
COUNTER-TERRORISM AND HUMAN RIGHTS: A REVIEW OF ANTI-TERRORISM COURT TRIAL PROCEDURE IN PAKISTAN

FEBRUARY 2018

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**A Report by the Research Society of International Law, Pakistan
with support from American Bar Association Rule of Law Initiative.**

Counter-Terrorism and Human Rights: A Review of Anti-Terrorism Court Trial Procedure in Pakistan: A Report by the Research Society of International Law, Pakistan with support from the American Bar Association.

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ABOUT RSIL

The Research Society of International Law is a research and policy institution whose mission is to conduct research into the intersection between international law and the Pakistani legal context. RSIL was founded in 1993 by Mr. Ahmer Bilal Soofi, Advocate Supreme Court of Pakistan, and aims to inform policy formulation on a national level through its efforts. The Society is a nonpartisan and apolitical organization, dedicated to examining the critical issues of law - international as well as domestic - with the intention of informing discourse on issues of national importance and effecting positive change in the domestic legal space.

To this end, RSIL engages in academic research, policy analysis and an approach of engagement with policy-makers and stakeholders in the domestic and international politico-legal contexts in order to better articulate meaningful and insightful national positions on these matters.

RSIL is staffed by a team of dedicated researchers and practitioners with a broad spectrum of specializations within international law, whose expertise covers the major policy areas and significant issues arising out of the intersection between the international and domestic legal spaces. The team contributes to the domestic legal policy discourse by conducting research and analysis into the challenges faced, both domestic as well as international, which arise out of the operation of the law.

Counter-Terrorism and Human Rights: A Review of Anti-Terrorism Court Trial Procedure in Pakistan

This report has been prepared by researchers at the Research Society of International Law, Pakistan (RSIL) with support from the American Bar Association- Rule of Law Initiative (ABA-ROLI). The report is part of a joint project between RSIL and ABA-ROLI on the capacity building of lawyers, prosecutors, and judges in the area of human rights and Anti-Terrorism Court trials. It is the second of two reports to be published on this subject. This report provides practical and detailed recommendations on how to improve the functioning of the Anti-Terrorism Courts.

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EXECUTIVE SUMMARY

Pakistan has been a victim of terrorism for the past two decades and is thus all too familiar with specialized anti-terror legislation. The Anti-Terrorism Act, 1997 (ATA), the Protection of Pakistan Act, 2014 and a Constitutional Amendment Act¹ (to allow the trial of civilians by the Military Courts) were all promulgated with the hopes of strengthening the prosecution of terrorists. However, there are deep systemic flaws within the criminal justice system which if left unaddressed can significantly contribute to potential human rights violations and the high rate of acquittals.

The Anti-Terrorism Courts

In Pakistan, the primary substantive law that governs counter-terrorism measures is the ATA. The ATA is a special law under which special courts were established to try scheduled offences of terrorism. By virtue of being a special law,² the ATA has an overriding effect on any other general laws. This rule is also provided for in Section 32³ of the ATA. However, the said section also states that the Code of Criminal Procedure 1898 (Cr.P.C) shall apply to the anti-terrorism courts (ATCs), as far as the provisions of Cr.P.C are consistent with the ATA.⁴ Under Section 32 the special courts are deemed to be Courts of Session and consequently provisions of the Cr.P.C and the Qanun-e- Shahadat Order 1984 (QSO) are applicable to the proceedings before the special courts.⁵ Section 32 of the ATA also recognizes that where there are no provisions provided in the ATA, the provisions in the Cr.P.C come into force.⁶ This is why the trial procedure for Sessions Courts,⁷ as laid down in the Cr.P.C, is the same procedure followed by the ATCs.

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1. "Parliament passes 21st Constitutional Amendment, Army Act Amendment." Dawn (2015) Available at: <https://www.dawn.com/news/1155271> [Accessed 4 Jul. 2017].
 2. Lex specialis derogat legi generali is a legal principle according to which a law governing a specific subject matter overrides a law that only governs general matters. <https://definitions.uslegal.com/l/lex-specialis/>
 3. The Anti-Terrorism Act 1997, Section 32: "**Overriding effect of Act. -1**) The provisions of this Act shall have effect notwithstanding anything contained in the Code or any other law but, save as expressly provided in this Act, the provisions of the Code shall, in so far as they are not inconsistent with the provisions of this Act, apply to the proceedings before a special Court, and for the purpose of the said provisions of the Code, a Special Court shall be deemed to be a Court of Sessions. 2) In particular and without prejudice to the generality of the provisions contained in subsection (1), the provisions of section 350 of the Code shall, as far as may be, apply to the proceedings before a Special Court, and for this purpose any reference in those provision to a Magistrate shall be construed as reference to (An anti-Terrorism Court)."
 4. *State v. Anis Bawani*, 2000 PCrLJ 1418.
 5. *Mehram Ali v. Federation of Pakistan*, PLD 1998 SC 1445.
 6. *Syed Nawaz Hussain v. State*, 2014 PCrLJ 1256.
 7. Code of Criminal Procedure, 1898, Chapter 22A Trials Before High Courts and Courts of Session

The ATCs are inundated with cases which could be categorized as 'ordinary criminal cases', due to the ambiguity surrounding the definition of terrorism under Section 6 of the ATA. The often relied upon criteria applied by judges is to determine whether the act "created terror in the public" i.e. what was the effect of the unlawful action. To further compound this problem, the interpretation of what terror is, has to be applied by the police in order to register an F.I.R, who are unfortunately not well-versed in the law.⁸ Justice Asif Saeed Khan Khosa, in a seminal judgment, provided a correct interpretation.⁹ Unfortunately, the route suggested in the judgment was not given much heed in following judgments.¹⁰ A recent judgment of the Supreme Court has attempted to clarify the ambit of terrorism, and has warned against the use of ATA over 'non-terrorist actions', in line with Justice Khosa's reasoning.¹¹ However, in the majority of cases the decision is normally based on how serious ('heinous') the offence purportedly is, and whether it amounts to spreading fear in the public.

As mentioned earlier, the police are not well versed with the law, and this lack of legal knowledge often leads to adversely affecting the prosecution's case. The police deal fatal blows to the prosecution's case by committing procedural defects such as delaying the lodging of an F.I.R, improperly registering the F.I.R, misidentifying the roles of the accused and nominating an unnecessary number of persons as the accused. Although the investigation commences with the registration of an F.I.R, there is an overreliance on its importance with consequently little attention paid to the actual crime scene. All these oversights significantly damage the prosecution's case and contribute to the high rate of acquittals in ATC cases. Furthermore, potential human rights abuses are prevalent while arresting

8. Interview with ATC Prosecutor, (May 2017).

9. *Basharat Ali v. Special Judge, Anti-Terrorism Court II, Gujranwala*, PLD 2004 LHC 199, "Terror and terrorism are concepts quite distinct from each other and the quintessence of the two notions is not difficult to distil. Terror as a manifestation of fright, dread, fear or insecurity is a consequential effect created by an act that may not necessarily be motivated to create such an effect whereas terrorism is an activity designed to create such an effect of terror. The critical difference between the two is the design and purpose understood in the criminal jurisprudence as mens rea. In the case of terror the act, or the actus reus, is not motivated to create fear and insecurity in the society at large but the same is actuated with a desire to commit a private crime against targeted individuals, etc. and unintended consequence or a fall out thereof whereas in the case of terrorism the main purpose is creation of fear and insecurity in the targets. Every crime, no matter what its magnitude or extent, creates some sort of fear and insecurity in some section of the society but every felony or misdemeanour cannot be branded or termed as terrorism. As the society at large may or may not succeed in achieving the desired effect but nonetheless it can be accepted as nothing but terrorism because of the object or purpose behind such act. Thus, the real test to determine whether a particular act is terrorism or not is the motivation, object, design or purpose behind the act and not the consequential effect created by such act."

10. Syed Manzar Abbas Zaidi, 'Terrorism Prosecution in Pakistan: A Critical Appraisal' (Platform 2016) 28.

11. *Waris Ali and others v. The State* (Criminal Appeal No. 104 of 2010).

suspects, as well as under the remand procedure of ATA. These violations mostly arise due to the failure to follow the proper procedures (excessive use of force, fake encounters, inconsistent case diaries, etc.) and the misapplication of the relevant provisions.

One of the major reasons for the human rights violations, as mentioned above, is the poor investigation skills of the police. Investigative tools in Pakistan are not up to date with scientific developments, even though evidence required through modern means is admissible under the law.¹² Since the police do not have requisite training and are consequently negligent while performing their duties, they fail to effectively use the mechanisms and tools available to them. Procedures are often learned on the job and passed on from seniors to juniors perpetuating a culture of bad practices. Evidence is routinely tampered with and they ignore the mandatory provisions of Section 172 Cr.P.C whereby they are required to maintain case diaries of the investigation. Fabrication of events in these case diaries is unfortunately a common occurrence. Moreover, a major hurdle in the investigative process is the absence of a forensics agency in many areas. All these flaws and gaps in the investigation, ultimately bear down on the accused and aggravate his/her suffering as they continue to serve lengthy periods in custody, whether in police or judicial lock up, until the Court discharges and/or acquits the accused on the grounds of insufficient evidence or gross defects in the investigation.

The actual trial process of the ATCs is also littered with various challenges and defects. There are often violations of the fundamental rights guaranteed under Articles 9 (Right to life or liberty) and 10-A (Right to fair trial) of the Constitution of Pakistan, 1973. These abuses of the law arise due to various reasons including trials in absentia, significant delays in the disposal of cases, inconsistency in the standards of evidence applied by judges, and denial of remissions to the convicted etc. One other significant issue faced by the involved parties is the lack of witness protection initiatives as required by the 2014 amendment to the ATA¹³ (that provided for the protection of judges, witnesses and prosecutors). Since it is not being implemented effectively there exists a high risk of witness intimidation and consequently many witnesses turn “hostile”, damaging the prosecution's case. Also, in most terrorism cases witnesses refuse to come forward and thus there is often a lack

12. Anti-Terrorism Act, 1997, Section 27-B

13. Anti-Terrorism (Amendment) Act, 2014.

of direct evidence in the form of eye witness testimony in most terrorism cases. Furthermore, pursuant to Section 21-D (1) ATA, only an ATC, High Court or Supreme Court may grant bail of a suspect charged with an ATA offence, thereby reducing his chances of being granted bail or delaying his chances of receiving bail. This is a grave infringement of an individual's right to liberty, especially when the charge may have been levied by an unscrupulous complainant or a corrupt police official.

INTRODUCTION

Purpose of this Report

This Report is prepared to serve as a guide for the capacity building of academics, legal practitioners and civil society by highlighting the capacity gaps and flaws prevalent in the trial procedure of ATCs in Pakistan, focusing on their impact on human rights. To ensure that on-ground realities are reflected in the Report, and the usefulness of the proposed recommendations, the research team drew upon its experience of visiting ATCs in Islamabad, Khyber-Pakhtunkhwa, and Sindh; interviewed several ATC Judges, and consulted with ATC Prosecutors as well as defense lawyers. The information that was gathered was used to map out the entire process from the registration of an F.I.R to the filing of an appeal against a final judgment of an ATC. Furthermore, this report, *inter alia*, identifies the various challenges faced at the different stages of the process, namely, the proper registration of an F.I.R, granting of bail, police investigation, collection and retention of evidence and presentation before the courts.

The report is structured upon eleven chapters, split into five stages:

- Stage-I** First Information Report (**Chapter 1**)
 - Stage-II** Arrest (**Chapter 2**)
 - Stage-III** Remand (**Chapter 3**)
 - Stage-IV** Commencement of Investigation (**Chapter 4**)
 - Stage-V** Commencement of an ATC trial (**Chapters 5, 6, 7, 8, 9, 10**)
- Bail proceedings under the ATA (**Chapter 11**)

Chapter 1 highlights the lacunae in the registration process of an F.I.R, and how the improper registration of an F.I.R can undermine the case of the prosecution. Furthermore, there are certain incorrect practices that have been learned on the job and have been passed on from seniors to juniors which can detrimentally affect the rights of the accused. **Chapter 2** pertains to arrests under the ATA. The power to arrest without a warrant under the ATA is critically analyzed and juxtaposed with the Cr.P.C. The importance of procedural safeguards is highlighted which include the police daily diary and case diary. Some of the major challenges of the procedure are also identified which relate to fake encounters, use of force and inconsistencies in the case diaries. **Chapter 3** deals with the provisions relating to remand under the ATA. The chapter looks at both the statute and related case law to determine the principles governing remand and where and how they are abridged. The corresponding provisions of remand under the Cr.P.C are looked at and the

differences between the regular criminal procedure and the ATA-specific procedure are highlighted. The chapter examines some of the flaws in the remand procedure and potential human rights abuses that arise as a result of the misapplication of the provisions relating to remand. **Chapter 4** relates to the terrorism investigation procedure, submission of the police report and the role that prosecutors are required to perform to scrutinize the police report. It emphasizes on the flaws in investigations, the delays in submission of reports and how these result in human rights violations.

Stage-V consists of **Chapters 5, 6, 7, 8, 9, 10** which discuss pre-trial documents, commencement of trial (framing of charges and recording of plea), recording of evidence and admissibility, final arguments and judgment, sentencing and execution and appeals, respectively. These chapters thus highlight the entire trial process of the ATCs and identify the major legal challenges present at each stage of the trial. The trial process under ATA is quite similar to that followed by courts of ordinary jurisdiction, but these chapters highlight the areas where the two processes diverge and the ATA prevails over the Cr.P.C. The last chapter (**Chapter 11**) discusses the bail procedure under the ATA and highlights the practice of including ATA provisions in the F.I.R in an otherwise ordinary criminal offence leading to undue restrictions on the right to liberty of the accused, and make the granting of bail difficult or leads to delays in the process. Bail is a procedure parallel to arrest, investigation and trial and can be sought at any stage of such proceedings subject to certain conditions and pre-requisites. Each of the chapters provides recommendations on how to improve the functioning of ATCs and reduce the potential abuse of human rights.

**STAGE I:
FIRST INFORMATION REPORT**

CHAPTER 1

1.1. BACKGROUND

The Code of Criminal Procedure, 1898 (Cr.P.C) lays down the procedure for the criminal justice system. It provides a mechanism for, *inter alia*, how to carry out an arrest, investigation, and trial. Prior to terrorist prosecution, the investigation is the first step which is carried out by the police and normally begins after the recording of a First Information Report (F.I.R) in the police station.

An F.I.R constitutes the conveyance of information, regarding an occurrence to the police authorities. It is a document, on the basis of which, the police machinery is activated and set in motion for investigation. The purpose of an F.I.R. is to set criminal law in motion and to obtain first hand spontaneous information of an occurrence, in order to exclude the possibility of fabrication, consultation or deliberation on the part of the complainant. Spontaneity of an F.I.R. is the guarantee of truth to a great extent,¹⁴ and it provides a sound basis for carrying out investigation in the right direction.¹⁵

An F.I.R has been referred to as the foundation stone of a criminal case. Despite that, it cannot be considered a substantive piece of evidence. It is only used for contradiction under Article 140¹⁶ of the Qanun-e-Shahadat Order, 1984 and corroboration under Article 153¹⁷ of Qanun-e-Shahadat.¹⁸ The primary object of an F.I.R under Section 154 Cr.P.C is to convey information about the commission of a cognizable offence, which a Police Officer is competent to investigate as contemplated under Section 156 Cr.P.C. An F.I.R therefore sets the investigation agency in motion, in order to probe into the commission of an offence and unearth the truth.¹⁹ Minute details about the occurrence are seldom found in the F.I.R and it is never the complete statement of the whole case of the prosecution.²⁰ It is also not an exhaustive document and therefore

14. *Mushtaq Hussain v. State*, 2011 SCMR 45.

15. *Umar Hayat Sajjad v. SHO Police Station Mochi Gate, Lahore*, 2005 YLR 1313.

16. Qanun-e-Shahadat Order, 1984, Article 140, Cross-examination as to previous statements in writing: A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant matters in question, without such writing being shown to him, or being proved; but, if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him

17. Qanun-e-Shahadat Order, 1984, Article 153, Former statements of witnesses may be proved to corroborate later testimony as to same fact: in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the facts; may be proved.

18. *Nasima Bibi v. State through Advocate-General*, 2008 P.Cr.L.J., 613.

19. *Alimdad alias Khan v. State*, 2002 P.Cr.L.J., 1785.

20. *The State v. Daniel Boyd (Muslim Name Saifullah)*, PLD 1992 Peshawar 56.

if detailed facts are not mentioned in the F.I.R the correctness of it is not diminished.²¹

The procedure for recording an F.I.R is provided under Section 154 of Cr.P.C,²² which states that the officer in charge of the police station will reduce in writing any information of cognizable offence and read it out to the complainant and have him/her sign it. The language of the section is reproduced as under:

154. Information in cognizable cases: information relating to the commission of a cognizable offence if given orally to an officer in charge of a police station, shall be reduced in writing by him or under his direction and read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Provincial Government may prescribe in this behalf.

Under Section 154, the police are obligated to register an F.I.R of a cognizable offence.²³ Section 154, Cr.P.C stipulates the procedure for the registration of information in cognizable cases and also provides mandatory direction for registration of the case as per the procedure. Thus, police do not have discretion to cause delay in the registration of a case under the law and are bound to act accordingly, enabling the machinery of law to come into action as soon as it is possible. When an F.I.R is registered without delay, it can help the investigating agency in completing the process of investigation expeditiously. Therefore, it is advisable that provisions of Section 154 Cr.P.C read with Rule 24.5 (c) of the Police Rules, 1934²⁴ be adhered to strictly. There should not be any negligence in either the recording of the F.I.R or in the supply of copies to the concerned quarters, because departure from the mandatory provisions of law creates room for doubt against the truthfulness of the allegation levelled against the accused in the F.I.R.²⁵

21. *Jan Muhammad v. Muhammad Ali*, 2002 SCMR 1586.

22. Code of Criminal Procedure, 1898, Section 154

23. *Saeed Muhammad Shah v. State*, 1993 SCMR 550.

24. The original copy of the F.I.R shall be preserved in the Police Station for a period of sixty years. One of the three copies shall be given to the complainant. Rule 24.5(c): One to the complainant unless a written report in Form 24.2 (1) has been received in which case the check receipt prescribed will be sent.

25. *Imran Ashraf v. The State*, 2001 SCMR 424.

Rule 22.45 of the Police Rules, 1934 (Police Rules) provides that all the registers that have to be maintained at each police station, with the F.I.R Register being one of them. Rule 22.46 states that no alteration in the form or method of keeping the books and no addition to their number may be made without the sanction of the Inspector-General. Rule 24.1 elaborates upon how the F.I.R should be recorded with special attention to the following matters:

- a) The source from which the information was obtained and the circumstances under which the informant ascertained the names of the offenders and witnesses (if any are mentioned).
- b) Whether the informant was an eye-witness to the offence.

Rule 24.5 of the Police Rules states that the F.I.R shall be a printed book in Form 24.5 (1) consisting of 200 pages and shall be completely filled before a new one is commenced. Cases shall bear an annual serial number in each police station for each calendar year. Every four pages of the register shall be numbered with the same number and shall be written at the same time by means of the carbon copying process. It further states that the original copy shall be preserved in the Police Station for a period of sixty years. A copy shall be given to the Superintendent of Police (SP) or other gazetted officer, nominated by him and one shall be given to the complainant unless a written report in Form 24.2 (1) has been received in which case the check receipt prescribed will be sent.²⁶

Office of Justice of the Peace

A complaint of a failure to register an F.I.R can be filed with an ex-officio Justice of the Peace. In a seminal judgment²⁷ of the Lahore High Court, the powers of an ex-officio Justice of the Peace were elucidated. The judgment states that ex-officio Justices of the Peace can entertain complaints regarding the failure of the police to register a criminal case, despite commission of a cognizable offence having been reported and complaints pertaining to failure by the investigating officer to add appropriate penal provisions to an F.I.R or a cross-version of the accused party, pursuant to the authority granted under Section 22-A (6) Cr.P.C. However, while exercising this jurisdiction, an ex-officio Justice of the Peace is only to activate the available legal remedy or procedure so that the grievance of the complaining 'person can be attended to and redressed, if found genuine, by the competent authority of the police.'²⁸

26. Police Rules, 1934, Section 24.5.

27. *Khizer Hayat v. Inspector-General of Police (Punjab)*, Lahore, PLD 2005 Lahore 470.

28. *Ibid*

1.2. LEGAL CHALLENGES

1.2.1. TANGENTIAL CASES

Section 6 of the ATA provides an overly broad definition of terrorism which results in ordinary criminal cases falling within the jurisdiction of the Anti-Terrorism Courts (ATCs). As the ATA operates in addition to the Pakistan Penal Code, there is a significant overlap of offences. The purpose of the definition of terrorism was to distinguish between offences which fall within the ambit of the ATA from those which attract common Penal Code provisions. Unfortunately, the ATA's expansive definition and its judicial interpretation have allowed numerous cases ordinarily triable by common courts to be tried by the special terrorism courts under the ATA. This has the effect of supplanting large portions of the common criminal law with special anti-terrorism laws.

A common criterion employed by the judiciary for an act to qualify as terrorism is the intention to "create terror in the public." There is inconsistency as to the ambit of Section 6 in the judgments of superior courts. Justice Asif Saeed Khan Khosa, in the seminal judgment,²⁹ provided an interpretation. Unfortunately, the route suggested in the judgment was not given much heed in following judgments.³⁰ The decision is normally based on how serious the offence purportedly was ('heinous'), and whether it amounted to spreading fear in the public.

To further compound this problem, the interpretation of what terror is, has to be applied by the police while registering an F.I.R. These F.I.Rs are registered by policemen who are not well-versed in the law.³¹ Personal enmity cases, which lack intent on the part of the perpetrator to cause fear and panic in society, are nonetheless often conflated with terrorism and an ATA charge is made against them by the Police.³² This is done by inserting Section 7 into the F.I.R and can have an inordinate impact on rights of the accused. Most alarmingly, this insertion is often undertaken by semi-literate policemen. The Provincial Prosecution Acts³³ state that there has to be co-operation between the prosecution and police, even in regard to sharing of information in

29. *Basharat Ali v. Special Judge, Anti-Terrorism Court II, Gujranwala*, PLD 2004 LHC 199.

30. Syed Manzar Abbas Zaidi, 'Terrorism Prosecution in Pakistan: A Critical Appraisal' (Platform 2016) 28.

31. Interview with ATC Prosecutor Islamabad, May 2017.

32. Zaidi "A Critical Appraisal" (n30) 29.

33. Refer to Section 4.9.5 Role of the Public Prosecutor.

relation to registration of cases. However, there is little if any such coordination on the ground. As a corollary, people are charged with terrorism in F.I.Rs by police without any institutional framework which would allow for joint decision-making or second opinions.³⁴

A common practice that has emerged is that when instances of violence become publicized through media, and the state feels pressured to do something about it, the case is often registered under the ATA, even if the case has no nexus with terrorism. These cases normally involve acid throwing, honor killings, attacks by mobs on law enforcement and other sensational events or crimes. This is highly unfortunate since such cases and other tangential cases add to the burden of ATCs and impede the successful prosecution of real terrorism cases in Pakistan.³⁵ In essence, due to various factors ATCs have effectively ceased to be just terrorism courts but rather courts for serious or high profile offences.

The rationale behind assigning such cases to ATCs is that the case will, at least ostensibly, be seen to be taken more seriously by authorities than if it was tried in an ordinary criminal court. Moreover, in ATCs more severe punishments are meted out and it is harder to get bail.³⁶ However, it is important to note that if the crime does not have a nexus with terrorism, the accused should be tried by an ordinary criminal court without infringement of any fair trial or due process rights. Furthermore, such poorly framed charges often lead to acquittals at the trial stage, thereby making the whole process redundant.

