

ORDER SHEET
IN THE HIGH COURT OF SINDH CIRCUIT COURT LARKANA
Criminal Appeal No. D- 14 of 2019

DATE | ORDER WITH SIGNATURE OF JUDGE

For Fresh Case

1. For orders on M.A No.1073 /2019 (U/A)
2. For orders on office objection 'A'
3. For orders on M.A No.1074/2019 (E/A)
4. For orders on M.A No.1075 /2019 (426/A)
5. For hearing of main case

20.03.2019

Mr. Shahbaz Ali Brohi, Advocate for the appellants.

Mr. Sharafuddin Kanhar, A.P.G for the State.

1. Urgency granted.

2. Overruled.

3. Exemption application granted subject to all just exceptions.

4.&5. Through this appeal, appellants have challenged the vires of the judgment dated 22.03.2012 handed down by learned Special Judge, Anti Terrorism Court, Jacobabad in Special Case No. 57/2011 re. The State v.

Khair Muhammad alias Khero and others which is outcome of Crime

No. 59/2011 registered at Police Station Naparkot district Shikarpur for

offence under section 365/A, 148, 149, PPC and section 6 of Anti

Terrorism Act, 1997. The learned trial Court after recording evidence

and having heard to either side had acquitted the co-accused Khair

Muhammad alias Khero as well as appellants in their absentia from the

charges of main section(s)/offence(s) viz. 365/A, 148, 149, PPC.,

however, convicted them in their absentia in terms of Section 21-L of

Anti Terrorism Act, 1997 for five years with forfeiture of their

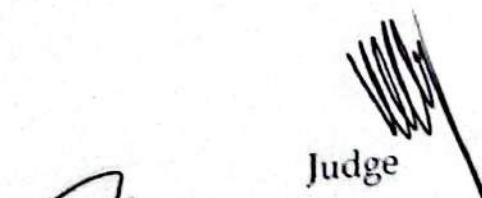
immovable property (ies) and perpetual warrants were ordered to be issued against them till their arrest.

Mr. Shahbaz Ali Brohi, learned counsel for the appellants submits that trial Court has acquitted the appellants in their absentia from the main charge/offence whereas convicted them in absentia without recording evidence. He next submits their absconson was not deliberate or willful; however, in order to prove the charge in terms of section 21-L of the Act, 1997 recording of evidence was necessary and without recording evidence they cannot be held responsible or convicted for absentia under section 21-L of the Act, 1997. He submits neither charge for their alleged absconson was framed nor evidence in this regard was recorded, therefore, the impugned judgment is not sustainable in law to the extent of conviction of the appellants in absentia and pray that the same may be set aside and may be acquitted of the charge under section 21-L of the Anti Terrorism Act, 1997. In support of his contention, he has placed reliance on the case of Dadoo alias Waddan v. The State (2016 P.Cr.LJ 1130), Arbab Khan v. The State (2010 SCMR 755) and unreported judgment dated 28.01.2015 in Criminal Appeal No. D- 128 of 2011 re. Attur v. The State and Criminal Appeal No. D-79 of 2016 Khan Jan @ Khan Mohammad and another v. The State.

Mr. Sharafuddin Kanhar, learned APG appearing for the State who is present in other cases waives notice and has recorded no objection for grant of appeal on the ground that no evidence has been

recorded by the trial Court for absconcion on the part of appellants which was not deliberate or willful and even no charge for section 21-L of the Anti Terrorism Act, 1997 was framed, therefore, the judgment in the light of citations referred to by the learned counsel for the appellants cannot be maintained.

For the detailed reasons recorded to be later on, instant appeal is allowed. The impugned judgment dated 22.3.2012 is hereby set aside to the extent of conviction and sentence of the appellants in their absentia in terms of section 21-L of Anti Terrorism Act, 1997. Consequently, the appellants are acquitted of the charge under section 21-L of Anti Terrorism Act, 1997. They are in custody, therefore, they shall be released forthwith if their custody is no more required.



