ORDER SHEET
IN THE HIGH COURT OF SINDH AT KARACHI

Special Cr.ATA No.19 of 2013
Special Cr.ATJA No.24 of 2013
Special Cr.ATA No.25 of 2013
Criminal Revision No.40/2014
Conf. Case No.1/2013

DATE **ORDER WITH SIGNATURE OF JUDGE**

Present:-
Mr. Justice Muhammad Ali Mazhar
Mr. Justice Nazar Akbar

Special Cr.ATA No.19 of 2013
[Nawab Siraj Ali & another vs. The State]

Special Cr.ATJA No.24 of 2013
[Ghulam Murtaza vs. The State]

Special Cr.ATA No.25 of 2013
[Shahrukh Jatoi vs. The State]

Criminal Revision No.40/2014
[Shahrukh Jatoi vs. The State]

Conf. Case No.1/2013
[Reference made by the Judge
ATC Karachi]

Dates of Hearing. 26.02.2018, 5.3.2018, 26.03.2018, 23.4.2018, 07.05.2018, 14.05.2018, 28.05.2018, 11.06.2018, 19.11.2018, 10.12.2018, 17.12.2018, 24.12.2018, 14.01.2019, 21.1.2019, 4.3.2019 and 11.3.2019.

Mr. Mahmood Akhtar Qureshi, Advocate for the Appellants in Special Cr. ATA No.19/2013.

Mr. Haq Nawaz Talpur, Advocate for the Appellant in Special Cr. ATA No.24/2013 along with M/s. Agha Mustafa Durrani, Asfandyar, Muhammad Asad Ashfaq and Jahanzaib Soomro Advocates.

Sardar M. Latif Khan Khosa, Advocate for the Appellant in Special Cr. ATA No.25/2013 along with Sardar Shahbaz Ali Khan Khosa, Rai Mudassar Iqbal Kharal, Mr.Baqar Mehdi, Mr. Imran Ali Jatoi and Syeda Naz Gul Advocates.

Mr. Farooq H. Naek, Advocate for the Applicant in Crl. Rev. App. No.40/2014 along with M/s. Muhammad Ali Riaz, Taimoor Ali Mangrio and Muzammil Soomro Advocates.

Syed Mahmood Alam Rizvi, Advocate for the legal heirs of deceased and the complainant along with Mr. Zakir Laghari and Syed Junaid Alam Advocates.

Mr. Zafar Ahmed Khan, Additional Prosecutor General Sindh.

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Muhammad Ali Mazhar, J: This common judgment will dispose of Special Cr. ATA No.19/2013 filed by Nawab Siraj Ali and Nawab Sajjad Ali Talpur, Special Cr. ATJA No.24/2013 filed by Ghulam Murtaza, Special Cr. ATA No.25/2013 filed by Shahrukh Jatoi under Section 25 of the Anti-Terrorism Act, 1997 read with Section 410 Cr.P.C. and Criminal Revision No.40/2014 filed by Shahrukh Jatoi to challenge the order dated 03.06.2013 passed by Anti-Terrorism Court No.III, Karachi holding that he was not minor at the time of crime. By dint of impugned common judgment passed in Special Case No. 15(III)/2013, the learned trial court convicted and sentenced to death Shahrukh Jatoi and Nawab Siraj Ali Talpur, whereas Nawab Sajjad Ali Talpur and Ghulam Murtaza Lashari were convicted and sentenced to imprisonment for life under Section 7 (a) ATA read with Section 302, 109 and 34 PPC whereas in Special Case No. 16(III) of 2013, one of the Appellants Shahrukh Jatoi was also tried in Crime No. 32 of 2013 lodged under Section 13(e) of Arms Ordinance and awarded rigorous imprisonment for three years whereas Ghulam Murtuza Lashari in addition to life imprisonment, also awarded sentence to imprisonment for one year under Section 354 P.P.C.

2. The transient facts of the case are that on 25.12.2012 at about 1215 hours, Ghulam Murtaza Lashari, cook of Nawab Siraj Ali Talpur and Nawab Sajjad Ali Talpur misbehaved to Miss Maha with intent to outrage her modesty at the door of her flat, Country Club Apartment, Phase V, DHA, Karachi, when she came back from valima reception of her sister. On coming to know this incident deceased Shahzeb squabbled

