Act, 1997 are fully attracted in this case. The impact of such act terrorized society at large by creating panic and fear in their minds. There is no force in the contention of learned advocate for the Applicant that present case does not fall within the jurisdiction of Anti-Terrorism Court in absence of motive. In the case of Mirza Shaukat Baig v. Shahid Jamil and others (PLD 2005 SC 530) it is held that, "there could be no second opinion that where the action of an accused results in striking 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." Arguments of learned advocate for the applicant that murder has been committed on the basis of previous enmity and offence would not fall within the jurisdiction of Anti-Terrorism Court is also without any merit for the reasons that presence of personal enmity would not exclude the jurisdiction of Anti-Terrorism Court. Neither motive nor intent for commission of offence is relevant for the purpose of conferring jurisdiction on the Anti-Terrorism Court. In the case of Nooruddin v. Nazeer Ahmed and 4 others (2011 PCr.LJ 1370) this precise argument was rejected, it was held that enmity would not be the sole criteria to determine the jurisdiction of Anti-Terrorism Court. Aforesaid judgment of this Court was upheld by Honourable Supreme Court in the case Nazeer Ahmed and others v. Nooruddin and another (2012 SCMR 517). Relevant portion is reproduced as under:

"We have heard the learned Advocate Supreme Court and have perused the record. The learned High Court has examined the material at length and has rightly concluded that the act of the petitioners created sense of insecurity among the villagers and did destabilize the public at large and therefore, attracts provisions of section 6 of the Anti-Terrorism Act. The learned Advocate Supreme Court in support of his contentions has relied upon the Judgment reported in the case of Mohabat Ali v. The State reported in 2007 SCMR 14 and the case of Basher Ahmed v. Muhammad Siddiq, reported in PLD 2009 SC 11, which are distinguishable on facts. Neither the motive nor intent for commission of the offence is relevant for the purpose of conferring jurisdiction of the Anti-Terrorism Court. It is the act which is designed to create sense of insecurity and or to destabilize the public at large, which attract the provisions of section 6 of the A.T. Act, which in the case in hand was designed to create sense of insecurity amongst the covillagers."

We, therefore, hold that act of accused Shah Rukh Jatoi created sense of helplessness and insecurity amongst the people of Defence/Clifton area, where offence was committed and did destabilize the public at large. As such, provisions of section 6 of the Anti-Terrorism Act, 1997 are fully attracted in this case. Therefore, present case would fall within the jurisdiction of Anti-Terrorism Court. Order of learned trial Court dated 05.03.2013 did not suffer from any material irregularity or illegality, the same is maintained. Trial Court is directed to decide the case expeditiously."

15. It is pertinent to observe that after decision of the Hon'ble Supreme Court of Pakistan, which is a five Member Bench judgment cited as PLD

2016 SC 951 supra, a contrary view was taken by a three Member Bench of Hon'ble Supreme Court of Pakistan in case reported as 'Waris Ali and 5-others Vs. The State' (2017 SCMR 1572), in which, it was observed that where there is previous enmity, the Anti-Terrorism Act shall not apply.

16. It is an established principle that where there is a difference of opinion between two judgments of Hon'ble Supreme Court of Pakistan on any issue, the judgment of larger Bench would be preferred and followed. Reliance is placed on cases reported as 'Sardar Muhammad Nawaz Vs. Mst. Firdous Begum' (2008 SCMR 404) & 'Fazal Muhammad Chaudhry Vs. Ch. Khadim Hussain and 3-others' (1997 SCMR 1368).

17. Under section 23 of the Act, after taking cognizance of the case, if the Special Court is of the opinion that it does not have the jurisdiction in the matter, it may order transfer of the case to the court of ordinary jurisdiction. In this behalf, the word 'cognizance' was explained in case reported as 'Manzoor Akbar Turak Vs. Raja Ashiq Hussain & 6-others' (2008 MLD 728) and it was observed that the court, taking cognizance of an offence, has to consider whether the offence falling within its jurisdiction is made out; whether offence is committed in its territorial jurisdiction, who are the persons responsible for the commission of offence and whether in court's opinion, sufficient grounds are existing for proceedings with the trial.

