

IN THE HIGH COURT OF SINDH, CIRCUIT COURT HYDERABAD

Criminal Appeal No.D-12 of 2017

PRESENT:

Mr. Justice Naimatullah Phulpoto

Mr. Justice Rasheed Ahmed Soomro

1. For orders on MA-759/2017

2. For orders on MA-760/2017

3. For orders on MA-761/2017

4. For katcha peshi.

5. For orders on MA-762/2017

Date of Hearing : 01.02.2017.

Date of Decision : 01.02.2017.

Appellant : Sirajuddin, through Mr. Javed S. Kumbhar,
Advocate

Respondent : The State, through Syed Meeral Shah
Bukhari, D.P.G

J U D G M E N T

RASHEED AHMED SOOMRO, J:- Accused Malook and others were tried by the learned Judge, Anti-Terrorism Court, Mirpurkhas in Special Case No.07 of 2008 and by judgment dated 29.11.2010 accused Sawan, appellant Sirajuddin (in absentia) were acquitted. Accused Malook, Ayoub, Khan Muhammad @ Khano and Sher Khan were convicted under Section 7(c) of Anti-Terrorism Act, 1997 and sentenced to suffer 10 years R.I and to pay a fine of Rs.50,000/- each. They were also convicted under Section 7(h) of Anti-Terrorism Act, 1997 and sentenced to suffer 05 years and to pay a fine of Rs.30,000/- each. They were also convicted under Section 337-A(i) PPC and sentenced to suffer 02 years R.I and to pay a fine of Rs.20,000/- each. They were also convicted under Section 337-F(i) PPC and sentenced to suffer 03 years R.I and to pay a fine of Rs.30,000/- each. They were also convicted under Section 504 PPC and sentenced to suffer 02 years and to pay a fine of Rs.20,000/- each. They were also convicted under Section 147 r/w Section 149

PPC and sentenced to suffer 02 years R.I and to pay a fine of Rs.20,000/- each. They were also convicted under Section 148 r/w Section 149 PPC and sentenced to suffer 03 years R.I and to pay a fine of Rs.30,000/- each. All the sentences are ordered to run concurrently. However, since the present appellant/accused Sirajuddin was declared as Proclaimed Offender, he was convicted under Section 21-L of Anti-Terrorism Act, 1997 and sentenced to suffer R.I for 05 years with direction to the District Police Officer, Tharparkar @ Mithi to arrest the absconding accused. Appellant/accused has filed the instant appeal and annexed a Certificate dated 28.01.2017 with the appeal issued by Superintendent Central Prison, Hyderabad, which appears that appellant Sirajuddin was confined in Central Prison, Hyderabad as he was awarded sentence by Military Court.

2. Brief facts of the prosecution case, as narrated in the FIR, lodged by Naib Sobedar Muhammad Arshad, are that he is associated with Military Intelligence Chore Section 945. On 10.03.2008, he alongwith LNK Naveed, Hawaldar Inayat, Driver Fahad and Major Muhammad Ali Bhatti, Incharge Officer, Military Intelligence was on duty in the area, where secret information was received that an Indian agent will cross the border near Village Soomarhar. On receiving such information, they proceed towards the pointed place and reached near Vilalge Soomarhar (on its northern side) at about 1:00 am (night time) and arranged Nakabandi, when at about 0215 hours a person was found coming from border side, who was apprehended and hand-cuffed by Intelligence Officers on which he started raising cries calling Khan Muhammad. At about 2:30 a.m. about 9/12 persons armed with weapons, hatchets and lathies came running towards them and started firing from some distance, upon which Major Muhammad Ali Bhatti informed his identity that they are Military Intelligence Officers and restrained the assailants from firing

upon them, but they assaulted upon Intelligence Officials and made straight firing through Kalashnikov and Gun firing with intention to kill, when they came near to them they identified the assailants to be (1) Sanwan S/o Saalik armed with Kalashnikov (2) Sirajuddin S/o Wali Muhammad armed with Gun (3) Ayoub S/o Saalim armed with hatchet, who caused hatchet injury to Hawaldar Inayat on his head on which he fell down on the ground, (4) Khan Muhammad @ Khano S/o Saalim armed with hatchet, who caused blows on head and hand to Major Muhammad Ali Bhatti (5) Malook S/o Saalib, who caused injury to complainant on right hand (6) Haneef S/o Roomal and (7) Sher Khan S/o Bachoo caused hatchet blows to LNK Naveed on his left hand, all above accused persons resident of Soomarhar (8) Hote Khan S/o Dost Muhammad Nohri (9) Saleem S/o Bachoo (10) Ali S/o Yousuf, both by caste Samejo, all resident of Village Somarhar and (11) Sirajuddin S/o Ali Khan Nohri resident of Charnoor Taluka Chachro, they all tried to rescue Indian agent from their captivity, they resisted but as accused persons are more in number and they had received injuries, therefore, accused persons forcibly took away Indian agent from their captivity alongwith hand-cuff. Thereafter, accused ran away after abusing and by creating sense of harassment by way of making rashly firing in air. Thereafter, he took all injured in Government vehicle and firstly proceeded towards Police Post Tarr-Ahmed but while on the way suddenly their vehicle became out of order, they stayed there for some time and then came at Police Post Tarr-Ahmed under Police Station Khensar and they got entered such information about the incident to get registered the case and obtained letter for medical treatment, thereafter got admitted the injured persons in Taluka Hospital Chachro, then he narrated the above facts to his high-ups, who directed him to lodge FIR at Police Station. Therefore, he came Police Station and lodged his FIR that above-named accused persons duly armed with weapons committed rioting, deterred the complainant party to perform their

official duties, forcibly took away hand-cuffed Indian-agent from their captivity, made straight firing upon them with intention to kill them, so also caused hatchet injuries and created sense of terror, insecurity and fear amongst the people of locality.

