

**IN THE HIGH COURT OF SINDH, CIRCUIT COURT
HYDERABAD**

Cr. Appeal No.D-40 of 2013.

Cr. Appeal No.D-131 of 2014.

PRESENT

Mr. Justice Naimatullah Phulpoto

Mr. Justice Zulfiqar Ahmad Khan.

Date of Hearing: 25.04.2017

Date of Judgment: 25.04.2017

Appellant/accused: *Zahid Hussain [in Criminal Appeal No.40 of 2013] Through Mr. Ishrat Ali Lohar, Advocate.*

Appellant/accused: *Mithal [in Criminal Appeal No.131 of 2014] Through Mr. Ishrat Ali Lohar, Advocate.*

The State: *Through Syed Meeral Shah Bukhari, Deputy Prosecutor General, Sindh.*

JUDGMENT

NAIMATULLAH PHULPOTO, J:- These appeals are directed against the Judgment dated 09.05.2013, passed by learned Judge A.T.C. Hyderabad in Special Case No.65 of 2012 [The State v. Zahid Hussain Malano & others], whereby the appellants Zahid Hussain along with absconding accused Mithal and others were convicted under section 7(h) of Anti-Terrorism Act, 1997, and sentenced to 05 years R.I. and to pay fine of Rs.50,000/-. In case of the default in payment of the fine, they were ordered to undergo S.I. for 06 months. Accused Zahid was extended benefit of Section 382-B Cr.P.C. Accused Zahid has filed Appeal bearing No.D-40 of 2013, against his conviction and sentence. Accused Mithal was convicted

in absentia he has also filed appeal before this Court challenging his conviction and sentence in absentia.

2. Mr. Ishrat Ali Lohar, learned Advocate for the appellant contended that charge against accused Zahid Hussain was defective and trial court has failed to frame the charge as provided under the law. He has also contended that material particulars with regard to the offence have not been mentioned in the charge. Lastly contended that charge has not been framed according to the Head wise to provide fair opportunity to accused to defend during trial. In support of his contentions, he has relied upon the case reported as AKHTAR MUHAMMAD v. THE STATE [P.L.D. 2017 Peshawar 55].

Mr. Lohar with regard to the appellant Mithal has contended that he was convicted in absentia which is violative of the Articles 9 & 10(1) of the Constitution and Section 10(11-A) of Anti-Terrorism Act, 1997. In support of his contentions he has relied upon the cases reported as (i) **LEEMON and 2 others v. THE STATE** [2004 P.Cr.L.J. 2031] (ii) **Qari ABDUL HAYEE and another v. THE STATE** [2005 Y.L.R. 1865], (iii) **Mir IKHLAQ AHMAD and another v. THE STATE** [2008 SCMR 951]. Learned Advocate for the appellant further argued that this is a fit case for remand to the trial court for framing of the charge afresh and proceeding further in accordance with law.

3. Syed Meeral Shah Bukhari, D.P.G. for the State conceded to the contentions raised by the learned advocate for the appellants and submitted that the matter may be remanded back to the learned trial court for framing of the charge afresh and proceeding further in accordance with law.

4. Under section 222 Criminal Procedure Code, charge shall contain the particulars as to the time and the place of the alleged offence and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

5. For the sake of convenience section 222 is reproduced as under:-

“222. Particulars as to time, place and person.---

(1) The charge shall contain such particulars as to the time and place of the alleged offence, and the person (if any) against whom, or the thing (if any) in respect of which, it was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged.

(2) When the accused is charged with criminal breach of trust or dishonest misappropriation of money, it shall be sufficient to specify the gross sum in respect of which the offence is alleged to have been committed, and the dates between items or exact dates, and the charge so framed shall be deemed to be a charge of one offence within the meaning of section 234;

Provided that the time included between the first and last of such dates shall not exceed one year.

