

THE HIGH COURT OF SINDH AT KARACHI

Special Criminal Anti-Terrorism Jail Appeal No.65 of 2019

Present:

Mr. Justice Nazar Akbar
Mr. Justice Zulfiqar Ahmad Khan

Appellant: Kamran alias Fauji son of Aslam through
Mr. Moula Bux, Advocate

Respondent: The State through Mr. Muhammad Iqbal Awan,
Deputy Prosecutor General Sindh

Date of hearing: **04.12.2020**

J U D G M E N T

NAZAR AKBAR, J. – Appellant Kamran alias Fauji was tried by learned Judge, Anti-Terrorism Court-X, Karachi in Special Cases Nos.150/2018 and 150-A/2018, arising out of FIRs No.1007/2016 and 1008/2016, registered at P.S. Korangi Industrial Area, Karachi, for offences under sections 393, 353, 324, 34, PPC read with section 7 of the Anti-Terrorism Act, 1997 and offence under section 23(1)(a) of the Sindh Arms Act, 2013. On conclusion of trial, vide judgment dated **28.01.2019**, appellant was convicted and sentenced as under:-

- (i) Accused Kamran alias Fouji son of Aslam is convicted for the offence u/s 394, PPC and sentenced to undergo R.I. for 10 years with fine of Rs.500,000/-. In default of payment of such fine, he shall further suffer R.I. for one year.
- (ii) Accused Kamran alias Fouji son of Aslam is further convicted for the offence u/s 7 of the Anti-Terrorism Act, 1997 and sentenced to undergo R.I. for 10 years with fine of Rs.100,000/-. In default of payment of such fine, he shall further suffer R.I. for one year.
- (iii) Accused Kamran alias Fouji son of Aslam is further convicted for the offence u/s 7(c) of the Anti-Terrorism Act, 1997 and sentenced to undergo R.I. for 10 years with fine of Rs.100,000/-. In default of payment of such fine, he shall further suffer R.I. for one year.
- (iv) Accused Kamran alias Fouji son of Aslam is further convicted for the offence u/s 7(h) of the Anti-Terrorism Act, 1997 r/w sections 353/324, PPC and sentenced to undergo R.I. for 10

years with fine of Rs.100,000/-. In default of payment of such fine, he shall further suffer R.I. for one year.

- (v) I, also convict accused Kamran alias Fouji son of Aslam for the offence u/s 25 of the Sindh Arms Act, 2013 and sentence him to undergo R.I. for 7 years with fine of Rs.50,000/-. In default of payment of such fine, he shall further suffer R.I. for six months.

All the sentences were ordered to run concurrently. Appellants were extended benefit of Section 382-B Cr.PC.

2. Brief facts of the case as disclosed in the F.I.R. are that on **07.12.2016**, statement u/s 154, Cr.PC of complainant Shabuddin son of Imtiazuddin was recorded. He stated that he, accompanied by his wife, was going in his car to attend the marriage. **At 2145 hours**, when they reached at road Sir Syed Hospital, 'A' Area, Korangi Industrial Area, Karachi, two unknown persons came from backside on a motorcycle, wearing Shalwar Qameez, identifiable by face, one person having pistol in his hand came in front and stopped them in order to rob them, complainant tried to reverse the car, accused persons thought that he is escaping and suddenly he fired on the complainant, the bullet fired hit at left side under shoulder on arm of the complainant, upon hearing firing the police party reached there, on seeing police party accused persons started firing on police with intention to kill them, in retaliation police party also fired, in result whereof one person became injured and fell down whereas the other by throwing the motorcycle escaped away. Police officer seized the pistol recovered from the hand of injured dacoit and enquired his name as well as that of his accomplice, who disclosed his name as Kamran alias Fauji son of Aslam and name of his accomplice as Naseer son of not known. Upon conducting his personal search, one brown wallet containing Rs.500/- and one black wallet containing Rs.100/-, cards, two mobile phones one iPhone white colour and one Nokia black colour were recovered. Motorcycle No.KGD-1980 was also

