IN THE HIGH COURT OF SINDH, KARACHI

Special Criminal Anti Terrorism Appeal No. 92 & 93 of 2022
Along with Special Criminal Anti Terrorism Jail Appeal No. 99 of 2022.

Date	Order with signature of Judge

Present: ***Mr. Justice Muhammad Junaid Ghaffar***
Mr. Justice Amjad Ali Sahito

Appellant in Appeals:	***(Waqas Azam)*** **Through Mr. Raj Ali Wahid Kunwar, Advocate.**
Respondent:	***(The State)*** **Through Mr. Muhammad Iqbal Awan, Addl. P.G.**
Date of hearing:	**20.06.2022**
Date of Judgment:	**21.07.2022**

J U D G M E N T

Muhammad Junaid Ghaffar, J: Through these Appeals, the Appellant Waqas Azam Son of Muhammad Azam seeks setting-aside of impugned Judgment dated 28.04.2022 passed by the Anti-Terrorism Court No.V, Karachi, in Special Cases Nos. 892 & 892-B of 2018 in Crime Nos.171 of 2018[1] and Crime No.175 of 2018[2] whereby, Appellant has been convicted under Section 265-H(2) Cr.P.C for offence under Section 21-L of The Anti Terrorism Act, 1997, ("**ATA**") and sentenced to undergo with rigorous imprisonment for five years and with fine of Rs.50,000/- and in case of default, to further undergo simple imprisonment for a period of six months along with benefit of Section 382-B Cr.P.C.

2. Learned Counsel for the Appellant has contended that the learned trial Court has fallen in serious error by convicting the Appellant under Section 21(L) of ATA; that the Appellant has been acquitted in respect of the main offence and charge; hence there was no occasion for any conviction under section 21(L) (ibid); that the Appellant was never an absconder and had in fact surrendered before the Anti Terrorism Court during the trial; hence the very invocation of Section 21(L) of ATA, was

[1] registered under Sections 353, 324 and 34 Pakistan Penal Code ("PPC") read with Section 7 of the Anti Terrorism Act, 1997 ("ATA")
[2] registered under Section 23(1) of Sindh Arms Act, 2013 at P.S. Pak Colony, Karachi,

illegal; that no evidence was ever recorded so as to establish that the Appellant was an absconder within the meaning of Sections 87 & 88 Cr.P.C.; that a mere statement of the Investigation Officer, recorded at a pre-trial stage, cannot be made basis for conviction under section 21(L) of ATA; that per settled law no conviction can be maintained in these facts and circumstances of the case, when the Appellant has been acquitted in the main case. In support he has relied upon the cases reported as ***Haji Muhammad V/s. The State*** **(PLD 2003 Supreme Court 262),** ***Arbab Khan V/s. The State*** **(2010 SCMR 755)**, ***Dadoo alias Waddan V/s. The State*** **(2016 P Cr. L J 1130)**, ***Zubair Jakhrani V/s. The State*** **(2022 MLD 438)**, ***Riaz Ahmed V/s. The State*** **(2016 MLD 700)**, ***Mst. Mubarak Salman and others V/s. The State*** **(PLD 2006 Karachi 678)**,***Wali Mohammad and another V/s. The State*** **(PLD 1973 Peshawar 135)**, ***Abdul Wahab V/s. The State*** **(2003 YLR 1915)**, ***Arbab Khan V/s. The State*** **(2010 SCMR 755)**, ***Rasool Bakhsh V/s. The State*** **(PLD 2019 Balochistan 63)**, ***Jumman alias Juma and another V/s. The State*** **(PLD 2006 Karachi 388)**, ***and an unreported judgment dated 29.03.2022 passed by a Divisional Bench of this Court passed in Cr. Appeal No. 610/2021 (Mst. Neha Hassan & two others V/s. The State).***

3. On the other hand, learned Additional Prosecutor General has opposed the Appeals on the ground that the Appellant had absconded after procuring interim pre arrest bail, whereas, due process within the contemplation of section 87 and 88 of the Criminal Procedure Code was followed; hence, no case is made out. He has prayed for dismissal of the Appeals in hand.