Kidnapping for ransom cases constitute a major number of the tangential cases which get sent to ATCs. It is difficult to comprehend how these crimes can cause widespread fear and insecurity if these crimes were not carried out by terrorists. In the majority of the cases, the ATC does not try to ascertain whether a terrorist carried out the kidnapping for ransom. Mostly, the commission of the offence triggers the application of the ATA automatically, since kidnapping for ransom is a scheduled offence therein. Looking at jurisprudence, it becomes evident that most of these crimes are committed by criminal gangs. Some kidnapping for ransom cases are also fabricated due to enmity between the parties or long-standing litigation. Even if the cases are

34. Zaidi "A Critical Appraisal" (n30) 28.

35. Ibid 19.

36. Ibid 30.

true, tangential cases add to the backlog of cases and impede the prosecution of 'serious' terrorist cases in ATCs.³⁷

Acid throwing cases are also often tried in ATCs, which may be a well-meaning attempt to give justice to women and rectify social evils, however, due to the higher burden of evidence in ATCs, a conviction may be harder to acquire. Moreover, a nexus with terrorism is hard to establish. An ATC Judge in Karachi stated that he wanted a similar case to be tried in an ATC, but the case was sent to an ordinary criminal court for trial.³⁸ This delineates the lack of clarity prevalent when determining whether an offense is actual terrorism. This applies equally to cases of *bhatta* or extortion money.

1.2.2. DELAY IN LODGING OF F.I.R

The Supreme Court has held that any delay in lodging of the F.I.R should be reasonably explained and that the Prosecution should not have derived any undue advantage through such delay.³⁹ It casts serious doubt in the case of the prosecution. Thus, benefit of doubt should be extended to the accused and he should be acquitted. The possibility of an F.I.R being fabricated cannot be excluded altogether. Although delay in lodging of an F.I.R is not always material, however, a heavy duty is cast upon the Prosecution to explain the same.⁴⁰ If the complainant fails to furnish the circumstances beyond his control or a sound justification in that regard, the allegations leveled in an F.I.R would be presumed to be a result of deliberations, negotiation, discussion and after thought; with an ulterior motive to get the accused convicted.⁴¹

However, an unexplained delay is not fatal by itself and is immaterial if the evidence gathered by the prosecution is strong enough to get a conviction. It becomes significant in the case where prosecution evidence and other circumstances of the case tilt the balance in favour of the accused.⁴²

A delay in lodging of F.I.R is particularly common when it comes to cases of kidnapping for ransom. In such cases, relatives do not raise much alarm, fearing harm to the abductees and as a result the F.I.R is lodged with

37. Ibid 31.

38. Interview with ATC Judge (Karachi, July 2017).

39. *Muhammad Nadeem v. State*, 2011 SCMR 872.

40. *Muhammad Nadeem v. State*, 2011 SCMR 872.

41. *Hajan v. State*, 2014 P.Cr.L.J., 1123.

42. *Ayub Masih v. The State*, PLD 2002 Supreme Court 1048.

considerably delay. ATCs are cognizant of this and are of the opinion that it does not taint the case of the prosecution.⁴³

There are exceptions to this general rule, as was the case during the insurgency in Swat. Police stations were not functional and F.I.Rs could not be recorded timely during that time. Such delays eventually lead to obstacles in the prosecution of the case and ultimately resulted in mass acquittals. Furthermore, even if a case does go forward, it may be a blatant violation of justice, since the story may have been concocted by the police and prosecution.

In some cases, influential people (pressure groups) who are trying their best to prevent the real accused being named in the F.I.R, are also involved, which contributes to the delay in lodging of an F.I.R. This is often done in order to nominate someone else as an accused person. This process also takes away from the investigation of the case. As a result, they often nominate a loosely-related person as the accused, which during the trial, casts doubt on the prosecution's case. This naming of an accused person is often not investigation-based and reliance is placed on their old record or fourth schedule lists under ATA.

1.2.3. OVER RELIANCE ON AN F.I.R

Investigating officers in Pakistan only do substantial work once the F.I.R has been registered and behave as if nothing has happened before it.⁴⁴ The crime scene or preparation of a terrorism offence is not then given its due importance. This may be the reason why there is a callous disregard of crime scenes in Pakistan.⁴⁵ The washing away of the crime scene when Benazir Bhutto was assassinated is a prime example.

1.2.4. IMPROPER REGISTRATION OF AN F.I.R

Since there is an overreliance on F.I.Rs, it becomes very crucial, as a corollary, that the F.I.R be registered in the proper manner. This is elucidated by the high-profile case of Maulana Azam Tariq's assassination case which led to an acquittal.⁴⁶ The police official, by mistake, did not add the name of the accused

43. *MISRI v. State*, 2012 PCrLJ 1218; Syed Manzar Abbas Zaidi, 'Terrorism Prosecution in Pakistan: A Critical Appraisal' (Platform 2016) 31.

44. Interview with ATC Defence lawyer, (June 2017).

45. Zaidi "A Critical Appraisal" (n30) 47.

46. "Plea Against Cleric's Acquittal in Azam Tariq Case Dismissed" Dawn (2015) <<https://www.dawn.com/news/1170326>> accessed 23 August 2017.

in the F.I.R. This has a domino effect on the prosecution's case. Since no accused was nominated in the F.I.R, it became evident that at the time of recording of complaint, there was nobody who could identify the accused. Ocular account, coupled with the identification parade would have been substantial evidence; however, since the presence of eye witnesses at the spot was doubtful, the evidence of identification parade was also tainted. If it could have been established by the prosecution that the accused were previously not known to the Prosecution Witnesses (PWs), the outcome of the trial may have been different.⁴⁷ This is a common occurrence. The accused that can be identified through investigation are often not named in the F.I.R which has the ability to undermine a case later on.

In cases of terrorism involving a large number of victims, police often do not carry out the requisite level of investigation and thus fail to discover an accurate description of the accused. An idea of what the accused looks like is sufficient in such cases for the purposes of an F.I.R. In cases of kidnapping for ransom, if the features of the accused persons are not mentioned in the F.I.R, it casts doubt on the identification parade and veracity of the witnesses.⁴⁸

1.2.5. ROLE OF THE ACCUSED NEEDS TO BE IDENTIFIED CLEARLY

If a crime has been committed by two persons, their roles need to be identified clearly in an F.I.R. The accused may be charged under the ATA, however, the involvement of the co-accused may be trivial and not as consequential. Awarding of punishments should therefore be dependent on the roles attributed to the accused in the interests of justice.⁴⁹ It would be a grave miscarriage of justice if the co-accused is not saved from the restrictive laws of ATA by attributing an incorrect role to the co-accused.

1.2.6. 'CASTING THE NET WIDE'⁵⁰

A common practice is that in order to increase the number of accused in cases, in the F.I.R or supplementary case diaries (*zimnis*)⁵¹ the 'net is cast wide'. Even if an eye-witness has nominated five persons, the police will challan nine people, as was done in the high-profile case of General Mushtaq Baig. No separate evidence was adduced against the other four. Normally, the other people that have been named in the F.I.R are let go by the police after taking

47. Interview with ATC Prosecutor, (May 2017).

48. *MISRI v. The State*, 2012 PCrLJ 1218 KHC.

49. *Muhammad Nawaz v. The State*, PLD 2005 Supreme Court 40.

50. *Zulqarnain v. The State*, 2016 YLRN 183 LHC.

51. Refer to Section 2.2.

bribes. This has become so common that it has become a part of police procedure even though there can be no expectation of getting bribes in high-profile terrorism cases. However, in practice it violates the rights of innocent people and undermines the case of the prosecution.⁵²

Furthermore, as mentioned previously, many accused persons in terrorism cases are often on 'lists' which the SHO maintains under the fourth schedule of the ATA.⁵³ As of 2015, Khyber Pakhtunkhwa (KP) had 2572 suspects on a list, Punjab more than 1896, Sindh 479, Balochistan 400, and Islamabad 50.⁵⁴ A person listed under the Fourth Schedule of ATA is a person suspected to be an, 'activist, office bearer or an associate of an organization kept under observation under Section 11-D or proscribed under Section 11E (ATA), or in any way concerned or suspected to be concerned with such organization or affiliated with any group or organization suspected to be involved in terrorism or sectarianism.'⁵⁵ Persons on these lists are often named in F.I.Rs only for the purpose of 'casting the net wide'.

1.2.7. 'BLIND' F.I.RS

There is a routine script employed by law enforcement agencies. This script includes cross-fire between them and the alleged terrorists, with the terrorists dying in the process. These are normally cover-ups of encounters of political workers in Karachi, after which 'blind' F.I.Rs are filed in order to give this whole process a cover of legitimacy. When ATC judges started to question law enforcement agencies about this so-called exchange of fire between the alleged terrorists and the law enforcement agencies, the practice of tying a damp cloth on a police official's arm and then firing at it (to avoid injury to the bone) was adopted, so as to increase the authenticity of their statement.⁵⁶

1.2.8. FAILURE TO FURNISH A COPY OF THE F.I.R TO THE PROSECUTION

Section 12 (1) (a) of the Punjab Criminal Prosecution Service (Constitution, Functions & Powers) Act, 2006⁵⁷ sets out the responsibilities of police towards prosecutors. This includes the duty to immediately report to the District Public Prosecutor the registration of each criminal case by sending a copy of the F.I.R.

52. Interview with Defense lawyer (Islamabad, June 2017).

53. Anti-Terrorism Act, 1997, Section 11(EE).

54. "New Terror Watch List Catalogues 5,400 Militants" The Express Tribune (2015) <<https://tribune.com.pk/story/823183/new-/>> accessed 23 August 2017.

55. Anti-Terrorism Act, 1997, Section 11(EE).

56. Interview with ATC Judge (Karachi, July 2017).

57. Punjab Criminal Prosecution Service (Constitution, Function and Powers) Act, 2006, Section 12(1), An officer in charge of a police station or the investigation officer shall—(a) immediately report to the District Public Prosecutor, the registration of each criminal case by sending a copy of the first information report.

In practice, a copy of F.I.R. is hardly provided to the prosecution. This failure to promptly provide the Prosecution Service with a copy of the F.I.R limits the ability of the Prosecutor to play a guiding role in the investigation of the purported crime.⁵⁸ Therefore, if a copy of the F.I.R is promptly furnished to the Prosecution department, appropriate guidance can be taken by the police.⁵⁹

1.3. RECOMMENDATIONS

- I. The legal authority given to policemen to add provisions of ATA in F.I.Rs needs to be monitored by an oversight mechanism.
- II. Definitive criteria must be established for Police personnel to apply when opting to include an ATA offence against an accused.
- III. An F.I.R must be lodged promptly as a general rule. If there is a delay, it must be reasonably explained and the practice of naming an individual from the Fourth Schedule of the ATA (where the accused is unknown) should be abandoned.
- IV. The preservation of a crime scene is crucial to the investigation and therefore its importance should be highlighted. Detailed SOPs regarding preservation of a crime scene should be implemented and special training should be imparted to all concerned Police personnel.
- V. Preliminary investigation needs to be carried out by the Police prior to the lodging of an F.I.R so that crucial details such as the name of the accused, features of the accused and role of the accused are not left out. Leaving these out can have a domino effect on the prosecution's case.
- VI. Judicial officers should be trained in according proportionate importance to the F.I.R and not allow it to be the sole undermining factor in prosecutions.
- VII. The common police practice of 'casting the net wide' should be abandoned and the consequences of this practice should be highlighted.
- VIII. The inquiry of all police related deaths should be undertaken by an independent body established by the government.
- IX. Section 12 of the Punjab Criminal Service (Constitution, Functions & Powers) Act, 2006 mandates that the provision of a copy of the F.I.R to the Prosecution Department should be strictly adhered to in order to enable the Prosecution department to provide the requisite guidance to the Police.

58. Prosecution Services and Media in Pakistan (PILDAT 2016) <http://www.pildat.org/Publications/publication/ROLR/ProsecutionServicesandMediainPakistan_MediaBrief.pdf> accessed 11 October 2017 16.

59. Interview with prosecutor, (Islamabad, 25 May 2017).

STAGE II: ARREST

CHAPTER 2

2.1. BACKGROUND

Section 60 of the Code of Criminal Procedure, 1898 provides that a person arrested without warrant should be produced before a Magistrate having jurisdiction without unnecessary delay. Section 61 of the Code of Criminal Procedure, 1898 curtails the powers of a police officer to detain persons arrested for more than twenty four hours, in the absence of a special order of a Magistrate under section 167⁶⁰ of the Code of Criminal Procedure.⁶¹

Safeguards in relation to an arrest are laid down in Article 10 of the Constitution of Pakistan. In that sense, a formal arrest also affords significant protections. An investigating officer also has the power to postpone the arrest of the accused and investigate the commission of the offence.⁶² If a person is unlawfully arrested, remedies such as the *habeas* writ are available in order to safeguard the petitioner's right to freedom.

Under Article 10 (2), an individual who is arrested and detained in custody has to be produced before a magistrate within a period of twenty-four hours of such arrest and it forbids the continued detention of an individual beyond twenty-four hours without the authority of a magistrate.

60. Code of Criminal Procedure, 1898, Section 167, Procedure when investigation cannot be completed in twenty-four hours: (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty four hours fixed by Section 61, and there are grounds for believing that the accusation or information is well founded, the officer in-charge of the police-station or the police-officer making the investigation if he is not below the rank of the sub-inspector, shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate. (2) The Magistrate to whom an accused person is forwarded under, this section may, whether he has or has not jurisdiction to try the case, from time to time, authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has no jurisdiction to try the case or [send] it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction; Provided that no Magistrate of the Third Class, and no Magistrate of the Second Class not specially empowered in this behalf by the Provincial Government shall authorise detention in the custody of the police. (3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing. [(4) The Magistrate, giving such order shall forward copy of his order, with his reasons for making it, to the Sessions Judge]. (5) Notwithstanding anything contained in Sections 60 and 61 or hereinbefore to the contrary, where the accused forwarded under sub-section (2) is a female, the Magistrate shall not except—in the cases involving Qatl or dacoity supported by reasons to be recorded in writing, authorize the detention of the accused in police custody, and the police officer making an investigation shall interrogate the accused referred to in subsection (1) in the prison in the presence of an officer of jail and a female police officer. (6) The officer in-charge of the prison shall make appropriate arrangements the admission of the investigating police officer into the prison for the purpose of interrogating the accused. (7) If for the purpose of investigation, it is necessary that the accused referred to in subsection (1) be taken out of the prison, the officer in-charge of the police station or the police officer making investigation, not below the rank of sub-inspector, shall apply to the Magistrate in that behalf and the Magistrate may, for the reasons to be recorded in writing, permit taking of accused out of the prison in the company of a female police officer appointed by the Magistrate: Provided that the accused shall not be kept out of the prison while in the custody of the police between sunset and sunrise).

61. *Ghulam Shabbir v. State*, 2000 P.Cr.L.J. 1411.

62. Interview with prosecutor, (Islamabad, 25 May 2017).

Neither the ATA nor the Cr.P.C define what an arrest is, however, a formal arrest authorizes the detention of an individual for a period of twenty-four hours in which the investigation is conducted. As per Section 46 of the Cr.P.C, the person making the arrest is to touch and confine the body of the person arrested unless there is a submission to custody by word or action.

Under the ATA, the police, armed forces and civil armed forces are empowered to arrest an individual without issuing a warrant of arrest.⁶³ This power of arrest is similar to the provision contained in Section 54 Cr.P.C whereby a police officer may arrest a person without a warrant under nine grounds.

It is important to note that under Section 54 Cr.P.C the wide powers of arrest have been limited by requiring the police to make an arrest on the basis of either 'credible information' or 'reasonable suspicion'.⁶⁴ Similarly, under Section 5 (2) (ii) of the ATA, a reasonable suspicion has to exist that a person has or is likely to commit an act or offence of terrorism.

In the Cr.P.C 'reasonable suspicion' does not mean a vague surmise or inference but rather a bona fide belief on the part of the police that an offence has been committed or was about to be committed.⁶⁵ Such belief has to be founded on some definitive averments/allegations which create the basis for suspicion of the involvement in the offence of the person to be arrested.⁶⁶ Therefore, for a person to be arrested under the ATA there has to be more than a vague inference that a person was involved in a crime of terrorism.

2.2. PROCEDURAL SAFEGUARDS

In Pakistan, as mentioned above, the guidelines available for arrest and detention are laid down in Article 10 of the Constitution. Apart from production before a Magistrate within twenty-four hours, two procedural safeguards available at this stage are the entry of the arrest memo in the

63. Anti-Terrorism Act, 1997, Section 5,

Use of armed forces and civil armed forces to prevent terrorism

(2) An officer of the police, armed forces and civil armed forces may--

(ii) arrest, without warrant, any person who has committed an action of terrorism or a scheduled offence, or against whom reasonable suspicion exists that he has committed, or is about to commit, any such act or offence.

(iii) enter and search, without warrant any premises to make any arrest or to take possession of any property, fire-arm, weapon or article used, or likely to be used, in the commission of any terrorist act or scheduled offence.

64. *Mohsin Ali Shah v. S.H.O. Police Station Gargh Maharaja*, 1995 MLD 771.

65. *Manthar Ali v. S.H.O.*, 2013 PCrLJ 553.

66. *Ibid*

police case diary/*zimni* (hereinafter 'case diary') wherein the details of the arrest are supposed to be recorded and the log of activities of police officials contained in the Daily Diary/*Roznamcha* (hereinafter 'daily dairy').

The daily diary is intended to be a complete record of all events which take place at the police station. It should, therefore, record not only the movements and activities of all police officers, but also visits of outsiders, whether official or non-official, coming or brought to the police station for any purpose whatsoever.⁶⁷

The format of the case diary is provided in Form 25.54 (1) in the Police Rules.⁶⁸ A case diary consists of sheets; each of which is numbered, dated and stamped with the police station stamp. As soon as each diary is completed its number and date is recorded at the police station and one copy is sent to higher police officials to ensure that no changes are made. Details of the stolen or recovered property,⁶⁹ documentary evidence, details of the arrest, a concise summary of statements of the suspect, victim, the eyewitnesses and contains all the proceedings carried out by the Investigation Officer in respect of said case.⁷⁰

A case diary acts as a procedural safeguard as it makes it mandatory to record the time and date of arrest and provides a check against individuals being picked at random by the authorities or illegally arrested. A case diary is a privileged document.⁷¹ However, it contains statements of prosecution witnesses, recorded under Section 161 Cr.P.C. which can be used for contradiction as provided under Article 140 of Qanun-e-Shahadat Order, 1984.⁷²

Courts are considered the ultimate custodian of the rights of detainees, are responsible for perusing the files to ensure transparency and accountability.

67. The Police Rules, 1934, Rule 22.48, Sub-rule 2.

68. See Section 4.4.2.1 below

69. Pursuant to power granted under Section 5 (2) (iii), Anti-Terrorism Act, 1997.

70. The Police Rules, 1934, Form No. 25.54(1).

71. Code of Criminal Procedure, 1898, Section 172 (2), Any Criminal Court may send for the police-diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police-officer who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting such police-officer, the provisions of the Evidence Act, 1872, Section 161 or Section 145, as the case may be, shall apply.

72. *Supra* (n 16)

The efficacy of the daily diary or case diary as a procedural safeguard is ensured by the compliance of the police and the oversight by the Court.

2.3. LEGAL CHALLENGES

2.3.1. INCONSISTENCIES IN CASE DIARIES

There is a well settled principle of law that even the slightest doubt in the case of the prosecution entitles the accused to an acquittal.⁷³ The problem that arises here is that the case diaries are not filled properly and are sometimes filled out by police officials sitting inside the police station as opposed to the place of arrest.⁷⁴ This can create inconsistencies in the accounts of the prosecution witnesses (the law enforcement agents) with regard to the time and means of the arrest which is fatal to the case and can lead to an acquittal of an otherwise strong suspect.⁷⁵

Where the story of the arrest is concocted at a later stage, the Court is likely to highlight the inconsistency. The Courts have commented on the far-fetched nature of some of the arrest accounts whereby in some cases the accused are seen walking towards a police van while carrying a fire-arm after having committed a crime.⁷⁶ This is a common premise given by the Police and is often viewed suspiciously by the courts. The accused in such cases produce a petition under Section 100 Code of Criminal Procedure⁷⁷ stating that they were already in illegal police custody at the time of the supposed arrest.

The document of arrest should also bear the F.I.R number of the case and where there is a failure in doing so, it creates dents in the prosecution's case creating a reasonable doubt.⁷⁸ In the case *Aslam Surhiani v. The State*, regarding kidnapping for ransom, the memo of arrest of the accused and recovery of the abductee were neither countersigned nor witnessed. This fact created a doubt in the case of the prosecution which, along with other contributory factors, led to an acquittal.⁷⁹

73. *Tariq Pervez v. The State*, 1995 SCMR 1345.

74. *Muhammad Umair v. The State*, 2017 YLR 1097.

75. *Abdul Wahab v. The State*, 2017 PCrLJ 568.

76. *Niaz alias Niazi v. The State*, 2017 MLD 1147.

77. Code of Criminal Procedure, 1898, Section 100, Search for persons wrongfully confined: If any magistrate of the First Class has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he may issue a search warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found, shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

78. *Muhammad Irfan v. The State*, 2016 PCrLJ 1178.

79. *Aslam Surhiani v. The State*, 2017 PCrLJ 174.

2.3.2. FAILURE TO FILL DAILY DIARIES

Properly numbered daily diaries are to be maintained in all police stations on registers provided by the senior superintendent of police. However, there is an inadequate number of registers available and officials make their own arrangements by using bundles of paper or books without any serial numbers or proper documentation.⁸⁰

Such practices can lead to two problems. There have been instances where seemingly genuine cases have been dismissed on the grounds that the Investigating Officer has arrested the accused during police patrol but no arrival and departure entries have been produced for the satisfaction of the Court.⁸¹ Secondly, the daily diaries can easily be manipulated in this manner to hide the actual facts of the arrest including the date and time whereby arrested individuals can be detained in police custody for periods exceeding twenty-four hours before they are produced in Court.⁸² The latter being a gross violation of the fundamental right guaranteed in the Constitution.⁸³

2.3.3. FAKE ENCOUNTERS AND USE OF FORCE

There have also been instances where the police have faked encounter cases to justify the injuries sustained by the detainee. When a case of encounter was brought before the Karachi High Court in 2016, the Court held that it was 'very astonishing' that an exchange of firing between the accused and the police lasted for a considerable period and yet it was only the accused who sustained injuries.⁸⁴ Proof of encounter is essential and has to be corroborated by the entries in the daily diary.⁸⁵

In some cases, people are picked up by the law enforcement agencies on mere suspicion and where enough proof is not acquired, fake and fictitious cases are registered against them and encounters are also staged to conceal injuries inflicted as a result of physical torture during interrogation in detention.⁸⁶ In many cases, family members of the accused are not informed of the arrest, causing grief and mental anguish.

80. "Proper diary keeping in police stations demanded," Dawn (26 September 2005) <https://www.dawn.com/news/158331>.

81. *Muhammad Tahir v. The State*, 2016 PCrLJ 130.

82. "Proper diary keeping in police stations demanded," Dawn (26 September 2005) <https://www.dawn.com/news/158331>.

83. Constitution of Pakistan, 1973, Article 10(2).

84. *Javed v. The State*, 2016 PCrLJ 54.

85. *Aslam Surhiani v. The State*, 2017 PCrLJ 174.

86. *Rizwan Ali v. The State*, 2016 PCrLJ 735.

2.4. RECOMMENDATIONS

In India, the Cr.P.C has been amended, laying down mandatory procedural duties of the arresting authorities. Under Section 41-B of the Indian Cr.P.C, every police officer while making an arrest has to bear an accurate, visible and clear identification of his name and prepare a memorandum of arrest to be attested by at least one witness and countersigned by the person arrested. Furthermore, the person arrested is to be informed of his right to have a relative or friend informed of his arrest.