with the appellants at the ground floor (reception) of the Country Club Apartment. In the meantime, his father Orangzaib Khan (complainant) along with his wife Ambreen reached there and tried to cool down the situation, but the appellants insisted that they would not be satisfied unless appellant Ghulam Murtaza Lashari is allowed to slap Shahzeb. The complainant directed Shahzeb to tender apology which he did, but the appellants were not satisfied. To avoid any untoward situation, the complainant asked him to leave the place. As soon as the Shahzeb left the place in his car, the appellant Shahrukh Jatoi brandished his pistol, made aerial firing and loudly declared that he is Shahrukh Jatoi son of Sikandar Ali Jatoi and he will kill Shahzeb (deceased). Thereafter, the appellants proceeded in a silver colour Toyota car of appellant Shahrukh Jatoi. Apprehending evil designs of the appellant, two friends of the Shahzeb namely Mohammad Shah and Mohammad Ahmed Zuberi followed him in their car whereas the parents of the Shahzeb went to the flat of appellants Nawab Siraj Ali Talpur and Nawab Sajjad Ali Talpur to talk their father Nawab Imdad Ali Talpur. The appellants intercepted Shahzeb near Bungalow No.44/1/1-A at Khayaban-e-Bahria, thereafter, appellants Shahrukh Jatoi and Nawab Siraj Ali Talpur made fires on him while the appellant Nawab Sajjad Ali Talpur and Ghulam Murtaza Lashari instigated them. Mohammad Shah and Mohammad Ahmed Zuberi witnessed the incident and they took the deceased to Ziauddin Hospital in their car and informed the complainant to reach the hospital. The Police had recorded the statement of the complainant at Ziauddin Hospital and registered FIR No.591/2012 at Police Station Darkhshan on 25.12.2012. The charge was framed and all the appellants pleaded not guilty and claimed to be tried. The prosecution examined 23 witnesses in the trial court. In the

statements recorded under Section 342 Cr.P.C at Ex.62 to 65, all the appellants contended that the case and the evidence produced against them were false. The appellants did not examine themselves on oath in their defence. The appellants Nawab Siraj Ali Talpur and Nawab Sajjad Ali Talpur examined their father Nawab Imdad Ali Talpur (D.W.1) at Ex.66, in their defence. Shahrukh Jatoi examined five witnesses namely Izharul Haq (D.W.2) at Ex.68, Ashraf Ali Jatoi (D.W.3) at Ex.69, who produced photocopy of his passport and photocopies of two passports of Azhar Ali and Ghulam Akber Jatoi at Ex.69/A & 69/B, Major ® Syed Asif Nabi (D.W.4) at Ex.70, who produced photocopy of order of permission for soil testing at Ex.70/A, Mohammad Iqbal Durrani (D.W.5) at Ex.71, who produced tenancy agreement at Ex.71/A and Gulzar Ahmed (D.W.6) at Ex.72.

3. Sardar Latif Khan Khosa, the learned counsel for the appellant Shahrukh Jatoi argued that the learned trial court seriously erred in shifting the burden of proof on the appellants. In support of this contention, he referred to 2001 SCMR 424, PLD 2005 SC 63, 2009 SCMR 790, 2009 SCMR 230,1995 SCMR 1345, and 2004 YLR 216. The version in the FIR was not corroborated through any circumstantial or medical evidence. The learned trial court ignored the deliberate dishonest improvement. Both the eye-witnesses namely Mohammad Shah PW-18 and Mohammad Ahmed Zuberi PW-19 improved their evidence in court to support the evidence of the complainant. The two eyewitnesses claimed to have taken the deceased in their car to Ziauddin Hospital but no blood stains on wears were obtained. The so called evidence of recovery both in respect of crime empties and alleged weapon appeared to be completely doubtful. The appellant was below the age of 18 years and was wrongly

tried and convicted by the learned trial court. The case was triable by Sessions Court and not ATC, hence the conviction and sentence awarded by the learned Judge is against the law. He further argued that post-trial legal evidence would determine the proof or disproof of the charge of terrorism. There is no iota of evidence supporting the charge of Section 7 of the ATA. The learned trial court observed that the incident was televised on different channels therefore element of terrorism prima facie visible in the crime and same falls within the ambit of Anti-Terrorism Act 1997. The FIR did not spell out any element of terrorism. No question was asked under section 342 Cr.P.C as to whether the act of appellants resulted insecurity, panic or terror in society. A compromise was also arrived at between the parties which was found to be genuine and voluntary. The natural witnesses, residents of Country Club Apartments were PW-13 & PW-14 who deposed the truth. It was further averred that the presence of both the eye witnesses i.e. Muhammad Shah PW-18 and Muhammad Zuberi, PW-19 was doubtful on the scene of occurrence.