4. We have heard the learned Counsel for the Appellant as well as learned Additional Prosecutor General and perused the record including the R & P. It appears that the appellant was nominated in Crime Nos.171 of 2018 and Crime No.175 of 2018 under various provisions of Pakistan Penal Code and Anti Terrorism Act along with the Arms Act as above. As to merits of the case and the main allegations against the Appellant, admittedly in respect of all charges, the Appellant has been acquitted by the trial Court and presently such acquittal has not been challenged any further by the State. The only issue now in these Appeals is that whether

in the given facts and circumstances the conviction of the Appellant under Section 21(L)[3] of ATA can be maintained or not.

5. From perusal of the record and the facts placed before us it seems to be an admitted position that the Appellant / Accused was arrested by Police during patrolling on 10.7.2018 and a case was registered for the crime as above. Thereafter the Appellant was granted bail on 18.08.2018 by the concerned trial Court and apparently thereafter from 15.09.2018 onwards, he did not appear before the Trial Court and the case was then kept on a dormant file. In between, the matter was proceeded against another accused who was in custody and after prosecutions evidence, the said person (not relevant for the present case) was acquitted. In the meantime, the trial Court initiated proceedings against the present Appellant and subsequently on 09.07.2019, he was declared a proclaimed offender by the learned Trial Court. Thereafter on 05.11.2021, the Appellant surrendered before the trial Court and was once again granted ad-interim pre-arrest bail, which was then dismissed on 23.2.2022 and he was remanded to judicial custody and was then prosecuted in the above cases. As to the merits of the case and the main charge, the Appellant as noted hereinabove, stands acquitted, whereas, in respect of his abscondance he was asked a question in this regard in his Section 342 Cr.P.C. statement during the trial which is as follows.

> Question No.5. That during trial you accused obtained the bail and then jumped out from this Court then proceedings U/s 87 and 88 Cr.P.C. were initiated against you What you have to say?
>
> "Ans: I was selling fruits in old golimar Karachi, some unknown person demanded Bhatta from me and also issued life threats so my mother send me to Baluchistan and moved application at P.S Pak Colony and P.S Rizvi."

6. A specific question was asked to the Appellant and he has responded as above that he had gone out of the Province due to threat to his life, but still the Trial Court was not agreeable and went on to convict the Appellant by holding that the absence of the Appellant was intentional and deliberate to avoid his arrest and to evade appearance before the Court and so also he remained fugitive from the law. The learned trial Court further observed that *had he not gone into hiding, he could have been tried*

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[3] **21L. 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 [1][five years] and not more than [2][ten years] or with fine or with both.

with the co-accused, but apparently instead of, he preferred to wait for decision of the Court in case of co-accused. It is a matter of admitted position that the entire basis on which the trial Court has convicted the Appellant under Section 21(L) of ATA, is the Statement of P.W-3 namely Syed Sajid Hussain i.e. Ex.-6, which was recorded before framing of the charge while concluding proceedings under Section 87 and 88 Cr.P.C. The same reads as under:-

"Ex.…
.06.

IN THE COUR TOF JUDGE, ANTI-TERRORISM COURT-VI, KARACHI

Special Case No. 892/2018

DEPOSITION OF WITNESS NO.CW-03 FOR THE PROSECUTION.

I do hereby on solemn affirmation state that:-

My Name:	Syed Sajid Hussain		
My Father Name:	Syed Nazar Hussain		
Religion:	Islam	**Caste:**	Syed
Age About:	50 years	**Occupation:**	Inspector
Residence:	Pak Colony Police Line, West Karachi.		
District:	Karachi, West.		