6. In the view of above legal position, we have examined the charge framed by the trial court. The trial court has framed Charge against the accused at Ex.8 which is reproduced as under:-

CHARGE

I, Muhammad Jawaid Alam, Judge, Anti-Terrorism Court, Hyderabad, do hereby charge you,

- (1) Zahid Hussain s/o Hussain Malano.... In custody.
- (2) Mithal s/o Muhammad Yousuf Kashmiri.
- (3) Ramzan s/o Muhammad Yousuf Kashmiri.
- (4) Zulfiqar s/o Muhammad Suleman Dhakan.
- (5) Ashiq s/o Ali Hassan Mallah

..... Proclaimed offenders as follows:-

That on 4/092012, your associate proclaimed offender Zulfiqar Ali Dhakan and Ashique Mallah made telephone call from Phone No.0344-7621630 to Security Guard of Soghat Shereen situated at Breeze Tower Alam Chowk Hussainabad directed him to ask his owner to pay them Bhatta of Rs.Five Lacs and they were sending their associates, and if bhatta not paid he would be killed. At about 4.15 pm, you Zahid Hussain and Mithal Kashmiri duly armed Pistols went on 125 motorcycle at the said shop and demanded Rs.Five lacs as bhatta from complainant in presence of Manager Awais Shaikh and labor Wazir Ali introducing yourself sent by Zulfiqar and Ashiq Mallah to receive Rs. Five Lacs and extended threats of dire consequences. On refusal you made fire upon above named P.Ws who saved their lives by hiding under the table. Your such act was with such intention and under such circumstances that if you caused death of anyone you would have been guilty of Qatl-e-Amd you also created sense of insecurity and fear amongst the people of the locality and thereby you have committed an offence of terrorism fall under Section 6(2)(b)(k) punishable under Section 7(d)(h) of Anti-Terrorism Act, 1997 r/w S. 384, 324/506(2)/149 PPC, within cognizance of this Court.

And I hereby direct that you be tried by this Court on the aforesaid charge.”

7. It has been observed that in the present case, charge against the accused persons was not specific as even it was not clear in all respects to provide an opportunity to the accused to defend themselves during the course of the trial. Further the charge has not been framed Head-wise and it is confusing, one which has caused prejudice to the accused. Under the law, the charge is precise formulation of specific accusation made against an accused person who is entitled to know its nature at the early stage. Its aim is to explain to the accused as correctly and precisely as well as

concisely as possible the allegations with which the accused is to be confronted but in this case it has not been done by the trial court. Moreover, charge framed by the trial court did not contain all essential details as to time, place as well as specific manner of the alleged offence, certainly that has caused prejudice to the accused.

8. In the case of **ASSADULLAH KHAN v. THE STATE and another** reported in P.L.D. 2017 Peshawar 55, it has been held as under:-

Charge against accused shall be specific, fair and clear in all respects to provide an opportunity to the accused to defend himself/herself in due course of trial. The charge shall be clear and by no means, confused to prejudice the accused. Charge is a precise formulation of specific accusation made against an accused person, who is entitled to know its nature at the early stage. Its aim is to explain to the accused as correctly and precisely as well as concisely as possible the allegations with which the accused is to be confronted. The charge must convey to the accused with sufficient transparency and in clear terms what the prosecution intends to prove against the accused. It shall contain all essential details as to time, place as well as specific manner of the alleged offence, the manner in which the offence was committed with full description of the accusation with which he is confronted. The prime object and the principle of framing charge shall be, to make aware the accused, of the substantive accusations which are to be proved by the prosecution with clear intention and with unambiguous description of the offence so as to enable the accused to defend himself.

9. We have carefully perused the Judgment passed by the trial court, it was also not in accordance with law. Relevant portion of Judgment dated 09.05.2013 is reproduced as under:-

“Point No.03.

On the basis of my findings on Points Nos. 1 and 2 I came to the conclusions that the prosecution has proved their case beyond any reasonable doubt that accused Zulfiqar Dhakan and present accused and also other absconding accused namely Mithal, Ramzan and Ashiq are involved in demanding Bhatta and on 4/09/2012, the present accused along with two absconding accused at the instance of Zulfiqar came at the shop of the complainant demanded Bhatta and in case of non payment with intent to create terror and sense of insecurity made fires and therefore, they have committed the offence as defined under Section 6(2)(k) punishable under Section 7(h) of Anti Terrorism Act, 1997 and therefore, they are convicted and sentenced to undergo RI for Five (5) Years each and fine of Rs.50,000/- each and in default of payment of fine each of them shall undergo for further Six months SI.”

