23. **Trial in absentia**

In a normal trial under Criminal Procedure Code, 1898 an accused person cannot be tried in his absence and court can merely record the evidence against an absconding accused person under section 512, Cr.P.C and after arrest of accused fresh trial takes place. In this manner, the trial of an absconding accused is separated from the trial of accused appearing before court. However, if prosecution adopts a course whereby an accused person has been challaned in absentia and trial is absentia is permissible under relevant law for the time being in force, and court adopts the course suggested/proposed by prosecution is debarred from raising objection to such course adopted by court. (2003 P Cr L J 216)

Procedure prescribed under this section should be applied only to cases of great gravity and can be put in force only under an order of High court. Mere delay, expense or inconvenience in obtaining the presence of the deponent is not sufficient ground for

excepting such deposition as evidence against the person subsequently accused. (2000 YLR 1330 FSC (BD)). Accused on being released on bail made good his escape and did not attend a single date of hearing. Trial court may confiscate bail bond of sureties and proceed against the accused under this section and declare him a proclaimed offender. (2001 MLD 673).

24. Trial---its meaning & significance.

There are two kinds of trial.

(1) Summary trial.

(2) Regular trial.

25. Summary trial.

(1) Notwithstanding anything contained in this code.

(a) x x x x x x x

(b) any Magistrate of the first class specially empowered in this behalf by the Provincial Government, and

(c) any bench of Magistrate invested with the powers of a Magistrate of the first class and especially empowered in this behalf by the Provincial Government.

May, if he or they think fit, try in a summary way all or any of the following

offence:

(a) offences not punishable with death, transportation or imprisonment for term exceeding six months;

(b) offences relating to weights and measures under section 264, 265 and 266 of the Pakistan Penal Code;

(c) hurt, under section (clause (i) of section 337-A) 323 of the same code;

(d) theft under sections 379, 380 or 381 of the same code, where the value of the property stolen does not exceed (ten thousand rupees);

(e) dishonest misappropriation of property under section 403 of the same code, where the value of the property misappropriated does not exceed (ten thousand rupees).

(f) Receiving or retaining stolen property under section 411 of the same code, where the value of such property does not exceed (ten thousand rupees).

(g) Assisting in the concealment or disposal of stolen property under section 414 of the same code, where the value of such property does not exceed (ten thousand rupees).

(h) Mischief, under section 427, of the same code;

(i) House trespass, under section 448, and offences under sections 451, 453, 454, 456 and 457 of the same code.

(j) Insult with intent to provoke a breach of the peace, under section 504, and criminal intimidation, under section 506, of the same code;

(k) Offence of personation at an election under section 171-F of the same code;

(l) Abetment of any of the foregoing offences;

(m) An attempt to commit any of the foregoing offences, when such attempt is an offence;

(n) Offence under section 20 of the cattle-tresspass Act 1871;

(3) When in the course of a summary trial it appears to the Magistrate or

Bench that the case is one which is of a character which renders it undesirable that it should be tried summarily, the Magistrate or Bench shall recall any witnesses who may have been examined and proceed to hear the case in manner provided by this code.

26. Record of cases where there is no appeal.

In cases where no appeal lies, the Magistrate or Bench of Magistrates need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter in such form as the Provincial Government may direct the following particulars:

(a) the serial number;

(b) the date of the commission of the offence;

(c) the date of the report or complaint;

(d) the name of the complainant (if any);

(e) the name, parentage and residence of the accused;

(f) the offence complained of and the offence (if any) proved, and in cases coming under clause (d), clause (e) clause (f) or clause (g) of sub section (1) of section 260 the value of the property in respect of which the offence has been committed;

(g) the plea of the accused and his examination (if any);

(h) the finding, and, in the case of a conviction, a brief statement of the reason therefore;

(i) the sentence or other final order, and

(j) the date on which the proceedings terminated.

Section 263 exempts the Magistrate holding a summary trial from recording the

evidence of witnesses as in ordinarily trials. This section applies to only to cases where no appeal lies. In appeal-able cases the Magistrate is bound under section 264 to record the substance of the evidence. In non appeal able cases, the form prescribed in this section with the particulars written constitutes the record. The Magistrate is required by the mandatory provisions of section 263 to enter in such form as the Provincial Government may direct, the various particulars mentioned therein. (PLD 1975 Pesh 216).