Pakistan can employ such a mechanism in its own criminal justice system and in light of the inconsistencies highlighted above:

- I. Each police station should have a standardized format for the arrest memo.
- II. One person, either a relative or a close friend, should be informed of the arrest. Recommendations I and II can be incorporated through an amendment in the Police Rules.
- III. Standing Orders should be issued that stipulate the requirements of the arrest memo.
- IV. Specific procedures should be followed when the arrest memo cannot be drafted at the place of arrest.
- V. The Court should sign and/or stamp all arrest memos to verify that they have been checked by them.
- VI. The Court should take action against the police officers who have failed to fill out diaries. Consistent failure to follow the standard procedure should lead to suspension and loss of benefits for that period.
- VII. Strict departmental disciplinary proceedings should be initiated against police officials who are found involved in any form of illegal detention.
- VIII. Modern technology should be utilized for this purpose and CCTV cameras should be installed in all police stations. Such kind of surveillance will not only prove helpful for security point of view but will also provide a preventive measure for illegal detentions.
- IX. The *Roznamcha* register should be scrutinized properly on a daily basis by a Gazetted police officer to prevent any subsequent tempering.
- X. Summary proceedings need to be introduced for the punishment of delinquent police officials involved in any such illegal action.

STAGE III: REMAND

CHAPTER 3

3.1. BACKGROUND

Under the Constitution of Pakistan as well as Section 61 of the Cr.P.C, an individual who is arrested must be produced before a Magistrate within twenty-four hours. Beyond this period, judicial authorization is required for any further deprivation of liberty of the accused as provided under Section 167 Cr.P.C.

If after arrest, physical custody of the accused is required for investigation beyond the initial period of twenty-four hours, the police or other investigating agency joined in the investigation may seek the physical remand of the individual from the concerned court in the following terms under Section 21-E of the ATA:

21-E. Remand: (1) where a person is detained for investigation, the investigating officer, within twenty-four hours of the arrest, excluding the time necessary for the journey from the place of arrest to the court, shall produce the accused before the Court, and may apply for remand of the accused to police custody [or custody of any other investigating Agency joined in the investigation], for which the maximum period allowed may be [not less [fifteen days and not more] than thirty days at one time]: Provided that, where an accused cannot within twenty-four hours be produced before the Court, a temporary order for police custody [or custody of any other investigating agency joined in the investigation] not exceeding twenty-four hours may be obtained from the nearest Magistrate for the purpose of producing the accused before the Court within that period.

(2) No extension of the time of the remand of the accused in police custody [or custody of any other investigating agency joined in the investigation] shall be allowed, unless it can be shown by the Investigating Officer, to the satisfaction of the Court that further evidence may be available and the Court is satisfied that no bodily harm has been or will be caused to the accused; Provided that the total period of such remand shall not exceed [ninety] days.

Section 21-E of the ATA works in consonance with Section 167⁸⁷ of the Cr.P.C which operates in a situation where investigation cannot be completed within twenty-four hours.⁸⁸ The physical custody of the accused is required for the purposes of interrogation and to allow the police or other investigation agency to complete their investigation upon completion of which the Police Report/Challan is filed under Section 173 Cr.P.C.

The second type of remand is judicial remand which operates under two sections of the Cr.P.C. Where the Court does not deem the individual's physical custody with the police or investigating agency to be necessary for investigation, he may remand him into magisterial custody under Section 167

87. Code of Criminal Procedure, 1898, Section 167. Procedure when investigation cannot be completed in twenty-four hours. – (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well-founded, the officer in charge of the police station or the police officer making the investigation if he is not below the rank of sub-inspector shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person is forwarded under this section may, whether he has or has not jurisdiction to try the case from time to time authorize the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or send it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction:

Provided that no Magistrate of the third class, and no Magistrate of the second class not specially empowered in this behalf by the Provincial Government shall authorise detention in the custody of the police.

(3) A Magistrate authorizing under this section detention in the custody of the police shall record his reasons for so doing.

(4) The Magistrate giving such order shall forward a copy of his order, with his reasons for making it, to the Sessions Judge.

(5) Notwithstanding anything contained in sections 60 and 61 or hereinbefore to the contrary, where the accused forwarded under subsection (2) is a female, the Magistrate shall not, except in the cases involving qatl or dacoity supported by reasons to be recorded in writing, authorise the detention of the accused in police custody, and the police officer making an investigation shall interrogate the accused referred to in subsection (1) in the prison in the presence of an officer of jail and a female police officer.

(6) The officer in charge of the prison shall make appropriate arrangements for the admission of the investigating police officer into the prison for the purpose of interrogating the accused.

(7) If for the purpose of investigation, it is necessary that the accused referred to in subsection (1) be taken out of the prison, the officer in charge of the police station or the police officer making investigation, not below the rank of sub-inspector, shall apply to the Magistrate in that behalf and the Magistrate may, for the reasons to be recorded in writing, permit taking of accused out of the prison in the company of a female police officer appointed by the Magistrate:

Provided that the accused shall not be kept out of the prison while in the custody of the police between sunset and sunrise.

88. *Raja Waheen Mehfooz v. Special Judge, Anti Terrorism Court-II, Rawalpindi*, 2016 PCrLJ 1773

Cr.P.C. Any further detention after the time in which the investigation is to be completed is granted under the provisions of Section 344 of the Cr.P.C.⁸⁹

In order for the prosecution to obtain a judicial remand under Section 344 Cr.P.C three conditions are required to be fulfilled:

- (i) Some evidence should be adduced before the Court which should be sufficient to raise suspicion of the accused's guilt and the Court should be sure that further evidence to strengthen the suspicion is expected to be collected;
- (ii) A police report in writing of acts constituting the offence must be produced to enable the Court to take cognizance of the offence; and
- (iii) If the nature of the case is such that no cognizance of the offence can be taken without previous sanction, then such sanction should be produced to enable the Court to take cognizance of the offence.⁹⁰

Once the accused is sent to judicial remand further detention is granted under Section 344 Cr.P.C.⁹¹ The court cannot grant more than two adjournments during the trial of the case and, that too, on imposition of exemplary costs. If the defense does not appear after two consecutive adjournments, the court may appoint a State Counsel.⁹² However, under Cr.P.C there is no such restriction and the case may be adjourned, if so advisable under section 344 Cr.P.C. If accused has not been granted bail such adjournment shall not exceed fifteen days. However, there is no limit on the total period of a series of orders of remand.

89. Code of Criminal Procedure, 1898, Section 344, Power to postpone or adjourn proceedings. (1) If, from the absence of a witness or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefore from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody; Remand. Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time. (2) Every order made under this section by a Court other than a High Court shall be in writing signed by the Presiding Judge or Magistrate.

Explanation. Reasonable cause for remand. If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

90. *Dr. Aijaz Hassan Qureshi v. Government of the Punjab through Secretary Home Department Government of Punjab, Lahore and another*, PLD 1977 Lah 1304.

91. Code of Criminal Procedure, 1898, Section 344, Power to postpone or adjourn proceedings: Power to postpone or adjourn proceedings: If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing, stating the reasons therefore, from time to time, postpone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable and may by a warrant remand the accused if in custody: Remand: Provided no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time. (2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

92. Anti-Terrorism Act, 1997, Section 19(8).

Where an accused has been released from physical custody on the basis of Section 169⁹³ of the Cr.P.C or has been remanded to judicial custody, the Court may again place him in police custody (or the custody of any other investigating agency) for the purposes of further investigation. This is contained in Section 19 (5) of the ATA and is reproduced below:

19(5): Where, in a case triable by a [Anti-Terrorism Court], an accused has been released from police custody under section 169 of the Code, or has been remanded to judicial custody, the Special Court may, on good grounds being shown by a public Prosecutor or a Law Officer of the Government for reasons to be recorded in writing, make an order for placing him in police custody [or the custody of any other investigating agency joined in investigation] for the purpose of further investigation in the case.

Specific guidance on when physical remand may be requested by the police and subsequently granted by the Court is mentioned in the Police Rules as well as in the Lahore High Court Rules and Orders Vol. III, Chapter 11, Part B, respectively. To ensure that the police act in accordance with the wishes of the High Court, extracts of the High Court Rules and Orders have been inserted in the Police Rules at Appendix 25.56 (1).

The Police Rules at Rule 25.56 (2) suggest the grounds for requesting remand:

- (2). No application for remand to police custody shall be made on the ground that an accused person is likely to confess. Grounds for such an application should be of the following nature:
- (a) That it is necessary to take the accused to a distance that he may be shown to persons likely to identify him as having been seen at or near the scene of the offence.
 - (b) That it is necessary to have his footprints compared with those found on or near the scene of offence.
 - (c) That the accused has offered to point out stolen property or weapons or other articles connected with the case.
 - (d) Any other good and sufficient special reason.

93. Code of Criminal Procedure, 1898, Section 169, Release of accused when evidence deficient: If upon an investigation under this Chapter, it appears to the officer in-charge of the police station or to the police officer making the investigation that there is no sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognisance of the offence on a police-report and to try the accused or send him for trial.

The Lahore High Court Rules and Orders, Vol. III, Chapter 11, Part B, para 8 provide principles for the guidance of Magistrates when granting remand and are reproduced below:

8. Principle applying remand cases.--The following principles are laid down for the guidance of Magistrates in the matter of granting remands, and District Magistrates are required to see that they are carefully applied:-

- (i) Under no circumstances should an accused person be remanded to Police custody unless it is made clear that his presence is actually needed in order to serve some important and specific purpose connected with the completion of the inquiry. A general statement by the officer applying for the remand that the accused may be able to give further information should not be accepted.
- (ii) When an accused person is remanded to Police custody the period of the remand should be as short as possible.
- (iii) In all ordinary cases in which time is required by the Police to complete the inquiry, the accused person should be detained in magisterial custody.
- (iv) Where the object of the remand is merely the verification of the prisoner's statement, he should be remanded to magisterial custody.
- (v) An accused person who has made a confession before a Magistrate should be sent to the Judicial lock-up and not made over to the Police after the confession has been recorded. If the Police subsequently require the accused person for the investigation, a written application should be made giving reasons in detail why he is required and an order obtained from the Magistrate for his delivery to them for the specific purposes named in the application. If an accused person, who has been produced for the purpose of making a confession, has declined to make a confession or has made a statement which is unsatisfactory from the point of view of the prosecution he should not be remanded to Police custody.

For remand the ATC court shall be deemed to be a Magistrate.⁹⁴ The arrested person shall be produced before the Court within twenty four hours from the time of arrest, excluding the time required for travelling. If the accused cannot be produced within twenty-four hours then temporary police custody may be ordered by a Magistrate who is available nearby. The Court cannot grant

94. Anti-Terrorism Act, 1997, Section 21-E(3).

physical remand of the accused for more than fifteen days at one time. The total period of such remand shall not exceed ninety days.⁹⁵ However, under Section 167 of Cr.P.C. total period of physical remand shall not exceed fifteen days.⁹⁶ When ordering physical remand of the accused, Special Courts have to observe the provisions of Section 167(3) Cr.P.C and the remand order if passed without assigning any reasons would be a nullity in the eyes of law.⁹⁷ It was held in the case of *Rashid v. The State* that remand is not to be granted mechanically without application of mind, rather it is to be granted only in case of a real necessity and also that the period of such remand is to be fixed with due regard to reasonable requirements.⁹⁸ In this case, the Trial Court was mistaken in understanding that while exercising its powers under Section 21-E of the ATA it was not required to give reasons for the order granting physical remand. This interpretation was completely in violation of the provision of Section 21-E (3) of ATA whereby the ATC is to operate as a Magistrate Court.

The landmark judgment of *Ghulam Sarwar v. The State*⁹⁹ consolidates some of the legal principles relating to remand under the general law and lays down fifteen principles aimed at regulating the grant of remand. Some of these principles are reproduced below:

- During the first 15 days, the Magistrate may authorise the detention of the accused in judicial custody liberally but shall not authorise the detention in the custody of the police except on strong and exceptional grounds and that too, for the shortest possible period;
- The Magistrate shall record reasons for the grant of remand.
- Before granting remand, the Magistrate shall assure that evidence sufficient to raise suspicion that the accused has committed the offence has been collected by the police and that further evidence will be obtained after the remand is granted.
- The Magistrate shall not grant remand /adjournment in the absence of the accused.
- The Magistrate should avoid giving remand /adjournment at his residence.
- The Magistrate shall record objection which may be raised by an accused person and shall give reasons for the rejection of the same.

95. Ibid Section 21-E.

96. Code of Criminal Procedure, 1898, Section 167.

97. *Raja Waheed Mehfooz v. Special Judge, Anti-Terrorism Court II, Rawalpindi*, 2016 PCrLJ 1773.

98. *Rashid v. The State*, PLD 1970 Lahore 389.

99. *Ghulam Sarwar v. The State*, 1984 P Cr. L.J 2588.

- The Magistrate shall examine police file before deciding the question of remand.
- If no investigation was conducted after having obtained remand, the Magistrate shall refuse to grant further remand / adjournment.
- The Magistrate shall not allow remand/ adjournment after 2 months (which is a reasonable time) of the arrest of the accused unless it is unavoidable.
- The Magistrate shall not grant remand mechanically for the sake of co-operation with the prosecution/ police.

Despite this formal recognition by the High Court, there have been instances where people have been deprived of their right to liberty without the law being followed and Courts have been liberal in applying Section 21-E of the ATA and granting physical remand.¹⁰⁰ The ATA, because of its frequent application of remand and long period of detention, raises certain concerns and faces certain challenges highlighted below.

3.2. LEGAL CHALLENGES

The Constitution of Pakistan enshrines the safeguards available to a person arrested and the subsequent deprivation of liberty. Remand works at two stages: pre-trial (physical or judicial) and during trial (judicial). After the arrest of a person and before the investigation is completed a person is sent to pre-trial detention. The safeguard available at this step is that the arrested person has to be produced before a Magistrate who has to authorize the detention. Once trial commences, a person can be sent to judicial remand. Under Section 344, no order of remand can exceed fifteen days at a time and a written order of remand has to be signed by the Magistrate specifying the reasons for remand. Despite the safeguards that are available under the law there are certain challenges that arise as a result of its misapplication.

3.2.1. NON-PRODUCTION OF THE ACCUSED IN COURT

In the *habeas corpus* petition filed by the wife of the accused allegedly involved in the Marriott hotel bombing on 21st September 2008 in Islamabad,¹⁰¹ it transpired that despite the ATC having granted permission to the family to meet the accused, this was denied by jail authorities.¹⁰² He was also denied the right to be produced in Court and his judicial remand was

100. *Zawar Hussain v. The State*, 2009 PCrLJ 705.

101. Carlotta Gall "Bombing at Hotel in Pakistan Kills at least 40" *The New York Times* (September 2008) <<http://www.nytimes.com/2008/09/21/world/asia/21islamabad.html>>.

102. *Sobia Ilyas v. The State*, 2009 PCrLJ 910.

authorized by the ATC in his absence. The High Court decided that while this does not amount to illegal detention, Judges should ensure that they see the accused before granting further remand.

3.2.2. NON-SPEAKING ORDERS OF REMAND

Judges are required to give reasons when granting remand. However, in some cases it has been observed that ATC Judges misinterpret Section 21-E and operate under the misunderstanding that they are not required to give reasons for the order granting physical remand of the accused. It has been observed by the Lahore High Court that such an interpretation is in violation of the provisions of Section 21-E (3) which provides that the Special Court under the ATA is deemed to be a Magistrate for purposes of Section 21-E(1) and therefore an ATC Judge is equally responsible to observe the provisions of Section 167(3) Cr.P.C.¹⁰³

3.2.3. EXTENDED PERIODS OF REMAND

The period of remand under the ATA is longer than the period given under the Cr.P.C. A person can be sent to physical custody of the police or other investigating agency for a period of at least fifteen days. The sum total period of remand is ninety days. This is problematic because it allows for an extended period of detention and increases chances of custodial torture and unlawful use of force by the investigating agencies and the police.

3.2.4. LACK OF ACCOUNTABILITY

Under the Cr.P.C, Magistrates have to forward a copy of the order of remand to the Sessions Judge. Such a provision does not exist in the ATA where the ATC judge sits as a Magistrate when deciding remand cases and as a Sessions Judge in other cases. This reduces the level of accountability on a Judge granting remand.

3.3. RECOMMENDATIONS

The granting of remand under domestic law is strife with abuses as highlighted above. The most fundamental problem with the extended period

103. *Raja Waheed Mehfooz v. Special Judge, Anti Terrorism Court II, Rawalpindi*, 2016 PCrLJ 1773.

of remand is the risk of custodial torture. Bearing in mind the high possibility of such untoward incidents, certain measures if taken will ensure that the risk of custodial torture is minimized:

- I. The period of remand should be decreased from fifteen days at a time. A minimum period of fifteen days at a time is problematic because if the person arrested is subjected to torture, the wounds can heal by the time the person is produced before a Magistrate.
- II. Therefore, regular medical examinations of detainee should be conducted weekly to prevent any maltreatment.
- III. All medical reports should be sent to the Magistrate and immediate action should be taken where the report indicates physical abuse.

Another grave violation of human rights is where a person arrested is not produced before the Magistrate and the order of remand is passed in absentia. Potential justification for such a practice is the grave nature of the crime and the risk associated with transporting a person from the lock-up to the court. Nevertheless, this practice should be condemned as it strips citizens of their right of due process enshrined under Article 10-A of the Constitution. The following recommendations are designed to ensure that citizens are given their right to due process:

- I. Every remand order should be reasoned and copies should be provided to all the parties. Where an order of remand is not justified or well-reasoned, action should be taken against the presiding officer of Court.
- II. The order of remand should be forwarded to an administrative Judge of the High Court appointed under Section 13¹⁰⁴ of the ATA. The administrative Judge should peruse all remand orders to ensure that the reasons are recorded.
- III. Before granting further physical remand, the accused should be medically examined and the medical report should be produced before the presiding judge.

104. Anti-Terrorism Act 1997, Section 13 (2),

Where more anti-terrorism courts than one have been established in any area, the Government in consultation with the Chief Justice of the High Court shall 155[designate a Judge of any such Court to be an administrative judge] and all cases triable under this Act pertaining to the said area shall be filed before the 156[said court and such judge may either try the case himself] or, assign any case, or cases, for trial to any other anti-terrorism court at any time prior to the framing of the charge.

STAGE IV: COMMENCEMENT OF INVESTIGATION

CHAPTER 4

4.1. BACKGROUND

An investigation normally commences once an F.I.R is lodged. It is conducted by the police and includes everything from the collection of evidence, recording of statements to the submission of the police report.¹⁰⁵ If it appears to the investigating officer that there is insufficient evidence or no reasonable grounds of suspicion against the accused exist, such officer shall, if such person is in custody, release him on his executing a bond (with or without sureties) as such officer may direct, to appear, if and when required, before a Magistrate empowered to take cognizance of the offence on a police-report and to try the accused or send him for trial.¹⁰⁶

The ATA lays down a special procedure for conducting investigations of terror suspects as opposed to the general procedure provided under the Cr.P.C. However, for those matters where the special law is silent, the general law remains applicable.¹⁰⁷

4.2. COMMENCEMENT OF AN INVESTIGATION UNDER THE ATA

There are multiple mechanisms for the commencement of an investigation under the ATA. The first one is pursuant to the registration of an F.I.R. The second mechanism is the transfer of a case registered by or an investigation already underway pursuant to any law. It is also relevant to note that there also cases where the accused has been released from Police custody or is being held in judicial custody, the Police may request that he be taken into their custody for further investigation. This mechanism would permit further investigation into the accused's actions.

4.2.1. INVESTIGATION PURSUANT TO AN F.I.R

Where Sections 4 and 5 of the ATA are not invoked

Under Section 19, an investigation in all cases, other than those invoked under Sections 4 and 5, may be conducted by an authorised officer or, if the Government deems it necessary, by a Joint Investigation Team (JIT).

Where it is through an individual officer, then he may either be a police officer

105. Code of Criminal Procedure, 1989, Section 4 (1)(1); Lal Khan and another v SHO, Police Station Kotwali Jhang, 2010 PCrLJ 182, para 6:

"Job of investigation consisted of spot inspection; ascertainment of facts and circumstances touching the offence under investigation; collection of evidence and apprehension of accused as and when sufficient evidence in support of the charge was made available."

106. Code of Criminal Procedure, 1989, Section 169.

107. The Anti-Terrorism Act 1997, Section 32.

or an officer equivalent to or not below the rank of an Inspector. Where the investigation is through a JIT, it shall be constituted by the Government and be comprised of five members and will be headed by a police officer not below the rank of Superintendent of Police (SP). Other officers of the JIT may include officers from intelligence agencies,¹⁰⁸ armed forces and civil armed forces equivalent to BS-18.

Ordering the composition of a JIT in such circumstances is the sole authority of the Government. Where in *Maqsood Yamin v RPO Multan*,¹⁰⁹ the SP had passed the order for constituting a JIT, the Lahore High Court held such orders to be illegal, as “within the meaning of S. 19... only Secretary, Home Department of a Provincial Government was authorized to pass [an] order for constituting a JIT...” In such circumstances, the investigation conducted by the JIT was also held to be without lawful authority.

The composition of a JIT offers a major advantage for a thorough investigation in anti-terrorism cases, as members having relevant expertise are chosen. Moreover, as the JIT is headed by an SP, who is a senior police officer, he has a large workforce at his disposal to get the job done. He may also call other departments to act in the aid of JIT. The SP also has a proper coordination mechanism between his and all relevant departments, therefore investigations conducted by a JIT have a better standing than those conducted by an individual police officer.

However, in practice, JITs are not regularly formed, rather sub-inspectors conduct investigations as provided in the Cr.P.C. These sub-inspectors neither have the expertise and experience nor thorough knowledge of the ATA procedures.¹¹⁰

Poor investigation may, then, lead to bail of the accused in terrorism cases and ultimately acquittal. In *Muhammad Noman v. the State and another*,¹¹¹ where the police had failed to investigate the allegations made by the accused, rather had conducted a one-sided investigation against the accused, the

108. The quorum of meetings will be met with three out of the five.

109. *Maqsood Yamin v. RPO Multan*, 2015 PCrLJ 923.

110. Interview with defense lawyer (Islamabad, 15 July 2017).

111. *Muhammad Noman v. the State and another*, 2017 SCMR 560.

Apex Court held bail to be a matter of right and not merely “grace.”¹¹² The Court observed that in such cases it was obligatory upon senior police officials to take the investigation into their own hands and find out the truth of the matter.¹¹³

Where Sections 4 and 5 of ATA are invoked

In such instances, the investigation is conducted by a JIT formed by the Government, comprising of members of the armed forces or civil armed forces; intelligence agencies (as the case may be); and other law enforcement agencies including a police officer not below the rank of an inspector.¹¹⁴

4.2.2. INVESTIGATION OR INQUIRY TRANSFERRED UNDER THE ATA

Section 19 (1A) provides that where any case has been registered under any other law or is under investigation by another authority, may be transferred to an investigation under the ATA through a written order of the Federal Government. Upon such transfer, the transferring authority shall supply the record of the case to the authority to whom the investigation is forthwith entrusted.

4.2.3. PERSON TO BE HELD IN CUSTODY FOR FURTHER INVESTIGATION

Under Section 19 (5) of the ATA, a person who has been released from police custody under Section 169 of the Cr.P.C or has been remanded to judicial custody may be subjected to further investigation. The ATC, after recording reasons in writing and upon good grounds shown by a Public Prosecutor, may order for a person to be placed in police custody or in the custody of the JIT, in

112. *Muhammad Noman v. The State and another*, 2017 SCMR 560.

Poor investigation leading to the granting of bail to the accused:

“True that the country is confronted with a formidable terrorist activities from one end to the other... however, this should not, in any manner, distract the Court of Law from doing justice in a given case, when, the investigation/inquiry carried out is neither satisfactory nor it is free from malice and the citizens’ implication in such nature of cases is not free from reasonable doubt, thus, they cannot be left at the mercy of the police’s traditional chicanery indulging in such like tactics, not authorized by the law.”

“In the present case, the facts and circumstances would show that the investigation was one-sided and the other aspects of vital importance were not touched much less investigated into without any explanation offered by the investigating officer present in court [emphasis added], therefore, the case of the petitioner squarely falls within subsection (2) of Section 497, Cr.P.C. being susceptible to further inquiry. Therefore, in our considered view, the petitioner is found entitled to grant of bail as a matter of right and not as a matter of grace.”

