

Judgment Sheet
IN THE LAHORE HIGH COURT
MULTAN BENCH, MULTAN
JUDICIAL DEPARTMENT

Crl. Appeal No.364/2022
(*Muhammad Umair vs. The State & another*)

JUDGMENT

Date of hearing: 26.05.2022

Appellant by: M/s Malik Riaz Hussain and Syed Jahanzeb, Advocates.

State by: Mr. Muhammad Ali Shohab, Deputy Prosecutor General.

ALI ZIA BAJWA, J.:- Muhammad Umair son of Muhammad Ajmal, caste Joiya, resident of Jallah Jeem, Tehsil Mailsi, District Vehari (*hereinafter 'the appellant'*) was involved in case FIR No.1/2016, dated 01.01.2016, offence under section 11-EE of the Anti-Terrorism Act 1997 (*hereinafter 'ATA 1997'*) registered with Police Station Saddar Mailsi, District Vehari. He was tried by learned Judge, Anti-Terrorism Court No.I, Multan, under the aforementioned offence. The learned court seized with the trial, vide judgment dated 19.07.2016, convicted and sentenced the appellant in the following terms:-

- Under section 11-EE(4) ATA 1997 sentenced to undergo R.I. for three years with fine of Rs.20,000/- and in case of default in payment thereof, to further undergo S.I. for one month.

Factual matrix and pre-trial proceedings

2. Precisely the prosecution story as portrayed in the FIR (Exh.PC/1) lodged on the complaint (Exh.PC) of Muhammad Akram, Inspector (PW-5) is that the appellant's name was placed on the list of 4th schedule of the ATA 1997, vide order dated 3rd February 2015, duly issued by the Government of Punjab, however, by violating the terms and conditions of the surety bonds submitted by him, he proceeded to Saudi Arabia and shifted there.

3. After registration of the case, the Investigating Officer prepared a rough site plan of the place of occurrence (Exh.PE). The father of the appellant produced the copies of the ticket (P-1) and the passport consisting of two pages (P-2/1-2) according to which the appellant had proceeded to Saudi Arabia. Investigating Officer obtained the non-bailable warrants of arrest of the appellant (Exh.PA), which couldn't be executed and thereafter proclamation under section 87 Cr.P.C. (Exh.PB) was also issued by the learned Anti-Terrorism Court No.I, Multan. He further brought on the record surety bond (Exh.PD), personal bonds of the appellant (Exh.PD/1 and PD/2) and Fard Malkiyat (Exh.PD/3). He further took into possession notification of 4th schedule pertaining to the appellant (Exh.PF). After adopting all codal/legal formalities report under Section 173, Cr.P.C. was prepared and submitted before the learned trial court.

Trial proceedings

4. On submission of report under section 173 Cr.P.C. learned trial court summoned the appellant through non-bailable warrants of arrest, which could not be executed. Subsequently, his proclamation in the newspaper was published and vide order dated 19.05.2016 trial court directed that the trial shall be held in absentia. Accordingly Ch. Imtiaz

Ahmed Advocate was appointed as defence counsel on behalf of the appellant in view of section 19(10) of ATA 1997.

5. After recording of the prosecution evidence, statement of the appellant under section 342 Cr.P.C. was recorded through his counsel and thereafter learned trial court convicted and sentenced him as mentioned and detailed above.

6. Arguments advanced from both the sides have been heard and the record available on the file perused.

7. We have straightway noticed that the appellant was convicted and sentenced vide the impugned judgment while his trial was conducted in absentia. Before we discuss the merits of the case it would not be out of place to briefly discuss the very concept of trial in absentia.

Trial in absentia

8. *Trial in absentia* (TIA) is a trial that is conducted in the absence of the accused and is an exception to the celebrated principle of natural justice *audi alterem partem* i.e. nobody should be condemned unheard. The provisions of law pertaining to TIA are available in international as well as national laws of many countries. TIA is a mechanism that always remained under discussion by legal experts and jurists. One school of thought, which seems less popular, is that an accused, who absents himself from trial or avoids the process of law deliberately, deserves no leniency and in the larger public interest he should be brought to book, and his absence should be no excuse to halt his trial. On the other hand, it is argued that TIA seriously undermines the transparency of the due process of law and compromises the various fundamental rights guaranteed under the statutes and constitutions of different jurisdictions.