4. It was further averred that both the eye witnesses failed to show any physical guarantee of their presence. When they took out Shahzeb drenched in blood from his Car, put him in their Car and took him to Ziauddin Hospital, neither they sustained any scratch mark nor their own clothes were stained in blood. The death certificate of Dr.Ziauddin Hospital Exh.60/E states that Shahzeb was brought to Hospital on 25.12.2012 at 1:30 am but all witnesses came up with changed time of occurrence. The deceased received both the injuries on the back side of the body while he was sitting in front seat and driving the car. The key point which dismantles the ocular account is the directions in which appellants and

the deceased proceeded after the brawl. The evidence of eyewitnesses are inconsistent, contradictory and poles apart which necessitated the court to give preference one over the other. In the trial, the complainant was examined as PW 7 at Ex 34 and has admitted certain pieces of his evidence not forming part of his 154 Cr.P.C statement with the explanation that on 25.12.2012 when he met with SI Nafees, then he came to know that his 154 Cr.P.C statement was not recorded properly, for which he complained to higher authorities and in consequence SI Yasin was put under suspension, however, no second FIR was registered except his further statement under Section 161 Cr.P.C. It was further averred that the time and date of the occurrence was mentioned in the FIR to be 24.12.2012 at about 11:50 pm. Time of Report 00:45 & FIR at 1:15 am dated 25.12.2012. According to other eye witnesses the time and date of occurrence is 1:15 am dated 25.12.2012 as improved subsequently to accord with entry of arrival in Dr. Ziauddin Hospital Exh. 60/E. The date of arrest of the appellant is 17.01.2013 and the recovery of crime weapon is 23.01.2013. There is a delay of almost 7 days in the alleged recovery of weapon after the arrest of appellant Shahrukh. The place of occurrence is an open plot without boundary wall and accessible to the general public. The identification marks of the crime weapons is also shrouded in mystery. He further argued that crime empties were deposited through letter dated 31.12.2012 in the FSL by PW-22 Nafees Ahmed SI which was taken back on 17.01.2013 upon telephonic direction from FSL to PW-22. The empties were resubmitted after alleged recovery of pistol.

5. Mr.Mehmood Qureshi Advocate for the appellant Nawab Siraj Talpur and Sajjad Talpur argued that the first version set up by complainant Orangzaib (PW-7) in FIR was

dishonestly improved through supplementary statement under Section 161 Cr.P.C. whereby complainant not only changed the time of incident but also the manner of dispute at Country Club Apartment. The learned trial Judge ignored material dishonest improvement. He relied on PLD 1994 (Pesh) 21, 1995 SCMR 1350, 2003 SCMR 1419, 2008 SCMR 6, 2007 SCMR 1825 and 1993 SCMR 550. Both the eyewitnesses namely Muhammad Shah (PW-18) and Muhammad Ahmed Zuberi (PW-19) dishonestly improved the case of prosecution. The PW-20 Muhammad Danish was a chance witness. He was not resident of Country Club Apartment. His presence required independent corroboration which is lacking in this case. There is no circumstantial and or any other corroborative evidence on record to support the prosecution version against the appellants. The testimony of defence witness Imdad Ali Talpur inspired confidence but not given due consideration. The learned counsel further argued that an offence may be gruesome and revolt the human conscience but the accused can be convicted only on legal evidence and not on surmises and conjecture. It is a settled principle of criminal jurisprudence that the more serious the offence, the stricter the degree of proof required, since a higher degree of assurance is required to convict the accused. Ref: **Sarwan Singh Rattan Singh v. State of Punjab (AIR 1957 SC 637)**, **1995 SCMR 599** and **PLD 2002 Supreme Court 1048.** The motive as alleged was too weak to prompt a person to kill. He further argued that the Medical Evidence was only confirmatory or of supporting nature and was never held to be corroborative evidence to identify the culprit. Ref: **Atta Muhammad and other v. The State (1995 SCMR 599).** The learned counsel further argued that the purpose of the F.I.R. is to set the criminal law in motion and to obtain the first hand, spontaneous information of occurrence in

order to exclude the possibility of fabrication of story on consultation or deliberation. Ref: **2011 SCMR 45 (Mushtaq Hussain and another v. The State), PLD 1994 Peshawar 214 (Asal Muhammad and others v. The State) and 2006 P Cr. LJ 639 (Dr. Khalid Moin and others v. The State and others).** It was further averred that any statement or further statement of the first informant recorded during the investigation by police cannot be equated with First Information Report. Ref: **1995 SCMR 1350 (Falak Sher alias Shero v. The State)**, **2003 SCMR 1419 (Khalid Javed and another v. The State) and 2008 SCMR 6 (Akhtar Ali and others v. The State).**

6. The learned counsel further argued that the testimony of witnesses containing material improvements which is not believable and trustworthy. Ref: **Sardar Bibi and another v. Munir Ahmed and others, (2017 SCMR 344**). He further argued that ocular evidence may be classified into three categories-firstly, wholly reliable; secondly, wholly unreliable; and thirdly, partly reliable and partly unreliable. Ref: **Atta Muhammad and others v. The State, (1995 SCMR 599).** The learned counsel also quoted the principle that the proper and the legal way of dealing with a criminal case is that the Court should first discuss the prosecution case/evidence in order to come to an independent finding with regard to the reliability of the prosecution witnesses, particularly the eye-witnesses and the probability of the story told by them and then examine the statement of the accused under section 342, Cr.P.C., statement under section 340(2), Cr.P.C. and the defence evidence. Ref: **PLD 1994 S.C. 879 (Ashiq Hussain alias Muhammad Ashraf v. The State), 1993 S C M R 550 (Syed Saeed Muhammad Shah and another v. The State), 2013 SCMR 106 (Mehboob ur Rehman v. The State), 1985**

