IN THE FEDERAL SHARIAT COURT
(APPELLATE JURISDICTION)

PRESENT
MR. JUSTICE MEHMOOD MAQBOOL BAJWA
MR. JUSTICE SHAUKAT ALI RAKHSHANI

APPEAL NO.09-I OF 2018

FAIZ MUHAMMAD KHAN SON OF MUHAMMAD YAQUB KHAN, RESIDENT OF NESHAN BANDA, OSORAI, WARI, DISTRICT DIR UPPER, PRESENTLY CONFINED AT TIMERGARA JAIL, DISTRICT DIR LOWER.

(APPELLANT)

VERSUS

1. THE STATE THROUGH ADDITIONAL ADVOCATE GENERAL, KPK.

2. KHAN BACHA SON OF HAJI AFRIDI, RESIDENT OF HAIBAT KHAN, NEHAK DARA, DISTRICT DIR UPPER.

(RESPONDENTS)

APPEAL NO.11-I OF 2018

ANWAR ZADA ALIAS ANWAR SON OF AMIR ZADA ALIAS MIRZADA RESIDENT OF SANKORE NEHAG DARA, TEHSIL WARI, DISTRICT DIR UPPER.

(APPELLANT)

VERSUS

1. THE STATE THROUGH ADDITIONAL ADVOCATE GENERAL, KPK, PESHAWAR HIGH COURT MINGORA BENCH/DARAUL QAZA AT SWAT.

2. KHAN BACHA SON OF HAJI AFRIDI RESIDENT OF VILLAGE HAIBAT KHAN, NEHAK DARA, TEHSIL WARI, DISTRICT DIR UPPER.

(RESPONDENTS)

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COUNSEL FOR THE APPELLANT IN APPEAL NO.11-I OF 2018		MR. SHER AMAN, ADVOCATE
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COUNSEL FOR THE RESPONDENT NO.2	…	MR. MUHAMMAD ARIF KHAN, ADVOCATE
FIR NO. AND POLICE STATION	…	163 OF 2002, WARI, DISTRICT DIR BALA.
DATE OF JUDGMENT OF TRIAL COURT	…	15.03.2018
DATE OF PREFERENCE OF APPEALS	…	23.05.2018
DATE OF HEARING AND DECISION	…	02.10.2018
DATE OF JUDGMENT	…	08.10.2018

MEHMOOD MAQBOOL BAJWA, J: Appraisal of evidence in case F.I.R. No.163 of 2002 registered at Police Station Wari, District Upper Dir by the learned Judge Anti-Terrorism Court No.III, Swat at Timergara, Lower Dir, though resulted in acquittal of appellants in different heads of charge formulated under Sections 396 and 452 of The Pakistan Penal Code, 1860 (Act XLV of 1860) (Hereinafter called Act XLV of 1860), Section 17(4) of The Offences Against Property (Enforcement of Hudood) Ordinance VI of 1979 (To be called Ordinance VI of 1979) and Section 7(a) of The Anti-Terrorism Act, 1997 (Act XXVII of 1997) but conviction was recorded under Section 21-L of The Anti-Terrorism Act, 1997 (Act XXVII of 1997) (Shall be named as Act XXVII of 1997 as and when required) against both the appellants, despite omission to frame charge under the said provisions of law, resulting in awarding of sentence for 03 years imprisonment each with fine of Rs.20,000/- each and in default three months imprisonment, under challenge by way of separate appeals, taken together for discussion and disposal in view of commonality of question of law and facts.

2. On 2nd of October, 2018, after hearing arguments, through short orders, both the appeals were accepted, while setting aside the judgment impugned with the direction to release the appellants forthwith if not required in any other case. Hereinafter are the reasons for our conclusion.

3. Khan Bacha, complainant (cited as respondent No.2 in both the appeals), brother of Muhammad Zamin (one of the deceased) approached Aziz Ullah Khan, Inspector (Retired), the then A.S.I. (P.W.7), on 29th July, 2002, narrating the occurrence of murder of not only his step brother, Muhammad Zamin, but also of his two sons. Nawab Zada, Yar Aman and nephew, Ali Zeb at previous night by some un-known assailants.

The complainant-respondent No.2 made supplementary statement on 13th August, 2002, implicating Bakhat Sher, both appellants and others (still fugitive from law). Bakhat Sher after arrest was put to face trial, against whom conviction was recorded, awarding him sentence of death on four counts alongwith other sentences which were not endorsed by learned Peshawar High Court through judgment dated 10th July, 2007, resulting in his acquittal.