10. Admittedly trial of appellant Mithal was undertaken by the trial court in his absentia which is violative of Articles 9 and 10(1) of the Constitution and S.10(11-A) of Anti-Terrorism Act, 1997, and could not be allowed to sustain. Accused Mithal was not afforded any opportunity of hearing and thus he was condemned unheard which was contrary to the principles of natural justice as held by Honourable Supreme Court of Pakistan in the case of **Mir IKHLAQ AHMAD and another v. THE STATE** [2008 SCMR 951]. The relevant portion of which is reproduced as under:-

“13. In the case in hand, the trial of the appellants was conducted the Special Judge and murder reference was answered in affirmative by the High Court in their

absence. Now the question arises as to whether the trial against the appellants, in absentia, was validly and legally conducted. Article 9 of the Constitution of Islamic Republic of Pakistan envisages that no person shall be deprived of life or liberty save in accordance with law. Article 10(1) of the Constitution, inter alia, provides that no person who is arrested shall be denied the right to consult and be defended by a legal practitioner of his choice. Subsection (11-A) to section 10 of the Anti-Terrorism Act, 1997, which was inserted, vide Ordinance No.XIII of 1999 dated 27.8.1999 and Ordinance No.IV of 1999, dated 27-4-1999, states that an accused person shall not be denied the right to consult or defend by a legal practitioner of his own choice. The afore-noted provision of law is in line with Article 10(1) of the Constitution and in fact reiterates the said Article of the Constitution in letter and spirit. The appellants were absconding at the relevant point of time, therefore, they, undoubtedly, were denied the right to defend themselves and deprived the right to consult or defend by legal practitioner. The above question came up for determination before the Lahore High Court and the learned Division bench of the said Court in the case reported as Zia Ullah Khan and others v. Government of Punjab and others PLD 1989 Lah. 554 has held that the trial of an accused person in absentia is violative of Article 10 of the Constitution of Islamic Republic of Pakistan. It may be noted that the said judgment was assailed by the Government of Punjab in Civil Appeal No.680 of 1989 and this Court in a case reported as Government of Punjab through Secretary, Home Department v. Zia Ullah Khan and 2 others 1992 SCMR 602 dismissed the appeal and upheld the judgment. Another Division Bench of the Lahore High Court in a case reported as Qari Abdul Hayee and another v. The State 2005 Y.L.R. 1865 while relying upon the aforesaid cases of Zia Ullah Khan and others

and Government of Punjab through Secretary, Home Department (ibid) has also taken the similar view.

14. In view of the above, we feel that the trial of the appellants, in absentia, undertaken by the Special Judge, Anti-Terrorism Court, was violative of Article 9 and 10(1) of the Constitution and Section 10(11-A) of the Anti-Terrorism Act, 1997, thus, cannot be allowed to sustain. Furthermore, the appellants were not afforded any opportunity of hearing and thus, they were condemned unheard which is contrary to the principle of natural justice. We are convinced that the judgments, convictions and sentences rendered and awarded by both the Courts, in the absence of the appellants, to their extent are not sustainable under the law and violative of the Constitution and law, which has necessitated the retrial of the case.

15. In view of the above discussion, we allow this appeal, set aside the impugned judgment and remand the case to the trial Court for decision afresh in accordance with law.”

11. Moreover under section 367(2) Cr.P.C. a judgment has to be specific depicting the offence (if any) and the Section of PPC or other law under which the accused was convicted and the punishment for which he was sentenced, but in this case the trial court had ignored the provisions of Section 367(2) Cr.P.C. and in general terms collectively recorded conviction, that is not warranted under the law.

12. In view of the above discussion and the case law we partly allowed both the appeals and set-aside the conviction and sentence recorded by the trial court and remand the case to the trial court for

framing of the charge afresh and to proceed further in the view of above observation in accordance with law.

13. Appellant Zahid Hussain is present on bail. Learned Advocate for appellant submits that he couldn't inform the date of hearing to appellant / accused Mithal. Learned Advocate undertakes to inform the appellant Mithal to appear before learned Judge A.T.C. on the date of hearing.

14. Since the appellants are on bail, they shall continue to remain on bail during the trial. Both the appellants shall appear before the trial court on 11.05.2017.

Learned trial court shall decide the case within a period of (03) three months in accordance with law.

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