SCMR 510 (Nadeem-ul-Haq Khan and others v. The State), PLD 2008 S.C. 513 (Muhammad Asghar v. The State), 2010 SCMR 1009 (Muhammad Shah v. The State) and 1993 SCMR 550 (Syed Saeed Muhammad Shah and another v. The State). It is a well-settled principle of law that in such a situation, the interpretation favourable to the accused is required to be taken into consideration. Ref: **2010 SCMR 1009 (Muhammad Shah v. The State), 1992 SCMR 96 (Yar Muhammad and others v. The State)**

7. Mr. Haq Nawaz Talpur Advocate for the appellant Ghulam Murtuza Lashari argued that the trial court fell in error by not attaching weight to the voluntarily and dishonest improvements made by the prosecution witnesses at trial in particular by the alleged eyewitnesses Muhammad Ahmed Zuberi and Shah Muhammad. The trial court also failed to appreciate that the omissions in 161 Cr.P.C. statements amount to contradiction and the benefit whereof is always given to the defence. The learned trial court has relied upon the corroboration of tainted piece of evidence for another piece of evidence in proof of the charge. The trial court fell in error by awarding punishment under Section 354 PPC as no ingredients of the offence is spelt out from the recorded evidence.

8. Mr. Farooq H. Naek, learned counsel for the applicant Shahrukh Jatoi in Criminal Revision Application 40/2014 argued that under Section 7 of Ordinance 2002, the Juvenile Court has to record findings after such inquiry which shall include a medical report for determination of the age of child. ATC Judge wrongly held that B Form of applicant issued on 15.01.2007 on verbal assertion of father was just to obtain passport for applicant which was issued on 03.02.2007. The court failed to consider Municipality birth certificate issued on

the basis of Hospital birth certificate but wrongly relied upon Samdani Hospital Certificate issued on 14.05.1998. Atchison College record is also based upon Samdani Hospital Certificate. The Medical report of the board is doubtful because dentists were not part of board. Greulich-Pyle not mentioned in the report to compare bones in X-Ray with bones of standard. It was further averred that Police Surgeon after medical examination of applicant submitted the Report on 21.03.2013 wherein age of the applicant was declared to be 17 to 18 years. The court did not consider the Medical Report and directed for constitution of a Board to conduct ossification test of the applicant to determine his age. On 06.02.2013 applicant was examined by the Medical Board and instead of forming an opinion wrote a letter on the same date to the I.O directing him to produce the passport (Original), birth certificate from Hospital, O'Level/Matric Certificate, NIC/B Form and School Leaving Certificate/Aitchison College. The I.O produced the photocopies of two Passports, duplicate birth certificate dated 14.05.1997 issued by Samdani Hospital in respect of a baby boy born to Mrs. Naseem Sikander and received from Aitchison College Lahore, photocopy and certified copy of "B" Form of NADRA, photocopy of birth certificate of District (East) No.65194 issued by District East Karachi. It was further averred that the Medical Board was not authorized to call for academic record of the applicant. He added that the Greulich-Pyle method is unreliable when it comes to children/adolescent persons in Pakistan. He further argued that there are two medical reports and two birth certificates. One in favour of the applicant must be considered which was not done by trial court.

9. The complainant (Orangzaib Khan) was being represented by Mr.Mehmood Alam Rizvi Advocate but during pendency of

the instant appeals, he expired, thereafter, Mr.Mehmood Alam Rizvi advocate filed vakaltnama for Mrs.Ambreen (mother of deceased Shahzeb and his sisters Maha Khan and Parishay Waqas). He clearly stated that after recording conviction by the trial court, the complainant had patched up the matter and an application was also filed for recording compromise in this court. He further argued that the affidavits of all legal heirs duly verified by this court are already on record in support of compromise application and even the trial court also recorded the statements of legal heirs and finally submitted the report in this court verifying the genuineness of the compromise. According to the learned counsel he has been issued instructions to concedes his no objection to the acquittal of the appellants in view of the compromise.

