

ORDER SHEET
THE HIGH COURT OF SINDH,
 CIRCUIT COURT, HYDERABAD.

Cr. Spl. A.T. Appeal No.D-09/2013

DATE	ORDER WITH SIGNATURE OF JUDGE
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PRESENT.
 Mr. Justice Aqeel Ahmed Abbasi.
 Mr. Justice Habib-ur-Rahman Shaikh.

<u>Date of Hearing:</u>	30.4.2013.
<u>Date of order:</u>	30.4.2013.

Mr/s Syed Muhammad Wasim Shah and Abdul Sattar Sarki, Advocates for the Appellants.
 Mr. Muhammad Iqbal Kalhoro, Additional Prosecutor General Sindh

ORDER

AQEEL AHMED ABBASI, J.- Through this common order we intend to dispose of aforesaid appeals in respect of appellants namely Muhammad Shoaib son of Muhammad Ramzan, Imdad Ali Shah alias Imdad son of Gulab Shah Pathan and Ismail Shah alias Laloo son of Gulab Shah Pathan as both the appeals arise out of same impugned judgment dated 16.01.2013 passed by the learned Judge, Anti-Terrorism Court, Hyderabad in ATC Case No.40/2011 arising out of Crime NO. 82/2011 registered at Police Station Qasimabad, U/s 6(2)(b)(k) R/W Section 7(c)(h) of Anti Terrorism Act 1997, whereby the above said appellants were convicted in absentia and sentenced as under:-

“(i) for the offence under Section 6(2)(b) committed under Section 7(c) of Anti Terrorism Act, 1997 r/w S. 34 PPC and sentenced to undergo Ten Years R.I with fine of Rs.50,000/- each in case of default of payment of fine, all three convicts shall suffer further Six months SI further.

“(ii) For the offence under Section 6(2)(k) committed under Section 7(h) of Anti Terrorism Act, 1997 r/w S. 34 PPC and sentenced to undergo Five Years R.I with fine of Rs.50,000/- each in case of default of payment of fine, shall suffer Six months SI further.

Both sentence shall be executed on the arrest of accused and to run concurrently. All three convicts are not present before this Court hence permanent NBWs against them be issued as soon as they are arrested they shall be remanded to Central Prison Hyderabad to serve out their sentence.”

2. Both the learned Counsel for the appellants at the very outset have submitted that since through impugned judgment admittedly the conviction has been awarded to the appellants in absence in violation of Article 9 & 10 of the Constitution of Islamic Republic of Pakistan, 1973 whereas the appellants, who were never served with the Court notices by the Anti Terrorism Court, have voluntarily surrendered before this Court therefore, in terms of Section 19(12) R/W Section 25 of the Anti Terrorism Act, 1997 instant appeals may be allowed and the impugned judgment may be set aside and the appellants may be acquitted after hearing the merits of the case. It has been contended by the learned Counsel for the appellants that none of the appellants, who have been convicted through impugned judgment including the present appellants and the convict Baban (Mairajuddin) who was declared absconder, were present before the Anti-Terrorism Court, which has passed the impugned judgment, without providing an opportunity of being heard to the appellants. Per learned Counsel, none of the appellants was ever served with the Court notices in accordance with law nor the learned Judge has recorded such finding to show that appellants have avoided service of Court notices. It has been argued that under the provisions of Section 19(12) Anti Terrorism Act 1997 this Court has concurrent jurisdiction either to set aside the impugned judgment and acquit the appellants or it can remand the case to the learned Anti-Terrorism Court to decide it afresh after providing an opportunity of being heard to the appellants. It has been further argued that remanding the matter back to the learned Anti Terrorism Court will be futile exercise as the appellants have a good case on merits however, per learned Counsel, if this Court is inclined to remand the matter to the learned Trial Court, the ad-interim bail granted to the appellants may be confirmed so further injustice may be prevented. In support of their contention, learned Counsel for the appellants have placed reliance in the cases of

Muhammad Arif V. The State reported as 2008 SCMR 829 and Ali Hassan V. The State reported as 2009 MLD 1198.

3. Conversely Mr. Muhammad Iqbal Kalhoro, Additional Prosecutor General Sindh, has submitted that in terms of provisions of Section 19(12) of the Anti Terrorism Act the appellants were required to appear before the learned Anti Terrorism Court with the prayer to set aside the impugned judgment, which was passed in abstentia and could decide the case afresh after providing proper opportunity of being heard to the appellants. Therefore, the learned Trial Court could have considered the request of the appellants keeping in view the facts and circumstances of the case and after being satisfied that the absence of the appellants was not deliberate. It has been contended by the learned Additional Prosecutor General Sindh that in terms of Section 25 of Anti Terrorism Act 1997 though, the appellants have the option to file appeal before this Court whereas this Court has concurrent jurisdiction to entertain the prayer of the appellants seeking their acquittal on merits, in cases where conviction has been awarded in abstentia however, per learned A.P.G, propriety warrants that instead of examining the merits of the case and undertaking the exercise of scrutiny and appraisal of the evidence by this Court, it will be appropriate if the impugned judgment is set aside and the matter may be remanded back to the learned Anti Terrorism Court to decide the case of the appellants afresh, after providing proper opportunity of being heard, whereas bail granted to the appellants by this Court may be confirmed in the similar terms as contained in the orders dated 26.3.2013 and 03.04.2013 respectively.

4. We have heard all the learned Counsel and perused the impugned judgment. We have also examined Articles 9 & 10 of the Constitution of Islamic Republic of Pakistan 1973 and the provisions of Section 19(12) and 25 of the Anti Terrorism Act, 1997, and have also

gone through the case law relied upon by the learned Counsel for the appellant, which shows that in case of conviction recorded in abstentia the convict has two options available in law, either (a) to approach the learned Trial Court within the stipulated period with a request to set aside his conviction recorded in abstentia, in terms of Section 19(12) of the Anti Terrorism Act 1997, by showing that he did not abscond deliberately from the Court during the Trial or (b) to surrender before this Court by filing an appeal U/s 25 of the Anti Terrorism Act 1997 with a prayer to set aside the conviction awarded in abstentia and to acquit him on merit or to remand the matter to the Trial Court for fresh trial by setting aside the impugned judgment. In the instant matter, it appears that all the accused persons in the aforesaid crime including appellants against whom conviction has been awarded in abstentia and the accused Baban (Mairajuddin), who has been shown absconder and whose case has been kept on dormant file, were not present before the learned Trial Court, hence no opportunity whatsoever to defend their case on merit was provided to them. The impugned judgment also does not suggest that the appellants have deliberately avoided the process of the Court or remained willfully absent from the Court.

5. In view of hereinabove, we are inclined to set aside the impugned judgment and the conviction awarded to the appellants in abstentia and remand the case back to the learned Anti Terrorism Court Hyderabad to decide the case of the appellants afresh, after providing them proper opportunity of being heard. The appellants shall surrender before the learned Trial Court and shall attend the Court on each and every date however, during the trial they shall remain on bail in terms of the orders dated 26.03.2013 and 03.04.2013 respectively passed by this Court in respect of the appellants. However, if the appellants misuse the concession of bail, the learned

Trial Court shall be at liberty to pass appropriate orders in accordance with law.

Both the appeals stand disposed of in the aforesaid terms.

JUDGE

JUDGE