Sanctity of Trial in absentia and international law

9. According to Article 14(3)(d) International Covenant on Civil and Political Rights [ICCPR], an accused shall be entitled to be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it. Article 6 of the European Convention on Human Rights provides for the right to a fair trial. In the case of *Colozza v Italy*¹, the European Court of Human Rights (ECHR) stated that the object and purpose of Article 6 reflect “that a person ‘charged with a criminal offence’ is entitled to take part in the hearing”. Article 63 (1) of the Rome Statute of the International Criminal Court provides that the accused shall be present during the trial.

Trial in absentia in our jurisdiction

10. In our jurisdiction, substantive and procedural laws have been derived from the English model through the adoption of laws and structures of British India, which itself is a codified legal system based on nineteenth-century English law.² In other words, our legal system is derived from English common law and is based on the much-amended Constitution and Islamic law (*‘sharia’*).³ Normal procedure for trial has been provided under the Code of Criminal Procedure, 1898 which makes it mandatory that accused must be present before the Court during the course of trial. Although presence of accused can be dispensed with in particular circumstances under sections 205 and 540-A Cr.P.C. but there are few stages

¹ *Colozza v. Italy*, application No. 9024/80, ECtHR, reported at (1985) 7 EHHR 516

² Introduction to the Pakistani Legal System, with special reference to the Law of Contract by Martin Lau - <https://heinonline.org/HOL/LandingPage?handle=hein.journals/yislamie1&div=9&id=&page=>

³ <https://www.globalsecurity.org/military/world/pakistan/legal-system.htm#:~:text=The%20legal%20system%20is%20derived,over%20criminal%20and%20civil%20issues.>

where even his personal attendance cannot be dispensed with like indictment, recording of his statement and pronouncement of the judgment, etc. Pertinently, conducting trial in absentia is an illegality which is not curable under section 537 Cr.P.C.

11. In our jurisdiction, the scheme of trial in absentia was provided under section 5-A (4) of the Suppression of Terrorist Activities (Special Courts) Act, 1975. The trial in absentia was also made permissible in the Martial Law regime in 1977. The Terrorist Affected Areas (Special Courts) Act which got promulgated in 1992 also granted Special Courts under the Act the power to conduct trials in absentia under Section 13(10). Similarly, Courts established under the Anti-Terrorism Act, 1997 were given powers under section 19(10) of the Act to hold the trial in absentia.

Merits of the case in hand

12. The trial of the appellant was carried out in *absente reo* (in the absence of the defendant⁴). The perusal of the record reflects that the personal attendance of the appellant was not dispensed with rather he was tried and convicted in absentia without pleader of his own choice. The right to be represented by counsel of own choice is given by the Constitution of Islamic Republic of Pakistan, 1973 under Article 10(1)⁵. Further, there is possibility that the appellant did not deliberately evade the process of criminal justice system, because his failure to appear before the trial court, as and when required by the trial court, was due to lack of knowledge or some other reasons beyond his control. Even otherwise, if it is assumed that as a means to circumvent the process of criminal justice system, the appellant deliberately absconded, even in that eventuality he could not have

⁴ Collins English Dictionary available on <https://www.collinsdictionary.com/dictionary/english/absente-reo>

⁵ Hakim Khan vs. The State - 1975 SCMR 1.

Note - - - that right to be defended by pleader of one's own choice is a statutory right (PLD 1973 LAH 365) and cannot be abridged (See Muhammad Sharif (1974 P.Cr.L.J 168), High Court Rules and Order's, Rule 2, Part C, Ch. 24, Vol. 3) - - - Section 19(11-A) of Anti-Terrorism Act, 1997 violates constitutional mandate of Article 10(1) is hereby declared Ultra Vires.