4. Both the appellants were declared hostile. Faiz Muhammad was arrested on 15th January, 2017, as is evident from "Arrest Card" (Ex.P.W.3-1).

Anwar Zada alias Anwar (appellant in Appeal No.11-I of 2018) was apprehended on 7th February, 2016 vide "Arrest Card" (Ex.P.W.9-1).

After usual investigation, they were sent to face trial. Charge was framed under Sections 396, 452 of Act XLV of 1860, Section 17(4) of The Ordinance VI of 1979 and Section 7(a) of Act XXVII of 1997.

Evidence led by prosecution consisting of 17 witnesses besides deposition of four witnesses transposed in pursuance of order dated 13th December, 2017, made by learned Trial Court was evaluated by it, concluding failure of prosecution to prove different heads of charge resulting in their acquittal.

However, in view of discussion made under heading of "Abscondence", the trial court in its wisdom held them guilty under Section 21-L of Act XXVII of 1997 and awarded each appellant, sentences referred to earlier.

5. Heard adversaries and perused the record.

6. Learned counsel for the appellants while submitting arguments separately, attacking the conclusion impugned at the very outset submitted that charge was not framed under the provision of law under which conviction and sentence was recorded and awarded. Argued that there was no evidence at all to prove the abscondence of the appellants, warranting conviction. Maintained that

Faiz Muhammad, appellant was resident of "charsadda" and was not aware of any such proceedings.

Learned counsel for Anwar Zada while taking exception to the judgment assailed adopted the arguments of his associate, further contending that said appellant was resident of "Mardan" who later on left Pakistan for abroad for labour and was not in the knowledge of any such proceedings particularly when crime-report was lodged against un-known assailants.

Learned counsel for the respondent No.2 assisted by learned law officer while making reference to the evidence of Said Anwar, Constable (P.W.1), copies of non-bailable warrant of arrest (Ex.P.W.1-1, P.W.1-2), copies of proclamations (Ex.P.W.1-5-Ex.P.W.1-6) maintained that sufficient evidence was available to prove the offence under Section 21-L of Act XXVII of 1997. Replying the contention regarding omission to frame charge under which conviction was recorded, the learned law officer while placing reliance upon the provision of Section 237 of The Code of Criminal Procedure, 1898 (Act V of 1898) (Hereinafter called The Code) submitted that the omission loses its importance in view of evidence of Said Anwar, Constable (P.W.1).

They both with one voice also prayed for enhancement of sentence awarded keeping in view maximum punishment provided in Section 21-L of Act XXVII of 1997.

7. It is an admitted fact that acquittal was recorded in favour of appellants under different heads of charge, reference of which has been made in para (1) of the judgment. Section 21-L of Act XXVII of 1997 under which conviction has been made was not part of the charge.

8. The Anti Terrorism Act, 1997 is a substantive as well as procedural law. Perusal of the scheme of the said Act reveals that it provides the definition of

certain offences, also providing procedure to proceed with the trial. Section 19 of Act XXVII of 1997 can be referred as a part of the procedural law, which provides the mode and manner of conduct of criminal trial before the Anti Terrorism Court. Sub-section 7 of Section 19 stipulates that the Anti-Terrorism Court "on taking cognizance of a case" shall proceed with the trial from day-to-day and shall decide the case within 07 days. The word "charge" has not been used in the said provision of law. In order to resolve the controversy, it is desirable to know the meaning of "taking of cognizance of a case". The said term as referred earlier has been used in Section 19 of Act XXVII of 1997. It has also been used in Sections 190, 192 and 193 of The Code. Controversy arose before the Apex Court with reference to the definition of the term referred to as well as "commencement of trial" and it was held in "HAQ NAWAZ and others vs. THE STATE and others" (2000 SCMR 785) at pages 797-798 as follow:

> "From a review of the above provisions of the Code, it is quite clear to us that taking of cognizance of a case by a Court is not synonymous with the commencement of the trial in a case. Taking of cognizance of a case by the Court is the first step, which may or may not culminate into the trial of the accused. The trial in a criminal case, therefore, does not commence with the taking of the cognizance of the case by the Court. A careful examination of the above provisions in the Code makes it clear that until charge is framed and copies of the material (Statement of witnesses recorded under sections 161 and 164, Cr.P.C., inspection note of the first visit to the place of occurrence and recoveries recorded by investigating officer, if the case is initiated on police report, and copies of complaint, other documents filed with complaint and statements recorded under section 200 or 202 if it is a case upon complaint in writing) are supplied to accused free of charge and he is called upon to answer the charge. In the case before us, the challan was filed before the Court on 5-1-1991 and the accused were also summoned to appear before the Court on 6-1-1991, which may amount to taking of the cognizance of the case by the Court. However, in view of the provisions of the Code referred to above, these steps could not amount to commencement of the trial of the appellant."