27. Regular trial.

Before a regular trial can commence, the following pre-trial steps are necessary to be taken.

(i) the determination of the place of trial;

(j) cognizance of offences by court;

(k) issue of process to procure the attendance of the persons accused;

(l) other matters, such as

(a) supplying copies;

(b) accused's counsel;

(c) fixing dates of hearing;

(d) trial of complaint and police cases arising out of the same offence.

28. Cognizance of offence by courts.

Section 190 provides for cognizance of offences by Magistrate by its sub section (1) all Magistrate of the 1st Class or any other Magistrate especially empowered by the Provincial Government on the recommendations of the High Court may take cognizance of any offence.

(a) upon receiving a complaint of facts which constitute such offence;

(b) upon a report in writing of such facts made by any police officer;

(c) upon information received from any person other than officer, or upon his own knowledge or suspicion;

that such offence has been committed which he may try or send to the court of Session for trial.

Sub section (2) of section 190 requires a Magistrate taking cognizance under sub section (1) of the offence triable exclusively by a Court of Session to send the case to the court of Session for trial, without recording any evidence.

Court of Session is debarred under section 193 Cr.P.C from taking cognizance of the case as a court of original jurisdiction unless the case is sent to it by a Magistrate under section 190(3) Cr.P.C. whereas a special court constituted otherwise than in the code can

take cognizance of the case directly as a court of original jurisdiction in the same manner as a Magistrate is empowered to take cognizance of a case under section 190 of the code. (2001 P.Cr.L.J. 481 (FSC)).

The High Court may take cognizance of any offence in manner hereinafter provided. Nothing herein contained shall be deemed to affect the provisions of any Letter Patent or Order by which a High court is constituted or continued, or any other provision of this code. (Section 194 Cr.P.C.).

29. Process to Procure the attendance of accused person.

Chapter XVII Cr.P.C. is titled "OF the commencement of proceedings before court". It has two sections namely sections 204 and 205. Section 204 provides that if in the opinion taking cognizance of an offence there is sufficient ground for proceeding and the case appears to be one in which according to the 4th column of the second Schedule to the Cr.P.C. a summons should issue in the first instance, it shall issue summons for the attendance of the accused and if the case appears to be one in which according to that column a warrant should issued in the first instance, it may issued a warrant or if it think fit, a summons for causing the accused to be brought or to appear at a certain time before such court. This section is so far as it relates to cases in which according to the 4th column of the Second Schedule of Cr.P.C. a summons should issue in the first instance, is to be read with section 90 which empowers the court, for reasons to be recorded in writing, to issue a warrant for the arrest of the accused person.

(a) When the court sees reason to believe that the accused has absconded or will not obey the summons; or

(b) If the summons had been served and the accused person failed to appear without offering any reasonable excuse.

All to the process to procure the attendance of persons, accused as well as

witnesses, the relevant provisions are to be found in chapter VI Cr.P.C. "Of process to compel appearance".

30. Supply of copies.

After the court has procured the attendance of an accused person, the first step in the trial of cases, before the Magistrate as well as before the High Court and the Court of Session is the supply of

certain statements and documents to the accused. When the trial is by Magistrate, the statements and documents required to be supplied to the accused persons are those mentioned in section 241A and when the trial is before the High Court and Court of Session, the statements and documents to be supplied to the accused persons are those mentioned in section 265-C. Cr.P.C.

It is note worthy that there are two classes of case triable before Magistrate, namely, those triable summarily under Chapter XXII and those triable under chapter XX. The relevance of this distinction is that the statements and documents mentioned in section 241A are to be supplied to the accused persons only in cases which are tried under Chapter XX.

The statements and documents to be supplied under section 241A and 265C are to be supplied free of cost. " not less than seven days before the commencement of the trial". (PLD 1960 SC 8).

31. Procedure for trial of complaint & police cases arising out of the same offence.

There may be cases in which out of an offence arise two cases, one being a police case and the other being a complaint case. For example, the first informant in a police case named three person. A, B and C as culprits of a murder in the FIR. The police after investigation finds that the offence was committed by A and B only and that C was innocent of the offence. Dissatisfied with the police investigation, the first informant or any other heir of the victim may file a complaint against A, B and C. In this way, there will be two cases before the Court arising out of the same offence.

