

IN THE HIGH COURT OF SINDH, CIRCUIT COURT, LARKANA

Crl. Appeal No.D-65 of 2016

PRESENT:

Mr. Justice Zafar Ahmed Rajput,
Mr. Justice Mohammad Iqbal Kalhoro,

Appellant : Aqeel alias Wakeel Shar, through Mr. Shahbaz Ali Brohi,
Advocate.

Respondent : The State, through Mr. Sardar Ali Shah, Assistant
Prosecutor General.

Date of hearing: 08-11-2016.

Date of Judgment: 08.11.2016.

J U D G M E N T.

ZAFAR AHMED RAJPUT, J.- Appellant/accused Aqeel alias Wakeel Shar through the instant appeal has challenged the judgment dated 19.03.2014, passed by the learned Judge, Anti-Terrorism Court, Shikarpur, in Special Case No.12/2012 (Re: State v. Rano & others) arising out of Crime No.49/2012, registered at Police Station Khanpur, District Shikarpur, for offence under Sections 302, 324, 353, 337-H(2), 427, 148, 149, PPC read with Sections 6 & 7 of the Anti-Terrorism Act, 1997.

2. According to the case of prosecution, on 13.4.2012 complainant ASI Riaz Hussain lodged F.I.R at P.S Khanpur, stating therein that on the said date HC Nisar Ahmed and PC Hairdin, duly armed with official weapons, proceeded from police station at 5.00 p.m. vide roznamcha entry No.20 to perform their duty at Sui Gas Picket situated on link road Garhi Dakhoo. At about 5.36 p.m. complainant alongwith subordinate staff, duly armed with official weapons, also left police station vide entry No.22 in the government vehicle driven by driver PC Bajar Ali for checking the pickets of their jurisdiction. At 10.45 p.m., when

they reached at Sui Gas Picket via link road Garhi Dakhoo, where he found HC Nisar Ahmed and PC Hairdin on duty. Meanwhile, on the headlight of official vehicle they all noticed 10 armed persons coming from eastern side of the road and allegedly identified them to be accused, namely, 1. Arsallah, 2. Wakeel, 3. Rano, 4. Shabir, 5. Laiq, all by cate Shar, armed with Kalashnikovs, 6. Meer Shar, 7. Abdullah Shar, 8. Ali Dad Shar, armed with T.T. Pistols, and two unidentified persons. The police party asked the accused persons to surrender, whereupon accused Arsallah made direct fires at the police party with intention to kill them, which hit HC Nisar Ahmed available in the picket, who fell down. The police party then took position and retaliated the firing. The other accused persons also made firing, which hit the body and wind screen of the police mobile and such encounter lasted for about 15/20 minutes. The accused persons then taking shelter of the canal fled away. HC Nisar Ahmed succumbed to injuries at the spot. The complainant sent the dead body of HC Nisar Ahmed to hospital for postmortem and then went to police station and lodged F.I.R.

3. After usual investigation, case was challaned, wherein appellant Aqeel alias Wakeel and others were shown as absconders. The N.B.Ws issued against the appellant by the trial Court returned unexecuted, whereafter proceedings under Sections 87 and 88, Cr.P.C were concluded and they were declared proclaimed offenders.

4. On conclusion of trial, the learned trial Court acquitted all the accused persons present before it of the charge for offences, they were booked with, however, the appellant and co-accused, namely, Mir were convicted by the learned trial Court under Section 21-L of the Anti-Terrorism Act, 1997 on account of their absconson and were sentenced to five (05) years imprisonment.

5. On 26.9.2016, the appellant surrendered before the trial Court, he was remanded to jail and thereafter, he challenged the impugned judgment before this Court by filing the aforesaid appeal against his conviction and sentence recorded in his absentia, as stated above, instead of filing an application under Section 19(12) of Anti-Terrorism Act, 1997.

6. Mr. Shahbaz Ali M. Brohi, learned Counsel for the appellant, contends that conviction of the appellant under Section 21-L of the Anti-Terrorism Act, in his absentia, is violative of Article 9 of the Constitution of Islamic Republic of Pakistan, 1973. Relying upon the precedents of *Muhammad Arif versus The State*, reported in 2008 SCMR 829 and *Mir Ikhtlaq Ahmed versus The State*, reported in 2008 SCMR 951, the learned Counsel for the appellant contended that the Hon'ble Supreme Court has held that trial in absentia is repugnant to Article 9 of the Constitution of the Islamic Republic of Pakistan, 1973.

7. Mr. Sardar Ali Shah, learned Assistant Prosecutor General, concedes to the above legal position and does not support the impugned judgment passed by trial Court in respect of conviction and sentence awarded to the appellant for an offence under Section 21-L of the Act, 1997. However, he submits that since the trial Court has not passed any order with regard to main offence for the appellant, so much so an order under Section 512, Cr.P.C, the appellant may be directed to appear before the trial Court for decision afresh with regard to the main offence.

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

9. Record reflects that proceedings under Sections 87 and 88, Cr.P.C were initiated for declaring the accused Aqeel alias Wakeel Shar as proclaimed offender for the purpose of proceeding with the case in his absentia. Thereafter,

charge was framed against present accused and others for the main offences. Record further reveals that no charge was framed against the appellant under Section 21-L of the Act, 1997. Record also shows that no evidence was recorded to prove the ingredients of Section 21-L of the Anti-Terrorism Act. Trial Court also failed to formulate a point for determination regarding the offence under Section 21-L of the Act, 1997 in the impugned judgment. There was absolutely no evidence to show that absconsion of the appellant 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 for the aforesaid offence. As such, procedure adopted by the learned trial Judge in convicting and sentencing the appellant under Section 21-L of the Anti-Terrorism Act, 1997 appears to be absolutely illegal. Learned APG also does not support the impugned judgment.

10. 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.

11. The appellant without filing an application 19(12) of the Anti-Terrorism Act, 1997 before the trial Court directly approached this Court through the instant appeal. In this regard, it may be observed that Section 25 of the Anti-Terrorism Act, 1997 does not contain any bar that a person convicted and sentenced in absentia cannot file appeal without first making application under Section 19(12) of the Anti-Terrorism Act, 1997.

12. In view of above discussion, we are of the firm view that conviction of the appellant Aqeel alias Wakeel Shar for offence under Section 21-L of the Anti-Terrorism Act, 1997, recorded by the learned Judge, Anti-Terrorism Court,

Shikarpur, is violative of Articles 9 and 10-A of the Constitution of Islamic Republic of Pakistan, 1973 as well as Section 10(11-A) of the Anti-Terrorism Act, 1997.

13. For the above-stated reasons, the appeal is allowed, conviction and sentence awarded to the appellant by the trial Court for offence under Section 21-L of the Anti-Terrorism Act, 1997, by judgment dated 19.3.2014, are set aside and the appellant is acquitted. He may be released, if his custody is not required in any other case by any other Court. However, he is directed to surrender before the trial Court in the main ^{- offence -} being Crime No.49/2012. The learned trial Court is directed to pass verdict relating to main offence against the appellant expeditiously, in accordance with law.

14. This Criminal Appeal stands disposed of.

