ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI
Spl. Crl. A.T.A. No. 50 of 2017.

Date	Order with signature of Judge

For hearing of case.

11.04.2017.

Mr. Asadullah Shah Rashidi, Advocate for appellant.
Mr. Muhammad Iqbal Awan, APG.

Salahuddin Panhwar-J:- To make back-ground of the matter, in hand, the order dated 07.04.2017 is reproduced hereunder which is:

> *"At the outset, learned counsel for the appellant contends that the appellant preferred Appeal No.47/2014 against the judgment dated 12.07.2014 recorded by the trial Court which was passed after full dressed trial of two cases i.e. FIR No.120/2013 and FIR No.111/2013 by common judgment of three appellants including the present appellant, who were convicted. However, separate appeals with respect of offshoot case were not filed with this impression that the judgment is common, therefore, there would be one appeal. After hearing the parties, this Court allowed the said appeal and acquitted all the accused persons. Para-16 of the judgment recorded by this Court shows that findings have been given with regard to off-shoot case i.e. recovery of pistol despite of such observation, the appellant was not released by the jail authorities, hence having no other option, the appellant preferred this appeal alongwith limitation application, such fact is not denied by the learned A.P.G however, learned counsel for the appellant filed miscellaneous application on the ground that the appellant is required to be released by the jail authorities as there was one judgment and that is in filed now, as such criminal administration of justice demands admission of this appeal and delay is condoned since paper book has already been prepared."*

Appellant was convicted by judgment dated 12.07.2014 recorded by the trial Court, which was passed after full dressed trial of two cases as mentioned above, and such judgment was assailed in

Special Cr. A. T. Appeal No.47 of 2014, which was allowed by this Court vide judgment dated 26.10.2016.

Thereafter appellant filed application under Section 561-A Cr.P.C. contending therein that judgment of the trial Court is not in field, therefore, he cannot be detained by the jail authorities but that application was dismissed by this Court vide order dated 02.02.2017 in the following manner:

> *"As the Special Cr. Anti-Terrorism Appeal No. 47 of 2014, impugning the Judgment of the trial Court rendered in Special Case No. A-127 of 2013, has already been allowed by this Court vide short order dated 04.10.2016, followed by the detailed reasons dated 26.10.2016, application in hand cannot be considered and is accordingly dismissed."*

At this juncture, it is quite essential to *first* attend a question to the effect that a *judgment* , recorded by the ATA Court after joint-trial within meaning of Section 21-M of the Act, needs to be challenged *separately* or a *single* appeal, assailing such judgment, would be sufficient to bring all convictions under *scrutiny* of appellate Court?. To properly appreciate this *proposition,* it would be proper to first refer Section 21-M of the Act which is:

> ***"21-M. Joint Trial.—*** *(1) While trying any offence under this Act, a Court may also try and other offence which an accused may, under the Code of Criminal Procedure, 1898, be charged, at the same trial if the offence is connected with such other offence.*
>
> *(2) If, ……*

From the above, it is quite evident that the *joint trial* is *legal* subject to permissibility of Code. The provision of Section 234 to 239

of the Code, no doubt, permits *joint trial* if the Court is competent to try all such separate charges/offences and that series of events are linked in a manner so as to constitute a single transaction. Reference may be made to the case of the Nawaizish Ali v. State 2010 SCMR 1785. Thus, it can *safely* be concluded that while proceeding under Section 21.M of the Act the Special Court finds the different offences , falling within meaning of *series of events* the joint-trial whereof causes no prejudice to either sides i.e. accused and prosecution.

