

IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR

Confirmation Reference No. 03 of 2001.

Present:

**Mr. Justice Naimatullah Phulpoto &
Mr. Justice Muhammad Humayon Khan.**

The State through DPG.....Versus.....Budho.

Mr. Zulfiqar Ali Jatoi, DPG for the State.

Date of hearing: 15.08.2016.

J U D G M E N T

Naimatullah Phulpoto J. Appellants Muhammad Bux, Muhammad Ameen alias Akbar and Nazeer were tried by learned Judge, Anti-Terrorism Court Sukkur & Larkana Division at Sukkur in special case No.01/1999 and by judgment dated 25.7.2001, appellants Muhammad Bux, Muhammad Ameen alias Akbar, Nazeer and absconding accused Budho were convicted under section 7(a) ATA, 1997 and sentenced to death. For offence under section 364 PPC, above named appellants were also convicted and sentenced to imprisonment for life. They were also convicted under section 353 PPC and sentenced to 07-years R.I. Appellants were also convicted under section 324 PPC read with sections 337A(i), 337F(i) PPC and sentenced to 10-years R.I. They were also imposed fine of Rs. 50,000/- each. Trial court made reference to this court for confirmation of death sentence awarded to the appellants Muhammad Bux, Muhammad Ameen alias Akbar, Nazeer and absconding accused Budho in his absentia.

2. Brief facts of the prosecution case are that on 31.7.1998 at 2045 hours, ASI Ahmed Ali lodged FIR on behalf of the State at P.S. Dubar against accused. It was recorded vide crime No. 35 of 1998 for offences under sections 302,324, 364,337A(i),337F(i),353,395,147,148, 149 PPC & 7(i)(a) ATA, 1997. After

usual investigation, challan was submitted against accused Muhammad Bux, Muhammad Ameen alias Akbar and Nazeer. Remaining accused including accused Budho were shown as absconders. Case proceeded against absconding accused in their absentia.

3. This court vide Judgment dated 23.6.2007 allowed the appeal filed by appellants Muhammad Bux, Muhammad Ameen alias Akbar and Nazeer and declined confirmation reference No.3 of 2001 of appellants except appellant Budho and consequently, acquitted the appellants Muhammad Bux, Muhammad Ameen alias Akbar and Nazeer. Relevant portion is reproduced as under:

"As per prosecution the dead body of deceased SHO Muhammad Achar Kalhoro, was found in a ditch and was in a civil clothes whereas the evidence that has been led by the prosecution was that the deceased SHO, who was accompanying his son, was in uniform. The tractor alleged to have been used by the Appellants in the commission of the offence was not recovered nor the number, make or model of tractor have been incorporated in any of the mashirnama prepared by the prosecution witnesses. We have also noticed that the aforesaid contradictions which are material in nature no sentence and conviction can be ordered. The arrest of the Appellants on 23-12-1998 as shown by the police in the face of the report of the Commissioner, appointed by this Court in Crl.Misc. Application No.D-376 of 1998, besides the prosecution story.

For the aforesaid reasons by our short order dated 2-3-2006 we had allowed the Appeal and declined the Confirmation Reference No.3 of 2001 of the Appellants, except for Appellant Budho son of Ali Hassan and acquitted Appellant Muhammad Bux, Muhammad Ameen alias Akbar and Nazeer"

As regards to the appeal of appellant Budho, by order dated 02.03.2006, appeal of appellant Budho, who was convicted in absentia, was segregated and adjourned to 09.03.2006 for hearing on the point of maintainability and confirmation reference against him as appellant Budho after conviction did not surrender himself before the court and his appeal was deferred. This court vide order dated 13.09.2006 held that the appeal filed by appellant

Budho through his father without surrendering himself, was not maintainable.

Relevant portion of the said Judgment is reproduced as under:-

"We have given due consideration to the arguments, gone through the file and the case law relied upon by Mr. Baloch.

In the case of Muhammad Jamil Ahmed the appellant was convicted in absentia. He filed appeal through his advocate without surrendering himself before the court. The court after considering the various authorities of the honourable Supreme Court of Pakistan in the cases of the State versus Zia-ur-Rehman, PLD 1973 SC 49, Gul Hassan versus the State PLD 1965 SC 89, Allah Bux versus the State, P L J 1982 SC 295 and Chan Shah versus the Crown, PLD 1956 F.C 43 held that the appeal filed by the appellant without surrendering himself was not maintainable.