113. *Muhammad Noman v. The State and another*, 2017 SCMR 560:

“It is essential and obligatory duty of the superior police officers of the rank of SP, SSP and above that, when the accused make such allegations, supported by record of the Police itself, they have to take charge of the investigation and to dig out the truth because it is the duty of the Police as a whole, irrespective of rank and file to bring the correct and true facts/materials before the Court of Law so that the actual criminals are punished, sans innocent citizens.”

114. The Anti-Terrorism Act 1997, Section 19 (1), First Proviso.

order to conduct further investigation in a case. As per Section 19 (6) the ATC is considered to be a Magistrate for this purpose.

4.2.4. REINVESTIGATION

Reinvestigation generally is not appreciated. Parties use influence, be it in any form, in such matters to get favourable reports and the reinvestigation is one of the major methods. Where investigation is defective or incomplete ... then reinvestigation, in fact, becomes necessary; however, if earlier investigation is transparent without any fault, independent and does not suffer from any illegality or irregularity and is complete in all respects, reinvestigation should not be allowed.¹¹⁵

The above judicial observation though relates to reinvestigation, it also illustrates the possibility of illegalities and irregularities during investigation. Moreover, it highlights the chances of investigations being manipulated by influential persons. Such illegalities along with being fatal for terrorist prosecutions, wrongfully implicate persons who then suffer time in lockups until released by assailing the judicial authorities.

4.3. CORDONING AREA(S) FOR TERRORIST INVESTIGATION

Sections 21-A and 21-B of the ATA lay down the rules for cordoning off areas for the purposes of a terrorist investigation. Cordoned area is one which has been designated as such under Section 21-A. Such designation can only be made by either a police officer equivalent to or above the rank of a Deputy Superintendent of the Police (DSP), or by a member of the JIT if it is considered expedient to do so.¹¹⁶ The investigating team has wide powers to not just cordon off areas but to also order the immediate removal of a person from such an area or an area adjacent to it, or to restrict the access of pedestrians and vehicles.¹¹⁷ However, this is a mechanism rarely used by the investigators; instead crime scenes are often contaminated leading to serious defects in the collection of evidence.¹¹⁸

115. *Khalid Javed v. Board through DIG of Police (Investigation)*, PLD 2009 Lahore 101, para. 9.

116. The Anti-Terrorism Act 1997, Section 21 (A)(2).

117. *Ibid* Section 21-B.

118. Interview with Defense Lawyer (Islamabad, 15 June 2017).

4.4. PROCEDURE OF INVESTIGATION

The investigative process to be followed in terrorism cases is as provided in the Cr.P.C. It consists of the following steps:

1. Site inspection
2. Ascertainment of facts and circumstances that connect with the offence under investigation¹¹⁹
3. Discovery and arrest of suspected offender
4. Collection of evidence related to the commission of the offence which may lead to the:
 - a. Examination of various persons including accused and recording their statements;
 - b. Search of places or seizure of things considered necessary for investigation
5. Formation of opinion as to whether, on material collected, there is a case to place before the [court] for trial and if so taking necessary steps for the same by filing of a challan under Section 173 Cr.P.C.¹²⁰

4.4.1. SITE INSPECTION

As soon as the F.I.R is recorded, a police officer is supposed to immediately proceed to the crime scene and if he is not competent to conduct the investigation, then to ensure that the scene is preserved and the evidence is not contaminated.¹²¹

A site map, or plan of the scene, is to be drawn up by the investigating officer. The procedure to be followed is laid down in Rule 25.13 of the Police Rules. It requires that two copies of the site map be made, one to be submitted with the final report and one to be retained by the police in the police file.

Where the crime is of a heinous nature, and the investigating officer considers that an accurate map is required,¹²² he is obligated to summon the *patwari* (draftsman) and cause him to prepare scaled site plan in triplicate. This scaled plan is admissible in evidence as it is useful to understand the location of the crime scene. All the material points are shown in digits in this map, followed by

119. M. Mahmood, *The Code of Criminal Procedure* (vol. 1, 2016) 631.

120. *Lal Khan v. SHO, Police Station Kotwali Jhang*, 2010 PCrLJ 182.

121. The Police Rules, 1934, Rule 25.10.

122. *Muhammad Ashraf Khan Tareen v. the State*, 1995 PCrLJ 313:

“Preparation of the site plan by the expert is necessary only if the Investigating Officer considers it proper to have the assistance of a technical man, otherwise there is no bar to the making of map by the police officer who investigates the case.”

explanatory notes by the patwari and the Investigation Officer.

4.4.2. MAINTENANCE OF CASE DIARY IN INVESTIGATION

Under Section 172 Cr.P.C it is mandatory for an investigating officer to enter day to day proceedings of the investigation in a case diary (*Zimni*). Setting forth the time at which the information reached him; the time at which he began and closed his investigation; the place or places visited by him; and a statement of the circumstances ascertained through his investigation. Case diaries are required to be as brief as possible and must record only those incidents that have a bearing on the case.¹²³ This diary may be used at the trial or inquiry, not as evidence in the case but to aid the Court in such inquiry or trial.¹²⁴ The object of recording “case diaries” under this section is to enable Courts to check the method of investigation by the Police.¹²⁵ Therefore, it is very crucial, in order to minimize potential human rights abuses and to encourage the adherence to proper law and procedure, that the case diary entries be accurate and made with diligence. If a police witness who has failed to keep a diary as required by Section 172, the evidence of such police officer is open to adverse criticism and may diminish its value but it does not make that evidence inadmissible.¹²⁶ The prosecution may use such diary to refresh the police witness's memory during recording of evidence, as provided under article 155 of Qanun-e-Shahadat Order, 1984.¹²⁷

In a seminal case it was stated:

The early stages of investigation which follows on the commission of a crime must necessarily in the vast majority of cases be left to the police, and until the honesty, the capacity, the discretion and judgement of the police be thoroughly trusted, it is necessary, for the protection of the public against criminals, for the vindication of the law and for the protection of those who are charged with having committed a criminal offence that the Magistrate or judge before

123. The Police Rules, 1934, Rule 25.53.

124. 19 Bom. BR 510.

125. *Peary Mohan Das v. D. Weston and Others*, 16 CWN 145.

126. *Zahiruddin v. Emperor*, PLD 1947 PC 13.

127. Qanun-e-Shahadat Order, 1984, Article 155, Refreshing memory: (1) A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory. (2) The witness may also refer to any such writing made by any other person, and read by the witness within the time aforesaid, if when he read it he knew it to be correct. (3) Whenever a witness may refresh his memory by reference to any document, he may with the permission of the Court, refer to a copy of such document: Provided the Court be satisfied that there is sufficient reason for the non-production of the original. (4) An expert may refresh his memory by reference to professional treatises.

whom the case is for investigation or for trial should have the means of ascertaining what was the information true, false or misleading, which was obtained from day to day by the police officer who was investigating the case and what were the lines of investigation upon which such police officer acted.¹²⁸

4.4.2.1. Record of Case Diaries

Case diaries are required to be submitted in the form given in the Police Rules, at 25.54 (1). The rule mandates that each case diary be numbered and stamped with the police station stamp.

Form No. 25.54(1) [Case Diary - Police Rules 1934]

POLICE DEPARTMENT _____		DISTRICT _____	
First Information Report No. ____ of 20__		Case Diary No. _____	
Date and place of occurrence		Time and date of receipt in Police Station _____	
		Time and date of dispatched from Police Station _____	
OFFENCE:-			
Date (with hour) on which action was taken	Serial No. of Report	Record of Investigation	
<i>CASE DIARY – continued</i>			

4.4.3. WITNESS STATEMENTS

Section 161 Cr.P.C empowers the investigating officer to orally examine witnesses and record their statements. He is required to make a separate record of such statements and to include them in the case diary maintained under Section 172. However, these are not mandatory provisions as such statements are not substantive pieces of evidence,¹²⁹ meaning thereby that it is up to the investigating officer if he requires witness statements.¹³⁰ They may

128. *Queen Empress v. Mannu*, (1897) ILR 19 All 390.
129. *Wazir Khan v. the State*, 2004 MLD 1982.

be used in evidence to contradict a witness or to test his veracity under Article 140 of the Qanun-e-Shahadat Order.¹³¹

4.5. LEGAL CHALLENGES

Out-dated investigative tools

Investigative tools in Pakistan are not up to date with scientific developments,¹³² even though under the law evidence required through modern means is admissible.¹³³ For instance, when blood samples are collected from the crime scene they are sent to forensic science laboratory. The report is very rudimentary and lacks concrete evidence; it simply alludes to the fact that the blood was human, and it does not even identify the blood. Thus, where the prosecution is relying on the medical report for corroboration of the ocular testimony, there tend to be many unexplained lacunae. To further compound the problem, there is only one forensics agency in Punjab, while there is none in Sindh. Moreover, tools for gunshot residue, iron-testing or print-barrel testing are not used.¹³⁴

Failure to effectively use available mechanisms

Due to the lack of awareness, gross incompetence and negligence of the police is another major contributor towards poor investigations, as they fail to effectively use the mechanisms available to them. For instance, the mechanism under the ATA to cordon off the site to save it from contamination is hardly ever used.¹³⁵ The famous “hosing down”¹³⁶ of the assassination site of former Prime Minister Benazir Bhutto is a huge failure of the investigation agencies and illustrates the total disregard of investigative procedures.

Site plan is one of the most crucial components of the investigation, and the Courts heavily rely on this plan to corroborate the ocular testimony.¹³⁷ It is essential that the site plan accurately depicts the crime scene, but the

130. *Dilshad v. The State*, 1995 PCrLJ 248.

131. *Supra* (n 16).

132. *Riaz v. SHO*, PLD 1998 Lahore 35.

133. The Anti-Terrorism Act 1997, Section 27-B.

134. Zaidi “A Critical Appraisal” (n 30) 57-63.

135. Syed Manzar Abbas Zaidi, “Terrorism Prosecution in Pakistan” (Report Peaceworks No. 13, United States Institute of Peace 2016) 15-16.

136. Declan Walsh, “Pakistan Police Officers to be Arrested over Death of Benazir Bhutto”, *The Guardian* (London, 5 December 2010) <<https://www.theguardian.com/world/2010/dec/05/benazir-bhutto-pakistan-police-officers>>; “BB Murder Site Washed Off on SP’s order: Witness” *Dawn News* (Rawalpindi, 20 February 2013) <<https://www.dawn.com/news/787429>>.

137. See *Mst. Rukhsana Begum v. Sajjad*, 2017 SCMR 596; *Muhammad Asif v. the State*, 2017 SCMR 486; *Sardar Bibi v. Munir Ahmed*, 2017 SCMR 344.

investigating authorities at times carelessly or even deliberately create inconsistencies in the investigation. In *Muhammad Wali Shah v. the State*,¹³⁸ where the investigating officer had deliberately failed to mention the names of the witnesses on the plan, it led to serious doubts in the veracity of the prosecution's case, resulting in the acquittal of the accused persons.

Moreover, evidence is routinely tampered with. For instance, empties have to be submitted into evidence even before the recovery of the gun. However, this is not the practice. Everything is recovered and placed together in evidence thereby breaking the chain of custody of evidence or raising doubts as to the credibility of the empties being fired from the gun in the commission of the crime or later on by the police just to show recovery of empties.

Every piece of recovery has to be sealed and stamped at the crime scene and then sent for forensics. In practice, evidence is brought to the police station and then wrongfully signed and stamped to show that the procedure was completed at the crime scene.¹³⁹ Such practices not only contaminate the evidence, but also cause delays in investigation during which time the accused is held in custody, even if he is innocent.

The mandatory provisions of Section 172 Cr.P.C are ignored by the police, whereby they are required to maintain case diaries of the investigation. These diaries may be later used by the Court for assistance. However, the investigating officers fabricate the day's events, that is instead of noting the events as and when they happened, they note everything once in the police station and manipulate the wording and chronology of investigation to match their oral versions (if summoned for testimony or during cross-examination).¹⁴⁰ Moreover, all written documentation of investigation, from site maps and daily diaries to recording of witness statements, are crudely and poorly undertaken by the concerned investigating officers.

These procedures are learned on the job and passed on from seniors to juniors. Thus, all irregularities are now institutionalized to the "detriment of the criminal justice system."¹⁴¹

138. *Muhammad Wali Shah v. the State*, 2017 PCrLJ 779.

139. Interview with prosecutor, (Islamabad, 25 May 2017).

140. Interview with Prosecutor, (Islamabad, 25 May 2017).

141. Zaidi, "A Critical Appraisal", 54.

Witness statements must be taken down promptly and verbatim. If these are missing, then it creates doubts on the veracity of these statements, thereby harming the prosecution's case. Police may also 'pad' witness statements which later do not corroborate with circumstantial or documentary evidence, thereby weakening the prosecution case.¹⁴² False F.I.Rs are registered to frame persons for the possession of narcotics or to show the commission of assault where the wounds were self-inflicted.

To cover their own tracks the Police have devised an unofficial mechanism of skipping F.I.R pages so as to skip the sequence and after having coached witnesses and received the post-mortem report, they then backdate the F.I.R to reflect all of these "facts". However, this sacrifices the trial, as it does not tally with the rest of the timeline.

Such practices also contribute towards 'case management', where prosecution attorneys are actually involved in the drafting of the police report and everything is done under their guidance.

All of these flaws and gaps in the investigation ultimately lead to human rights violations, as the accused who is essentially 'innocent until proven guilty' suffers due to such incompetence and negligence. He serves lengthy periods in custody, whether in police lockups or judicial lockups, until the Court discharges and/or acquits him for insufficient evidence or gross flaws in the investigation.

4.6. COMPLAINTS AGAINST AN INVESTIGATING OFFICER

Investigating officers are routinely 'managed',¹⁴³ which means that they are often easily corrupted and as investigation is the sole domain of the police, it proves fatal to prosecution cases or results in fabricated evidence against accused persons. The only tool the defence may use to challenge the investigation procedures of the police is under Section 22-A of the Cr.P.C, i.e. through a Justice of Peace.

4.7. DEFECTIVE INVESTIGATIONS

The ATC or a High Court, as the case may be, under Section 27 of the ATA is empowered to penalize investigating officers for defective investigations with imprisonment for up to two years, or with fine or with both.¹⁴⁴ However,

142. Interview with ATC Judge, (Karachi, 25 July 2017).

143. Interview with Defense Lawyer, (Islamabad, 15 June 2017).

144. *Muhammad Saeed Khan v. State*, 2012 PCrLJ 1337.

as explained by an ATC Judge based in Karachi, police officials are suspended or given notice to show cause¹⁴⁵ in such circumstances. This does not have much effect as delinquent persons are still given remunerations during suspension, and more importantly, it is practically impossible to penalize every investigating officer responsible for defective investigations.¹⁴⁶ The reason, as is self-evident, being the institutionalization of illegalities and irregularities in investigation.

Nonetheless, delinquent officers have faced punishments in the past in pursuance of Section 27 of the ATA,¹⁴⁷ as “investigation by the police formed the backbone of the criminal justice system and investigating officer, enjoyed authority in the matter of investigation ... such authority would unquestionably demand accountability.”¹⁴⁸ The Peshawar High Court also observed that defective and improper investigations had “eroded the confidence of the general public in the police ... which was touching the lowest ebb of its credibility.”¹⁴⁹

It is worth mentioning that for imposing liability under Section 27 of the ATA on an investigating officer, it is essential to show that such a defect was intentional on his part. Where the defect was held to be such that could be cured by the Trial Court and was not intentional, the entire trial does not get vitiated.¹⁵⁰

Furthermore, similar penalties are embodied within Section 27-AA of the ATA for falsely implicating an innocent person in terrorist investigations. However, such measures are rarely undertaken and 'terrorist' deaths in police encounters remain a common occurrence.

Under Article 155 of the Police Order, 2002, a police officer who wilfully neglects or breaches any provision of law, rule, regulation or order which he is obligated to obey, may be punished with imprisonment for a period of up to 3 years and with fine.

145. See *Ghazi Marjan v. The State*, 2014 PCrLJ 1750 (Peshawar).

146. Interview with ATC Judge (Karachi, July 2017).

147. See *Ashrafullah Khan v. the State*, 2003 PCrLJ 872.

148. *Waqar Ahmad v. the State*, PLD 2015 Peshawar 218.

149. *Waqar Ahmad v. the State*, PLD 2015 Peshawar 218.

150. *Muhammad Sharif Shar v. the State*, 2000 PCrLJ 1882; see also *Salim Riaz Khan v. the State*, 2014 PCrLJ 1262.

4.8. RECOMMENDATIONS REGARDING INVESTIGATIONS

- I. Investigating officers need to be equipped with 'crime scene bags'¹⁵¹ and more importantly, trained to use these bags properly.
- II. They must carry notepads with them at all times, so that any development in the investigation may be recorded there and then.
- III. There must be an internal oversight mechanism for ensuring that the mandatory provisions of law are adhered to, with periodic reports submitted to the concerned DSP who may seek assistance from the Office of the Prosecutor to identify deficiencies in investigations.
- IV. Periodical training of Investigation Officers should be conducted to improve their investigation skills.

4.9. POLICE REPORT UNDER SECTION 19 ATA

In respect of the police report, both the investigating authority and the public prosecutor have specific roles to play. The investigating authority is responsible for submitting the report upon expiration of the investigation, while the public prosecutor is required to scrutinize it for any deficiencies or flaws. This section, hereinafter, is dedicated to this discussion.

4.9.1. THE ROLE OF THE INVESTIGATING AUTHORITY

Upon the completion of an investigation, the officer compiling the report may find that:

- The accused be charged, as there exists sufficient evidence to implicate him, thereby requiring the submission of a 'challan' or charge sheet;

151. Under Rule 25.58 of the Police Rules, 1934, for the purpose of carrying out this investigation the police officer in charge of investigation shall be given an investigation bag which shall contain:

1. One bottle of grey powder.
2. One bottle of graphite powder.
3. One camel hair brush.
4. Follen Paper
5. Fingerprint forms.
6. Fingerprint ink.
7. Appliance for fingerprinting dead bodies.
8. One magnifying glass.
9. One finger print impression pad and roller.
10. One electric torch.
11. One knife.
12. One pair of scissors.
13. One measuring tape 60" long.
14. One foot-rule 2 feet long.
15. Sealing wax and candles.
16. Formalin diluted to 10 per cent together with chloride of lime to counteract decomposition of corpses.
17. Cotton wool and 1 yards cloth for packing exhibits.
18. Case diary book with plate, pencil or pen, carbon paper and the usual forms required in investigation.

- The F.I.R against the accused be cancelled where a case is found to be false or unfit for prosecution, thereby submitting a 'cancellation report'; or
- The accused has not been found or traced by the police, thereby submitting a 'report of untraced'.

Under Section 19 of the ATA, a challan may be final or interim.

4.9.2. FINAL CHALLAN

An investigation report under the ATA is to be submitted within 30 working days, meaning thereby that the investigating officer / JIT shall have 30 working days to complete their investigation. This differs from the Cr.P.C wherein 14 days are provided for the completion of an investigation. This report is signed and submitted to the ATC directly by the investigating officer,¹⁵² while under the Cr.P.C, a police report is forwarded to the Magistrate through the public prosecutor.¹⁵³ For cases of investigation pursuant to Sections 4 and 5 of the ATA, the police report shall be signed and forwarded by the police member of the JIT.¹⁵⁴ Final reports and incomplete reports recommending initiation of trial are sent in Form 25.56(1).¹⁵⁵ This is called the challan form.

Although under Section 19 of the ATA the public prosecutor is not involved in the submission of a final report, it is still a mandatory component for compliance with Section 173 of Cr.P.C and Section 9(4)¹⁵⁶ of the Punjab Criminal Prosecution Service Act, 2006.¹⁵⁷ Moreover, under Section 19-B of the ATA, it is obligatory for the public prosecutor to scrutinize the case file “to ensure that all pre-trial formalities have been committed.”¹⁵⁸

152. The Anti-Terrorism Act 1997, Section 19(1).

153. Code of Criminal Procedure, 1898, Section 173(1).

154. The Anti-Terrorism Act 1997, Section 19(1), First Proviso.

155. Case law exists that challans should be sent up only filled in the above form, so not following this direction would amount to procedural anomaly.

156. Punjab Criminal Prosecution Service Act, 2006, Section 9(4):

“A police report under section 173 of the Code [of Criminal Procedure] including a report of cancellation of the first information report or a request for discharge of a suspect or an accused shall be submitted to a Court through the Prosecutor appointed under this Act.”

157. Each federating unit has a criminal prosecution service pursuant to specific legislation: The Punjab Criminal Prosecution Service (Constitution, Functions and Powers) Act 2006; The Sindh Criminal Prosecution Service (Constitution, Functions and Powers) Act 2009; The Khyber Pakhtunkhwa Prosecution Service (Constitution, Functions and Powers) Act 2005; The Baluchistan Prosecution Service (Constitution, Functions and Powers) Act 2003.

158. The Anti-Terrorism Act 1997, Section 19-B.

The essentials of a challan submitted under Section 173 Cr.P.C are as follows:

- Description of the offence;
- Production of the accused (in the trial court); and
- The evidence to prove the offence.¹⁵⁹

An investigation is thus incomplete where the accused is not within custody of the investigating officer to be produced in front of the trial court.¹⁶⁰ Moreover, the only provision under which a challan may be submitted is Section 173 of the Cr.P.C, even for an investigation under Section 19 of ATA. The Courts are not empowered to order the submission of a challan under any other provision of law.¹⁶¹

A supplementary report may be filed after a final report. As is self-explanatory, the supplementary report is for the purposes of bringing any material or evidence on record, and there is no bar in law regarding the same.¹⁶² A reinvestigation and subsequent report is permissible if it would “definitely help [the] court for arriving at [a] just conclusion,”¹⁶³ but it can only be done before the commencement of a trial pursuant to the first final challan and not once the trial has concluded and the matter is up for appeal.¹⁶⁴

159. *General (retd) Syed Pervez Musharraf v. the State and another*, PLD 2014 Quetta 33, para. 9.

160. *Arshad Hussain v. the State*, PLD 2001 Karachi 211.

161. *Ch. Khalid Mushtaq v. Special Judge*, PLD 2010 Lahore 114:

The Special Court had directed the police to submit a challan U/S 365-A, Pakistan Penal Code, the High Court held such order to be ultra vires as the police could only submit a challan under Section 173 Cr.P.C. The High Court observed that even Section 19 of ATA did not empower the trial courts to issue such directions to the police, therefore it was not sustainable in law.

162. *Mian Iftikhar Ahmad v. DSP Range Crime Branch*, 2016 YLR 495.

163. *Ibid*

164. *Bahadur Khan v. Muhammad Azam*, 2006 SCMR 373.

Following is the form of the final report as found in the Police Rules, 1934:

Form No. 25.57(2) [Final Report U/S 173 Cr.P.C]

District _____ Final Report No. _____, Dated ____ 20 ____ Police Station _____ in FIR No. _____, Dated ____ 20 ____	
<ol style="list-style-type: none"> 1. Name and address of complainant or informant. 2. Nature of charge or complaint. 3. Description of property stolen, if any. 4. Name and addresses of accused persons, if any. 5. If arrested, date and hour of arrest. 6. Date and hour of release and whether on bail or recognizance. 7. Property (including weapons) found, with particulars of where, when and by whom, found and whether forwarded to Magistrate. 8. Brief description of information or complaint, action taken by police with result, and reasons for not proceeding further with investigation. 	
A.M. [Dispatched] at ____ on ____ 20 ____	
P.M.	<i>Signature of Investigating Officer</i>
N.B. – The Magistrate should record his order on the back [of this form]	

4.9.3. INTERIM REPORT

The second proviso to Section 19(1) provides for the submission of an interim report where the investigation is not completed in 30 days from the lodging of an F.I.R. An important point to note here is the inconsistency of this proviso with the first subsection itself; wherein the former allows 30 working days for the completion of investigation, the latter calls for the submission of an interim report where the investigation is not completed within 30 days.