been tried and convicted in absentia. Rather, trial court could merely record evidence against him as envisaged under section 512 Cr.P.C⁶ after satisfying itself by adhering to the provisions of section 87/88 Cr.P.C that the accused has, in fact, absconded himself and there is no likelihood of his joining the trial proceedings in near future. It is important to state here that the purpose of section 512 Cr.P.C is merely to preserve the evidence of a witness⁷ for an eventuality where protection was given to the deposition of such witness who might not be alive at the time of appearance of the accused or might have become incapable of giving evidence or attendance of said witness could not be procured without any delay, expense or inconvenience.⁸

13. A trial conducted in absentia violates both constitutional guarantees enshrined under Articles 4, 8, 9, 10 and 10-A of the Constitution of the Islamic Republic of Pakistan, 1973 and principles of natural justice. The only vital question of law involved in this appeal is that whether the appellant could be tried and convicted in absentia under section 19(10) of the Anti-Terrorism Act, 1997. Vires of the aforementioned section were judiciously reviewed by the Apex Court of the country in Mehram Ali and others vs. Federation of Pakistan and others – PLD 1998 SC 1445 whereby only section 19(10)(b) (since deleted) of the Anti-Terrorism Act, 1997 was declared *ultra vires* being violative of Article 10 of the Constitution of the Islamic Republic of Pakistan, 1973. Rest of the provisions of section 19 were held to be *intra vires*.

⁶ **512. Record of evidence in absence of accused:** (1) if it is proved that an accused person has absconded, and that there is no immediate prospect of arresting him, the Court competent to try of send for trial to the Court of Session or High Court such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on behalf of the prosecution and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against him on the inquiry into, or trial for the offence with which he is charged if the deponent is dead or incapable of, giving evidence or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstance's of the case, would be unreasonable.

⁷ Niamat Khan vs. Qudrat Shah - 2017 MLD 883 PESHAWAR

⁸ Mumtaz vs. Moeen - 2006 P.Cr.L.J 1436

14. Legality of trial in absentia was considered by the prestigious Supreme Court of Pakistan in Mir IKHLAQ AHMAD and another vs. THE STATE – 2008 SCMR 951 in which appellants were tried and convicted in absentia by the Anti-Terrorism Court, as they could not be arrested. Their conviction and sentences were upheld by this Court. The Apex Court ruled that trial of the appellants in absentia is violative of the Constitution and remanded the case to the trial court for decision afresh in accordance with the law. In MUHAMMAD ARIF vs. THE STATE - 2008 SCMR 829, constitutionality of trial in absentia came under consideration of the Apex Court, wherein conviction and sentence of the convict were declared illegal and the matter was sent back for retrial. Similar view was reiterated in the cases of M.B. ABBASI and another vs. THE STATE - 2009 SCMR 808 and ARBAB KHAN vs. THE STATE - 2010 SCMR 755. Moreover, amendment in the Constitution by way of insertion of Article 10-A, further fortifies and strengthens the view taken by the revered Supreme Court of Pakistan.

15. The concept of trial in absentia is inconsistent with the “doctrine of Islamic Justice” enunciated in the Holy Qur’an and Sunnah. This aspect was taken into consideration and elaborated by august Supreme Court of Pakistan in a landmark judgment in PAKISTAN and others vs. PUBLIC AT LARGE and others - PLD 1987 Supreme Court 304. In the pronouncement the Apex Court while referring to numerous verses of the Holy Qur'an observed that even on the ‘Day of Judgment’ everyone shall be confronted with the evidence of his deeds during the present life and he would have an opportunity of denial.

Conclusion:

16. What has been discussed above, we are of the considered view that trial of the appellant in absentia is illegal, unwarranted and of no legal effect. Therefore, for the safe administration of criminal justice, we allow **Crl. Appeal No.364/2022**, set-aside the judgment dated 19.07.2016 passed

by learned Anti-Terrorism Court No.I, Multan and remand the case back to the learned trial court for its retrial in accordance with the law. The trial of the case shall be deemed pending before the learned trial court and during this period the appellant shall be considered as under trial prisoner.

17. **Case remanded.**

(ASJAD JAVOID GHURAL)
JUDGE

(ALI ZIA BAJWA)
JUDGE

Approved for Reporting

JUDGE

JUDGE

Riaz