3. After usual investigation, the challan was submitted against accused Malook and others. The present appellant/accused was shown as absconder and N.B.Ws were issued against appellant/accused Sirajuddin, which returned un-executed. The proceedings under Section 87 & 88 Cr.P.C were concluded against the appellant/accused. The learned Trial Court proceeded against accused Malook and others. From the impugned judgment it appears that appellant/accused Sirajuddin has been acquitted from the main offence but he has been convicted under Section 21-L of Anti-Terrorism Act, 1997. Appellant/accused Sirajuddin has challenged the impugned judgment by filing the present appeal against his conviction and sentenced recorded in his absentia as referred to above.

4. Mr. Javed S. Kumbhar, learned Counsel for the appellant/accused has argued that conviction of the appellant under Section 21-L of Anti-Terrorism Act, 1997, in his absentia, is violative of Article 9 of the Constitution of Islamic Republic of Pakistan, 1973. Relying upon the precedents of *Muhammad Arif V/s. The State (2008 SCMR 829)* and *Mir Ikhlq Ahmed V/s. The State (2008 SCMR 951)*, the learned Counsel for the appellant/accused contended that the Hon'ble Supreme Court has held that trial in absentia is repugnant to Article 9 of the Constitution of Islamic Republic of Pakistan, 1973.

5. Syed Meeral Shah Bukhari, learned Deputy Prosecutor General conceded the above legal position and did not support the impugned judgment

passed by the trial Court in respect of conviction and sentence awarded to the appellant/accused for an offence under Section 21-L of the Anti-Terrorism Act, 1997.

6. We have heard the learned Counsel for the parties and have carefully perused the record.

7. Record reflects that proceedings under Section 87 & 88 Cr.P.C were initiated for declaring the accused Sirajuddin as proclaimed offender for the purpose of proceeding with the case in his absentia. Thereafter, charge was framed against the present appellant/accused and others for the main offences. Record further reveals that no charge was framed against the appellant/accused under Section 21-L of Anti-Terrorism Act, 1997. Record also reflects that no evidence was recorded to prove the ingredients of Section 21-L of the Anti-Terrorism Act, 1997. The trial Court also failed to formulate a point for determination regarding the offence under Section 21-L of the Anti-Terrorism Act, 1997 in the impugned judgment. There was absolutely no evidence to show that absconson of the appellant/accused was intentional and no finding has been recorded by the trial Court to the effect that appellant was fugitive from the law. However, in the cursory manner learned trial Judge has convicted and sentenced the appellant/accused for the aforesaid offence. As such, the procedure adopted by the learned trial Judge in convicting and sentencing the appellant/accused under Section 21-L of the Anti-Terrorism Act, 1997 appears to be absolutely illegal.

8. We have gone through 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.”*

9. The appellant/accused without filing an application under Section 19(12) of the Anti-Terrorism Act, 1997 before the trial Court directly approached this Court through the instant appeal. Reliance is placed upon the cases of *MIR IKHLAQ AHMED & ANOTHR V/S. THE STATE (2008 SCMR 951)*, *ALI HASSAN V/S. THE STATE (2009 MLD KARACHI 1198)*, *KHANZADO @ KETOO SABZOI V/S. THE STATE (2015 P.Cr.L.J Sindh 1561)* and unreported judgment dated 13.08.2015 in Criminal Appeal No.D-38 of 2015 (*Amanullah Brohi V/s. The State*). The relevant portion of one of the above referred cases viz. *Ali Hassan V/s. The State (2009 MLD Karachi 1198)* is reproduced as under:-

“In law there are two options available to a person convicted in absentia. He can request the trial Court to set aside his conviction under Section 19(12) of the Anti-Terrorism Act, 1997, by showing that he did not abscond and can also file appeal under Section 25 ibid. Filing of application under Section 19(2) ibid is not an indispensable condition for filing appeal under Section 25 ibid. Powers of the appellate Court are wider than the powers of the trial Court in the matters of setting aside conviction in absentia. The trial Court after setting aside the conviction shall proceed to try the accused in his presence; while the appellate Court after setting aside the conviction may remand the case to the trial Court for fresh trial or may even acquit him on merits. If a case is fit for acquittal on merits, it will be futile to conduct fresh trial. If a person convicted in absentia is entitled to acquittal on merits, he cannot be forced to undergo the botheration of trial. Under Section 25 ibid, there is nothing to suggest that a person convicted and

sentenced in absentia cannot file appeal without first making application under Section 19(2) ibid.”

10. In the present case, appellant/accused was acquitted for offences under Section 324, 332, 353, 337-A(i), 337-F(i), 337-H(ii), 504, 147, 148, PPC & 7 Anti-Terrorism Act, 1997. There is no record to prove the offence under Section 21-L of the Anti-Terrorism Act, 1997 against the appellant.

11. In view of above discussion, while relying upon the cases as referred to above, we are of the firm view that conviction of the appellant Sirajuddin for the offence under Section 21-L of the Anti-Terrorisms Act, 1997, recorded by the learned Judge, Anti-Terrorism Court, Mirpurkhas in Special Case No.07/2008, is violative of Articles 9 and 10-A of the Constitution of Islamic Republic of Pakistan, 1973.

12. For the above-stated reasons, the appeal is allowed, conviction and sentence awarded to the appellant/accused by the trial Court for offence under Section 21-L of the Anti-Terrorism Act, 1997, by judgment dated 29.11.2010, are set-aside and the appellant/accused is acquitted.

13. These are the reasons for our short order dated 01.02.2017 pronounced in open Court.

JUDGE

JUDGE