In this case, within 3 days after the expiration of 30 days the investigating officer or the JIT must forward to the ATC an interim report through the Public Prosecutor, signed by the investigating officer of the police. The interim report shall state the result of the investigation that has been conducted till that point.

The ATC is empowered to commence trial on the basis of this interim report, and if it decides to not do so, to then record reasons for such a decision.

4.9.4. DELAY IN INVESTIGATION OR SUBMISSION OF POLICE REPORT

Under Section 19(2) of ATA, any act on the part of a person conducting the investigation, which causes or effects a delay in the investigation or the submission of the police report, are taken as “wilful disobedience of an ATC’s orders”. A person who commits such defaults shall be liable to be held in contempt of Court. Section 37 deals with cases of contempt of Court, which provides that a person who “abuses, interferes with or obstructs the process of the Court in any way or disobeys any order or direction of the Court”¹⁶⁵ may be punished with a maximum of six months imprisonment and with fine. In *S./ Kazi Shahid Ali v. The State*,¹⁶⁶ the accused (a police officer) was investigating a criminal case, but, he having not completed investigation within time as provided under Section 19(1) of ATA moved the Trial Court for extension of time which was granted from time to time. On the relevant date, the accused moved another application for extension of time which was dismissed and the accused was simultaneously convicted as he was found guilty of not submitting the challan within the stipulated time as this fell within the ambit of contempt of Court in terms of Section 19(2) of ATA.

In *Adnan Prince v. the State*,¹⁶⁷ the Court observed that the three wings of the police force – preventive/detective, investigation and prosecution – were not working in an efficient or effective manner, which resulted in unreasonable delays in the submission of the reports. This practice led to disregard of the law by the police and adversely effected the case as well which was a major contributor to the backlog in criminal cases.

4.9.5. ROLE OF THE PUBLIC PROSECUTOR

The Director General [of Prosecution] is now expected to prove the

165. The Anti-Terrorism Act 1997, Section 37 (a).

166. *S./ Kazi Shahid Ali v. The State*, 2003 PCr.LJ 1468.

167. *Adnan Prince v. the State*, PLD 2017 SC 147.

worth of the “Prosecution Institution” in the minimum possible time by attaining the target of improving standard of investigation in all cases ... by motivating, launching and promoting endeavours through District Public Prosecutors with a well-oriented check and balance system so that the cases may successfully face all kinds of [scrutiny] on the dissection table of qualified and experienced law experts, in courts of law.¹⁶⁸

As noted above, both under the ATA and Cr.P.C, public prosecutors have specific functions in respect of a police report. These functions are reiterated and further enunciated in the specific laws establishing the prosecution service in each of the provinces. In Punjab, under Section 9 of the Criminal Prosecution Service Act, 2006, (CPSA) the prosecution branch has the following functions:

- To scrutinize¹⁶⁹ the report and return it to the SHO or investigating officer within three days if found to be defective for the removal of such defects as provided under section 9(5) of Punjab Criminal Prosecution Service Act, 2006;¹⁷⁰
- To submit the report for trial if found to be fit for such purposes;
- If required, to submit in writing the results of such scrutiny to the Court with his opinion on the same as provided under section 9(7) of Punjab Criminal Prosecution Service Act, 2006;¹⁷¹
- Where the report is interim, to examine the reasons for delay, and if he thinks fit to request the Court for postponement of trial until the completion of investigation, or to commence the trial on the basis of the interim report.

When the prosecutor reviews the police report, the prosecutor must consider

168. *Bahar Ali v. the State*, PLD 2008 Peshawar 28, the Peshawar High Court commenting on the then-recently constituted Prosecution Service and its functions under the [Khyber Pakhtunkhwa] Prosecution Service Act, 2005.

169. *Nadeem alias Deema v. DPP, Sialkot*, 2012 PCrLJ 1823, para. 6:
 “Scrutinize means to examine a matter from all pros and cons and attend all its aspects with due care and caution inasmuch as to make deep search or inspect the matter in close, [careful] and thorough manner”

170. Punjab Criminal Prosecution Service Act, 2006, Section 9 (5), The Prosecutor shall scrutinize the report or the request and may–

(a) return the same within three days to the officer in-charge of police station or investigation officer, as the case may be, if he finds the same to be defective, for removal of such defects as may be identified by him; or
 (b) if it is fit for submission, file it before the Court of competent jurisdiction.

171. Punjab Criminal Prosecution Service Act, 2006, Section 9 (7), The Prosecutor shall submit, in writing, to the Magistrate or the Court, the result of his assessment as to the available evidence and applicability of offences against all or any of the accused as per facts and circumstances of the case and the Magistrate or the Court shall give due consideration to such submission.]

whether there are any defects/shortcomings in the report. The term “defect” has not been defined in the statute but the defects would include non-provision of essential documents, non-provision of essential details in documents, evidentiary weaknesses or jurisdictional shortcomings. The defects may either be 'remediable' or 'non-remediable'. A remedial defect can be removed and this would not result in a miscarriage of justice. However, a non-remediable defect cannot be remedied since it has an impact on the integrity of the evidence.

In *Rasoolan Bibi v. Additional Sessions Judge*, it was held that under Section 9(7) of the CPSA “it is crystal clear that the prosecutor has the powers to scrutinize the available evidence and applicability of offences ... the deletion or insertion of any offence [is] within the exclusive domain of the Prosecutor.” Whether the prosecutor had correctly deleted a provision from the report or not, had to be ascertained by the trial court and could not be assailed by the petitioner in front of the Justice of Peace as the latter had no authority to interfere in such matters.¹⁷²

The CPSA empowered the Prosecutor General Punjab under Section 17 to issue a Code of Conduct for Prosecutors (the Code). Pursuant to a 2016 amendment to the CPSA, it is now mandatory for prosecutors to perform their duties in accordance with the Code.¹⁷³

Rule 4 of the Code, relating to the role of prosecutors during investigations and criminal proceedings, enjoin prosecutors:

- To impartially and objectively provide advice to ensure that investigating services respect the law and human rights;
- To proceed with the institution of a criminal case only when there is sufficient reliable and admissible evidence to do so;
- To examine proposed evidence to ascertain if it has been lawfully obtained and to strive to ensure that action is taken against persons who use unlawful methods for obtaining evidence.

172. *Rasoolan Bibi v. Additional Sessions Judge*, PLD 2009 Lahore 135, para. 5; see also *Abdul Hafeez Junejo v. The State*, 2010 YLR 470 [Karachi]; see also *Aziz ullah Khan v. SHO, Police Station City, Mianwali*, 2001 YLR 263 [Lahore].

173. The Punjab Criminal Prosecution Service (Constitution, Functions and Powers) (Amendment) Act 2016 (LIV of 2016), Section 3, published in the Punjab Gazette (Extraordinary), dated: 6 December 2016, p. 2899-2900.

Rule 5 of the Code provides that:

In order to ensure the fairness and effectiveness of prosecutions, prosecutors shall cooperate with the Police, the Courts, the legal profession, defense counsel and other Government Agencies, whether nationally or internationally; and render assistance to the prosecution services and colleagues of other jurisdictions, in accordance with the law and in a spirit of mutual co-operation.

4.10. LEGAL CHALLENGES

Scrutiny of the police report by the prosecutor's office is a vital component of criminal proceedings, as the police are not very proficient or well-versed when it comes to the law.¹⁷⁴ Where the prosecutor is available and willing to provide assistance, it is beneficial for the trial. Otherwise, it may suffer from serious flaws which are hard to rectify at later stages. Following are some examples of such flaws.

Inclusion of incorrect provisions in the report:

Where incorrect legal provisions are included in the report, the case eventually suffers. Even though, amendment of charges is possible during trial, it is very limited in scope. Therefore, it is essential that these flaws be removed before the case is sent to trial. Where the prosecutor's office does voice their objections, the police then proceed to remove the fatalities or errors from these reports.

Moreover, the prosecutor may flag a case to be unfit for trial and suggest its dismissal; however, the same has to be confirmed by the Court. Thus, the accused essentially remains in custody while the Court deliberates upon the fatalities in the investigation or case.¹⁷⁵

Lack of interest shown by public prosecutors:

Regardless of the legal mandate, public prosecutors are hardly ever interested in these trials, let alone scrutinize police reports and raise objections on them.¹⁷⁶ Courts are often hard-pressed to even ensure their presence.¹⁷⁷

174. *Nadeem alias Deema v. DPP, Sialkot*, 2012 PCrLJ 1823, para. 8.

175. Interview with Prosecutor (Islamabad, 25 May 2017).

176. Interview with Prosecutor (Karachi, 25 July 2017).

177. Interview with Defense Lawyer, (Islamabad, 15 June 2017).

4.11. RECOMMENDATIONS REGARDING POLICE REPORT

- I. The inconsistency in the legislation regarding the number of days given to submit the final police report in Section 19 (1) ATA needs to be addressed and harmonized with its second proviso.
- II. In order to ensure that the final police report is thoroughly scrutinized the ATA should specify that the report be submitted through the Office of the Public Prosecutor.

The importance of rigorous scrutiny of the police report by the prosecutor needs to be emphasized since the police are not well versed with the ATA procedures. Furthermore, the investigating authorities also need to be trained because every defect in the investigation and/or the police report cannot be remedied and may lead to fatal flaws in the prosecution's case

STAGE V: COMMENCEMENT OF AN ATC TRIAL

CHAPTER 5

5.1. BACKGROUND

In Pakistan there are two kinds of applicable laws, one is the General Law which is applicable to the public at large, and second is the Special Law which is applicable in specific circumstances. The Anti-Terrorism Act 1997 (ATA) is a special law under which special courts were established to try offences of terrorism. By virtue of being a special law,¹⁷⁸ the ATA has an overriding effect on any other law. This rule is also provided for in Section 32¹⁷⁹ of the ATA. However, the said section also states that the Code of Criminal Procedure 1898 (Cr.P.C) shall apply to the anti-terrorism courts (ATCs), as long as the provisions of Cr.P.C are consistent with the ATA. Under Section 32 the special courts are deemed to be Courts of Session and consequently provisions of the Cr.P.C and the Qanun-e- Shahadat Order 1984 (QSO) are applicable to the proceedings before the special courts.¹⁸⁰ Cr.P.C is applicable to Anti-terrorism courts only to the extent that its provisions are not inconsistent with the provisions of ATA and in case of inconsistency the provisions of Cr.P.C are to be struck down.¹⁸¹ Section 32 of the ATA also recognizes that where there are no provisions provided in the ATA, the provisions in the Cr.P.C come into force.¹⁸² This is why the trial procedure for Session Courts,¹⁸³ as laid down in the Cr.P.C, is the same procedure followed by the ATCs.

Regular courts take cognizance¹⁸⁴ of cases under Section 190 (2) Cr.P.C but as ATA is a special law it has an overriding effect and so it can take cognizance of scheduled offences regulated by provisions of Sections 12, 19 and 23 of ATA.¹⁸⁵ The purpose of Section 19 (3) is to “by-pass the said procedure [S 190 Cr.P.C] to which at the first instance challan/report under S 173 Cr.P.C is

178. *Lex Specialis derogat legi generali* is a legal principle according to which a law governing a specific subject matter overrides a law that only governs general matters.

179. The Anti-Terrorism Act 1997, Section 32:

(1) The provisions of this Act shall have effect notwithstanding anything contained in the Code or any other law but, save as expressly provided in this Act, the provisions of the Code shall, in so far as they are not inconsistent with the provisions of this Act, apply to the proceedings before a special Court, and for the purpose of the said provisions of the Code, a Special Court shall be deemed to be a Court of Sessions.

2) In particular and without prejudice to the generality of the provisions contained in subsection (1), the provisions of section 350 of the Code shall, as far as may be, apply to the proceedings before a Special Court, and for this purpose any reference in those provision to a Magistrate shall be construed as reference to (An anti-Terrorism Court).”

180. *Mehram Ali v. Federation of Pakistan*, PLD 1998 SC 1445.

181. *State v. Anis Bawani*, 2000 PCrLJ 1418.

182. *Syed Nawaz Hussain v. State*, 2014 PCrLJ 1256.

183. Code of Criminal Procedure, 1898, Chapter 22A Trials Before High Courts and Courts of Session.

184. *Abdur Rehman v. Ghazan* 2005 MLD 954:

“Cognizance in its general meaning would mean identification, ascertainment of and getting knowledge about the facts and relevant law of the case.”

185. *Mohabat Khan v. The State*, 2010 MLD 883.

submitted before the concerned Magistrate, who under S 190 Cr.P.C after examining the facts of the case, refers the matter to the court of competent jurisdiction, if the same is not triable...Special Courts constituted under the Anti-Terrorism Act, 1997, have been given the jurisdiction to take cognizance of the matter directly when the same is placed before them either through police challan or by way of private complaint disclosing the commission of offence falling within the ambit of the said Act.”¹⁸⁶

While ATCs can only try scheduled offences, in the case of *Mir Zaman v Zubair*,¹⁸⁷ the Court took cognizance of a case where none of the offences against the accused person were a scheduled offence. This is because under Section 19 (3) of the ATA, the ATC could directly take cognizance of a case, “once file was sent to it and it was of the opinion that offence committed by accused fell within the purview of Section 6 ATA and the moment such opinion was formulated, offence would become one falling within jurisdiction of ATC on the basis of Section 12 of the said Act.”¹⁸⁸

In the case of *Imran Raza Khan v. S.S.P.Lahore*,¹⁸⁹ it was held:

In the above said case, the appellant along with 9 others was named as an accused in F.I.R. No.369 of 1992 under sections 302, 324, 148, 149 and, 109, P.P.C. This related to murder of Nazir Shah and Sajjid Ahmad. The F.I.R. was lodged on 28-8-1992. Before the submission of police challan, the complainant filed a direct complaint before the Special Court on 12-1-1993. The learned Special Court recorded the statements of the complainant as well as witnesses and issued process against all the accused... A Court of Session under section 193 of the Code is debarred from taking cognizance of a case as a Court of original jurisdiction unless the case is sent to it by a Magistrate under section 190(3) of the Code whereas a Special Court under the Act can take cognizance of a case directly as a Court of original jurisdiction in the same manner as a Magistrate is empowered to take cognizance of a case under section 190 of the Code.

However, this section does not give the ATC any suo motu powers or authority to fish out cases from different police stations and to direct agencies to submit

186. *Muhammad Azam v. Judge, ATC Faisalabad and 6 others*, PLD 2008 Lahore 63.

187. *Mir Zaman v. Zubair*, 2003 PCrLJ 1086.

188. *Ibid*

189. *Imran Raza Khan v. S.S.P.Lahore*, 2001 MLD 1735.

challan.¹⁹⁰ It only authorizes Special judges to take cognizance in a matter falling within the ambit of the said Act directly. It has the jurisdiction to determine whether an offence is a scheduled offence or not. If not a scheduled offence the ATC has the power to transfer the case to a regular court under Section 23.¹⁹¹

In *Sardar v. State*,¹⁹² the Judge of an ATC came to know of an occurrence and taking suo motu notice directed the local police to produce the accused with the record before him. But it was ruled that no such provision was provided in ATC and such powers were not available to him under ATA. The High Court has such powers, that too in its constitutional jurisdiction. In *Khalid Mushtaq v. Special Judge*¹⁹³ the ATC had directed an IO to submit a challan under Section 365-A PPC, but it was held that as a special court under ATA the ATC did not have such powers and the court had functioned beyond its legal powers. The impugned order was not sustainable in law and the same was consequently set aside.

The following sections will discuss the trial procedure found in the Cr.P.C to the extent to which it applies to the ATCs. Before the trial can begin, the prosecution has to share certain information and documents with the accused as per Section 265-C of Cr.P.C, so that the accused gets the opportunity to prepare his/her defense and if those documents are not shared it could vitiate the trial altogether.

5.2. LEGAL PROVISIONS

Section 19 (14) of the Anti-Terrorism Act 1997, grants ATCs “for the purpose of trial of any offence...the powers of a Courts of Sessions...in accordance with the procedure prescribed in the Code.”¹⁹⁴ Therefore, the ATCs follow the trial procedure for Sessions Courts as laid out in Cr.P.C, as long as it is consistent with the ATA as per the requirement of Section 32 ATA.

190. *Muhammad Azam v. Judge, ATC Faisalabad*, PLD 2008 Lahore 63.

191. Anti-Terrorism Act, Section 23:

Where, after taking cognizance of an offence, [an Anti-Terrorism 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.

192. *Sardar v. State*, 2011 MLD 45.

193. *Ch. Khalid Mushtaq v. Special Judge (Admn.)*, PLD 2010 Lahore 114.

194. The Anti-Terrorism Act 1997, Section 19 (14):

“Subject to the other provisions of this Act, [an Anti-terrorism Court] shall, for the purpose of trial of any offence, have all the powers of a Court of Sessions and shall try such offence as if it were a Court of Sessions as far as may be in accordance with the procedure prescribed in the Code for trial before a Court of Sessions.”

Chapter 22-A of the Cr.P.C lays out the trial procedure to be followed in Courts of Session and High Courts.¹⁹⁵ The first step to be taken by the prosecution is to supply the accused with all the relevant documents required for the trial.

Section 265-C makes it mandatory on the prosecution to supply to the accused, free of cost, the following documents in cases instituted upon a police report: the first information report (F.I.R); the police report; witness statements under Sections 161 and 164; and inspection note of the investigating officer of his first visit to the scene of crime/occurrence.¹⁹⁶ These documents have to be compiled before setting the case for trial.¹⁹⁷

5.3. JURISPRUDENCE

The purpose of Section 265-C is to give the accused the opportunity to prepare their defence before the trial begins. The interval of seven days is also significant because it is meant to give the accused sufficient time to study the allegations against them and to prepare their plea in defence. Non-compliance with this provision may tend to cause prejudice to the accused. Even otherwise, prejudice to the accused is to be inferred from every breach of a provision of the law meant for the protection or benefit of the accused. The position would not change even if the accused themselves consented to such breach. The nature of the provision of Section 265-C makes it vital and in absence of its compliance the trial itself cannot commence. The object of this section is to give ample time to the accused to prepare their case and to find out the charge that has been put forward by the prosecution against him. Non-compliance of this provision shall jeopardize the accused's right of fair trial enshrined in Article 10-A of the Constitution of Pakistan.¹⁹⁸

The provision of Section 265-C is mandatory without which the trial cannot start and this is not an error that can be cured under Section 537¹⁹⁹ of Cr.P.C.²⁰⁰ The prosecution is expected to produce without "fear or favour, malice or

195. Code of Criminal Procedure, 1898, Section 26-B:
"Procedure in cases triable by High Courts and Courts of Session. The following procedure shall be observed by the High Courts and the Courts of Session in the trial of cases triable by the said Courts."

196. Cr.P.C, 1898, Section 265-C.

197. *Nadeem Ahmed Khan v. State*, 2007 PCrLJ 233.

198. *Muhammad Siddique v. State*, 2009 YLR 1007.

199. Code of Criminal Procedure, 1898, Section 537:

"...no finding, sentence or order passed by a Court...shall be reversed or altered under Chapter XXVII or on appeal of revision on account... (a) of any error, omission or irregularity ... or (b) of any error, omission or irregularity in the mode of trial... unless such error, omission or irregularity has in fact occasioned a failure of justice."

200. *Sarfraz Ahmad v. Pakistan*, PLD 1982 Lahore 120, 10.

ulterior motive of any kind, all available evidence which has a material bearing on the case, with the object of placing the true facts before the court.”²⁰¹ The supply of the requisite material would enable the accused to properly defend himself against the accusations made and “the violation of the provision of law can surely jeopardize his right to a fair and impartial trial.”²⁰²

However, it is still the court's prerogative to determine whether or not the accused was prejudiced by the non-compliance on part of the prosecution. In *Soobo v. The State*,²⁰³ copies of the statement had been provided to the accused under Section 265-C Cr.P.C but their corresponding exhibits were not available on record. The accused had been given ample time to extensively examine all the prosecution witnesses but the accused raised no objection at any stage of the trial. Right from the framing of charges, the accused was aware of the case against him and had ample time to prepare his defence. Since the accused chose to remain silent and did not avail any opportunity to insist for the supply of copies, the question of prejudice did not arise and the trial was not deemed to be vitiated. The Judge held that the court was to decide whether any failure of justice had occasioned or any prejudice had been caused to the accused. Since the accused had failed to point out any prejudice which had been caused to them, no failure of justice had been occasioned and therefore the objection to the non-supply of copies of statements was overruled.

5.4. LEGAL CHALLENGES

Witness Intimidation

Another problem that is faced by the prosecution is the risk of witness intimidation. As one lawyer revealed, when interviewed, that the prosecution by sharing the statements of the witnesses with the accused risk putting the witnesses in harm's way, especially if the accused belongs to a powerful party. To minimize this risk, the court can be requested not to disclose all the evidence to the accused. However, even where this is followed by the courts, there have been instances where the police have been bribed into leaking copies of the case files to the accused.²⁰⁴ This puts the witnesses at risk of not just being harmed but also of being bribed into changing their statements or retracting their statements altogether, greatly damaging the case of the prosecution.

201. *Nasrullah v. State*, 1980 PCrLJ 5.

202. *Muhammad Siddique v. State*, 2009 YLR 1007.

203. *Soobo v. The State*, 2016 PCrLJ 290 Karachi.

204. Interview with Prosecutor (Islamabad, 25 May 2017).

5.5. RECOMMENDATIONS

- I. It is important to note that at this stage of the process the practitioners normally do not face grave challenges. Since the court is involved in overseeing the exchange of documents the parties usually comply²⁰⁵ and do not cause issues for the other parties. However, to avoid the risk of witness intimidation, Pakistan's criminal justice system needs to invest in effective witness protection programs. To ensure that even where the prosecution reveals the name of the witness(es) to the accused, the concerned witness(es) can be kept in a safe location till the trial. This would require substantial financial investment and manpower to ensure the safety of the witness(es). Furthermore, the police personnel should be checked and monitored to prevent them from revealing case evidence and information to other parties.

205. Interview with Defence Attorney (Islamabad, 15 June 2017).

COMMENCEMENT OF TRIAL-FRAMING OF CHARGES AND RECORDING OF PLEA

CHAPTER 6

6.1. BACKGROUND

Section 21-G²⁰⁶ of the ATA clearly states that an offense of terrorism can only be tried under the ATA by an ATC since, as mentioned earlier the ATA has an overriding effect over all other laws.²⁰⁷ The word “trial” has not been defined anywhere in the Cr.P.C or the ATA, but it is vital to know at what point in the procedure a trial begins. In a criminal case the framing of charge(s) involves a judicial decision taken by the trial court and it forms the basis of trial. As discussed in the previous section the ATCs also follow the same understanding of the concept of trial.

6.2. LEGAL PROVISIONS

Sections 265-D²⁰⁸ and 265-E²⁰⁹ of Cr.P.C deal with the framing of charges and recording of the defense plea, respectively:

265-D When charge is to be framed- If, after perusing the police report or, as the case may be, the complaint, and all other documents and statements filed by the prosecution, the Court is of opinion that there is ground for proceeding with the trial of the accused it shall frame in writing a charge against the accused.

265-E. Plea- (1) The charge shall be read and explained to the accused, and he shall be asked whether he is guilty or has any defense to make.
(2) If the accused pleads guilty the Court shall record the plea, and may in its discretion convict him thereon.

6.3. JURISPRUDENCE

Section 265-D Cr.P.C: Framing Charges

As per Section 265-D, the actual trial commences after 7 days of having supplied the copies of documents to the accused. The court can frame a charge if after “perusing the police report or as the case may be...the court is of the opinion that there is a ground for proceeding with the trial of the accused, it shall frame in writing a charge against the accused.”²¹⁰ While framing a charge, the first information report is not the only substantive piece of evidence to be relied on, the statement of the victim and the prosecution witnesses are also necessary to be kept in mind. A charge should not be

206. Anti-Terrorism Act, 1997, Section 21-G.

207. *Muhammad Din v. Muhammad Jehangir*, PLD 2004 Lah. 779.