It can be argued that since the word "charge" has not been used in Act XXVII of 1997, therefore, omission to frame charge under particular provision

will be of no significance, particularly when evidence was adduced by prosecution. This presumptive argument would be of little help to the prosecution because it is the fundamental principle of criminal administration of justice that a person against whom there is accusation, when put to face the trial must be briefed in explicit terms the nature of allegations with which he has to face the trial so that he may be able to prepare his defence and reply.

However, Chapter-19 of The Code deals with the framing of charge.

Since The Act XXVII of 1997 provides the procedure to conduct the trial, therefore, question may arise regarding the applicability of The Code to the proceedings before the Anti-Terrorism Court. In this regard, we may refer to Section 32 of Act XXVII of 1997, which reads as follows:

> "**32. Overriding effect of Act.--**(1) The provisions of this Act shall have effect notwithstanding anything contained in the Code or any other law but, save as expressly provided in this Act, the provisions of the Code shall, insofar as they are not inconsistent with the provisions of this Act, apply to the proceedings before [3][an Anti-Terrorism Court], and for the purpose of the said provisions of the Code, [1][an Anti-Terrorism Court] shall be deemed to be a Court of Sessions.
> (2) ………….." (Emphasis supplied)

Perusal of the sub-section reproduced clearly reveals that the provision of The Code which are not inconsistent with the statute (Act XXVII of 1997), shall be applied to the proceedings before Anti-Terrorism Court in order to conduct the trial.

9. The Code provides detailed mechanism to conduct trial of criminal cases.

After procuring attendance of accused, supplying copies of statements and documents as envisaged, charge has to be framed. Chapter XIX of The Code deals with the framing of charge. Different Sections of the Chapter

(Section 221 to Section 240) explain mode and manner of framing of charge and deal with different eventualities.

Charge is the foundation of criminal trial. The expression corresponds to an "indictment" in English law. It is precise formulation of allegations made against a person. Very purpose and object is to provide awareness to the accused about the exact nature of the accusation enabling him to give proper reply, prepare defence, ruling out element of mis-leading, causing prejudice to his interest. He can only be convicted on proof of particular offences disclosed (subject to certain exceptions) and not for the offences regarding which charge has not been framed.

We may advantageously make reference to the discussion made by a learned Division Bench of the Karachi High Court in the case of "NOOR MUHAMMAD KHATTI and others v. THE STATE" (2005 PCr.L.J. 1889) in which it was held at pages 1896-1897 as follow:

> "11-A. The natural justice requires that the accused person should be tried by a competent Court. He should be told and clearly understands the nature of offence for which he is being tried. The case against him should be fully and fairly explained to him. He should be afforded a full and fair opportunity of defending himself. If substantial compliance with the outward forms of the law is made then, mere mistakes in procedure, mere inconsequential errors and omissions in the trial would be regarded as the venial by the Procedural Code and the trial would not be vitiated unless the accused could show substantial prejudice. It is pointed out that the intention of the Procedure Code is that they should not encourage the hindering of justice but all procedure is intended to help justice. Basic rule is that Criminal Courts exist for the administration of justice and the Courts have inherent powers to mould the procedure, subject to the statutory provisions applicable to the matter in hand, to enable them to discharge their functions as Courts of justice. The said power is not capriciously or arbitrarily exercised. It is exercised as debito justitiae to do the real and substantial justice for the administration of which alone Courts exist. However, the Courts in the exercise of such inherent power must be careful to see that their decisions are based on sound general principles and are not in conflict with them or with the intentions of the Legislature as indicated in statutory provisions."

In "M. YOUNUS HABIB v. THE STATE" (PLD 2006 SC 153), importance of charge was highlighted at page-156 in the following manner:

> "The criminal procedure code lays down an elaborate procedure for framing of the charge and the rationale is that the accused should know the exact nature of the accusation made against him so that he may give a proper reply and is not misled by any vagueness in the accusation leveled……"

There is no cavil with the proposition that charge under Section 21-L of Act XXVII of 1997 was not framed. Un-deniably it is a distinct offence which means an offence having no connection with other offences under which charge was framed. Section 233 of The Code envisages separate charge for every distinct offence.