This is the stage when the court is confronted with the question how to proceed with the trial of such cases as to cause no prejudice to other party. The leading authority on this point is Nur Ellahi V. State (PLD 1966 SC 708) it was held:

> " After considering all aspects of the matter, we hold that a fair procedure would be for the learned trial Judge to take up the complaint case first for trial. during that case the learned trial Judge may call the witnesses mentioned in the police challan, if they were not already examined, on behalf of the complainant as court witnesses under section 540-A of the Criminal Procedure Code, so that they can be cross-examined by both the parties. This will enable the court to have the whole

relevant evidence included in one trial and a decision could be arrived at after a proper consideration of the entire material relied on by the parties. The accused persons would in addition obviously have the right to adduce defence evidence if they so choose. If that trial results in a conviction, it will be for Public Prosecutor to consider whether or not he should withdraw from the prosecution, with the permission of the court, under section 494 of the Code of Criminal Procedure, in police challan case. It would be easy for him to take such a decision after the whole evidence has been thrashed out in the first trial. If the first case ends in an acquittal, he might still have to consider whether the police case has not been so seriously damaged by what has been brought out in the first trial, as to justify withdrawal of the prosecution. Otherwise the second trial would be allowed to proceed to its normal conclusion and the parties would have the advantage of utilizing the material placed on the record of the earlier trial, by way of cross-examination of the relevant witnesses as permitted by law.

This procedure is being suggested to avoid a difficulty that might otherwise confront the complaint. If the police challan is taken up first for trial, the complainant would be under a handicap in so far as he would not be in a position to cross-examine the witnesses for the prosecution.

Another difficulty may arise in respect of conducting the case on behalf of the complaint in the first trial. Normally, of course, under the law, the Public Prosecutor is to be in charge of the case, even if the trial is based on a private complaint. The Public Prosecutor however, in the special circumstances of the case, could permit the complainant's counsel to conduct the proceedings on his behalf under his directions. Alternatively and that may meet the situation more adequately, Government in the interest of justice, could notify the complainant's counsel, as a special Public Prosecutor, for the conduct of that case alone. This would ensure full justice to the complainant and he would not be left with any sense of grievance.

In that case, Kaikaus J wrote a dissent; in his view the two proceedings should be

Consolidated and there should be a single hearing so that the whole the evidence is produced before the court and then a decisi recorded.

The rule in Nur Ellahi case does not however, lay down invariable rule that the complaint case is always to be tried firs Where the version and the accused are practically the same in both th complaint and the challan case, a separate trial may not be necessar As was held in Zulfiqar Ali Bhutto V. State there is no necessity for separate trial of the two cases when technically speaking there ar neither two sets of accused nor different versions nor any addition evidence is being examined by the complainant. It was only to avo prejudice to the complainant that a particular procedure was devise in Nur Ellahi V. State case but to say that invariably it should b followed even if the facts are distinguishable is not correct. This vie was followed in Raja Khaushbakht-ur-Rehman V. State. (1985 SCM 1314).

32. Commencement of trial.

The stage set for commencement of trial. the first step framing of charge.

33. Framing of charge.

A charge is what is known as indictment in the English Law is a statement of the offence, that is a description of the offence, an the particulars of the offence, that is brief statement of the essenti facts which constitute the offence. The object of framing of a charge to give reasonable information and notice as to the matter with whi the accused is charged and which he is called upon to defend. Th basic requirement in every criminal trial is that the charge must b framed so as to give the accused a fairly reasonable idea as to the cas which he is to face, and the validity of the charge must in each case b determined by the application of the test viz had the accused reasonably sufficient notice of the matter which he was charged.

34 The essentials of a charge are as under:

1. The charge should state the offence with which th accused is charged.
2. If the offence is named specifically by the law whic creates the offence, the offence may be described in th charge by that name only.

3. The law and section of the law against which the offence is committed should be mentioned.

4. The charge shall be written either in English or in the language of the court.

5. In case of previous conviction of the accused for affecting the sentence, the fact and date, place of the previous conviction are to be stated.