10. Heard the arguments. To start with, we feel like to thrash out the plea raised by the learned counsel for the appellants that the case was not triable by the Anti-Terrorism Court and despite previous orders passed by this court and apex court in this regard, still it is opened to this appellate court to revisit as to whether the case was triable by ATC or ordinary court. The backdrop of this argument is the compromise reached between the parties. The learned counsel argued that if this court comes to the conclusion that the case should have been tried by ordinary court and remand the case, then on the strength of compromise, the appellants will be acquitted. The learned counsel referred to the case of **Province of Punjab vs. Muhammad Rafique (PLD 2018 S.C. 178)**, in which apex court held that while deciding the question of attraction of the provisions of the Anti-Terrorism Act, 1997 the court has to see the manners in which the incident had taken place including the time and place and should also take note of whether the act created terror or insecurity in the general public. In the

case of **Waris Ali vs. State (2017 SCMR 1572)**, the court held the harm caused to human life might be devastating, gruesome and sickening, however, this by itself would be not sufficient to bring the crime within the fold of terrorism or to attract the provisions of Sections 6 or 7 of the Anti-Terrorism Act, 1997, unless the object intended to be achieved fell within the category of crimes clearly meant to create terror in people and/or sense of insecurity. Likewise, in the case of **Kashif Ali vs. Judge, Anti-Terrorism, Court, Lahore (PLD 2016 S.C. 951),** the apex court held that whether a particular act was an act of terrorism or not, the motivation, object, design or purpose behind the act had to be seen. The background of the case in hand demonstrates that earlier also, one of the appellants Shahrukh Jatoi moved an application in the trial court to transfer the case in the ordinary court and when the application was rejected, he approached this court. Ref: **2013 MLD 1588 (Shahrukh Jatoi vs. The State)**. The learned divisional bench of this court held that the act of Shahrukh Jatoi created sense of helplessness and insecurity amongst the people of Defence/Clifton area, where offence was committed and did destabilize the public at large. As such, provisions of section 6 of the Anti-Terrorism Act, 1997 are fully attracted in this case. The court further held that the case would fall within the jurisdiction of Anti-Terrorism Court and the order of learned trial Court dated 5-3-2013 did not suffer from any material irregularity or illegality, the same was maintained. The learned division bench was fortified by the dictum laid down in the case of **Mirza Shaukat Baig v. Shahid Jamil (PLD 2005 SC 530)** and also relied on the case of **Nooruddin v. Nazeer Ahmed and 4 others (2011 PCr.LJ 1370)** in which it was held that enmity would not be the sole criteria to determine the jurisdiction of Anti-Terrorism Court. Aforesaid judgment of this Court was upheld by honourable Supreme

Court in the case **Nazeer Ahmed and others v. Nooruddin and another (2012 SCMR 517)**. Relevant portion is reproduced as under:--

> "**We have heard the learned Advocate Supreme Court and have perused the record. The learned High Court has examined the material at length and has rightly concluded that the act of the petitioners created sense of insecurity amongst the villagers and did destabilize the public at large and therefore, attracts the provisions of section 6 of the Anti-Terrorism Act……. Neither the motive nor intent for commission of the offence is relevant for the purpose of conferring jurisdiction on the Anti-Terrorism Court. It is the act which is designed to create sense of insecurity and or to destabilize the public at large, which attract the provisions of section 6 of the Anti-Terrorism Act, which in the case in hand was designed to create sense of insecurity amongst the co-villagers.**"

11. It is a matter of record that earlier the instant appeals were disposed of by a learned Division Bench of this Court on 28.11.2017 and remanded the matter to the court of ordinary jurisdiction for denovo trial on the ground that Anti-Terrorism Court had no jurisdiction to try the same. The said order was challenged by civil society members, **Muhammad Jibran Nasir & others vs. The State (PLD 2018 S.C. 351).** The apex court while deciding the matter also traced the history of this case and observed in the order that soon after taking place of the incident in this case the apex Court had taken suo motu notice of the matter through Constitution Petition No. 01 of 2013 and remained seized of those proceedings under Article 184(3) of the Constitution till after a Challan of the case was submitted by the local police before an Anti-Terrorism Court. The court further observed in the order that suo motu case was finally disposed of on 22.02.2013 and the operative part of the order reads as under:

> "**4. In view of the above, we are of the opinion that the challan has been submitted, therefore, the trial has to take place independently, without being influenced in any manner from the present proceedings, in terms of the provisions of Anti Terrorism Act, particularly, Section 19(7), which provides that the cases have to be decided within a period of seven days by holding**

day-to-day hearing and also in accordance with the guidelines, which have been provided by this Court to monitor the trial proceedings in the case of Sh. Liaqat Hussain and others v. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs and others (PLD 1999 SC 504). The relevant guidelines have been incorporated in the following paras of the short order:-

"(iii) The concerned Special Court should proceed with the case entrusted to it on day to day basis and pronounce judgment within a period of 7 days as already provided in A.T.A. or as may be provided in any other law;

(viii) That the Chief Justice of Pakistan may nominate one or more Judges of the Supreme Court to monitor the implementation of the above guidelines. The Judge or Judges so nominated will also ensure that if any petition for leave/or appeal with the leave is filed, the same is disposed of without any delay in the Supreme Court;

(ix) That besides invoking aid of the Armed Forces in terms of sections 4 and 5 of the A.T.A. the assistance of the Armed Forces can be pressed into service by virtue of Article 245 of the Constitution at all stages including the security of the Presiding Officer, Advocates and witnesses appearing in the cases, minus the process of judicial adjudication as to the guilt and quantum of sentence, till the execution of the sentence."