seized and was get verified through phone from ACLC and came to know that original number of Motorcycle is KIL-2479 Super Star black colour stolen from jurisdiction of P.S Landhi. ASI demanded license of weapon which the accused failed to produce. ASI also recovered three empties of 30 bore and four empties of SMG from the place of incident. ASI completed the formalities at the spot and obtained signatures of the witnesses. Therefore, FIRs No.1007/2016 and 1008/2016, for offences under sections 393, 353, 324, 34, PPC and for offence under section 23(1)(a) of the Sindh Arms Act, 2013, were registered against the accused persons. After usual investigation, on **26.12.2016** challan was submitted against the appellant as well as absconding accused Naseer son of not known, under sections 393, 353, 324, 34, PPC read with section 7 of the Anti-Terrorism Act, 1997 before the Administrative Judge, Anti-Terrorism Courts, Karachi Division.

3. Learned Judge, Anti-Terrorism Court, framed charge against the accused at Ex-7. Accused pleaded not guilty and claimed to be tried.

4. At trial, prosecution examined PW-1 H.C Hamza Khan at Ex.9, PW-2 ASI Mumtaz Ali at Ex.10, PW-3 Shahab Ghani at Ex.11, PW-4 Inspector Muhammad Pathan Khan at Ex.12. Thereafter, prosecution side was closed vide statement dated 10.01.2019 at Ex-13.

5. Statement of accused was recorded under section 342, Cr.PC at Ex.14, appellant claimed false implication in this case and denied the prosecution allegations. He raised plea that he was picked up by police from his house four days prior to registration of these cases. Accused did not examine himself on oath nor did he lead any evidence in defence.

6. On conclusion of trial, after hearing learned counsel for the parties, and assessment of evidence available on record, learned Judge, Anti-Terrorism Court-X, Karachi, convicted and sentenced the appellant vide impugned judgment dated **29.01.2019** as stated above, hence instant appeal is preferred by the appellant.

7. Mr. Moula Bux, learned counsel for appellants, mainly contended that prosecution evidence with regard to the main offences under sections 395/353/324/34, PPC read with section 7 of the Anti-Terrorism Act, 1997 appears to be unnatural and unbelievable. He has further argued that ingredients of section 353, PPC are not satisfied from the evidence available on record as none of the police officials sustained any firearm injury nor any scratch has been caused to the police mobile during alleged encounter. It is also contended that prosecution has also failed to examine any private witness though the incident had occurred at a thoroughfare. As per memo of arrest and recovery, the empties as well as pistol allegedly recovered from the appellant was not sealed at the spot. Lastly, it is contended that the prosecution case is highly doubtful and prayed for acquittal of the appellant.

8. Mr. Muhammad Iqbal Awan, learned D.P.G. argued that evidence of the police officials was trustworthy and reliable. He further contended that trial court has rightly appreciated the evidence. However, he admitted that during encounter not a single injury was caused to any police official. He also argued that present accused was arrested at the spot, arms and ammunitions were also recovered from his possession whereas one accused succeeded to run away. He fully supported the impugned judgment, opposed the appeal and prayed that the same may be dismissed.

9. We have carefully heard the learned counsel for the appellant as well as learned Deputy Prosecutor General Sindh and have also gone through the entire evidence available on record with their assistance.

10. PW-1 HC Hamza Khan had deposed that on **07.12.2016**, he along with ASI Mumtaz, HC Amanullah, DPC Shakeel proceeded for patrolling in **Mobile-V**, when they reached at 'A' Area, Qayyumabad, they heard firing at about 11:30 pm, they rushed towards the place of firing and saw that 2 culprits had stopped one vehicle. On seeing police, the culprits started firing on the police, the police also fired in self-defence, in result whereof one accused person sustained firearm injury and fell down whereas the other accused succeeded to escape away from the scene of offence. Injured accused was apprehended, who disclosed his name as Kamran alias Fauji son of Aslam and the name of his accomplice as Nasir son of not known. ASI Mumtaz recovered one 30 bore pistol from his right hand, **loaded magazine containing 3 rounds, 1 round loaded in chamber**. Upon his further search, one wallet, brown colour, one black colour wallet, containing cash Rs.100/- one I-Phone, One Nokia mobile phone were recovered from his side pocket. ASI Mumtaz prepared memo of arrest, recovery and seizure on the spot as well as prepared sketch of the recovered pistol on the backside of the memo. He also secured 3 empties of 30 bore and **7 empties of SMG** from the place of incident; **ASI Mumtaz sealed the same on the spot**. He also seized one motorcycle KGB-1980 used by accused during encounter. ASI also obtained signatures of **Shahab-ul-Ghani son of Imtiaz Illahi**. Thereafter, injured accused was sent to JPMC through ASI Mumtaz for medical treatment. Thereafter, they came back to Police Station along with case property. After returning from JPMC ASI Mumtaz incorporated the statement under section 154, Cr.PC of the complainant into FIR No.1007/2015, under sections 393,