The facts of the above reported authority of Muhammad Jamil Ahmed are similar to the facts of the present case. As such the appeal filed by the appellant through his father without surrendering himself before the court is not maintainable. Hence the same is dismissed".

4. Mr. Zulfiqar Ali Jatoi, DPG appeared on behalf of the State and pointed out yet confirmation reference No.03 of 2001 dated 28.7.2001 sent by learned Judge, ATC, Sukkur & Larkana Divisions against absconding accused Budho is pending decision. However, he stated that confirmation reference sent for remaining accused Muhammad Bux, Muhammad Ameen alias Akbar and Nazeer has already been answered in negative by this court vide judgment dated 23.6.2007.

5. It appears that this court vide order dated 20.1.2010, adjourned the confirmation reference of accused Budho sine die with following observation:

"...Now only the confirmation case of the present accused has to be disposed of but considering the fact that the accused has not been arrested so far nor he has surrendered; therefore, this confirmation is adjourned sine die and the office is directed to place the file before the court as and when they receive information that the present accused has been arrested or has surrendered. In the meantime office is directed to issue notice to the concerned police officers to initiate the proceedings for the arrest of the absconding accused and file quarterly report to this court".

6. Convict Budho is still absconding. Admittedly, he has preferred no appeal against his conviction and sentence. His appeal through his father in his absentia, without surrendering himself, has already been dismissed on legal ground that appeal has been filed by accused Budho through his father without surrendering himself, by this court vide order dated 13.9.2006. At present, we have to decide confirmation death reference No.3 of 2001 sent by learned Judge, ATC, Sukkur & Larkana Divisions at Sukkur against convict Budho.

7. Since legal point of conviction of accused in his absentia is to be decided by this court, as such we are not inclined to discuss the evidence on record. Legal position of the trial in absentia of accused has already been enunciated by the honourable Supreme Court in the case of **Arbab Khanv. The State (2010 S C M R 755)**. Relevant portion is reproduced as under:-

"6. This Court in the above unreported decision had held that the trial in absentia and conviction under section 31-A of the Ordinance was violative of Article 9 of the Constitution. Relying upon the said decision, the learned High Court of Sindh in the cases of Mst. Mubarak Salman and Noor Muhammad Khatti (supra) had also formed the similar opinion and further added that the trial Court did not adopt correct procedure of framing the charge, recording the evidence and discussing the same. Thus the trial in absentia without adopting the legal procedure for trial of such offence is violative of Article 9 of the Constitution. Further in the case of Ikhtlaq Ahmad v. State 2008 SCMR 951 this Court set aside the conviction and sentence passed by the Special

Judge, Anti-Terrorism Court, in a case of murder in which the accused were tried in absentia as they were absconders and it was held that trial in absentia was violative of Articles 9 and 10(1) of the Constitution and section 10(11-A) of the Act. The relevant portion of the judgment reads as under:---

"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 Articles 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 re-trial of the case."

7. In the light of above discussion, the conviction and sentence awarded to the appellant under the impugned judgment and that of the trial Court are set aside. However, this judgment shall not be construed to preclude the trial Court from taking any proceedings in accordance with law and adopt legal procedure for trial of offence punishable under section 21-L of the Act. Consequently, the appeal is allowed.

8. In the present case, trial was held in absentia of accused. Trial court did not adopt proper procedure of conducting trial, which shows that convict Budho was not provided fair trial and was condemned unheard which is against the principles of natural justice. Learned DPG was confronted with such legal position and he frankly conceded to this position. We are, therefore, convinced that sentence of death awarded to accused Budho in his absentia by trial court vide judgment dated 25.7.2001 is not sustainable in law, being violative of Articles 9 and 10-A of the Constitution of Islamic Republic of Pakistan, 1973, which has necessitated re-trial of case.

9. In view of above discussions and legal position, we are clear in our mind to hold that that since accused Budho has not been arrested, as such trial of accused Budho in his absentia and sentence to death are not sustainable under the law. Consequently, conviction and sentence rendered by trial court vide

judgment dated 25.7.2001 are set aside. However, trial court is directed to proceed with the case of absconding accused Budho, as and when he is arrested, strictly in accordance with law. Learned trial court shall issue coercive process for the arrest of absconding accused Budho. In view of above, reference No.3 of 2001 dated 28.7.2001 made by learned Judge, ATC, Sukkur & Larkana Divisions at Sukkur, for confirmation of death of accused Budho is answered in negative.

JUDGE

JUDGE