5. Copy of this order be sent to the learned Monitoring Judge, appointed by the Hon Chief Justice of High Court of Sindh as well as to the learned Monitoring Judge of this Court for information and for ensuring that the trial of this case is concluded, strictly in accordance with law, within the period as stipulated by the above provisions.

6. Raja Muhammad Ibrahim Satti, learned Sr. ASC, has submitted a Civil Misc. Application No. 765/2012 and stated that as the challan has been submitted and the court had made observation that the trial shall be held independently, without being influenced in any manner, from the instant proceedings, therefore, his application be disposed of. Order accordingly.

7. The learned Monitoring Judge of the High Court of Sindh shall submit report to the learned Monitoring Judge, appointed by the Supreme Court of Pakistan, through the Registrar, for his perusal in Chambers."

"A bare reading of the said order shows that <u>this Court had not only blessed submission of the Challan of the case before an Anti-Terrorism Court but it had issued detailed guidelines as to how the case was to be tried by the relevant Anti-Terrorism Court and as to how such trial was to be monitored by the Monitoring Judges of this Court and the High Court vis- -vis cases of terrorism. (emphasis applied by us)</u> It was clearly observed by this Court that the trial of the case had to be conducted strictly in accordance with the provisions of the Anti-

Terrorism Act, 1997 and the guidelines issued by this Court in that regard. It is quite unfortunate that no mention of that order passed by this Court on 22.02.2013 in Constitution Petition No.1 of 2013 had been made by the High Court in its order dated 28.11.2017".

"6. During the pendency of the trial of this case before the Anti-Terrorism Court one of the accused persons had filed an application under section 23 of the Anti-Terrorism Act, 1997 seeking transfer of the case to a court of ordinary jurisdiction as it did not involve the offence of terrorism. The said application was dismissed by the Anti-Terrorism Court on 05.03.2013....

The said order passed by the Anti-Terrorism Court expressly referred to the order dated 22.02.2013 passed by this Court in Constitution Petition No.1 of 2013 but the order passed by the Anti-Terrorism Court on 05.03.2013 was also completely ignored by the High Court while passing the order dated 28.11.2017.

7. The above mentioned order dated 05.03.2013 passed by the Anti-Terrorism Court was assailed by the relevant accused person before the High Court of Sindh, Karachi through Criminal Revision Application No. 43 of 2013 which was dismissed by a learned Division Bench of the High Court on 24.04.2013 through an elaborate order.....

In the above mentioned order the learned Division Bench of the High Court had clearly referred to the earlier order passed by this Court on 22.02.2013 in Constitution Petition No. 1 of 2013 but while passing the order dated 28.11.2017 another learned Division Bench of the same High Court had not only completely ignored the order passed by this Court on 22.02.2013 but had also failed even to refer to the order dated 24.04.2013 passed in this very case by another learned Division Bench of the same Court.....

8. The order dated 24.04.2013 passed by the High Court of Sindh, Karachi dismissing Criminal Revision Application No. 43 of 2013 was challenged by the relevant accused person before this Court through Criminal Petition for Leave to Appeal No. 57-K of 2013 which was dismissed by this Court on 21.10.2013 at a time when the Anti-Terrorism Court had already concluded the trial and had convicted and sentenced the accused persons. The order passed by this Court on 21.10.2013 reads as under:

> **"This criminal petition is barred by eight days, but not accompanied with any application for condonation of delay. Otherwise too, after the final judgment passed by the trial court, this criminal petition seems to have become infructuous, as the question of jurisdiction can now well be agitated before the appellate Court seized of the matter. Dismissed. Leave refused."**

9. In the order passed by the High Court of Sindh, Karachi on 28.11.2017 the learned Division Bench of that Court had twice reproduced the words "as the question of jurisdiction can now well be agitated before the appellate Court seized of the matter" which appeared only as a part of a sentence used by this Court in the above mentioned order dated 21.10.2013. That part of the sentence used by this Court in that order was utilized by the High Court as an authorization from this Court to the High