Inability on the part of learned Trial Court to frame charge not only offends the provisions of Section 233 but also that of Section 221 of The Code.

Omission to frame charge is fatal, going to the root of the case, un-deniably causing prejudice to the appellants resulting in mis-carriage of justice.

Inability on the part of Trial Court to frame charge is strong circumstance to be considered for acceptance of appeals, which is also violative of Articles 9 and 10(1) of The Constitution of Islamic Republic of Pakistan (See: "ARBAB KHAN V. THE STATE" (2010 SCMR 755), "KHAN ZADO alias KETOO SAB ZOI V. THE STATE" (2015 PCr.L.J. 1561).

We are not unaware of the provisions of Section 537 of The code. Section 537(b) of The Code is also of little help to the prosecution because it deals with any error, omission or irregularity in the mode of trial including mis-joinder of charges.

It cannot be applied to an infringement of a statutory compulsion but only errors or omission, result of over sight. The expression "subject to the provisions herein before contained" used in the provision under discussion is of significance and refers to Sections 529 to 536.

The word "error" in the provision with reference to a charge is to be understood in the sense, used in Sections 225 and 232.

10. Line of distinction and demarcation has to be made between "charge of defective nature" causing no prejudice to the accused and "omission to frame charge".

Conscious of omission, attempt was made by learned law officer to seek help from the provision of Section 237 of The Code with the stance that it is permissible for the Court to record conviction in another offence though person was charged with one offence.

For the purpose of better appreciation, provision of Section 237 of The Code is re-produced for ready-reference:

> **"237. When a person is charged with one offence, he can be convicted to another**. (1) If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed although he was not charged with it."

Perusal of the text of Section clearly reveals that it is controlled by Section 236. It is an exception to general rule that a person cannot be convicted of an offence of which he was not charged and of which he had no notice. (See: "ZAHID SHAHZAD, ETC. vs. THE STATE" (NLR 1981 Criminal 602), (1981 PCr.L.J. 844). Language of Section 236 suggests that person charged with one offence cannot be convicted for another unless it was doubtful as to

what offence was made out against accused. Provision of Section 237 cannot be invoked for a distinct offence or for an offence which falls under different penal statute. We are fortified in our view by law laid down in "Nemai Adak and others vs. The State" (AIR 1965 Calcutta 89), "Istahar Khondkar and others vs. Emperor" (AIR 1936 Calcutta 796), "Chhanga Khan vs. The State" (AIR 1956 Allahabad 69).

Viewed from whichever angle, omission to frame charge and that too for distinct offence under different penal statute is fatal to the case of prosecution.

11. Matter can be examined from another angle as well. So far as appellant Anwar Zada is concerned. Admittedly, question with reference to his abscondence was not put to him under Section 342 of The Code with which omission, the learned law officer as well as learned counsel for the complainant were confronted who frankly conceded it with addition that question No.19 was put to Faiz Muhammad (appellant in Appeal No.09-I of 2018).

Factual position explained on behalf of prosecution though cannot be questioned but undeniably no question was ever put to the Anwar Zada.

12. Next question for consideration is to determine the consequences of omission to put such type of evidence to the said appellant in his statement recorded. Perusal of Section 342 of The Code clearly reveals that it can be classified into two parts. First part of the provision is discretionary in nature, vesting jurisdiction in the Court to put questions to the accused at any stage of inquiry or trial without previous warning but later part of the provision cast duty upon the Court to put incriminating evidence produced by the prosecution during the course of trial "for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him". The underlined

expression clearly demonstrates the purpose and object of confronting the accused with incriminating evidence, simultaneously suggesting that if the evidence suggesting his involvement in the commission of crime is not put to him, it cannot be used as evidence against him. Failure to confront will make it impossible for the accused to explain the circumstances appearing in the evidence. It is based on the principle of "*Audi Alteram Partem*". The purpose and object was highlighted by the Apex Court in the case of "ASIF ALI ZARDARI and another vs. THE STATE" (PLD 2001 SC 568), "S.A.K. REHMANI vs. THE STATE" (2005 SCMR 364).

In the case of "MUHAMMAD SHAH vs. THE STATE" (2010 SCMR 1009), while dealing with the omission on the part of the Trial Court to put incriminating evidence, it was held by the Apex Court that if any incriminating piece of evidence is not put to the accused in his statement under Section 342 of The Code for his explanation, then the same cannot be used against him for his conviction. Same Rule of law was enunciated in "QADDAN and others vs. The STATE" (2017 SCMR 148), "Mst. ANWAR BEGUM vs. AKHTAR HUSSAIN alias KAKA and 2 others" (2017 SCMR 1710).