EXAMINATION-IN-CHIEF

To Court

At present I am posted at PS Pak Colony, Karachi. I had received the NBW's of absconding accused namely Waqas S/o Muhammad Azam R/O House No.06, Abdullah Gorej Village, Usmania Masjid, Purana Golimar, Karachi, for execution. I went to his address as mentioned in NBW's but he was not available, as such I made enquiries from the people of that locality. They informed me that the accused was previously residing there but due to fear of his arrest, he has gone underground and his present whereabouts are not known to anyone. I, therefore, recorded statement of Mohalla people. The subject fact explicitly disclosed that there is no likelihood of arrest of accused in near future. I therefore returned unexecuted NBW, Statement of vicinity people along with their CNIC and my report at EX.06/A to EX.06/H respectively.

CROSS TO MISS FARHANA PARVEEN LEARNED APG FOR THE STATE.

Nil though chance given.

No. Re."

Dated:15-02-2019.

Sd/=(15.02.2019)
(MUNEER BHUTTO)
Judge
Anti-Terrorism Court No.VI,
Karachi"

7. From perusal of the above, it appears that this is dated 15.02.2019 and is a Statement of the Investigation Officer before the Trial Court in respect of the proceedings against the Appellant under Section 87 & 88

Cr.P.C. It is a matter of fact that subsequently, the Appellant had surrendered before the Trial Court; an amended charge was framed on 12.3.2022 and then evidence was led by the same witness, which is Exh 22, and in his entire evidence recorded in respect of the main charge, this witness has never deposed anything about the conduct of the Appellant and his alleged abscondance. In his Examination-in-Chief, after framing of the, charge he never adduced any evidence in respect of this abscondance and as a consequence, thereof, the said witness was never cross-examined on behalf of the Appellant to that effect. The learned Trial Court has relied upon Ex-6, which apparently is a document, dated much prior to the framing of the Charge and in law, it cannot be treated as a part of evidence within the contemplation of The Qanoon-e-Shahadat Order, 1984. The said statement is in fact at best is a statement of a process server for the purposes of proceedings under Section 87 and 88 Cr.P.C.; and per settled law cannot be treated as evidence within the meaning of Qanoon-e-Shahadat Order, 1984[4]. At best it is a statement. It may be a document to assist the Court, and even can be relied upon in the facts and circumstances of a particular case; however, once it has come on record that after framing of the Charge, no such evidence was ever led by the Prosecution, which in fact kept its focus on the main charge against the Appellant, in which they failed to get any conviction, therefore, the learned trial Court was not justified by first acquitting the Appellant in the main case, and then on its own, by relying upon Ex-6, to convict the Appellant under Section 21(L) of ATA which merely is a statement recorded before framing of the Charge.

8. There is another aspect of this case which is noteworthy and needs attention as well. From the record it transpires that when the trial of the case(s) in hand was initially being conducted against the Appellant and other co-accused, the case of the present Appellant was placed on dormant file, after he had jumped bail, notwithstanding the fact that in terms of Section 19(10)[5] of ATA, and the proviso thereof, the learned Trial

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[4] Mst. Mubarak Salman v The State (PLD 2006 Karachi 678)

[5] **19. Procedure and powers of Anti Terrorism Court;**

(10) Any accused person may be tried in his absence if the Anti Terrorism Court, after such inquiry as it deems fit, is satisfied that such absence is deliberate and brought about with a view of impeding the course of justice;

Provided that the accused person shall not be tried under this sub-section unless a proclamation has been published in respect of him in at least in one daily newspaper including sindhi language requiring him to appear at a specified place within seven days failing which action may also be taken against him under section 88 of the Code;

Provided further that the Court shall proceed with the trial after taking the necessary steps to appoint an advocate at the expense of the State to defend the accused person who is not before the Court.

Explanation: An accused person who is tried in his absence under this sub-section shall be deemed not to have admitted the commission of any offence for which he has been charged.