6. Particulars as to the time, place of the offence, and the person against whom or the thing in respect which it is committed.

7. Where the accused is charged with criminal breach of trust or dishonest misappropriation of money, it is sufficient to specify the gross sum in respect of which the offence is committed and the dates between which it is committed provided the time between the first and last date does not exceed one year.

8. When the particulars mentioned in section 221 and 222 are insufficient to notify accused with the matter with which he is charged, the charge should also contain such particulars of the manner in which the alleged offence was committed. (Extract of Section 221 to 240 Cr.P.C.).

35. Conviction on admission of truth of accusation.

After a formal charge has been framed, the accused is to be called upon to plead guilty or not guilty. When the trial is by a Magistrate and the accused admits that he has committed the offence, his admission shall be recorded as nearly as possible in his own words and it he shows no sufficient cause why he should not be convicted, the Magistrate may convict him accordingly. (Section 243). If the trial is before High Court or a Court of Session and the accused pleads guilty, the court shall record the plea and may in its discretion convict him thereon. (section 265-E).

It is obvious that the admission by the accused of the commission of the offence or the admission that he is guilty and has

no defence to make, followed by a conviction thereon, puts an end to the trial.

But where the accused does not plead guilty or does not admit the commission of the offence, the hearing of the case commences. This is the point of the trial where issues such as double jeopardy and jurisdiction of the court to try etc. may appropriately be raised.

36. **Procedure when no such admission is made.**

If the Magistrate does not convict the accused under the preceding section or if the accused does not make such admission, the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.

Provided that the Magistrate shall not be bound to hear any person as a complaint in any case in which the complaint has been made by a court.

(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue a summons to any witness directing him to attend or to produce any document or other thing.

(3) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purpose of the trial be deposited in court.

Provided that it shall not be necessary for the accused to deposit any such expenses in court in case where he is charged with an offence punishable with imprisonment exceeding six months. S-244 Cr.P.C

37. **Prosecution evidence.**

By article 130 of the Qanun-e-Shahadat Order 1984, the order in which witnesses are produced and examined is regulated by the law and practice for the time being relating to civil and criminal procedure, and in the absence of any such law, by the direction of the court. The provision referred to above precisely do this; they regulate the order in which the evidence in a criminal trial shall be recorded. But suppose that these provisions in the Cr.P.C. were not there or a situation arises for which such provisions do not cater. To meet such a situation, so says Article 130 of the 1984 Order, it is for the court to

take over. This seems to be the meaning of the phrase "by the direction of the court"

The order in which the recording of evidence should under the provisions of the Cr.P.C. ordinarily proceed thus is:

(i) Prosecution evidence that is to say evidence which the prosecution produce in support of its case;

(ii) Examination of the accused;

(iii) Defence evidence, that is, evidence produced by the accused;

(iv) There is no fixed stage for the examination of witnesses by the court under Section 540 Cr.P.C.

As to the credibility of a witness, that is not a matter of law or an exercise in the

application of law but merely an application of simple human judgment. The usual aids to belief or disbelief as to the credibility of a witness are the appearance of the face of witness as he makes his statement, the manner in which he receives a question, considers his reply and states it, the manner in which he faces cross-examination and meets objections affecting his veracity and such other factors by which the human judgment is assisted. That is why section 363 Cr.P.C. provides that when a Sessions Judge or Magistrate has recorded the evidence of a witness, he shall also record such remark if any as he thinks material respecting the demeanor of such witness whilst under examination.

38. Examination of the accused.

Section 342 Cr.P.C. provides that for the purpose of enabling him to explain any circumstances appearing in the evidence against him, the court may at any stage of an inquiry or trial without previously warning the accused put such questions to him as the court considers necessary, and shall for the purpose aforesaid question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence. The answers given by the accused may be taken into consideration in such an inquiry or trial and put in evidence for and against him in any other inquiry or trial.

Sub-section (4) of Section 342 providees: "Except as provided by sub-section (2) of section 340, no oath shall be administered to the accused".

It will be noticed that section 342 Cr.P.C. has two parts: the first empowers the court to put any question it considers necessary at any stage of an inquiry or trial; this is a discretionary power; under the second part the court shall, that is to say, it is mandatory for the court, for the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, to question him generally.

Our concern here is the second part of Section 342.

