

**IN THE HIGH COURT OF SINDH, BENCH AT SUKKUR**

Confirmation Reference No. 09 of 2015

Present:

**Mr. Justice Naimatullah Phulpoto &  
Mr. Justice Rasheed Ahmed Soomro.**

The State.....Versus.....Khadim Hussain alias Khadim Narejo.

Mr. Saleem Akhtar, Additional Prosecutor General for the State.

Date of hearing: 05-07-2017

Date of Judgment: 05-07-2017

**J U D G M E N T**

**NAIMATULLAH PHULPOTO J.**, Accused Khadim Hussain alias Khadim and Mumtaz Ali (since acquitted) were tried by learned Judge, Anti-Terrorism Court Khairpur in special case No. 26 of 2012 and by judgment dated 13.10.2015, accused Khadim Hussain was convicted in his absentia for committing murder of H.C Fateh Muhammad and causing injuries to PCs Ali Gul and Ayaz Hussain and sentenced as under:

- i). Under section 302(b) r/w section 149 PPC, appellant Khadim Hussain alias Khadim was sentenced to death by his neck till his death after his arrest subject to confirmation of death sentence by this court. He was also directed to pay compensation of Rs. 2,50,000/- in terms of section 544-A CrPC to the legal heirs of deceased. In case of default in payment of fine, he was ordered to suffer R.I for 6-months.
- ii). Under Section 324 r/w section 149 PPC, accused Khadim Hussain was sentenced to suffer R.I for 10-years and to pay fine of Rs. 25,000/-. In case of default in payment of fine, he shall suffer further R.I for 6-months.
- iii). Under section 353 r/w section 149 PPC, accused Khadim Hussain was also sentenced to suffer R.I for two years.
- iv). Under section 427 r/w section 149 PPC, accused Khadim Hussain was also sentenced to suffer R.I for two years and to pay fine of Rs. 10,000/-. In case of default in payment of fine, he shall suffer R.I. for four months.

- v). Under section 21-L of ATA, 1997, accused Khadim Hussain was sentenced to suffer R.I for 5-years and to pay fine of Rs. 15,000/- and in case of default in payment of fine, he shall suffer R.I. for 2-months.
- vi). Under section 7 of ATA, 1997, accused Khadim Hussain was sentenced to death by his neck till his death subject to confirmation of death sentence by this court. He was also ordered to pay Rs. 50,000/- and in case of default, he shall suffer further RI for six months.

All the sentences were ordered to run concurrently from the date of his arrest, however, according to trial court prosecution failed to establish its case against accused Mumtaz Ali and he was extended benefit of doubt and was acquitted.

2. Brief facts of the prosecution case as disclosed in the FIR are that on 14.3.2012 at 2200 hours, ASI Anwar Ali lodged report on behalf of State at P.S Ahmedpur district Khairpur alleging therein that on 14.3.2012 he alongwith his subordinate staff left P.S and in the government vehicle for patrolling duty, when police party reached near Mian bridge at 2000 hours, where on the headlight of vehicle saw 18 armed persons standing there, out of them police party identified 15 accused persons namely Laloo, Sikandar, Niaz all by caste Narejo armed with KKs, Jaro Narejo armed with rifle, Altaf Narejo armed with repeater, Arbelo Narejo, Riaz Lashari, Mujahid Lashari armed with KKs, Mirchoo Narejo armed with rifle, Mazhar Narejo armed with KK, Jabbar Narejo armed with KK Bashir Jalbani armed with rocket launcher, Umed Ali Narejo armed with KK, Bhambhor Narejo armed with KK and Iqbal Narejo armed with KK and three unidentified persons who were armed with KKs. It is alleged that accused persons deterred the police party from performing their lawful duties and started firing upon the police officials with intention to kill them. Police party also fired in self defence. It is alleged that encounter continued for half an hour in which H.C Faiz Muhammad received fire arm injuries and died at the spot. PCs Ayaz Ali and Ali Gul had also sustained injuries and damage was caused to police mobile. It is also alleged that all accused succeeded in running away by taking benefit of dark night. Dead body

of H.C Shafi Muhammad was brought to P.S and FIR was lodged on behalf of State.