353, 324, 34 PPC read with section 7 of the Anti-Terrorism Act, 1997 and also registered FIR No.1008/2016 under section 23(1)(a) of the Sindh Arms Act, 2013 against arrested accused. On 08.12.2020, IO/PI Pathan Khan inspected place of wardat, on the pointation of ASI Mumtaz, prepared such memo and obtained his signatures as well as that of ASI Mumtaz Ali. Then they came back to P.S. where IO recorded his 161, Cr.PC statement. He also deposed **the case property of this case has been reportedly burnt into ashes, lying the Malkhana of City Courts.**

11. In his cross-examination, PW-1 **admitted that he had not produced departure and arrival entries.** He also admitted that at the place of incident there were shops, Sir Syed Hospital and the flow of traffic on the said road; they chased the culprits upto 400 feet as they tried to run away from the crime scene by foot; police fired 7/8 shots on the accused persons from their backside; *that neither any police official sustained any firearm injury at the hands of accused persons nor any bullet hit the police mobile in the encounter;* that as per memo of arrest, recovery and seizure 4 empties of SMG were secured from the place of wardat; injured accused was shifted to JPMC for treatment in Chipa Ambulance by ASI Mumtaz Ali all alone; *he did not remember registration number of complainant's car, its colour and maker;* and that empty shells were secured from the place of wardat within the circle of **one foot.**

12. PW-2 ASI Mumtaz Ali deposed that on 07.12.2016 he was posted at P.S. Korangi Industrial Area, he left P.S. along with PW-01 HC Hamza Khan and others for patrolling in the area, he reiterated the same story but in his cross-examination, PW-2 stated that, *"I had not produced entry of Register No.19 regarding receipt of weapon from Police Station. It is correct to*

suggest that it is mentioned in Ex.10/E that ASI Ghulam Qadir along with subordinate staff and official mobile were called by me to send the injured accused for medical treatment, voluntarily says that I had called them before leaving injured accused at JPMC and the injured accused was sent second time to the JPMC. It is correct to suggest that I have not deposed the fact before this Court that accused was sent to JPMC second time due to his deteriorating condition. It is correct to suggest it is mentioned in the memo of arrest, recovery and seizure, Ex.9/A that during patrolling duty, when we reached at Sir Syed Hospital, A-Area, Qayyumabad, Korangi Industrial Area, Karachi, we heard firing noise, all of sudden at about 2345 hours, while in FIR No.1008/2016, Ex.10/F, timings of registration of FIR is written as 2345 hours. It is correct to suggest that it is not mentioned in the memo of arrest, recovery and seizure as well in the FIR that the case property was sealed on the spot."

13. PW-4 Inspector Muhammad Pathan Khan Mangrio, deposed that on 08.12.2016, he received investigation of Crime No.1007/2016 under section 393, 324, 353, 34, PPC read with section 7 of the ATA and FIR No.1008/2016 u/s 23(1)(a) of the Sindh Arms Act, 2013, along with police papers, sealed case property **while accused Kamran alias Fauji was admitted in JPMC for medical treatment.** Later on, he recorded statement u/s 161, Cr.PC of the complainant who was under treatment at Liaquat National Hospital. He also obtained CRO of accused at Ex.12/F. He also obtained FSL report, Ex.12/G, which reveals that; *"(i) The above mentioned pistol is in working condition at the time of examination; (ii) two 30 bore crime empties marked as C1 and C2 were fired from the above mentioned 30 bore pistol No.10351, in question in view of the fact that major points i.e. striker pin marks and breech face marks are similar; (iii) one 30 bore crime empty marked as C3 was not fired from the above mentioned 30 bore pistol No.10351, in question in view of the*

