

ORDER SHEET

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA.

Cr. Appeal No. D- 07 of 2019.

Date

Order with signature of Hon'ble Judge

1. For orders on office objections as flag A.
2. For hearing of main case.

20.3.2019.

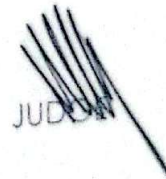
Appellants are present in person.

Mr. Muhammad Noonari, D.P.G.

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For the detailed reasons to be recorded later on, instant Appeal is allowed. Impugned Judgment dated 12.4.2012 passed by Special Judge, Antiterrorism Court, Jacobabad in Special Case No.58 of 2009 re: State v. Muhammad Hayat and others being outcome of Crime No.144/2008 P.S New Foujdari Shikarpur, U/S 148, 149, 365-A PPC and 7 of Anti-Terrorism Act, 1997 is hereby set aside to the extent of conviction and sentence of the appellants present before the Court. Consequently the appellants Abdul Aziz and Mamo Abdul Haque are acquitted of the charge U/S 21-L of Antiterrorism Act, 1997. They are present before the Court on bail. Their bail bond stand cancelled and surety(ies) discharged.


JUDGE


JUDGE

Above Order Complied
On dt 27-03-2019


Accountant

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANO

Crl. Appeal No.D-07 of 2019

PRESENT:

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

Appellant

Abdul Azeez Mahar & another in person

Respondent

The State, through Mr. Mohammad Noonari,
Deputy Prosecutor General, Sindh

Date of Hearing : 20-03-2019.

Date of Order : 20-03-2019.

JUDGMENT

MOHAMMAD SALEEM JESSAR, J.- Appellants Abdul Azeez son of Abdul Haque Mahar and Mamo Abdul Haque son of Sulleman Mahar, through this appeal have impugned the judgment dated 12.4.2012 passed by the learned Judge, Anti-Terrorism Court, Jacobabad in Special Case No.58/2009, re-State v. Muhammad Hayat Mahar & others, being outcome of Crime No.144/2008, registered at Police Station New Foujdari, Shikarpur, for offence under Sections 365-A, 148, 149, PPC read with Section 7 of the Anti-Terrorism Act, 1997, whereby the appellants along with co-accused Laloo Mahar 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, PPC read with Section 7 of the Anti-Terrorism Act, 1997.

2. The police submitted challan of this case before the learned trial Court placing the names of appellants Abdul Azeez and Mamo Abdul Haque as well as co-accused Laloo Mahar as absconders. After completion of codal formalities, the learned trial Court framed formal charge against the accused persons, who were present before it. After recording evidence of prosecution witnesses, statements 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 viz. under Sections 365-A, PPC read with Section 7 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 Laloo Mahar in following terms:

"16. However, it would be pertinent to mention here that accused 1. Abdul Azeez son of Abdul Haque Mahar, 2. Mamo Abdul Haque son of Sulleman Mahar, and 3. Laloo son of Khan Muhammad Mahar, are absconding in this case. I am satisfied with their deliberate abscondence, therefore, each of them is convicted under Section 21-L of the Anti-Terrorism Act, 1997 and each of them is sentenced for FIVE YEARS with forfeiture of their movable and immovable property, as such perpetual warrants be issued against these absconding accused."

3. The appellants at the very outset have argued that they alongwith co-accused Laloo Mahar had been acquitted from the charge of main offence viz. under Sections 365-A, PPC read with Section 7 of the Act but had been convicted under Section 21-L of the Act. Moreover, they contend their innocence and prayed they have been acquitted of the charge of the main offence, hence, pray for their acquittal.

4. Mr. Mohammad Noonari, learned DPG, 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 cannot be entertained.

5. We have heard the appellants in person, learned DPG, 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 7 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 absconsion 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 :-

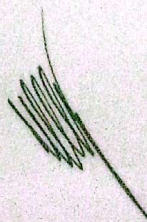
"21-L. Punishment for an Absconder.—Whoever being accused of an offence under this Act, absconds and avoids arrest or evades appearance before any inquiry, investigation or Court proceedings or conceals himself, and obstructs the course of justice, shall be liable to imprisonment for a term not less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

8. The argument of learned DPG 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 application under Section 19(12) of the Act. In our view, without framing charge and recording evidence regarding alleged absconsion 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 as 2008 SCMR 829 and case of Mir Ikhlauque 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 as 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 advertng 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 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, Islamic Republic of Pakistan, 1973 (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 7 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, Islamic Republic of Pakistan, 1973 (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 principle 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 Azeez Mahar and Mamo Abdul Haque Mahar 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 accumulative effect of above discussion, we are persuaded to allow the appeal. Consequently, the impugned judgment dated 12.04.2012 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. They are present on bail; their bail bonds stand cancelled and surety(ies) furnished by them is/are also hereby discharged. 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.

JUDGE

JUDGE

Qazi Tahir/