Court was fully competent to proceed with the trial against the present appellant in absentia, who was already declared as a Proclaimed Offender under Sections 87 & 88 Cr.P.C. after providing a Counsel at State expenses to defend him. This is a special provision under ATA as against the procedure provided in Criminal Procedure Code[6]. This never happened, and it is only after the Appellant surrendered that he has been convicted under Section 21(L) of ATA, whereas, he stands acquitted on merits and the main charge(s) against him. In our considered view, once the Appellant has been acquitted on merits, and the trial Court, chose not to proceed in terms of section 19(10) ibid, then perhaps any conviction thereof under Section 21(L) (ibid) for his alleged abscondance would be too harsh a punishment to maintain. In fact, it is like from day one a person was innocent, was never wanted in any such crime, but since he couldn't attend the Court for reasons which have never been dilated upon and looked into; must undergo a sentence as the law provides for. This seems to be a very unusual way of punishing a person, who in fact, on the basis of his acquittal, ought not to have been tried from day one. Just because he was nominated in a criminal case, and was an accused for a certain period of time; he must be punished as he failed to attend the Court does not seems to be the intention of the lawmakers. A punishment under Section 21(L) ibid, has a reasoning of its own and has apparently been provided to add as a surplus-age as a sentence against an accused who is being convicted and sentenced for the main offence(s) under ATA and has avoided to attend the Court with intention to escape any sort of punishment. In fact, acquittal, even in case of a compromise, has always been treated as an Honourable acquittal[7], as if there was no case ever against the said person, rather it is a case, wherein, he has been falsely implicated when the State has never appealed against such acquittal. We do not see any justification and reason to maintain this conviction merely on the ground that after obtaining bail, the Appellant failed to appear before the Court and then absconded. In this view of the matter when there was no evidence against the Appellant on merits, except his abscondance, the said piece of evidence in isolation, if at all, is not sufficient to uphold the conviction and sentence[8]. It is further settled that mere abscondance in absence of any other incriminating piece of evidence could not entail penal consequences against the accused or to

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[6] Muhammad Siddique v The State (2018 SCMR 71); Haji Muhammad v The State (PLD 2003 SC 262)
[7] See Suo Moto Case Re v The State (PLD 2018 SC 703); Dr. Muhammad Islam v Govt. of NWFP (1998 SCMR 1993) & ADBP v Mumtaz Khan (PLD 2010 SC 695)
[8] Muhammad Abbas v The State (2007 YLR 45)

expose them to the criminal liability on which they had been charged[9]. It is further settled that when the accused has been acquitted in the main offence, therefore, no useful purpose would be served either to remand the matter or to maintain the same[10]. Similar view has been expressed in the case of *Dadoo alias Waddan*[11]. In our considered view if an accused person absconds through which valuable piece of evidence is lost or concealed or allowed to be destroyed then he is not entitled for a concession or a benefit of doubt; but if an innocent person became fugitive from law or absconds for reasons beyond his control and ultimately such innocence was established by way of his acquittal, then at least, per settled proposition in criminal jurisprudence, he is entitled for such benefit of doubt. The facts and circumstances of this case, wherein, the appellant had appeared by himself before his conviction and trial demonstrates that though he had failed to regularly appear before the Trial Court after obtaining bail; but his intention was never so to abscond permanently. Otherwise, he would have only sought relief by way of appeal after his conviction in absentia.

9. In view of the above facts and circumstances of the case in our considered opinion these Appeals merits consideration and in given facts we cannot maintain the conviction and the sentence awarded to the Appellant. Accordingly, the listed Appeals are hereby allowed. The impugned judgment dated 28.4.2022 is hereby set-aside. The Appellant is acquitted from the charge under Section 21(L) of ATA and his conviction/ sentence in Crims Nos. 171 and 175 of 2018 to that extent is hereby set-aside. He shall be released forthwith, if not required in any other case.

10. All listed Appeals are ***allowed*** as above.

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[9] Shafqat Abbas v The State (2007 SCMR 162)
[10] Khanzado alias Ketoo Sabzoi v The State (2015 P.Cr.L J 1561)
[11] 2016 P.Cr.L J 1130