The whole object of section 342 Cr.P.C. is to provide an opportunity to the accused to explain the circumstances, which are relied upon by the prosecution as established in the case against him. Section 342 Cr.P.C. aims at bringing to the notice of the accused such points of evidence as are likely to influence the mind of the court to draw adverse inference against him and to give him chance if he so desires to offer his version or to explain circumstances appearing in evidence against him. (PLD 1995 FC 63, 70). The object is not to cross-examine the accused or to resort to unduly detailed examination, which savours of cross-examination, nor is it to fill up gaps in the prosecution case. (PLD 1955 FC 88; PLD 1960 WP Lah. 1192, 1195).

After the prosecution evidence has concluded, the accused is examined under section 342 Cr.P.C. with the object of providing him an opportunity to explain the circumstances appearing in the evidence against him. At the end of that examination the normal practice is to put two questions to the accused, first, whether he would give evidence on oath in disproof of the charges or allegations made against him and second, whether he would adduce evidence in defence. The accused may not himself enter into the witness box to give evidence on oath but that will not deprive him of the right to lead evidence in defence.

Section 340 Cr.P.C. by its sub-section (2) requires that an accused person shall, if he does not plead guilty, give evidence on oath in disproof of the charges or allegations made against him or any person charged or tried together with him at the same trial. but the proviso to sub-section (2) says that the accused shall not be asked and if asked shall not be required to answer any question tending to show that he has committed or been convicted of any offence other than the

offence with which he is charged or for which he is being tried, or is of bad character, unless the case falls in one of the categories mentioned in the proviso.

39 Accused's right to testify.

The question whether an accused has a right to testify as his own witness has a long history and it is not necessary to weary the reader with the narration. As was by Chief Justice Appleton in a case from American Jurisdiction (State vs. Vleaves-59 Me.298 (1871) "the defendant in criminal cases is either innocent or guilty. If innocent he has every truth would be his protection. But the defendant having the opportunity to contradict or explain the inculpative facts proved against him, may decline to avail himself of the opportunity thus afforded him by the law. His declining to avail himself of the privilege of testifying is an existent and obvious fact. It is a fact patent in the case. The Jury cannot avoid perceiving it. Why should they not regard it as a fact of more or less weight in determing the guilt or innocence of the guilt.....". (1992 P.Cr.L.J. 2059, 2077).

40. Arguments.

In trials before the High Court and Courts of Session, after the evidence of the prosecution, examination of the accused, and evidence of the accused, have concluded, the court hears arguments. Section 265-G Cr.P.C. provides that in cases where the accused or any one of several accused, does not adduce evidence in his defence, the court shall, on the close of the prosecution case and examination of the accuse, call upon the prosecutor to sum up his case. After the prosecutor has done so, the accused shall make a reply. Where the accused or any of the several accused examines evidence in his defence, the court shall, on the close of the defence evidence, call upon the accused to sum up the case. After he has done so, the prosecutor shall make a reply.

There is no such provision in Chapter XX which governs the trial of cases by Magistrates. Despite the absence of an express provision to that effect in Chapter XX, the practice is, and it is a salutary practice more in accord with the principle of natural justice, that arguments are heard by the courts of Magistrate also. As the matter concerns the right of hearing, the courts proceed on the principle that absence of an express provision does not mean the

absence of power to do a thing which is necessary for a just decision of the case.(PLD 1993 SC 399)

41. Judgment.

The word "judgment" is not defined. It is a word of general import and means only "judicial determination of decision of court". (PLD 1957 SC (Ind) 361). As provided in section 366 Cr.P.C. judgment has first to be written and then delivered in open court simultaneously signing the same. (PLD 1985 Kar 4).

Section 366 provides a detailed procedure as to how a judgment by criminal court is pronounced and delivered. A judgment in every trial in any criminal court of original jurisdiction shall be:-

(1) Pronounced in open court;

(2) By the Presiding officer of the court immediately after the termination of the trial or at some subsequent time;

(3) Of which notice shall be given to the parties or their pleaders, and

(4) It should be in the language of the court of in some other language which the accused or his pleader understands.

42. High Court Rules.

Rule 1 Chapter 1-H, Vol.III of the High Court Rules in respect of "judgment" os reads as under:

Contents of judgment.