Judge



Judge

PRESENT:

Mr. Justice Mohammad Saleem Jessar,
Mr. Justice Adnan Iqbal Chaudhry

Appellant	: <u>Mandost Jaffer and 02 others, through Mr. Shahbaz Ali M. Brohi, Advocate.</u>
Respondent	: <u>The State, through Mr. Sharafuddin Kanhar, Assistant Prosecutor General, Sindh</u>
Date of Hearing	: <u>20-03-2019.</u>
Date of Order	: <u>20-03-2019.</u>

JUDGMENT

MOHAMMAD SALEEM JESSAR, J.- Appellants 1. Mandost, 2. Shah Dost, both sons of Toto Jaffer, and 3. Dhani Bux son of Darak Jaffer, through this appeal have impugned the judgment dated 22.3.2012 passed by the learned Judge, Anti-Terrorism Court, Jacobabad, in Special Case No.57/2011, re-State v. Khair Muhammad alias Khairo Jaffer & others, being outcome of Crime No.59/2011, registered at Police Station Naper Kot, District Shikarpur, for offence under Sections 365-A, 148, 149, PPC read with Section 6 of the Anti-Terrorism Act, 1997, whereby the appellants along with co-accused Qalander Bux Jaffer and Ghulam Qadir Jaffer were convicted in absentia under Section 21-L of Anti-Terrorism Act, 1997, but they were acquitted from the charges of the offence under Section 365-A, 148, 149, PPC read with Section 6 of the Anti-Terrorism Act, 1997.

2. After registration of FIR, police after completing usual investigation submitted challan of this case before the learned trial Court placing the names of appellants Mandost, Shah Dost and Dhani Bux as well as co-accused Qalandar Bux and Ghulam Qadir as absconders. After completion of codal formalities, the learned trial Court framed formal charge against the accused persons, who was present before it. After recording evidence of prosecution witnesses, statement of accused under Section 342, Cr.P.C were recorded. The learned trial Court after hearing the arguments of either side acquitted all the accused present as well as absconders including the appellants from the charge of main case/offence viz. under Sections 365-A, PPC read with Section 6 of Anti-Terrorism Act, 1997 (The Act) in terms of Section 265-H(i), Cr.P.C, while

convicted and sentenced the appellants and co-accused named above in following terms:

"16. From the circumstances of the case it appears that accused Qalandar Bux son of Ahmedan, 2. Ghulam Qadir son of Peeral, 3. Mandost son of Toto, 4. Shah Dost son of Toto, 5. Dhani Bux son of unknown, all by caste Jaffery are absconding in this case. I am satisfied with their deliberate abscondence of these accused, each of them is convicted under Section 21-L of Anti-Terrorism Act, 1997 and each of them is sentenced for (FIVE YEARS) with forfeiture of their movable and immovable property, therefore, perpetual warrants be issued against these absconding accused."

3. The learned Counsel for the appellants at the very outset has argued that they alongwith co-accused Qalandar Bux and Ghulam Qadir had been acquitted from the charge of main offence viz. under Sections 365-A, PPC read with Section 6 of the Act but had been convicted under Section 21-L of the Act. He further submits that the appellants are innocent and they were totally unaware about their involvement in the present case. Lastly, he contended that since the appellants have been acquitted of the charge of the main offence, hence, prayed for their acquittal.

4. Mr. Sharafuddin Kanhar, learned APG, present in Court in other matters, waived notice and opposed the appeal on the ground that charge against the appellants under Section 21-L of the Act, was not framed, as they were not present before the trial Court. He next contended that the appellants have not availed the remedy before the trial Court as required by Section 19(12) of the Act, and instant appeal has been filed directly before this Court, which being defective may not be entertained.

5. We have heard learned Counsel for the appellants, learned APG, Sindh appearing for the State and have gone through the impugned judgment as well as other material made available before us on record.

6. Record reflects that charge was framed against accused present before the trial Court for offences under Sections 365-A, 148, 149, PPC and Section 6 of the Act. Record further reveals that no charge was framed against the appellants under Section 21-L of the Act and no evidence was recorded to prove the ingredients of Section 21-L of the Act. Trial Court also failed to formulate a point for determination regarding the offence under Section 21-L of the Act, in the impugned judgment. There was absolutely no evidence to show that absconson of the appellants was intentional and no finding has been recorded by the trial Court to the effect that appellants were fugitive from the law.