Here, it is necessary to add that provision of Sections 408 and 410 of the Code give right of the appeal while saying that:

> *"Any person convicted on a **trial** , held by a……, may appeal…"*

hence, prima facie, even in the event of a conviction on a *joint-trial* a *single* appeal will lie for simple reason that conviction is based on a *single* trial *though* of joint-charges. The provision of Section 25 of the Act, *however*, gives right of appeal against **'a final judgment'** but again it would suffice to say that if a **'final judgment'** is result of *joint trial* then it would not be justified to challenge such *judgment* in piece meal when *trial* though *joint* was one and same which *otherwise* would be within spirit of propriety, administration of justice and fair-play. Besides, when the *trial court* records findings / observations in a *'common judgment*, based on a *joint trial'* hence it cannot be expected from the appellate Court that it (appellate Court) shall be required to examine the findings/observations in a manner to effect *single* observation valid/effective for one conviction and invalid/ineffective

for other conviction. Even otherwise, it is also a well settled principle of law that in appeal whole case becomes opened hence if lower court (trial court) can *legally* conduct joint-trial and pass a common judgment hence same *power* could competently be exercised by appellate Court. It is *however* needless to add that appellate Court would be competent to maintain conviction for one offence and acquit for other, as was / is competence of trial Court. However, since it is statutory right of the *convict* to prefer appeal and if he chooses not to challenge legality of certain sentences he may *competently* challenge particular sentence even if awarded through a common judgment, the convict may choose so. This *however* will not prejudice the competence of appellate Court to examine the legality of all convictions while examining the common (single) judgment.

In view of above discussion, we would conclude that convict may *competently* prefer a single appeal challenging legality of different charges, if *final* judgment is common and is consequence of *joint-trial.*

Now, we would revert to merits of instant case. The perusal of the record shows that **'final judgment'** through which the appellant was convicted for *different charges* has been set-aside by this Court hence *legally* is no more in field which (judgment of appellate court) *did* include observation with regard to *instant* charge i.e. recovery of crime weapon. Paragraph No.16 whereof being relevant is reproduced herewith:

> "16. *Insofar as recovery of pistol, which was alleged to have been recovered on the pointation of the Appellant Abdul Hafeez*

> *is concerned, according to the FSL report, the said weapon was not in a working condition. <u>In the light of FSL report</u>* <u>**no weight could be attached to the recovery of pistol.”**</u>

It is also material to add that the Counsel for the appellant *did* contend that paragraph No.1 of Spl. Cr. A.T. Appeal No.47 of 2014 shows the detail of the crime, however, the case number is not mentioned however, perusal of the appeal made it clear that the appellant did not choose to confine appeal to extent of conviction in main case crime but has stated as:

> "… being aggrieved with impugned judgment of conviction prefers appeal…."

It is also material to add here that *final judgment,* passed by this Court referred above, while concluding states as under:

> " 18. *Resultantly, the instant Special Cr. Anti-Terrorism Appeal No.47 of 2014 is allowed and the impugned judgment and sentence is set aside. The Appellants Abdul Hafeez son of Qadir Bux Balouch, Altaf Hussain son of Abdul Aziz Lashari Balouch and Riaz Ahmed son of Imam Bux Balouch are acquitted of the charge. These are the reasons in support of our short order dated 04.10.2016 hereby Appeal was allowed."*

Thus, it is *prima facie* evident that while setting aside the **final judgment** of trial Court this Court (appellate Court) set-aside the same as a *whole* and never saved the conviction awarded through common judgment for off-shoot case. It is, however, a matter of record that appellate remained in jail despite his acquittal perhaps merely for reason that the *issue* was not properly brought to notice of this Court. It is very sad to say that despite acquittal order appellant has remained in jail for about six months, although application for

seeking release was filed but without explaining the proper cause / reason of detention.

Since, undisputedly, the *final judgment* through which the appellant was convicted is no more in field which even renders the concept of *second / separate* appeal within meaning of Section 25 of the Act which insists filing of appeal against **'final judgment'** which in the instant case is not in *field***.** A mistake of counsel or Court *even* should not result in prejudicing the substantial right which *shall* include *liberty* of a person and in such eventuality the Court is required to intervene and rescue that person, who has earned legal right, even *soumoto* under revisional powers. Jail authorities should also be courageous enough to make reference whenever there is any *ambiguity* resulting in keeping one away from his guaranteed liberty. Accordingly, instant appeal is allowed. Appellant shall be released forthwith if not required in any other custody case.

JUDGE

JUDGE

SAJID