(m) in all cases a judgment must be drawn up containing;

(1) the point or points for determination,

(2) the decision thereon, and,

(3) the reason for the decision.

The word "judgment" means a decision in a trial which decides a case finally so

far as the court trying the case is concerned, and terminating in either a conviction or acquittal of the accused. (AIR 1957 SC 389). It is the expression of the opinion of Judge or Magistrate arrived at after due consideration of the evidence and the arguments (1970 P.Cr.L.J. 412) deciding a case finally so far as the court trying the case is concerned (AIR 1949 FC 1). The word "judgment" signifies the final of the court reached upon after full deliberation on the facts and it decides the point in issue between the parties. Its final verdict makes the court delivering judgment to become functus officio. Any irregularity or illegality can only be corrected by the appellate forum or revisional court, as the case may be. (2000 MLD 943). The main requirements of section 367 Cr.P.C. are that the judgment must be lucid, should contain discussion of evidence, reasons for the decisions and not merely the conclusion. (1980 P.Cr.L.J. 1101). Every judgment must contain inter alia points for determination, decision thereon and reasons for decision. (1980 P.Cr.L.J. 992). Such judgment must contain.

(1) the fact alleged by the prosecution as well as the accused;

(2) the point and points for determination; and

(3) the decision of those points with reasons therefor.

43. Acquittal.

If the magistrate upon taking the evidence referred to in section 244 and such

further evidence (if any) as he may, of his own motion cause to be produced, and (if he thinks fit) examining the accused, finds the accused not guilty, he shall record an order of acquittal. (Section 245 Cr.P.C.).

44. Sentence.

Where the Magistrate does not proceed in accordance with the provisions of section 349 he shall, if he finds the accused guilty, pass sentence upon him according to law. (Section 245 Cr.P.C.).

2003 P Cr. L J 216

[Karachi]

Before Muhammad Roshan Essani
and Muhammad Mujeebullah Siddiqui, JJ

THE STATE---Appellant

versus

MUHAMMAD UMAR alias CHOTOO---Respondent

Special Anti-Terrorism Appeal No.56 of 2002, decided on 19th August, 2002.

(a) Penal Code (XLV of 1860)---

----Ss. 302/324---Anti-Terrorism Act (XXVII of 1997), Ss.6, 7, 8, 19(10) & 25(4)---Criminal Procedure Code (V of 1898), Ss.417, 439 & 561-A---Acquittal of accused tried in absentia---Validity---Prosecution itself had prayed Anti-Terrorism Court to try accused in absentia, which had tried him accordingly with law governing trial before Anti-Terrorism Court---Not open to prosecution to contend now that Trial Court ought to have separated the case of accused from other arrested accused and ought not have framed charge against him and tried him in absentia as no evidence was available against him---Absconding accused could be tried in absentia by Anti-Terrorism Court under S.19(10) of Anti-Terrorism Act, 1997---Prosecution itself had not produced any material before Trial Court warranting conviction of accused, thus, his acquittal was fully justified---Judgment of acquittal was not open to exception for simple reason that memo. of appeal itself contained that prosecution had not been able to collect any material against accused and there was no evidence whatsoever connecting him with offence for which

PCrLJ

he had been challenged to face trial---High Court dismissed appeal in limine. [pp. 219, 220, 221] A, B, C, E, G, K & M

(b) Criminal Procedure Code (V of 1898)---

---S. 512---Trial in absentia---Procedure.

In a normal trial under Criminal Procedure Code, 1898 an accused person cannot be tried in his absence and Court can merely record the evidence against an absconding accused person under section 512, Cr.P.C. and after arrest of accused, fresh trial takes place. In this manner, the trial of an absconding accused is separated from the trial of accused appearing before Court. [p. 220] D

However, if prosecution adopts a course, whereby an accused person has been challaned in absentia and trial in absentia is permissible under relevant law for the time being in force, and Court adopts the course suggested/proposed by prosecution, then prosecution is debarred from raising objection to such course adopted by Court. [p. 221] J

(c) Approbate and reprobate---

---Nobody/party could be allowed to blow hot and cold at the same time---No person could be allowed to approbate and reprobate in same matter. [p. 220] F

(d) Criminal trial---

---Charge framed by Court at instance of prosecution---Validity---Accused could take exception to such framing of charge, but prosecution could not be allowed to raise any objection to framing of charge against accused, who had been sent up by prosecution to face trial. [p. 220] H

(e) Criminal Procedure Code (V of 1898)---

---S. 512---Challan by prosecution---Submission of challans against arrested accused and absconding accused/suspects---Procedure.