Court to reopen and reconsider the issue pertaining to jurisdiction of the Anti-Terrorism Court to try the relevant criminal case. That impression gathered or conjured up by the High Court was, however, nothing but erroneous and misconceived. The Criminal Petition for Leave to Appeal filed before this Court was barred by time and the same was not accompanied by any miscellaneous application seeking condonation of the delay and, thus, in the absence of condoning the delay there was no lawfully instituted petition before this Court and that is why it was dismissed by this Court. Apart from that the said petition had also been dismissed by this Court as having become infructuous because during its pendency the trial of the case had concluded before the trial court. A part of a sentence in an order passed by this Court in a petition which was dismissed on account of being barred by time and also on account of it having fructified could not possibly be construed by the High Court to have reopened the question of jurisdiction of an Anti-Terrorism Court which question already stood conclusively settled through earlier orders of this Court as well as the High Court itself, particularly when the said earlier orders of this Court and the High Court were not even mentioned in the relevant order of this Court. The High Court ought to have appreciated that the relevant part of the sentence in this Court's order dated 21.10.2013 could not be construed as reviewing the earlier order of this Court passed on 22.02.2013 in Constitution Petition No. 1 of 2013 or setting aside the order passed by the High Court on 24.04.2013 in Criminal Revision Application No. 43 of 2013. Even otherwise, an observation made by this Court in a leave refusing order regarding a party to a case agitating a matter before the High Court could not be taken or understood by the High Court as a license or authorization from this Court to ignore an earlier order passed by this Court finally clinching an issue and still holding the field. It has, thus, not surprised us that the learned Attorney-General for Pakistan and the learned Additional Prosecutor-General, Sindh have refused to support the order passed by the High Court of Sindh, Karachi on 28.11.2017.

10. The learned counsel for the private respondents have argued that it had been observed by this Court in its order dated 22.02.2013 passed in Constitution Petition No. 1 of 2013 that "the trial has to take place independently, without being influenced in any manner from the present proceedings" which observation left it to the trial court as well as the High Court to decide the issue of jurisdiction of an Anti-Terrorism Court independently and without being influenced by the proceedings undertaken in the matter by this Court. The said argument of the learned counsel for the private respondents is based upon an incomplete reading of the sentence being relied upon. The complete sentence actually reads as "In view of the above, we are of the opinion that the challan has been submitted, therefore, the trial has to take place independently, without being influenced in any manner from the present proceedings, in terms of the provisions of Anti Terrorism Act, particularly, Section 19(7), which provides that the cases have to be decided within a period of seven days by holding day-to-day hearing and also in accordance with the guidelines, which have been provided by this Court to monitor the trial proceedings in the case of Sh. Liaqat Hussain and others v. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs and others (PLD 1999 SC 504)." The said sentence in fact contained a command that the trial of the case was to be conducted in terms of the Anti-Terrorism Act, 1997 and the Anti-Terrorism

Court was to proceed with the trial independently and without being influenced by any extraneous factor. The said command of this Court could not be disregarded by the trial court and the High Court also cannot be allowed to dig holes in the same through half-baked or artificial reasons". (Emphasis applied by us)

12. After surveying the backdrop and contextual chronicles, we feel no reluctance to hold that the question of jurisdiction of Anti-Terrorism Court has irrefutably straightened out by the earlier orders of this court and the Supreme Court. The judgment of Jibran Nasir case (supra) put on view further that the learned counsel for the same appellants in the Jibran case pointed out to apex court the observations made in the order dated 22.02.2013 in Constitution Petition No.01 of 2013 and argued that it is still opened to the trial court as well as the High Court to decide the issue of jurisdiction of Anti-Terrorism Court independently and without being influenced by the proceedings undertaken in the matter by the apex court. The honourable Supreme Court while considering this articulation made adequate clarity that this contention is based upon an incomplete reading of the sentence being relied upon. The complete sentence actually reads as ***"In view of the above, we are of the opinion that the challan has been submitted, therefore, the trial has to take place independently, without being influenced in any manner from the present proceedings, in terms of the provisions of Anti-Terrorism Act, particularly, Section 19(7), which provides that the cases have to be decided within a period of seven days by holding day-to-day hearing and also in accordance with the guidelines, which have been provided by this Court to monitor the trial proceedings in the case of Sh. Liaqat Hussain and others v. Federation of Pakistan through Ministry of Law, Justice and Parliamentary Affairs and others (PLD 1999 SC 504)."*** The apex court held that the said sentence in fact contained a

command that the trial of the case was to be conducted in terms of the Anti-Terrorism Act, 1997 and the Anti-Terrorism Court was to proceed with the trial independently and without being influenced by any extraneous factor. The said command of this Court could not be disregarded by the trial court and the High Court also cannot be allowed to dig holes in the same through half-baked or artificial reasons.

13. In view of translucent verdicts rendered by this court as well as honourable Supreme Court, we cannot embark and reexamine or reevaluate this question recurrently or again and again. In our good judgment and astuteness, the case in hand was rightly tried by Anti-Terrorism Court and no jurisdictional error or shortcoming is assimilated.