208. Code of Criminal Procedure, 1898, Section 265-D.

209. *Ibid* Section 265-E.

210. *Muhammad Siddique v. The State*, 1991 PCrLJ 630.

framed from the contents of an F.I.R alone;²¹¹ the court must consider all documents and statements available on record.²¹²

The word “charge” has always meant that when the Court decides to commence the trial the accused shall appear and the charge be read out in court and explained to him so that he may defend himself “thus it is clear that framing of charge means that the trial of the accused has started.”²¹³ The purpose of this step is to enable the accused to know the exact accusation(s) against him/her. The court may alter the charge but it cannot frame charges for a second time.²¹⁴

Section 265-E Cr.P.C: Recording Plea

The next step in the trial is to record the plea of the accused. Where the accused pleads guilty the court may in its discretion convict him/her. However, even when an accused pleads guilty, it is the court’s discretion to pass an order of conviction. If the accused does not plead guilty then the court must continue with the trial and the court cannot under any circumstance withhold the right to trial from the accused and only the accused may forgo this right later on by changing his/her plea. Even where that occurs it is vital for the court to ask and record the reason for the subsequent change of mind in order to establish that there was no element of coercion from either side over the accused.

When Sections 265- D and 265-E are read in line with Section 342 of Cr.P.C,²¹⁵ the presence of the accused for reading of charges becomes mandatory. However, as a general rule it is mandatory for the Court to read out the framed charges in the presence of the accused as the whole point of the exercise is to inform and explain the allegations to the accused.

211. Ibid

212. *Safdar Ali v. Zafar Iqbal*, 2002 SCMR 63; *Monia Jee and others v The State*, 2004 YLR 1802.

213. *Muhammad v. The State*, 1996 PLD Karachi 483.

214. *Habibur Rehman v. The State*, 1997 PCrLJ 1930.

215. Code of Criminal Procedure, 1898, Section 342:

“Power to examine the accused.(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court *** may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed. 2 [(4) Except as provided by subsection (2) of section 340, no oath shall be administered to the accused.]”

Section 21-M: Joint Trial

While discussing the trials conducted in the ATCs another point to be noted is the fact that as per Section 21-M,²¹⁶ while trying any offence under ATA, an ATC can also try any other offence with which the accused could be charged under Cr.P.C during the same trial if the two offences are connected. However, Section 21-M did not give the power to withdraw a case pending within or outside its jurisdiction before a regular court functioning under administrative control of the High Court.

ATCs were established for “prevention of terrorism, sectarian violence and speedy trial of heinous offences and for matters connected therewith and incidental thereto.” An ATC while trying an accused of a scheduled offence could also try such person for an offence which did not find mention in the schedule of offences by trying it as a matter connected and incidental to a scheduled offence as under Section 21-M. However, an ATC does not have jurisdiction to try an accused for an offence which is not mentioned in the schedule of offences.²¹⁷ In such a situation, the ATC is duty bound to transfer a case to the court of ordinary jurisdiction.²¹⁸

Section 28: Transfer of Cases

Under Section 28 (1) of ATA, the Chief Justice of the High Court has the power to transfer any case from one ATC to another ATC or outside the area, if the Judge considers “it expedient so to do in the interest of justice, or where the convenience or safety of the witness or the safety of the accused so requires.”²¹⁹ The ATC to which a case is transferred is to proceed with it from the stage at which it was pending immediately before the transfer and it would not be bound to recall and re-hear any witness (already heard) and could act on the evidence already recorded.²²⁰

6.4. LEGAL CHALLENGES

It is the duty of the court to ensure that the accused be present in court for the pronouncement of charges against them. However, the interviews conducted revealed that there are no significant difficulties faced at this stage of the trial because the ATC judges make sure that the accused is present at the time of pronouncement of the charge(s).²²¹

216. The Anti-Terrorism Act 1997, Section 21-M.

217. *Syeda Zahida Rizvi v. The State through D.S.P.*, 2011 YLR 1319.

218. *Nasir Masih v. State*, 2008 PCrLJ 713.

219. The Anti-Terrorism Act 1997, Section 28 (1).

220. *Ibid* Section 28 (2).

221. Interview with Defence Attorney, (Islamabad, 15 June 2017).

RECORDING OF EVIDENCE AND ADMISSIBILITY

CHAPTER 7

7.1. BACKGROUND

This section looks at the various legal provisions that govern the process of recording and examining evidence in the court. These include Sections 265-F, 265-J, 340, 342, and 353 to 365 of the Cr.P.C, and Chapter 10 (Articles 130 to 161) of the Qanun-e-Shahadat Order, 1984 (QSO). This section also discusses certain relevant provisions of the ATA including Sections 19 (9), 19 (10), 21-H and 21-L. Since there are many legal provisions that govern the recording of evidence and admissibility, not all of the provisions will be reproduced but instead will be explained through jurisprudence and case law.

7.2. LEGAL PROVISIONS AND JURISPRUDENCE

7.2.1. PROCESS OF RECORDING EVIDENCE AND ADMISSIBILITY

To elucidate the above mentioned it is crucial to lay out the procedure for how evidence is to be presented and recorded in the court at the outset. Chapter 10 of the QSO first explains the order in which evidence is recorded in court and secondly, it delineates the law on the admissibility of evidence.

Order of production and examination of witnesses

Article 130 QSO states that the order of producing and examining witnesses in courts will be according to the existing practice which dictates that since the burden of proof lies on the prosecution, they will begin the presentation of evidence.²²² According to Article 133 QSO, witnesses are first examined-in-chief,²²³ then (if the adverse party so desires) cross-examined,²²⁴ and finally (if the party calling them so desires) re-examined.²²⁵ Witnesses have to be examined in chief, and then only can they be cross-examined. Moreover, witnesses of same fact should be preferably examined on the same day so that the accused cannot be prejudiced.

Cross-Examination of witnesses

Cross-examination is conducted to test the “credibility of a witness and to

222. Qanun-e-Shahadat Order, 1984, Article 130:

Order of production and examination of witnesses. The order in which witnesses are produced and examined shall be regulated by the law and practice, for the time being relating to civil and criminal procedure respectively, and, in the absence of any such law, by the discretion of the Court.

223. Ibid Article 132:

Examination-in-chief, etc. (1) The examination of a witness by the party who calls him shall be called his examination-in-chief. (2) The examination of a witness by the adverse party shall be called his cross-examination. (3) The examination of a witness, subsequent to the cross-examination by the party who called him, shall be called his re-examination.

224. Ibid Article 132 (2).

225. Ibid Article 132 (3).

bring true facts on the record which the witness has either not brought on record or has deliberately concealed.”²²⁶ It is important to note that if an accused (even when given the chance) does not avail the right to cross-examine the witness, cannot claim that any prejudice was caused to the case and the evidence “will be accepted as correct.”²²⁷ However, if the accused was never provided the opportunity to cross-examine the witness' evidence, then that particular piece of evidence has to be excluded from consideration.²²⁸ Moreover, if any piece of evidence is not put to the accused in the statement under Section 342 Cr.P.C (which will be discussed below) then that same evidence cannot be used against them for their conviction.²²⁹

Questions lawful in examination of witness

Leading questions²³⁰ can be asked during a cross-examination²³¹ but not during an examination-in-chief or re-examination.²³² Hypothetical questions may be put to an expert witness only.²³³ Also, during a cross-examination of a witness to character,²³⁴ the counsel may ask questions “affecting his character for the purpose of shaking the credibility,”²³⁵ of the witness. Moreover, an attorney may not ask misleading questions even during a cross-examination²³⁶ because as mentioned earlier, the cross-examination has to maintain relevancy to the case and facts at hand. Furthermore Article 144²³⁷ states that a counsel may ask questions: to test veracity,²³⁸ to establish witness

226. *Mehdi Khan v. State*, PCrLJ 2015 26.

227. *Ayub v. Munsif*, PCrLJ 2015 369.

228. PLJ 2011 SC 117.

229. In PLJ 2011 SC 348, the lower courts without realizing the legal position not only used such portion of the evidence against the accused but also convicted him on the same evidence, and therefore it was ruled by the higher court that such a conviction cannot be sustained.

230. Leading questions are ones that suggest the answer within the question and generally answerable by a “yes” or “no.”

231. Qanun-e-Shahadat Order, 1984, Article 138:

When leading questions may be asked. Leading questions may be asked in cross-examination.

232. *Ibid* Article 137:

When leading questions must not be asked. (1) Leading questions must not, if objected to by the adverse party, be asked in an examination-in-chief, or in a re-examination, except with the permission of the Court.

(2) The Court shall permit leading questions as to matters which are introductory or undisputed, or which have, in its opinion, been already sufficiently proved.

233. *Raj Bahadurhal and Others v. Government of Uttar Pradesh*, AIR 1972 All 308.

234. Qanun-e-Shahadat Order, 1984, Article 135:

Witness to character. Witnesses to character may be cross-examined and re-examined.

235. AIR 1954 AP 39.

236. *Muttal v. the State*, 1984 CRLJ 209.

237. Qanun-e-Shahadat Order, 1984, Article 144.

238. AIR 1969 Goa 68: A witness may always be subject to a strict cross-examination “as a test of his accuracy, his understanding, his integrity, his biases and his means of judging.

position and relation;²³⁹ and to shake the credibility of witnesses. But any such questions can only be asked till there are “reasonable grounds to believe that those imputations are well-founded.”²⁴⁰ Where there are no reasonable grounds for such questions and the court finds any question(s) to be defamatory, the judge may report it to the High Court.²⁴¹ A court may also stop cross-examiners from asking scandalous questions²⁴² as well as questions intended to “insult or annoy,”²⁴³ unless they are relevant.²⁴⁴ As per Article 143,²⁴⁵ the Court determines if and when a witness may be compelled to answer a question that may be injurious to their character.

Hostile Witnesses

When a party's own witness unexpectedly turns hostile, then as per Article 150 of the Qanun-e-Shahadat Order, 1984,²⁴⁶ the court may allow the party whose witness he is to ask leading questions under a cross examination, to test his veracity and impeach his truthfulness. However, even then, the evidence will not be entirely disregarded, it can still be taken into consideration; certain portions “which inspire confidence to be acted upon can be relied on.”²⁴⁷ Furthermore, as per Article 153 QSO the court may allow independent corroboration before relying on such testimony.²⁴⁸ It should be

239. AIR 1969 Goa 68: A witness may be asked questioned in order to reveal his/her feelings towards the party against whom his/her testimony is being given.

240. Qanun-e-Shahadat Order, 1984, Article 144,

Question not to be asked without reasonable grounds. No such question as is referred to in Article 143 ought to be asked, unless the person asking it has reasonable grounds for thinking that the imputation which it conveys is well founded.

241. Ibid Article 145:

Procedure of Court in case of question being asked without reasonable grounds. If the Court is of opinion that any such question was asked without reasonable grounds, it may, if it was asked by any advocate, report the circumstances of the case to the High Court or other authority to which such advocate is subject in the exercise of his profession.

242. Ibid Article 146:

Indecent and scandalous question. The Court may forbid any question or inquiries which it regards as indecent or scandalous, although such questions or inquiries may have some bearing on the questions before the Court, unless they relate to facts in issue, or to matters necessary to be known in order to determine whether or not the facts in issue existed.

243. Ibid Article 148:

Questions intended to insult or annoy. The Court shall forbid any question which appears to it to be intended to insult or annoy, or which though proper in itself, appears to the Court needlessly offensive in form.

244. *Re. G. Vasantha Pai*, AIR 1960 Madras 73.

245. Qanun-e-Shahadat Order, 1984, Article 143:

Court to decide when question shall be asked and when witness compelled to answer.

246. Qanun-e-Shahadat Order, 1984, Article 150:

Question by party to his own witness. The Court may, in its discretion, permit the person who calls a witness to put any questions to him, which might be put in cross examination by the adverse party.

247. 1930 PCrLJ 2125.

248. PLJ 2004 CRC 530.

noted that mere forgetfulness does not qualify as turning hostile,²⁴⁹ and in fact under Article 155 (1) witnesses may refresh their memory by looking into a document or writing with the court's permission, made by themselves at the time of the transaction or soon afterwards.²⁵⁰

Confessional Statements

Any confession and/or statements recorded under Section 164 Cr.P.C may be treated as evidence if the accused had the opportunity to cross-examine as per the requirements of Section 265-J Cr.P.C.²⁵¹ If the statement of Section 164 was not recorded in the presence of the accused then Section 265-J cannot be invoked²⁵² and the statement cannot be relied upon as a substantive piece of evidence.²⁵³ Also if the prior statement is subsequently changed or withdrawn it may still be relied upon with corroborative evidence.²⁵⁴ The judge ultimately determines the admissibility of any evidence²⁵⁵ even with regards to alleged confessional statements recorded before the police which are normally inadmissible in court.²⁵⁶ Confessional statement recorded under Section 21-H ATA cannot on its own constitute the material evidence on which criminal cases could be based for conviction. Decision about the admissibility of confessional statements under 21-H is left to the court's discretion and before relying upon such statements, court has to satisfy itself about the credibility of such statements. Admissible evidence does not necessarily mean that it is credible as well.²⁵⁷ An alleged confessional statement of the accused recorded by a police officer, may cast serious doubts on its voluntariness despite its admissibility under Section 21-H of ATA.²⁵⁸

249. AIR 1971 SC 1568.

250. Qanun-e-Shahadat Order, 1984, Article 155:

"Refreshing memory- (1) A witness may, while under examination, refresh his memory by referring to any writing made by himself at the time of the transaction concerning which he is questioned, or so soon afterwards that the Court considers it likely that the transaction was at that time fresh in his memory."

See also Qanun-e-Shahadat 1984, Article 156.

251. Code of Criminal Procedure, 1898, Section 265-J.

252. *Shadoo Alias Shahzadov. State*, 1989 PCrLJ 1093.

253. *Roshan v. The State*, 1985 PCrLJ 2312.

254. *Muhammad Ahmad Alias Mahanda v. The State*, PLD 1970 SC 72.

255. Qanun-e-Shahadat Order, 1984, Article 131.

256. *Ibid* Article 38:

"Confession to police officer not to be proved. No confession made to a police officer shall be proved as against a person accused of any offence."

257. *Dhani Bakhsh v. State*, 2006 PCrLJ 1671.

258. *Aftab Ahmad v. The State*, 2004 MLD 1337.

Recalling of Witnesses

Article 161 grants the judge discretion to ask any question of any witness,²⁵⁹ however, a Court cannot compel a party to examine a witness.²⁶⁰ A regular court may call and recall a witness at any stage in order to get things explained or get any doubt removed,²⁶¹ but as per section 19 (9)²⁶² an ATC is not bound to re-call or rehear any witness whose evidence has already been given, just because there was a change in the ATC composition or the case was transferred under Section 12 (3) ATA. In *Dildar v The State*,²⁶³ the Trial Court had appointed a State funded counsel for the accused, who subsequently engaged private counsel. The private counsel chose to rely on the cross-examination already conducted by the previous counsel and there was no record to indicate that the private counsel had raised any objection or sought opportunity and the same was denied to them. Therefore, when the accused filed an application to the High Court for the re-summoning of the prosecution witnesses for cross-examination, the High Court decided not to interfere in the order passed by the Trial Court and the application was dismissed.

7.2.2. THE ROLE OF THE PROSECUTION

It is now crucial to highlight the role of and rights granted to the prosecution during the evidence recording under Cr.P.C. The duty of the prosecution is to assist the court in discovering the truth and should place before the court all material evidence available to it.²⁶⁴ The public prosecutor is just that, a prosecutor not a persecutor:

As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor — indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one²⁶⁵

259. Qanun-e-Shahadat Order, 1984, Article 161.

260. The Municipal Corporation of Greater Bombay v. Lala Pancham, AIR 1965 SC1008.

261. It was ruled in *Anwar Ahmed v. Nafis Bano*, 2005 SCMR 152 that even without calling upon the plaintiff to explain the discrepancy, the court was competent to look into the document and to comment upon its true nature or otherwise as such power was inherent in every court much more the high court.

262. Anti-Terrorism Act, 1997, Section 19 (9).

263. *Dildar v. the State*, 2016 YLR 546.

264. *Bawa Hajee Hasma v. State of Kerala*, AIR 1974 SC 902.

265. *Bergerv. US*, 1935 295 US 78.

Under Section 265-F Cr.P.C the judge is empowered to oversee the prosecutor's working to ensure that proper witnesses are being produced. However, the prosecution has the discretion in deciding which witnesses to call on stand and no court can interfere in that, unless it is shown that the prosecutor has "oblique" motives.²⁶⁶ Sub Section 3²⁶⁷ gives the court the power to refuse to summon any witness if the court feels that such witness is being called for the purpose of "vexation or defeating the end of justice;" this discretion has to be "exercised judicially regarding the recording of statements of the witnesses."²⁶⁸ Similarly, the court may refuse to summon a defence witness if it seems that the purpose is "to defeat or delay justice."²⁶⁹ Furthermore, if the prosecution produces a document later on and the defense does not object to its authenticity then the court cannot refuse the document from being presented simply on the ground that it was presented later.²⁷⁰

7.2.3. THE ACCUSED

The rights of the accused during the recording of evidence are covered under Sections 340, 342 Cr.P.C and in Chapter 25 (Sections 353 to 365) Cr.P.C the mode of recording the evidence has been laid down.

Section 340: Competency of accused to be a witness

Section 340²⁷¹ confers an option on those accused to give evidence on oath to disprove the charges levelled against them. Upon conclusion of the prosecution evidence the court examines the accused under Section 342 and asks whether they want to give evidence on oath in disproof of the charges or allegations made against them and if the answer is in affirmative the court proceeds to record the statement of the accused on oath and then also affords an opportunity of cross-examination to the prosecution or co-accused, within the limits prescribed under the proviso of 340(2). When an accused has agreed to produce evidence in defence, then denial of this opportunity "would amount to a denial of fair trial."²⁷² Furthermore, the court does not need to

266. Secretary, Revenue Department, Government of East Pakistan v. Ibrahim Mondal, PLD 1964 Dacca 420.

267. Code of Criminal Procedure, 1898, Section 265-F (3):

"The Court may refuse to summon any such witness, if it is of opinion that such witness is being called for the purpose of vexation or delay or defeating the ends of justice. Such ground shall be recorded by the Court in writing."

268. *Ghulam Haider v. The State*, 2004 YLR 913.

269. *Pahlwan v. The State*, 2000 PCrLJ 299.

270. *Rizwan Ahmad v. State*, 2012 PCrLJ 73.

271. Code of Criminal Procedure, 1898, Section 340.

272. *Haji Alias Muhammad Rafiq v. The State*, 1997 PCrLJ 1434.

punish an accused for refusing to give evidence under S. 340 (2)²⁷³ because the accused only gives evidence in disproof of the allegations, the prosecution has to establish its case on the strength of its own evidence.

Right to be defended

Under Section 340 (1) Cr.P.C an accused has a right to be defended by a pleader in his trial. This right is of immense importance and must be safeguarded under any circumstances in order to protect the life and liberty of citizens. If adequate opportunity of defence is not provided to the accused it will be a severe violation of the fundamental right under Article 9 of the Constitution of Pakistan which provides, "No person shall be deprived of life or liberty save in accordance with the law." To enjoy the protection of the law under this section "the opportunity of defence through a counsel must be reasonable and fair keeping in view the nature of each case. In some cases time for a few hours to prepare the defence may be adequate but in others...one week or more may be needed."²⁷⁴

Section 342: Power to examine the accused

Section 342²⁷⁵ is based on the legal maxim "audi alteram partem", which means that no one should be condemned unheard. The purpose of this section is to give an opportunity to the accused to give such explanation as he may consider necessary in regard to the salient points made against him. Section 342 does not subject the accused to a detailed cross-examination. The objective is to draw the attention of the accused "to the specific points in the evidence on which the prosecution claims that the case is made out against the accused, so he may be able to give such explanation as he desires to give."²⁷⁶ Therefore, the proper procedure of examination under this section is to highlight the "salient" circumstances which point to the guilt of the

273. *Muhammad Saeed Alias Pulla v. The State*, PLD 1987 Pesh 31.

274. *Sher Muhammad v. State*, 1998 PCrLJ 1758.

275. Code of Criminal Procedure, 1898, Section 342:

"Power to examine the accused.(1) For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence (2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court 1 * * * may draw such inference from such refusal or answers as it thinks just. (3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed. 2 [(4) Except as provided by subsection (2) of section 340, no oath shall be administered to the accused.]"

276. *S.A.K Rehmani v. The State*, 2005 SCMR 364.

accused.²⁷⁷ It is important to note that this statement is not a confession, nor is it to be treated as evidence because Cr.P.C is a procedural law and as discussed above Qanun-e-Shahadat is the substantial law on the value of evidence; Section 342 merely grants the opportunity for the accused to explain the evidence against him.²⁷⁸ Although examination of the accused is at the discretion of the court, once undertaken compliance with Section 342 is essential and any violation may prove to be fatal to the prosecution case;²⁷⁹ leading to the possibility of vitiating the conviction and subsequently acquitting the accused.²⁸⁰

Section 353 Cr.P.C and Trial in absentia under the ATA

Section 353²⁸¹ states that evidence must be recorded in front of the accused. It is not enough that only the cross-examination occurs in the presence of the accused, but as per this section the examination in chief is also to be carried out in the presence of the accused, otherwise the parties risk vitiating the trial.²⁸² If evidence is not recorded in the presence of the accused, the conviction may be liable to be set aside²⁸³ as it is not allowable for the court to “ignore the mandatory provision of law.”²⁸⁴ The court has to ensure that all such actions are taken to guarantee the attendance of the accused.²⁸⁵ However, the ATA under Section 19 (10) allows the ATCs to conduct trials in the absence of the accused, given that the ATC is of the opinion that “such absence is deliberate and brought about with a view to impeding the course of justice,”²⁸⁶ provided that the accused failed to produce themselves in front of the court within seven days of a proclamation published in one/a daily newspaper “requiring him to appear at a specified place.”²⁸⁷ Under Section 21-L of ATA an accused can be convicted if he absconds or avoids arrest or evades appearance before any “inquiry, investigation or court proceedings or conceals himself, and obstructs the course of justice,” but before being punished the Court must satisfy itself under S 19 (10) of ATA that such absence

277. *Jemal v. The State*, PLD 1960 Lah. 1192.

278. *Khalid Mehmood v. State*, 2012 PCrLJ 1486.

279. *Chaudhry AbdulRazzaq v. The State*, 2002 YLR 96.

280. *Air Marshal (Retd) Waqar Azim v. The State*, 2002 YLR 1811.

281. Code of Criminal Procedure, 1898, Section 353

Except as otherwise expressly provided, all evidence taken under [Chapters XX, XXI, XXII and XXIIA] shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in presence of his pleader.

282. *Sikandar v. State*, 1990 PCrLJ 397.

283. *Ijlees Ahmad v. The State*, 1988 MLD 167.

284. *Hidayatullah v. The State*, 2000 YLR 2330

285. *Roshan Rind v. S.H.O Police Station Sanghar*, 2011 MLD 1415.

286. Anti-Terrorism Act, 1997, Section 19 (10).

287. *Ibid*

was deliberate. In *Haji Muhammad v. The State*, initially the court was satisfied that the absence of the accused was deliberate²⁸⁸ but later on "being satisfied on the basis of documentary evidence that his abscondence was not deliberate,"²⁸⁹ it accepted his plea and set aside his conviction... Trial court had kept the said sentence of accused intact which was unwarranted because conviction was followed by the sentence and if conviction was not sustainable then the sentence also could not be allowed to remain intact, otherwise presumption would be that the plea put forward by the accused for not attending the court was not found to be acceptable... as such recording evidence in his absence in terms of Section 21-L of ATA was illegal. Impugned judgment was set aside."²⁹⁰ Section 512 Cr.P.C is an exception to this general rule.²⁹¹

Manner of recording evidence

Section 364²⁹² explains that the examination of the accused: (i) is to be recorded in the language in which s/he is examined; (ii) after the recording, it is to be read back to the accused; and (iii) it shall be signed by the accused and the judge. The accused is free to explain or add on to her/his answers and if s/he confesses, that statement must not only be "true, voluntary and reliable but should be without fear, favor, or any inducement."²⁹³

Other evidence is to be recorded in a similar manner.²⁹⁴ Moreover, statements

288. Anti-Terrorism Act, 1997, Section 21L:

"Whoever being accused of an offence under this Act, absconds and avoids arrest or evades appearance before any inquiry, investigation or court proceedings or conceals himself, and obstructs the course of justice, shall be liable to imprisonment for a term not less than 256 [five years] and not more than 257 [ten years] or with fine or with both."