If in a particular case, certain accused persons have been arrested and investigation is conducted against them, while some other suspects are still at large and investigation is not closed against them, therefore, instead of submitting challan against such suspects, it is always open to prosecution to submit charge-sheet against such accused persons only in respect of whom prosecution is able to collect sufficient evidence. It can be observed in a charge-sheet that there are other suspects also against whom sufficient evidence has not been collected and prosecution reserves its right to investigate the case against other suspects/absconding accused persons as and when apprehended. By adopting such course, prosecution

can conduct investigation against such persons as and when arrested and they can be separately charge-sheeted, if in subsequent investigation sufficient evidence is collected against them. [p. 220] I

However, if prosecution adopts a course, whereby an accused person has been challaned in absentia and trial in absentia is permissible under relevant law for the time being in force, and Court adopts the course suggested/proposed by prosecution, then prosecution is debarred from raising objection to such course adopted by trial Court. [p. 221] J

(f) Penal Code (XLV of 1860)---

---Ss. 302/324---Anti-Terrorism Act (XXVII of 1997), Ss. 6, 7, 8, 19(10) & 25(4)---Criminal Procedure Code (V of 1898), Ss. 417, 439 & 561-A---Appeal against acquittal of accused tried in absentia alongwith arrested accused---Contention of prosecution was that such acquittal was not on merits, but was mere technical acquittal, which could not create any right in favour of accused-respondent for not being tried again for same evidence---Validity---High Court declined to consider such point in appeal directed against acquittal of accused by Trial Court which was left open---Parties would be at liberty to raise same in appropriate proceedings, if so advised. [p. 221] L

Habib Ahmed, A.A.-G. for Appellant.

Nemo for Respondent.

Date of hearing: 19th August, 2002.

ORDER

MUHAMMAD MUJEEBULLAH SIDDIQUI, J.---Through this appeal under section 25(4) of the Anti-Terrorism Act, 1997 read with sections 417/439/561-A, Cr.P.C. the State has assailed the judgment dated 17-5-2002 passed by the learned Judge, Anti-Terrorism Court No. 2, Karachi in Special Case No. 202 of 2001, whereby the respondent has been acquitted of the charge under sections 302/324/34, P.P.C. read with sections 6, 7 and 8 of the Anti-Terrorism Act, 1997, arising out of F.I.R. No. 121 of 1999, Police Station, Al-Falah, Karachi.

Heard Mr. Habib Ahmed, learned A.A.-G. for the State/Appellant.

At the very outset the learned A.A.-G. has candidly sated that, so far, the acquittal of respondent/accused Muhammad Umer alias Chotoo son of Muhammad Siddique, on the basis of prosecution evidence led during the course of trial is concerned, is unassailable. His contention

...that, the respondent was sent up to face trial in absentia in accordance with the relevant provisions contained in the Anti-Terrorism Act, 1997. ...some accused persons were arrested and the accused under arrest, as well as the respondent Muhammad Umer who was absconding were tried together. The arrested accused persons were convicted under section 302, P.P.C. and were sentenced to imprisonment for life. However, the respondent was tired in absentia and acquitted with the following observations:---

"So far as the absconding accused are concerned, there is no evidence against them. The Investigating Officer has only sated in his cross-examination that, they are implicated because of the arrested accused had named them. When there is no other evidence against them worth implicating in this case, they are therefore, entitled to acquittal."

The respondent has been arrested in another case, after the judgment of acquittal was pronounced in this case. During the course of interrogation the accused in another case, he is alleged to have admitted his guilt in the present case and several other cases and has led the Police to recovery of large quantity of explosive material for which another F.I.R. bearing No.161 of 2002, under section 5 of the Explosive Substances Act, has been registered.