18. In the instant case, after presentation of the challan, application under section 23 ibid was filed by respondents No.3 & 4. It is pertinent to observe that no evidence had yet been recorded in the case. When the applications were filed, the learned trial court, while passing the impugned order, solely relied upon the contents of FIR, report under section 173 Cr.P.C. and the statements obtained during course of investigation.

19. The upshot of the case law mentioned hereinabove is that in order to determine whether the offence falls within the meaning of 'terrorism', it is essential to examine the allegations leveled in the FIR, the material collected by the investigation agency and the surrounding circumstances. The jurisdiction of the Anti-Terrorism Court, under the Act, has been broadened by the use of the word 'design' in section 6 ibid. Moreover, where action of accused results in striking terror, creating fear, panic, sensation, helplessness and sense of security amongst the people in a particular vicinity, it amounts to terror and such action falls within the ambit of section 6 of the Act. In light of case reported as PLD 2016 SC 951 supra, it is to be seen that terrorist act was such that it did have tendency to create sense of fear or insecurity in the minds of people or any section of the society as well as the physiological impact created on the mind of the society.

20. The learned trial court though has discussed the factual aspects of the matter on the basis of the record available yet has not really appreciated the recent case law on the subject. It has been observed by the learned trial court that to determine a particular act, the object, design or purpose behind the said act is to be seen and fear or insecurity shall thus not be a by-product of a private crime. This observation is completely contrary to case law reported as PLD 2016 SC 951 as well as PLD 2005 SC 530 & 2013 MLD 1588 supra.

21. The learned trial court has also not considered the statements of eye-witnesses Husnain Malik, Zonain Malik & Bazaid Malik in true perspective. There are other eye-witnesses as well, who are the residents of the locality namely Ahmad Sharjeel Zafar, Muhammad Ajmal and Azmat Mumtaz Saqib.

22. Since the determining factor is the ‘design’ of the accused in the commission of offence which has created a sense of panic, fear and helplessness in public or any segment of the public, therefore the question of applicability of section 7 ATA, 1997 cannot be adjudged solely on the basis of record available and recording of the prosecution evidence albeit some material evidence is essential; learned trial court erred in just following the record and not appreciating the essence of the above mentioned ‘test’, which could only be established through evidence.

23. Kh. Ahmad Tariq Rahim, Senior Advocate Supreme Court contended that under Article 199 of the Constitution, this Court is not to replace the findings of learned trial court to examine, if there is any error of law. The above contention of learned counsel has substance and we are in full accord to the same.

24 Respondent No.2, as mentioned above, did not appreciate and follow the recent pronouncements of the august Apex Court in order to determine its jurisdiction under sections 6 & 7 of the Act hence it has committed an error of law. Moreover, since the ‘test’ as propounded by Hon’ble Supreme Court of Pakistan, is factual in nature hence the proper course by the learned trial court was to defer the question of jurisdiction till recording of the material evidence of the prosecution. Learned trial court was also required to follow the guidelines propounded by the Hon’ble Supreme Court of Pakistan in the aforementioned suo-moto proceedings.

25. Moreover, since report under section 173 Cr.P.C. was filed before respondent No.2, therefore, now it is just and proper that the question of applicability of section 7 of the Act be decided by the referred court.

26. In view of the foregoing, instant petition is allowed and the impugned order dated 22.12.2016 is set aside. Consequently, the

applications filed by respondents No.3 & 4 shall be deemed to be pending before respondent No.2 and the question of deletion of section 7 of the Act, shall be determined by the learned trial court after recording material evidence by the prosecution. In this regard, learned trial court shall follow the aforementioned guidelines/principles propounded by the Hon'ble Supreme Court.

27. Since the matter is pending since long therefore learned trial court shall conclude the matter within 60-days of this judgment.

(MOHSIN AKHTAR KAYANI)
JUDGE

(AAMER FAROOQ)
JUDGE

Announced in Open Court on _____

JUDGE JUDGE

zawar

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