289. *Haji Muhammad v. The State*, PLD 2003 SC 262.

290. *Ibid*

291. Code of Criminal Procedure, 1898, Section 512, Record of evidence in absence of accused: (1) if it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try or send for trial to the Court of Session or High Court such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for the offence with which he is charged if the deponent is dead or incapable of, giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstance's of the case, would be unreasonable, (2) Record of evidence when offender unknown : if it appears that an offence punishable with death or imprisonment for life has been committed by some person or persons unknown, the High Court may direct that any Magistrate of the First Class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence.

Any depositions so taken may, be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or -incapable of giving evidence or beyond the limits of Pakistan.

292. Code of Criminal Procedure, 1898, Section 364.

293. *Asif Mahmood v. The State*, 2005 SCMR 515.

294. Code of Criminal Procedure, 1898, Section 356:

Evidence is to be written in front of the judge; in first person narrative; in English or in language of the Judge; it is to be signed by the Judge

of each witness should be recorded separately as “there is no concept in law to record joint statements.”²⁹⁵ Once the evidence is completed it is to be read back to the witness in the presence of the accused, before recording evidence of another witness.²⁹⁶ While recording the statements, Session Judges have to record remarks regarding the demeanour of the witness who is being examined. The purpose of this exercise is that if the case goes to a higher forum it will aid in “estimating the value of the evidence by the lower court.”²⁹⁸

7.3. LEGAL CHALLENGES

Non-uniformity in standards of evidence

As mentioned in Section 7.2.1, under Article 131 QSO the Judge determines the admissibility of evidence. This gives the judge wide discretion in accepting and/or rejecting the evidence presented in the court during trial. The issue with such discretionary powers is that it results in non-uniform standards of evidence being applied in the cases.

Generally, the standard of evidence is very high for terrorism cases i.e. beyond a shadow of a doubt. Since there is heavy dependence on ocular evidence along with the high evidentiary standards, in the case of any slight discrepancies in the statements of different witnesses, the “benefit of doubt tends to favour acquittal of the accused.”²⁹⁹

However, judges ignore minor discrepancies in evidence as being irrelevant if other reliable evidence was placed on record. ATCs have a settled principle that, “the procedural defects and sometimes even the illegality committed during the course of investigation, shall not demolish the prosecution case nor vitiate the trial.”³⁰⁰ ATCs in different areas seem to treat evidentiary standards differently which may lead to an inconsistent development of the law.

295. PLJ 2000 SC AJ&K 426.

296. Code of Criminal Procedure, 1898, Section 360:

(1) As the evidence of each witness taken under section 356 or section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall, if necessary, be corrected. (2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary. (3) If the evidence is taken in a language different from that in which it has been given and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands.

297. Code of Criminal Procedure, 1898, Section 363:

When a Sessions Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

298. 1956 2 All 736.

299. Zaidi, “A Critical Appraisal” (n 30) 20.

300. Zaidi, “A Critical Appraisal” (n 30) 21.

Hostile Witnesses

As mentioned earlier, another commonly faced obstacle during the recording of evidence in a trial is when witnesses become hostile towards the party who called them to testify. This usually happens when the witnesses are afraid for their safety as they have to be in close proximity to the accused in the court room. Unfortunately, Pakistan's criminal justice system lacks the resources to provide witness protection; "No anonymity whatsoever is afforded to the witnesses, and according to law...full disclosure of the antecedents of the witnesses to the defence is mandatory."³⁰¹ Other reasons for why witnesses turn hostile may include logistical and financial costs incurred by them when they have to travel back and forth for multiple court hearings. Since they have to incur such costs personally it often leads the witnesses to accept "compensation" from the opposing parties, in return of retraction of their statements.³⁰² Not only do witnesses resale, but at times even complainants and victims withdraw their statements, adversely affecting the prosecution's case.

Trials in Absentia

As discussed earlier, the ATA allows for trials in absentia which is a clear violation of Articles 9³⁰³ and 10-A³⁰⁴ of the Constitution of Pakistan guaranteeing the right to a fair trial. The right to a fair trial includes the right to be heard and "condemning of the accused without affording an opportunity of hearing is also contrary to the principles of natural justice."

There are two options available to the accused under the ATA: (i) it can approach the ATC within 60 days to request to set aside his conviction recorded in absentia as per Section 19 (12)³⁰⁵ of the ATA by showing that he did not abscond on purpose; or (ii) he could surrender before the High Court by filing an appeal under Section 25 of ATA with a prayer to set aside the conviction and to acquit him on merit or remand the matter back for fresh trial by setting aside the impugned judgment.³⁰⁶

301. Zaidi, "A Critical Appraisal" (n 30) 34

302. Zaidi, "A Critical Appraisal" (n 30) 35

303. Constitution of the Islamic Republic of Pakistan, 1973, Article 9,
Security of person. No person shall be deprived of life or liberty saves in accordance with law.

304. Constitution of the Islamic Republic of Pakistan, 1973, Article 10-A,
Right to fair trial. For the determination of his civil rights and obligations or in any criminal charge against a person shall be entitled to a fair trial and due process.

305. Anti-Terrorism Act, 1997, Section 19 (12).

306. *Imad v. State*, 2015 YLR 2036.

7.4. RECOMMENDATIONS

- I. The ATC judges should be given periodical trainings on the procedure and standards to be followed in the courts so that all the judges follow a relatively uniform system of disposing the cases. Higher administrative courts should be engaged to monitor the decided ATC cases periodically to ensure that uniform standards are being applied.
- II. Section 21³⁰⁷ of ATA provides measures that can be taken to protect judges, counsels and witnesses during the court proceedings. However, this provision has not been employed adequately. There are simple measures that can be taken to ensure safety within the court such as having separate entrances for the witnesses to enter and exit the courts or screening the witness from the accused during the testimony.³⁰⁸
- III. With regards to trials in absentia, Section 19 (10) needs to be revisited and amended as it is a clear violation of the fundamental right to a fair trial guaranteed by the Constitution of Pakistan. Perhaps a further legal provision may be added to the ATA increasing the duty of the court to ensuring that the accused is present at trial. The ATCs should be directed to carry out more substantial steps than merely publishing a proclamation in newspapers requesting the accused to present himself in court. This may require the court and law enforcement agencies to coordinate better and work together in summoning the accused to trials.

307. Anti-Terrorism Act, 1997, Section 21.

308. Zaidi, "A Critical Appraisal" (n 30) 67.

FINAL ARGUMENTS AND JUDGEMENT

CHAPTER 8

8.1. BACKGROUND

This section will examine the legal provisions that govern the form and mode in which the trial is concluded and the court's judgment is delivered. The sections under discussion will include Sections 265-G, H and K of Cr.P.C, Chapter 26 (Sections 366 to 373) of Cr.P.C and Section 19 (7), (8) of ATA. Again, as there are a number of legal provisions to go through, not all of them will be reproduced; instead the provisions will be explained with the help of the jurisprudence and case law together.

8.2. LEGAL PROVISIONS AND JURISPRUDENCE

It should be noted here that the ATCs as per Section 19 (7), after having taken cognizance of the case, are to proceed with the trial and decide the case within seven days.³⁰⁹ Under Section 19 (8) an ATC can only grant two adjournments during the trial of the case, and if the defense counsel fails to appear after 2 consecutive adjournments the Court appoints a state counsel for the defense of the accused.³¹⁰ The purpose of this is to frustrate “delaying tactics of the accused.”³¹¹ Non-compliance may lead the matter to be sent to High Court for disciplinary action.³¹²

8.2.1. FINAL ARGUMENTS

Section 265- G³¹³ of Cr.P.C, states that once the prosecution is done with its evidence and if the defense has no evidence to produce, then the court directs the prosecution to make its final arguments to which the defense has the right of rebuttal. However, if the defense does have evidence it shall present it after the prosecution, which is then followed by the final arguments of the defense. Subsequently, the prosecution is then given the right of rebuttal. At this point

309. Anti-Terrorism Act, 1997, Section 19 (7).

310. Anti-Terrorism Act, 1997, Section 19 (8).

An anti-terrorism Court shall not give more than two [adjournments during the trial of the case and that also imposition of exemplary costs]. If the defense counsel does not appear after two consecutive adjournments, the Court may appoint a State Counsel with at least seven years standing in criminal matters for the defense of the accused from the panel of advocates maintained by the Court for the purpose in consultation with the Government and shall proceed with the trial of the case].

311. *S.J. Kazi Shahid Ali v. The State*, 2003 PCrLJ 1468.

312. Anti-Terrorism Act, 1997, Section 19 (8a).

313. Code of Criminal Procedure, 1898, S 265-G.

Summing up by prosecutor and defense. (1) In case where the accused, or any one of several accused, does not adduce evidence in his defense, the Court shall on the close of the prosecution case and examination (if any) of the accused call upon the prosecutor to sum up his case whereafter the accused shall make a reply. (2) In cases where the accused, or any one of the several accused examines evidence in his defense, the Court shall, on the close of the defense case, call upon the accused to sum up the case whereafter the prosecutor shall make a reply.

the court may also allow for the recalling of witnesses “if satisfied that the witness will depose material different from its original deposition.”³¹⁴

8.2.2. JUDGEMENT

Under Section 265-H³¹⁵ Cr.P.C, if the Court “finds the accused not guilty it shall record an order of acquittal... [or] if in any case... the Court finds the accused guilty the Court shall... pass a sentence upon him according to law.” Generally the word “judgment” means “judicial determination of decision of a court.”³¹⁶ Section 366 (1) of Cr.P.C lays down that judgment in any trial shall be “pronounced...in open court either immediately after the termination of the trial or at some subsequent time of which notice shall be given to all parties... [and it shall be] in the language of the court... [or the language] which the accused... understands.”³¹⁷ The judgment should be written before its pronouncement otherwise it is illegal³¹⁸ and it “must contain reasons in its support and be passed by the conscious application of judicial mind and it shall not be written in a slipshod manner.”³¹⁹

Mode of Judgment

Section 367 (1) specifies that the judgment “be written by the presiding officer of the Court [or from the dictation of such presiding officer] in the language of the Court, or in English; and shall contain the point or points, for determination, the decision, thereon and the reasons for the decision, and shall be dated and signed by the presiding officer in open.”³²⁰ This is an imperative section as it states that the judgment has to specify the relevant section under which the accused is convicted and sentenced.³²¹ It is mandatory that every judgment contain, inter alia, the points for determination and the reasons for the decision reached by the Court.³²² The characteristic of a good judgment is that it must be “self-evident and self-explanatory... in other words, it must contain the reasons that justify the conclusion arrived at and these reasons should be such that a disinterested reader can find convincing or at least reasonable. The reasoning should not be

314. 19902 Cus Cr J (MP) 148.

315. Cr.P.C, 1898, Section 265-H.

316. PLD 1957 SC (Ind) 361.

317. Code of Criminal Procedure, 1898, Section 366 (1).

318. *Mehboob Ali v. Syed Qamar Ali*, 1969 PCrLJ 641.

319. *Muhammad Nawaz v. The State*, 2002 YLR 56.

320. Code of Criminal Procedure, 1898, Section 367 (1).

321. *Jabbar v. State*, 2014 YLR 135.

322. *Muhammad Yaqoob v. State*, 1980 PCrLJ 992; In *Hameedullah v. State*, 2000 PCrLJ 472 it was ruled that a judgment must not be vague and it must conform to the requirements of Section 367.

left to the imagination of the reader for such an order is apt to be termed as arbitrary.”³²³ Furthermore, the judgment must be signed and dated at the time of pronouncement in open court on the date of its delivery, otherwise it is “not a judgment in the eye of the law,”³²⁴ and if it was written and signed on a day prior to its pronouncement, it is vitiated.³²⁵ The entire purpose of this section is based on “good and substantial grounds of public policy i.e. to let it be known to the accused that trial court consciously applied its judicial mind to give a finding against him.”³²⁶ As per Section 371 (1) of Cr.P.C a copy of the judgment is to be given to the convicted accused, free of cost, “at the time of pronouncing the judgment,”³²⁷ and if need be it will be translated into the language of the accused. The Court is also required to forward a copy of the sentence and finding to the “officer-in-charge of prosecution in the district within the local limits of whose Jurisdiction the trial was held.”³²⁸ Moreover, as per Section 369 Cr.P.C the court is precluded from altering its judgment after it has been written, signed and pronounced except to correct a clerical error.³²⁹ Under section 25 of ATA, 1997 a copy of the judgement shall be supplied to the accused and the Public Prosecutor free of cost on the day the judgment is pronounced.

Section 265-K Cr.P.C: Power to Acquit

It should be mentioned here that under Section 265-K³³⁰ Cr.P.C, the Court has the power to acquit the accused at any stage of the trial, if there is no probability of conviction. Jurisdiction can be exercised by a trial court if accused is being “prosecuted without proper material implicating or connecting him with the commission of any offence;”³³¹ but the trial court should not exercise this “without examining important witnesses to the case.”³³² “At any stage” means any time before or after the recording of evidence and it can also be before the charge is framed, heard any complainant or examined witnesses.³³³ Section 265-K is meant to prevent the “rigors of a prolonged trial”; if the court reached the conclusion that “it would be [a] sheer futile exercise to linger on [with] the case, which would not

323. *Muhammad Din v. Zabarast Khan and another*, PLD 1972 AJ & K 7 (FB).

324. *Muhammad Hassan Alias Cheena v. The State*, 1992 PCrLJ 1294.

325. *M.K. Zaman v. Matia Rehman*, 1969 PCrLJ 361.

326. KLR 1985 CrL C 311.

327. Code of Criminal Procedure, 1898, Section 371.

328. *Ibid* Section 373.

329. *Ibid* Section 369.

330. *Ibid* Section 265-K.

331. *Ashgar Ali v. State*, 1991 MLD 228.

332. 1997 PLR 1071.

333. *Yasin Khan Baberv. The State*, 1995 PCrLJ 1424.

culminate into conviction the court, could exercise such powers...which could be used at any stage."³³⁴ It has been emphasized by all superior courts that the discretionary powers under this section are not to be exercised arbitrarily. It may not be fair for the court to pass an order of acquittal without providing proper and full opportunity to the parties concerned to produce evidence. The court is undoubtedly empowered to acquit the accused at any stage, but it should only do so only after having heard the concerned parties. The court should come to a definite conclusion, on the basis of adequate reasons, that there is no possibility of the accused being convicted of any offence.³³⁵

The authority vested in court under this section is an exception to the procedure in the trial and should be construed strictly. It does not permit the trial court to enter into investigation to collect evidence; "rather such application should be decided on the basis of material already produced by the complainant and available on record. If the trial court enters into investigation it would be exceeding its lawful authority."³³⁶

8.3. LEGAL CHALLENGES

Delay in disposal of cases

One of the main challenges in the trial process of the ATCs is the delay in the disposal of cases. There are multiple reasons for this delay. Keeping in view the considerable backlog of cases in ATCs and shortage of staff in courts, it is just not possible to decide a case within the stipulated time (7 days). Furthermore, there are constant adjournments either because the lawyers are present but their client is absent, or the accused is present but his/her counsel is absent or the witnesses cannot be produced. "Most of the time the police are the main witnesses but since the police is understaffed and have lengthy shifts they are preoccupied with their other duties and are not always available for court hearings."³³⁷ Also, ATC judges are on contract and are frequently transferred leaving the courts vacant for periods of time.³³⁸ Another factor affecting the disposal of cases is the frequent strike calls by Bar Councils.

The problem of delays in the ATC is persistent and it was also observed by our

334. *The State via PP ATA Quetta v. Abdul Hameed*, 2015 YLR 1197.

335. *Kalsoom v. Bashir Ahmad*, 2000 PCrLJ 1054.

336. *Dr. Mukhtiar Hussain v. Muhammad Aslam*, 2013 MLD 778.

337. Interview with Prosecutor, (Islamabad. 25 May 2017).

338. Interview with Prosecutor, (Islamabad. 25 May 2017).

team when we visited the ATC in Islamabad; out of the nine cases listed to be heard seven cases were adjourned due to the absence of the relevant parties.³³⁹ One interviewer even said that on average a trial could last for 4-5 years.³⁴⁰

Low Rate of Convictions

The low rate of convictions in ATCs is a matter of concern as well and can be contributed to the large number of tangential litigation. So many cases are wrongfully brought forth to the ATCs that the judge has to exercise its powers under Section 265-K Cr.P.C to acquit the accused. As the team witnessed on its visit to the Islamabad ATC in *Abdullah v. Sarwar*, the accused was acquitted because he was clearly not the kidnapper since he did not fit the description of the alleged kidnapper in the statements of the victim.³⁴¹ Tangential litigation increases the workload on the ATCs defeating its original objective of acting as “fast-track courts.”³⁴²

8.4. RECOMMENDATIONS

- I. A proper caseload analysis needs to be carried out in all ATCs and accordingly an upper ceiling may be set limiting the number of cases a court may hear at any given time. The provision of not allowing more than two adjournments needs to be followed more strictly. Counsels who violate that provision should be reprimanded in order to correct such behavior and attitudes.
- II. New Anti-Terrorism Courts should be built to deal with the heavy backlog of cases more effectively. The strength of ATC judges should be increased accordingly.
- III. The ATC judges should not be appointed in an ad hoc manner. There should be permanent judges for the ATCs so that the judges would take more responsibility and ownership of their courts. It may be reiterated that the judges need training to increase their capacity and efficiency while disposing off cases. Furthermore, the ATC judges are overburdened since they perform both administrative and judicial functions and therefore, the two should be separated.

339. Visit to Islamabad ATC Court 1 on 23rd May 2017.

340. Interview with Defense Attorney, (Islamabad. 15 June 2017).

341. Visit to Islamabad ATC Court 1, Case 1 on 23rd May 2017.

342. Zaidi “A Critical Appraisal” (n 30) 27.

SENTENCING AND EXECUTION

CHAPTER 9

9.1. BACKGROUND

The following section will discuss the legal provisions and jurisprudence that cover the passing of sentencing, their execution orders and granting of remissions. These provisions include Chapters 27, 28 and 29 of the Cr.P.C and Section 21-F of the ATA.

9.2. LEGAL PROVISIONS AND JURISPRUDENCE

It is important to note that Section 30 (2) of the ATA states that, “Sections 374 to 379 of the Code shall apply in relation to a case involving a scheduled offence subject to the modification that the references to a “Court of Sessions” and “High Court,” wherever occurring therein, shall be construed as reference to “an Anti-terrorism Court” and a High Court.”³⁴³ Therefore, the following sections related to the sentencing of an accused are fully applicable to an ATC.

9.2.1 SENTENCING

Awarding and Confirming Death Sentence

As per Section 368 of the Cr.P.C, if a “person is sentenced to death,³⁴⁴ the sentence shall direct that he be hanged by the neck till he is dead,” and those sentenced to death will be informed of the period within which an appeal may be preferred, if s/he so desired.³⁴⁵ Under Section 374³⁴⁶ when an ATC passes the sentence of death, the court is legally bound to submit the proceedings to the High Court for confirmation and the sentence shall not be executable unless it is confirmed by the High Court. The ATC Judge should issue a warrant of “commitment under sentence of death” in form XXIV appearing in the Fifth Schedule of the Cr.P.C.³⁴⁷ The High Court must be satisfied on the facts as well as the law of the case, and that the conviction is correct before confirming the sentence. The High Court has to reach this decision on its own, independent of the lower court's opinion. It is the duty of the court to sift through the evidence and to do justice even if the convict has absconded after the close of trial. However, if it is found that his case requires interference before the judgement is announced, he will not be condemned for absconding.³⁴⁸

343. Anti-Terrorism Act, 1997, Section 30.

344. Code of Criminal Procedure, 1898, Section 368.

345. Ibid Section 371 (3).

346. Code of Criminal Procedure, 1898, Section 374

Sentence of death to be submitted by Court of Session. When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court.

347. *Eid Muhammad v. The State*, PLD 1993 SC 14

348. *Shameem Alias Aasche v. State*, 1989 PCrLJ 2336.

Power to direct further inquiry

Section 375³⁴⁹ states that if the High Court thinks that a further inquiry is needed or additional evidence is required, it may make such inquiry to take such evidence or direct it to be made or taken by the ATC. The accused may be present unless the High Court directs otherwise for any further inquiry.³⁵⁰ This provision is not primarily meant for the parties but for the court which feels it necessary to meet the ends of justice. "It should not be used to fill in gaps left by prosecution but in the interest of justice."³⁵¹ "Further inquiry" does not only mean to take additional evidence but to also reconsider the evidence already taken. The High Court has these powers in order to rectify any procedural defects or additional evidence which has bearing on the "guilt or innocence of accused" to avoid injustice to either party.³⁵² It should be exercised only when additional evidence was not available at trial or the parties were unable to produce either by circumstances beyond his control or by way of mistake/misunderstanding; "non-availability of witness is not the same as non-availability of evidence."³⁵³

Under a reference of Section 374, the High Court has no statutory limit on its powers, it is obliged to come to its own independent conclusion as to the guilt or innocence of the accused therefore, as per Section 376³⁵⁴ a case reference under Section 374 the High Court may: (i) confirm the sentence or pass any other sentence warranted by law; (ii) annul the conviction and convict the accused or order a new trial on same or amended charge; or (iii) acquit the accused. If after scrutinizing the evidence the High Court finds that the admissible evidence establishes guilt it may confirm the sentence. If the evidence is found not to be enough to sustain the conviction the High Court will annul it. "Doubt as to the guilt of the accused is grounds for not awarding a lesser punishment but for acquitting the accused."³⁵⁵ However, where the evidence is incomplete and needs further proof for giving a judgment, a new or re-trial may be ordered.

349. Code of Criminal Procedure, 1898, Section 375.

350. Code of Criminal Procedure, 1898 Section 375 (2); *Khannan Khan and others v. The State*, PLD 1966 Pesh 232.

351. *Lal Khan and another v. Sarkar*, PLD 1972 AJ&K 1.

352. *Latif v. State*, 1992 PCrLJ 1116.

353. *Ghulam Muhammad v. The State*, PLD 1957 Lah. 263.

354. Code of Criminal Procedure, 1898, Section 376.

355. AIR 1926 Nag 386.

9.2.2. EXECUTION OF SENTENCES

Execution of Death Sentence

Section 381 of Cr.P.C³⁵⁶ states that once an order of execution has been passed under Section 376 by the High Court, confirming the sentence, the ATC has to issue a warrant (black warrant) intimating the execution of such order.

Consideration of detention period while awarding imprisonment

In cases where the Court is deciding to pass a sentence of imprisonment, under Section 382-B Cr.P.C³⁵⁷ the court has to take into consideration the period, if any, during which such accused was detained in custody for such offence. The period so spent in jail shall automatically count towards the sentence of imprisonment imposed by the court and the sentence of imprisonment shall stand reduced accordingly because that period was not spent in jail by way of "punishment."³⁵⁸ Nevertheless, this relief is discretionary and cannot be claimed as a matter of right. The court is under an obligation to take into consideration Section 382-B and exercise its discretion judiciously.³⁵⁹ The courts should "consciously apply their mind whether benefit of Section 382-B be allowed or declined to the convict."³⁶⁰

The object of this section is to compensate the accused for the delay in conclusion of her/his trial because of various factors generally not attributable to the accused as the state is forced to provide speedy justice.³⁶¹ However, the clause "it shall take into consideration" does not mean that the court's hands are fettered and that it must necessarily reduce the substantive sentence by the period an accused has remained in custody as an under-trial prisoner.³⁶²

Execution of non-capital sentences

When an accused is sentenced to imprisonment for life in cases other than those provided by Sections 381 and 381-A, the court will send a warrant to the

356. Code of Criminal Procedure, 1898, Section 381,

Execution of order passed under section 376. When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary [.] [Provided that the sentence of death shall not be executed if the heirs of the deceased pardon the convict or enter into a compromise with him even at the last moment before execution of the sentence].