However, in the cursory manner learned trial court has convicted and sentenced the appellants for the aforesaid offence. As such, procedure adopted by the learned trial court in convicting and sentencing the appellants under Section 21-L of the Act, appears to be absolutely illegal.

7. It would be conducive to reproduce Section 21-L of the Anti-Terrorism Act, 1997, which reads as under :-

"21-L. Punishment for an Absconder.—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 [five years] and not more than [ten years] or with fine or with both.

8. The argument of learned APG that charge could not be framed against the appellants due to their absence is without force, as the charge could have been framed by the trial Court in absentia, but the trial Court had not done so. His next argument that the appellants without filing an application 19(12) of the Act, before the trial Court, have directly approached this Court through the instant appeal. In this regard, it may be suffice to say that under Section 25 of the Act, there is no bar that a person convicted and sentenced in absentia cannot file appeal without first making an application under Section 19(12) of the Act. In our view, without framing charge and recording evidence regarding alleged absconcion of the appellants, conviction and sentence of the appellants in terms of section 21-L of the Act is violative of Article 9 of the Constitution, Islamic Republic of Pakistan, 1973 (The Constitution). Reliance can be placed upon the case of Muhammad Arif Vs. The State reported in 2008 SCMR 829 and case of Mir Ikhlaque Ahmed Vs. The State reported in 2008 SCMR 951. We are fortified with the dictum laid down by the Honourable Supreme Court of Pakistan in case of ARBAB KHAN Versus THE STATE reported in 2010 SCMR 755, whereby the apex Court while granting leave to appeal in respect of conviction and sentence under section 21-L of the Act, observed as under:

"A. Could the trial court under its judgment dated 02.10.2007 convict and sentence the petitioner under section 21-L of Anti-Terrorism Act, 1997 without recording and discussing the evidence in that behalf particularly when no charge to that effect was framed.

B. Whether on an appeal preferred by the petitioner, could the appellant court non-suit him on technical ground without adverting to the above aspect of the matter; and

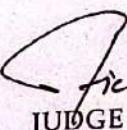
C. Whether during pendency of an application under section 19(12) of ATA, 1997 moved by the petitioner before

trial court without taking the said fact into account dismiss his appeal under the impugned order."

9. This Court in an unreported decision, in case of Khan Jan @ Khan Muhammad & another vide Criminal Appeal No.D-79 of 2016, while discussing the identical issue had held that conviction and sentence awarded to appellants under section 21-L of the Act, is violative of Articles 9 and 10-A of the Constitution and allowed the appeal.

10. Admittedly, the appellants have been acquitted from the charge of main offences under Section 365-A, PPC and Section 6 of the Act, in absentia; however, no evidence was recorded by the trial court to prove the offence under Section 21-L of the Act, against the appellants. In view of above discussion and legal position, we feel that conviction and sentence awarded to appellants by the trial court in absentia was violative of articles 9 and 10-A of the Constitution and Section 10(11-A) of the Act, thus, cannot be allowed to sustain. Furthermore, the appellants were not afforded any opportunity of hearing and thus they have been condemned unheard which is contrary to the principles of natural justice, hence, conviction and sentence rendered and awarded by the trial court, in absence of the appellants are not sustainable under the law and is violative of the constitution.

11. In view of above discussion, we are of the firm view that conviction of appellants 1. Mandost, 2. Shah Dost, both sons of Toto Jaffer, and 3. Dhani Bux son of Darak Jaffer, for offence under Section 21-L of the Act, recorded by the learned trial Court is violative of Articles 9 and 10-A of the Constitution. The upshot and cumulative effect of above discussion is that we are persuaded to allow the appeal. Consequently, the impugned judgment dated 22.03.2012 penned down by the Special Judge, Anti-Terrorism Court, Jacobabad is set aside to the extent of conviction and sentence of the appellants under section 21-L of the Act. Resultantly, the appellants are acquitted of the charge under section 21-L of the Act. The instant appeal was allowed and the appellants were acquitted by our shot order dated 20.03.2019 and above are the reasons of same of even date. The appeal along with listed application(s), if any, stands disposed of.



JUDGE

JUDGE
21/03/2019