fact that major points i.e. striker pin marks and breech face marks are dissimilar; (iv) Four 7.62x39mm bore crime empties marked as C4 to C7 are fired empties of 7.62x39mm bore firearm/weapons". He also received provisional medico legal report of injured complainant from JPMC, Ex.12/H. In his cross-examination, IO stated that, *"It is correct that I could not produce medico legal report of accused. It is correct to suggest that I have not cited MLO concerned as a witness in this case. The number of pistol mentioned in FSL Report (Ex.12/G) is 10351, whereas in FIR No.1008/2016 it is written as 30351. It is correct to suggest that I had not produced car of the complainant in this case as the same was not taken as case property."*

14. From close scrutiny of evidence, we have come to the conclusion that prosecution has failed to establish its case against the appellants beyond any reasonable doubt. **It is a matter of record that recoveries of arms and ammunition as well as empties were recorded by ASI Mumtaz Ali, whereas, PW-1 HC Hamza Khan had deposed that they came back at Police Station along with case property, however, nowhere in the evidence of both the PWs, 1 and 2, it is mentioned that after return to the Police Station recovered weapon and empties were kept in safe custody at Malkhana of Police Station.** No entry in this regard has been produced before the trial court. Incharge of *Malkhana* of Police Station has also not been examined at trial. It has also not been proved that it was a safe transit case. It would be unsafe to believe the prosecution evidence in respect of present appellant without independent corroboration, which is lacking in this case. On the point of safe custody of recovered crime weapon and empties, its safe transit, the Honourable Supreme Court in the case of *IKRAMULLAH & OTHERS V/S. THE STATE (2015 SCMR 1002)*, as observed as under:-

“5. In the case in hand not only the report submitted by the Chemical Examiner was legally laconic but safe custody of the recovered substance as well as safe transmission of the separated samples to the office of the Chemical Examiner had also not been established by the prosecution. It is not disputed that the investigating officer appearing before the learned trial court had failed to even to mention the name of the police official who had taken the samples to the office of the Chemical Examiner and admittedly no such police official had been produced before the learned trial Court to depose about safe custody of the samples entrusted to him for being deposited in the office of the Chemical Examiner. In this view of the matter the prosecution had not been able to establish that after the alleged recovery the substance so recovered was either kept in safe custody or that the samples taken from the recovered substance had safely been transmitted to the office of the Chemical Examiner without the same being tampered with or replaced while in transit.”

15. After careful examination of the prosecution evidence available on record, we have come to the conclusion that there are material contradictions, as highlighted in the preceding paragraphs, which create serious dents in the prosecution case and make the case of the prosecution highly doubtful, as such, we have no hesitation to hold that the prosecution has failed to prove its case against the appellant beyond any shadow of doubt. Needless to mention that while giving the benefit of doubt to an accused it is not necessary that there should be many circumstances creating doubt. If there is a single circumstance which creates reasonable doubt in a prudent mind about the guilt of the accused then the accused would be entitled to benefit of such doubt, not as a matter of grace and concession, but as a matter of right.

16. Logical conclusion of above discussion of facts, law and evidence is that we are unable to uphold the conviction and sentence of appellant Kamran alias Fouji son of Aslam recorded by the trial Court vide judgment dated **28.01.2019**. He was entitled to the benefit of doubt, therefore, his conviction and sentence is set aside. Appellant is acquitted of the charge and

is ordered to be released forthwith by the concerned jail authorities in the aforesaid cases, unless he is in custody in respect of some other case.

17. These are the reasons for our short order dated **04.12.2020**, acquitting the aforesaid appellant in this case.

J U D G E

J U D G E

Karachi, dated
January 05, 2021

Gulsher/PS