It is a very interesting case in which the prosecution has raised objections to the course adopted by itself and has contended that, the learned trial Court ought not to have accepted and followed the course, suggested by the prosecution. It is stated in the grounds of appeal as follows:-- A

(i) That the learned trial Court has not applied his mind at the time of framing of the charge, that there is no legal evidence available against the respondent at that stage, therefore, his trial in absentia was not warranted under the law.

(ii) That in the circumstances of the present case the learned trial Court could have separated the case of the absconder from the case of the arrested accused as there was no legal evidence available against them except statement of co-accused during the interrogation.

(iii) That the acquittal order passed by the learned trial Court has tied the hands of the prosecution and they cannot arrest the accused in this case, until his acquittal order is set aside by this Hon'ble Court.

(iv) That the accused was not arrested at the time of first challan, therefore, the prosecution was having no opportunity to get the accused identified through the eye-witnesses of this case nor any other material could have been collected by the prosecution at that stage, hence the acquittal order passed by the learned trial Court is not sustainable under the law."

A perusal of the above grounds shows, that, according to the prosecution itself no material was produced before the learned trial Court warranting conviction of the respondent. The logical conclusion is that, the learned trial Court was fully justified in recording the judgment of acquittal in respect of the respondent.

The contention that the learned trial Court ought to have separated the case of the respondent, is not available to the prosecution, as during the course of arguments the learned A.A.-G. had no option but to concede that in a normal trial under Cr.P.C. an accused person cannot be tried in his absence and the Court can merely record the evidence against an absconding accused person under section 512, Cr.P.C. and that after arrest of the accused, fresh trial takes place. In this manner the trial of an absconding accused is separated from the trial of the accused appearing before the Court. However, there is a special provision contained in section 19(10) of the Anti-Terrorism Act, 1997, whereby an absconding accused can be tried in absentia by Anti-Terrorism Court. It is established principles of the administration of justice, that nobody/party can be allowed to bow hot and cold at the same time and no person can be allowed to approbate and reprobate in the same matter. In this case, the prosecution itself prayed the Anti-Terrorism Court to try the respondent in absentia and the learned trial Court proceeded accordingly in accordance with the law governing the trial before the Anti-Terrorism Court. Now it is not available to the prosecution to say that, the learned trial Court ought not to have tried the respondent in absentia and ought not to have framed the charge against him as no evidence was available against the respondent. If a charge is framed by the trial Court at the instance of prosecution, then an accused person can take exception to the framing of the charge but the prosecution cannot be allowed to raise any objection to the framing of charge against the accused person, who has been sent up by the prosecution to face trial. If in a particular case, certain accused persons have been arrested and investigation is conducted against them, while the some other suspects are still at large, the investigation is not closed against the other suspects and therefore, instead of submitting challan against such suspects it is always open to the prosecution to submit charge-sheet against such accused persons only in respect of whom the prosecution is able to collect the sufficient evidence. It can be observed in a charge-sheet that, there are

other suspects also against whom sufficient evidence has not been collected and the prosecution reserves its right to investigate the case against the other suspects/absconding accused persons as and when apprehended. By adopting such course the prosecution can conduct the investigation against such persons as and when arrested and they can be separately charge-sheeted if in the subsequent investigation, sufficient evidence is collected against them. However, if the prosecution adopts a course, whereby an accused person has been challaned in absentia and the trial in absentia is permissible under the relevant law for the time being in force, and the Court adopts the course suggested/proposed by the prosecution, the prosecution is debarred from raising objection to such course adopted by the trial Court. Even otherwise the judgment of acquittal recorded by the trial Court is not open to any exception for the simple reason that, the memo. of appeal itself contains that, the prosecution was not able to collect any material against the respondent and there was no evidence whatsoever, connecting the respondent with the offence for which he was challaned to face trial.

It is further contended in the grounds of appeal that, the acquittal of the respondent is not on merits of the case as it is a mere technical acquittal which cannot create any right in favour of the respondent for not being tried again for the same evidence.

We would not like to delve on this point, in the present appeal directed against the acquittal of the respondent by the trial Court. This point is left open and the parties are at liberty to raise this point in the appropriate proceedings, if so advised.

For the foregoing reasons, we are not persuaded to admit the appeal for regular hearing which stands dismissed in limine.

Appeal dismissed.

N.H.Q./S-231/K