357. Code of Criminal Procedure, 1898, Section 382-B.

358. *Muhammad Rafiq v. State*, 1995 SCMR 1525.

359. *Abdul Salam v. The State*, 2003 YLR 1407.

360. *Sultan v. State*, 2000 SCMR 1818.

361. *Aloov v. State*, 2000 SCMR 1655.

362. *Ghulam Hyder v. the State*, 1991 PCrLJ 471.

jail to which the convict is to be confined and in case s/he is already detained in such a jail, s/he will be forwarded to such jail with a warrant.³⁶³ Every warrant for execution of imprisonment is to be directed to the officer in-charge of the jail. A separate warrant should be issued in case of each prisoner and a definite period of imprisonment should be stated.³⁶⁴ According to Section 385, the prisoner is to be confined in jail, while the warrant is to be lodged with the jailor.³⁶⁵ In case an offender has been sentenced to pay a fine the court may take recovery of the same by either: (i) issuing a warrant for the amount by attachment and sale of any immovable property of the offender; or (ii) issuing a warrant to the district Collector authorizing him to realize the amount. Furthermore, Section 389 states that the judge who passed the sentence is the one who may issue the warrant of execution.

Concurrent and Consecutive Sentences

Generally the norm of sentencing is that of consecutive sentencing while concurrent sentences are only an exception and are to be awarded depending on the facts and circumstances of a case.³⁶⁸ The phrase “when a person undergoing a sentence” in Section 397³⁶⁹ clearly means that where an accused is under a sentence yet appearing before a court in another case or trial. One basic aim of punishment is reformation, therefore a court trying a person undergoing a sentence has been vested with discretion that such court can competently and legally issue order of running of sentences. Even a subsequently awarded sentence for imprisonment can be ordered to run concurrently with that sentence of imprisonment which a person is already undergoing.³⁷⁰

After the execution of the sentence order, the executing officer is to return the warrant with an endorsement certifying the manner in which the sentence was executed. Under Section 400,³⁷¹ the entire period of sentence served out by a convict, together with the details of remissions awarded to him is to be submitted to the court which had initially convicted and sentenced him with a warrant of conviction.³⁷²

363. Code of Criminal Procedure, 1898, Section 383.

364. 20 Cal 286.

365. Code of Criminal Procedure, 1898, Section 385.

366. Ibid Section 386.

367. Ibid Section 389.

368. NLR 1980 Cr Lah 449.

369. Code of Criminal Procedure, 1898, Section 397.

370. *Muhammad Hussain v. The State*, PLD 2015 Sindh 284.

371. Code of Criminal Procedure, 1898, Section 400.

372. *Abdul Rauf v. The State*, 2005 PCrLJ 162.

9.2.3. REMISSIONS

Section 401³⁷³ Cr.P.C gives discretionary powers to the appropriate government “which may be moved or act on its own accord to suspend or remit the sentences” (imprisonment and default of payment of fine).³⁷⁴ The provincial government can suspend execution of sentence at any time with or without conditions or remit the whole or any part of the sentence. Such power of the provincial government does not interfere with the right of President or of the Federal government to grant pardons reprieves, respites or remissions of punishment.³⁷⁵ Remissions once added to the credit of petitioner cannot be withdrawn.³⁷⁶ However, Section 21-F of the ATA states that “notwithstanding anything contained in any law or prison rules. . .no remission in any sentence shall be allowed,” to a person who is convicted and sentenced under the ATA.³⁷⁷

9.3. LEGAL CHALLENGES

Denial of Remissions

In *Hammad Abbasi v. SI Central Adyala Jail (Rawalpindi)*,³⁷⁸ it was ruled that once the benefit of Section 382-B Cr.P.C is granted to a convict, then the benefits of a remission cannot be withheld. Thus, denial of remissions to the convicted under ATA can amount to the deprivation of liberty within the contemplation of Article 9 of the Constitution which provides that “no person shall be deprived of life or liberty save in accordance with law”.³⁷⁹ Therefore, the High Court under its constitutional jurisdiction declared Section 21-F ultra vires of the Constitution and struck it down and directed the jail authorities to grant all the remissions to the petitioner. However, in *SI Central Adyala Jail v. Hammad Abbasi*,³⁸⁰ this matter was appealed against and the Supreme Court set aside the impugned judgment because the High Court had failed to issue notifications to the Advocate General as required under Order XXVII-A Code of Civil Procedure. Unfortunately, the Supreme Court did not discuss the issue of the legal validity of Section 21-F and consequently, Section 21-F ATA is still in operation.

373. Code of Criminal Procedure, 1898, Section 401.

374. *Habib-ul-Wahab Alkhairi v. Federation of Pakistan*, PLD 1991 FSC 236 FB.

375. *Muhammaz Afzal v. Home Secretary Govt. of Sindh*, PLD 1989 Kar 7.

376. *Nasir Ali v. SI, Central Jail Multan*, 2007 YLR 1368.

377. Anti-Terrorism Act, 1997, Section 21-F.

378. *Hammad Abbasi v. SI Central Adyala Jail (Rawalpindi)*, PLD 2010 Lahore 428.

379. Constitution of the Islamic Republic of Pakistan, 1973, Article 9.

380. *SI Central Adyala Jail v. Hammad Abbasi*, PLD 2013 Supreme Court 223.

9.4. RECOMMENDATION

- I. The position regarding the legal validity of Section 21-F is still ambiguous and needs to be addressed properly.

APPEALS

CHAPTER 10

10.1. BACKGROUND

As per Section 31 of the ATA, “a judgment or order passed, or sentence awarded, by Anti-terrorism Court, subject to the result of an appeal under this Act shall be final and shall not be called in question in any court.”³⁸¹ Any revision against the order passed by an ATC is not maintainable. Provisions of Sections 25, 31 and 32 of the ATA when, “read in conjunction do not permit that an order passed by a Special Court can be challenged in revision as Section 435 and 439 of the Cr.P.C are repugnant to the ATA.”³⁸² This is why the ATA provides for application of appeals under the ATA itself in the form of Section 25.

10.2. LEGAL PROVISIONS

Under the provisions of Section 25, an appeal against a final judgment of the ATC lies to the High Court.³⁸³ Copies of the judgment are to be shared with the accused and the prosecutor on the day the judgment is announced and the record is to be transferred to the High Court within three days of the decision.³⁸⁴ The appeal is to be filed:

- i. Within 15 days of the passing of the sentence, if it is being filed by the person against whom the sentence was passed;³⁸⁵
- ii. Within 30 days, if it is being filed against an order of acquittal or sentence passed by an ATC;³⁸⁶
- iii. Within 30 days, if it is being filed by the victim or legal heir of a victim who is aggrieved by the order of acquittal passed by an ATC.³⁸⁷

The appeal is to be heard and decided by the High Court within 7 days³⁸⁸ and the High Court has to establish a special bench or benches consisting of no less than two Judges for hearing the appeals.³⁸⁹ The Bench shall not allow more than two consecutive adjournments.³⁹⁰ The Petition for leave to appeal

381. Anti-Terrorism Act, 1997, Act No. XXVII of 1997, Section 31.

382. *The State v. Khalid Moin*, 2000 YLR 2668.

383. Anti-Terrorism Act, 1997, Section 25(1).

384. *Ibid* Section 25 (2).

385. *Ibid* Section 25 (3).

386. *Ibid* Section 25 (4).

387. *Ibid* Section 25 (4A).

Anti-Terrorism Act, 1997, Section 25 (4B)- If an order of acquittal is passed by an Anti-Terrorism Court in any case instituted upon complaint and the High Court, on an application made to it by the complainant in this behalf, grant special leave to appeal from the order of acquittal, the complainant may within thirty days present such an appeal to the High Court.]

388. Anti-Terrorism Act, 1997, Section 25 (5).

389. *Ibid* Section 25 (9).

390. *Ibid* Section 25 (10).

may be filed by an aggrieved person (including victim, his legal heirs or a private complainant)³⁹¹ against an order of acquittal passed by the ATC before the High Court.

10.3. JURISPRUDENCE

Filing of application under Section 19 (12) is not an “indispensable condition” for filing an appeal under Section 25 ATA as the Appellate Court has wider powers than a Trial Court. A trial court, after setting aside the conviction, would proceed to try the accused in his presence. Whereas, an Appellate Court may set aside the conviction and remand the case back for a fresh trial or could even acquit the accused on merits. If a person convicted in absentia was acquitted on merits he cannot be forced to undergo the “botheration of a trial”. Nothing under Section 25 suggests that a person convicted and sentenced in absentia cannot file an appeal without first making an application under Section 19 (12) of the ATA.³⁹²

Courts should be slow to interfere with the judgment of acquittal unless there has been gross injustice or it is completely illegal and on perusal of evidence no other conclusion other than the guilt of the accused can be drawn or the complete misreading of evidence has resulted in the miscarriage of justice.³⁹³ The following are certain matters that an Appellate Court must consider in appeals against acquittals:

- i. Views of the trial judge as to the credibility of the witnesses
- ii. Presumption of innocence in favor of the accused
- iii. Right of the accused to the benefit of any doubt; and
- iv. The slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses

Ordinarily the scope of appeal against acquittal is considerably narrow and limited; an order of acquittal having been passed by Trial Court “on valid and sound reasons, could not be interfered with in appeal”³⁹⁴ unless the conclusion reached by the lower court was such that no reasonable person would conceivably reach the same. Furthermore, interim or interlocutory orders of ATC are not appealable under Section 25 which provides appeal only against final judgments of ATCs.³⁹⁵

391. *Atta ullah v. Ghulam Rasool*, PLD 2006 Lah. 290.

392. *Ali Hussain v. State*, 2009 MLD 1 198.

393. *State v. Jamadar Muhammad Khan*, 2005 PCrLJ 1442.

394. *State v. Sher Zaman*, PLD 2005 Kar 270.

395. NLR 2002 Criminal 449.

According to Section 25 sub-section 4 the Attorney General, Deputy Attorney General, Standing Counsel, or an Advocate General, Advocate High Court or Supreme Court of Pakistan appointed as Public Prosecutor, Additional Public Prosecutor or a Special Public Prosecutor may, on being directed by the Federal Government, can file an appeal against an order of acquittal or a sentence passed by an Anti-Terrorism Court within thirty days of such order. Sub-Section 4(a) provides that a private person who is aggrieved by the order of acquittal passed by the Anti-Terrorism Court, may within thirty days, file an appeal in a High Court against such order.

10.4. LEGAL CHALLENGES

Delays in deciding appeals

Even though Section 25 (5) of ATA stipulates that an appeal must be heard and decided within 7 days, this is not possible practically because of the backlog of cases and overburdened judges. This delay leads to the accused waiting for long periods of time to get his/her appeal heard and an apprehension may exist that if the accused persons were not released on bail during pendency of appeal, they would undergo their entire sentence before the final decision.³⁹⁶ In such circumstances the High Court may suspend the sentence of the accused and release him/her on bail accordingly.³⁹⁷

10.5. RECOMMENDATION

- I. To overcome the delays in deciding appeals the courts' caseload needs to be better managed so that the courts are not overburdened and cases do not pile up. Furthermore, the provision of not allowing more than two adjournments needs to be followed more strictly.

396. *Rizwan v. Federation of Pakistan via Secretary Ministry*, 2013 YLR 520.

397. *Waseem v. State*, 2012 YLR 1013.

BAIL PROCEEDINGS UNDER THE ATA

CHAPTER 11

11.1. BACKGROUND

The relevant provisions that deal with bail for an ATC trial are Section 21-D ATA and Sections 496,³⁹⁸ 497, and 498A of Cr.P.C. Bail is essentially a procedure parallel to arrest, investigation and trial. It is not a part of criminal proceedings; however, it may be sought at any stage of such proceedings subject to certain conditions and pre-requisites. Section 21-D of the ATA states that no Court, other than an ATC, a High Court or the Supreme Court of Pakistan has the authority to grant bail to or otherwise release the accused in a case triable by an ATC.³⁹⁹ Thus, ordinary courts are excluded from granting of bail for ATC cases.

A bail is a release of a suspect from judicial custody to personal custody during the pendency of trial, on the condition that if the suspect does not fulfil the conditions contained in the bail order or absconds, the surety or sureties will pay the amount of money fixed in the bail order. A bond is a personal assurance that the suspect will surrender to the custody as agreed and will pay a fixed sum of money if he breaches that promise. A surety is a specific individual who undertakes that he will produce the accused on each date and in case of any failure he is liable to pay the sum as mentioned in bail bond. A security is an actual sum of money that is used to secure the liability under the bond. In practice, ATCs do not normally accept money to secure appearance. The bond provides that a sum of money may be forfeited if the accused breaches the condition to attend the court.

11.2. PRE-ARREST BAIL AND POST-ARREST BAIL

A suspect/accused can make a bail application(s) to a court before or after his/her arrest. The effect of a pre-arrest bail (interim bail) is that the police cannot arrest the suspect till the date given in the bail order or the conditions mentioned in the bail order are still in place. The ATA, by virtue of Section 21-D, envisages both pre-arrest and post-arrest bail. In *Noor Hassan v. Haji Muhammad Khan*, the ATC taking cognizance of the facts and circumstances of the case, had granted pre-arrest bail to the accused on the grounds of previous enmity between the parties which amounted to mala fide against

398. Code of Criminal Procedure, 1898, Section 496,

In what cases bail to be taken: When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail: Provided that such officer or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided.

399. The Anti-Terrorism Act 1997, Section 21-D (1).

the accused. The High Court finding no irregularities in the bail order dismissed the application for cancellation of bail.⁴⁰⁰ This case also illustrates how the law is at times used to settle rivalries, thereby, raising the threshold of the caution to be employed by both the investigating authorities and the judiciary in criminal cases.

Additionally, there are two types of offences in Pakistan with respect to grant of bail, bailable offences and non-bailable offences.

11.3. BAILABLE OFFENCES

A person accused of a bailable offence can obtain bail as a matter of right, from either the SHO or the Court. The Police in such cases should take a bail decision in bailable matters before the matter proceeds to court.

11.4. NON-BAILABLE OFFENCES

In non-bailable offences (which includes offences under the ATA), a person may be released on bail by the court.

11.4.1. GROUNDS FOR BAIL IN NON-BAILABLE OFFENCES

The two main grounds for granting bail in non-bailable offences are:

- (a) Evidential grounds;
- (b) Public policy.

Other considerations mentioned in Section 21-D (4) of ATA, 1997 include:

- (a) The nature and seriousness of the offence with which the person is to be charged;
- (b) The character, antecedents, associations and community ties of the person;
- (c) The time which the person has already spent in custody and the time which he is likely to spend in custody if he is not admitted to bail; and
- (d) The strength of the evidence of his having committed the offence.⁴⁰¹

It can be gleaned from jurisprudence that courts place reliance on a myriad of factors when determining whether or not to grant bail. The Courts look at whether the accused poses a particular threat to society, whether or not the accused resisted arrest, whether mens rea for the offence can be established

400. *Noor Hassan v. Haji Muhammad Khan alias Turkey*, 2005 YLR 1791.

401. The Anti-Terrorism Act 1997, Section 21-D (4),

and whether or not an F.I.R was promptly lodged. Thus, the Court places reliance on a number of factors when determining whether or not to grant bail in practice, and it seems that these factors are expansive in nature as compared to the considerations laid down under the ATA. However, perhaps the list of factors under the ATA were not intended to be exhaustive in nature and were meant to equip the Courts with the necessary tools to determine whether an individual poses a threat to society. Bail is normally granted in cases where the accused is seemingly innocent, or where there is insufficient evidence, or there is a factor that casts doubt on the accused's guilt.

Section 21-D (2) of the ATA states that all offences under the Act that are punishable with death or imprisonment exceeding three years shall be non-bailable. The proviso to sub-section (2) of Section 21-D states that if there appear to be reasonable grounds for believing that any person accused of non-bailable offences has been guilty of an offence punishable with death or imprisonment for life or imprisonment for not less than ten years, such person shall not be released on bail. The wording of this proviso is not only confusing but creates a lot of room for ambiguity. However, Section 497 Cr.P.C provides clarity as that has a similar wording to the proviso and provides grounds for the release on bail of an individual charged with non-bailable offences.

Section 497 Cr.P.C states that the person will not be released if there are reasonable grounds for believing that he has been guilty of an offence punishable with death, or imprisonment for life or imprisonment for ten years. Bail for cases which fall under the prohibitory clause of Section 497 are normally denied. Therefore the wording of Section 497 Cr.P.C is more or less similar to the wording of the provision provided for in the proviso to Section 21-D (2), just with better sentence structure.⁴⁰² Thus, it can be said that bail may be granted in cases under Section 21-D (2) read with Section 497 Cr.P.C if there are no reasonable grounds for believing that the accused person is guilty of the non-bailable offence.⁴⁰³ Section 21-D (3) states that subject to sub-section (2), the Court may admit a person to bail unless satisfied that the accused would commit one of the acts specified in the section.⁴⁰⁴

402. Code of Criminal Procedure, 1898, Section 497.

403. *Bahar Ali v. The State*, PLD 2008 PHC 28

404. The Anti-Terrorism Act 1997, Section 21-D (3):

"Subject to sub-section 2, the Court may admit a person to bail unless satisfied that there are substantial grounds for believing that the person, if released on bail... would-

(a) fail to surrender to custody, (b) commit an offence while on bail, (c) Interfere with a witness; otherwise obstruct or attempt to obstruct the course of justice, whether in relation to himself or another person; or (d) fail to comply with the conditions of release (if any)."

It is paramount to state that a person unless convicted should be presumed to be innocent and thus should be granted bail, unless there are reasonable grounds for believing that s/he is guilty of a non-bailable offence which is punishable with death, life imprisonment or imprisonment for ten years. The wording of Section 21-D (2)'s proviso needs to be clarified so as to avoid any ambiguities. Therefore, amendments to this portion may be expedient to clearly set out the intended limitations on the grant of bail in such cases.

In respect of sub-sections 2, 3 and 4 of Section 21-D of the ATA, it was observed in *Bahar Ali v. the State*:

It is [a] settled principle of administration of criminal justice that heinous nature of an alleged crime, alone, can never be a hauler to expose an accused to adversities, because in all eventualities, presumption of innocence of accused is enormously paramount. The pointed out difficulties faced by investigators of crimes of highway robberies, kidnappings and abductions for ransom, that have emerged as menace in majority of districts of NWFP Province, may be true and correct, but should fundamental notions of justice be disfigured on these grounds? The rational answer can never be in affirmative, because innocent person, if involved, the only rescuer for him is the golden principle of innocence of accused and proof against him beyond shadow of doubt.

In the instant case, where the lack of legal knowledge of the complainant and scanty legal knowledge of the investigator had hampered collection of conclusive evidence to implicate the accused, bail was granted in such circumstances as these could not hinder the "application of canons of safe administration of justice." It becomes evident from this case that even if the suspect is accused of a non-bailable offence under the ATA (kidnapping for ransom), if the exigencies of justice require the grant of bail, the suspect should not be denied his liberty.

11.5. CONDITIONS FOR ADMISSION TO BAIL

The Court also has the authority to impose conditions on admission to bail.⁴⁰⁵ Furthermore, Section 21-D (6) ATA states that it shall be lawful for the person

405. The Anti-Terrorism Act 1997, Section 21-D (5):

"...the Court admitting a person to bail under this section may impose such conditions as it consider

(a) Likely to result in the person's appearance at the time and place required, or (b) Necessary in the interests of justice or for the prevention of crime."

to be held in military or police protective custody in accordance with the conditions of his bail. Subsection (7) states that the Government or the Court may, under this Section, at any time, in respect of a person charged of an offence under this Act, if it considers it necessary by special or general order, direct special arrangements to be made as to the place at which the person is to be held in order:

- (a) To prevent his escape; or
- (b) To ensure his safety or the safety of others.

It can be argued that the practical operation of subsection (6) is shrouded in secrecy as there is no public record of its practical application. This can constitute an infringement of the person's due process and fair trial rights, along with the right to liberty. This sub-section should only become operational in exceptional circumstances. A defence lawyer⁴⁰⁶ stated that it is normally used in Military court cases.

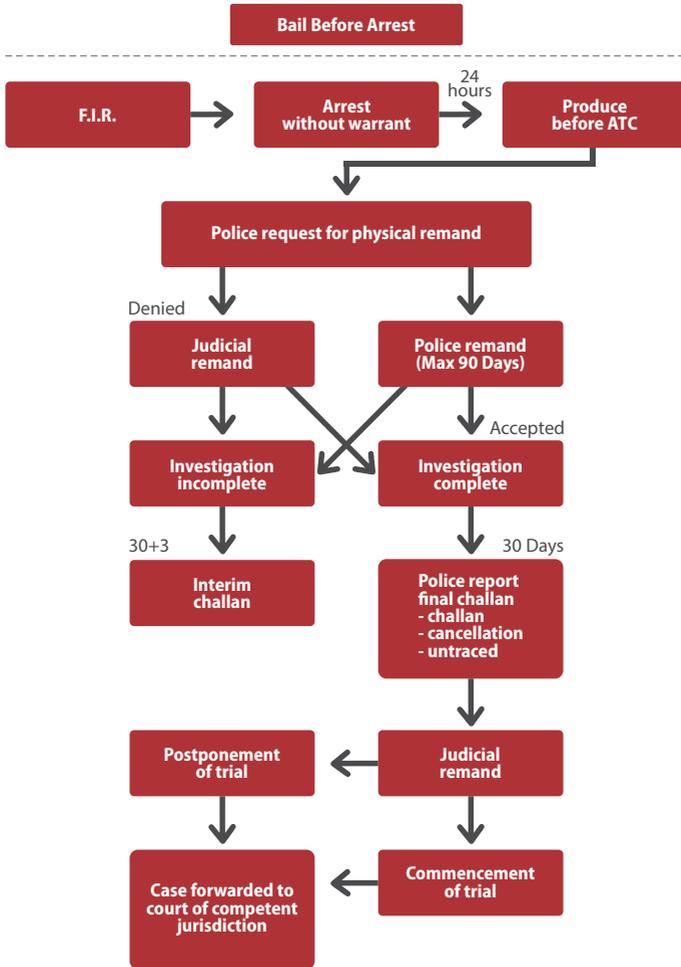
11.6. RECOMMENDATIONS

- I. By unnecessarily applying an ATA provision to an ordinary offence in the suspect's charge sheet or challan, the chances of the suspect receiving bail become very slim. Section 21-D (1) ATA, as mentioned previously states that only an ATC, High Court or Supreme Court may grant bail of a suspect charged with an ATA offence. This can constitute a grave infringement of an individual's right to liberty since the charge may be levied by an unscrupulous complainant or a corrupt police official. Thus, cooperation between the prosecution and the police needs to be enhanced, so that proper scrutiny can be carried out before adding the provisions of the ATA to an F.I.R and an individual's right to liberty is not unduly restricted.
- II. The wording of the proviso of Subsection 21-D (2) needs to be clarified so as to avoid any ambiguity surrounding the application of the provision.

406. Interview with Defence lawyer (Karachi, 24 July 2017).

APPENDICES

APPENDIX-A INVESTIGATION



- Bail U/S 21-D ATA read with S. 496 or 497 Cr.P.C. except in physical remand
- Discharge U/S 63 Cr.P.C. (Magistrate)
- Release on bond U/S 169 Cr.P.C. with or without sureties → To be confirmed by magistrate

APPENDIX-B ATC TRIAL PROCEDURE