3. After usual investigation, challan was submitted against accused in which name of accused Mumtaz Ali was shown in column-2 and other accused namely Laloo, Sikandar, Niaz, Jaro, Altaf, Arbelo, Riaz, Mujahid, Mirchoo, Mazhar, Jabbar, Bashir, Umed Ali, Bhambhor and Iqbal were shown as absconders. Accused Mumtaz Ali was joined as accused by the trial court vide order dated 19.4.2012.

4. NBWs were issued against absconding accused which returned unexecuted. Proceedings under section 87/88 CrPC were also initiated against accused. Accused Khadim Hussain was subsequently arrested and produced before the trial court with supplementary challan.

5. Charge was framed against accused Khadim Hussain and Mumtaz Ali at Exh.7, both accused pleaded not guilty and claimed to be tried. At the trial, prosecution examined following witnesses:

1. PW-1 complainant ASI Anwar Ali Rajper at Exh.09.
2. PW-2 Dr. Inayat Ali Memon at Exh.10.
3. PW-3 Tapedar Nisar Ahmed Memon at Exh.11.
4. PW-4 PC-Mohammad Bux Vistro at Exh.13.
5. PW-5 PC Ali Gul Lohar Baloch at Exh.14.
6. PW-6 PC Ayaz Hussain Massan at exh.15.
7. Inspector Altaf Hussain Burdi at Exh.16.

Thereafter, side of prosecution was closed vide statement of DDPP at Exh.17.

6. Statements of accused Mumtaz Ali and Khadim Hussain were recorded at Exh.18&19, in which both accused claimed false implication in this case and denied prosecution allegations. Trial court in the judgment has mentioned that before arguments accused Khadim Hussain who was on bail, granted by this court, absconded away and his case was bifurcated/separated from the case of accused Mumtaz Ali Narejo. Thereafter, NBWs were issued against absconding

accused Khadim Hussain which could not be executed and he was declared as proclaimed offender by completing all the legal formalities and case proceeded against absconding accused in his absentia by the trial court vide order dated 21.09.2015.

7. Learned Judge, ATC, Khairpur vide judgment dated 13.10.2015 sentenced him to death and has made reference under section 374 CrPC in special case No. 26 of 2012 for confirmation of death sentence awarded to absconding accused Khadim Hussain in his absentia vide letter dated 14.10.2015. Reference was admitted to regular hearing. NBWs were issued against absconding accused. This court vide order dated 15.8.2016 directed the DPG to satisfy the court as to how conviction in absentia was sustainable under the law.

8. Learned Additional P.G argued that trial of accused Khadim Hussain held by trial court in his absence being ultra vires of Article 10-A of the Constitution was not legal and therefore, the same is not sustainable and prayed for remand of case for fresh decision according to law.

9. In view of above, we feel that the trial of accused Khadim Hussain in his absentia and without hearing arguments, undertaken by learned Judge, ATC, Khairpur, 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 accused was not afforded any opportunity of hearing and thus, he was condemned unheard which is contrary to the principle of natural justice. We are convinced that the death sentence awarded to accused in his absentia vide judgment dated 13.10.2015 is not sustainable under the law and violative of Constitution and law, which has necessitated the retrial of the case, as held by the Hon'ble Supreme Court of Pakistan in case of **Mir Ikhlaq Ahmad and v. the State (2008 S C M R 951)**.

10. For the above stated reasons, we set aside judgment of the trial court dated 13.10.2015 to the extent of absconding accused Khadim Hussain alias Khadim

and answer the Murder Reference No. 09 of 2015 made by trial court for confirmation in negative and remand the case to the trial court for decision afresh after arrest of accused Khadim Hussain, in accordance with law.

**JUDGE**

**JUDGE**

Ahmad