13. In view of the matter, the evidence of abscondence, if any, produced by the prosecution cannot be taken into consideration against Anwar Zada (appellant). The natural consequences would be that it will be considered case of no evidence against the said appellant on factual premises, besides suffering from legal infirmities already discussed.

14. We are conscious and as pointed out on behalf of prosecution that Said Anwar, Constable (P.W.1) was produced by the prosecution to prove abscondence, who produced copies of non-bailable warrant of arrest and proclamation (Ex.P.W.1-1, Ex.P.W.1-5) against Faiz Muhammad, appellant.

We may add here that the evidence of said witness was produced by the prosecution being a corroborative piece of evidence against the appellants and not as evidence on a distinct offence and that too, under the separate statute, for the obvious omission to frame charge under Section 21-L of Act XXVII of 1997.

15. We have gone through the statement of Said Anwar, Constable (P.W.1) who maintained that non-bailable warrant of arrest were entrusted to him against both the appellants, the copies of which are Ex.P.W.1/1 and Ex.P.W.1/2, who went at the given addresses but both the appellants were not found there. He further deposed that he was also entrusted with proclamations (Ex.P.W.1/5 and Ex.P.W.1/6) and at given addresses, he made search of the appellants and ultimately affixed the copies of proclamation at the outer door of their respective houses as well as other conspicuous places. The witness in cross-examination admitted that when he went to affix the proclamations, houses of the appellants were no more in existence as the same were already burnt. We have also gone through the reports on the non-bailable warrant of arrest as well as proclamations. In order to declare a person proclaimed offender, it is necessary that factum of issuance of coercive measures including the proclamations must be in the knowledge of person who is intentionally avoiding his arrest or evading process. Perusal of the reports on the back of proclamations issued in the name of Faiz Muhammad (Ex.P.W.1/5) reveals that the process-server affixed the proclamation on the wall of burnt house. Report further suggests that it was also verbally told that accused is required to appear within thirty days. When the houses of appellants were burnt and none was residing in the said house, then question of avoiding the process or intentional concealment does not arise at all.

16. We have also gone through the impugned judgment. No doubt at pages-9 and 10 of the judgment, a reference was made to the abscondence of the appellants while referring to the evidence of Said Anwar, Constable (P.W.1) but undeniably no discussion was made in order to satisfy the yardstick contained in Section 21-L of Act XXVII of 1997 in order to reach a definite conclusion that both the appellants made avoid of their arrest or evaded appearance, concealed themselves in order to obstruct the course of justice. No determination was made by the learned Trial Court by applying the judicial mind. Evidence on the point neither fulfills the yardstick nor learned Trial Court ever dilated upon this aspect.

17. Reference to the provisions of Section 31-A of The National Accountability Ordinance, 1999 would be also beneficial to resolve the controversy as the provision referred to and Section 21-L of Act XXVII of 1997 are similar to each other. Section 31-A of The National Accountability Ordinance, 1999 is re-produced for ready-reference:

> "**[31-A. Absconding to avoid service of warrants.--**2[(2) Whoever absconds in order to avoid being served with any process issued by any Court or any other authority or officer under this Ordinance or in any manner prevents, avoids or evades the service on himself of such process or conceals himself to screen himself from the proceedings or punishment under this Ordinance shall be guilty of an offence 3[under this Ordinance] punishable with imprisonment which may extend to three years notwithstanding the provisions of Section 87 and 88 of 4[Code], or any other law for the time being in force…."

Question of recording conviction under the said provision providing same yardstick was challenged in many cases and it was held that conviction under the said provision to the absconder is violative of Article 9 of The Constitution of the Islamic Republic of Pakistan. Reliance is placed upon

"SOHAIL ZIA BUTT vs. THE STATE" (2011 PCr.L.J. 2), "Mian QURBAN ALI vs. The STATE through Director-General, NAB" (2015 PCr.L.J. 1787).

18. Viewed from whichever angle, opinion of learned Trial Court recording guilt of appellants under Section 21-L of Act XXVII of 1997 cannot be endorsed on legal as well as factual premises, resulting in quashment of conviction recorded and sentences awarded.

SHAUKAT ALI RAKHSHANI
JUDGE

MEHMOOD MAQBOOL BAJWA
JUDGE

Announced
Dated, Islamabad the
08th October, 2018

Approved for Reporting

JUDGE