14. One Criminal Revision Application No.40 of 2014 is also clubbed with the bunch of these cases filed by the applicant Shahrukh Jatoi against the order dated 03.06.2013 passed by the learned Trial Court whereby the application moved under Section 5 of Juvenile Justice System Ordinance, 2000 was dismissed. Separate ground in the appeal has also been jot down for the same plea. The record reflects that learned trial court directed the Medical Superintendent, Services Hospital to constitute a medical board to conduct ossification test for determination of age. Earlier also the same court dismissed the application vide order dated 6.3.2013, which was challenged in C.P.No.D-1089/2013 in this court and through consensual order the petition was disposed of with the directions to the learned trial court to re-examine and decide the question of age while taking into consideration all the documents pertaining to the age of Shahrukh Jatoi. The learned trial court again examined the issue of age and vide impugned order dated 3.6.2013 reached to the conclusion that Shahrukh Jatoi was not minor at the time of crime. It was

further held that the Police Surgeon was not issued any directions to submit age certificate. However the age certificate dated 21.01.2013 submitted by the Police Surgeon divulged that as per ossification of bones the age of Shahrukh Jatoi son of Sikandar Ali Jatoi is 17-18 years near to 18 as reported by Professor of Radiology CHK.

15. Since the above age certificate was based on the report of only one Professor of Radiology CHK and not the board, therefore, the learned trial court directed to constitute Special Medical Board for the determination of age of Shahrukh Jatoi. The Medical Superintendent, Services Hospital Karachi constituted Medical Board vide his letter dated 1.2.2012. On 06.02.2013, the I.O. of the case was directed by the Medical Superintendent, Services Hospital to produce passport, birth certificate from hospital, O level/matric certificate, NIC/B Form, school leaving certificate from Aitchison College Lahore on or before 09.02.2013. Shahrukh Jatoi was produced before the Special Medical Board for determination of his age on 06.02.2013. On examination by the members, they advised for *X-Ray left wrist joint, X-Ray left shoulder joint, X-Ray left elbow joint, X-Ray left knee joint, X-Ray left pelvis and O.P.G.* The aforesaid X-Rays were exposed at Civil Hospital Karachi on 6.2.2013 in presence of the members of the board. The PW-21 Dr.Muhammad Tofique in his testimony testified that on 1.2.2013, Special Board was constituted, X-Rays were taken on the directions of 03 Radiologists, namely, Professor Tariq Mehmood, Professor Saba Suhail, and Dr.Atiq Ahmed Khan. OPG X-Rays were taken on the directions of Dr.Muzaffar Ahmed Siddiqui. The physical examination was conducted by Professor Dr.Farhat Hussain Mirza and Dr.Hamid Ali Parhyar, Associate Professor of Jurisprudence. After physical examination of Shahrukh Jatoi the medical board

unanimously opined that the age of accused was above 19 years and below 20 years.

16. According to birth certificate supplied by the I.O. to the medical board the date of birth of the applicant is 27.11.1993, whereas the same date is mentioned in the registration/application Form submitted to the Aitchison College Lahore in which the name of applicant is mentioned with his father's name as Sikandar Ali Jatoi and mother name is Naseem Sikandar, even the address of the applicant is same as mentioned in this Criminal Revision Application. One more Education Certificate dated 7.2.2013 issued by Aitchison College Lahore to the I.O. is available in which the date of admission is mentioned as 7.9.1998, the date of withdrawal from college is 30.6.2001 from Class KIA with the date of birth as 27.11.1993. In the admission order issued by Aitchison College Lahore the date of birth of the applicant is 27.11.1993 with the father name Sikandar Ali Jatoi and the permanent address is same which is mentioned in the present revision application. Even in the birth certificate, the date of birth of the applicant is 27.11.1993.

17. The Learned counsel for the applicant on 07.03.2012 filed a statement along with certain documents i.e. copy of B-Form in which the date of birth of the applicant is 27.11.1995, but the name of his mother is recorded as Badshahzadi and the father name is same. Copy of passport is also attached in which his date of birth is 27.11.1995 and the same date of birth is mentioned in the CNIC of the applicant. The cumulative effect is that in some documents produced by the I.O. including the documents issued by Aitchison College Lahore, the date of birth of the applicant is 27.11.1993 whereas documents produced by the applicant though belatedly his date of birth is 27.11.1995. In the event of such

discrepancies and incompatibilities in the documents produced for and against, the most excellent approach and methodology was to get a hold of medical board opinion.

18. Under Section 7 of the Juvenile Justice System Ordinance, 2000, if a question arises as to whether a person is child or not, the Juvenile Court has to record finding after such inquiry, which shall include a medical report for determination of the age of the child. The learned trial court in order to determine the age of the applicant rightly issued directions to constitute a medical board which was essential and indispensable for the determination of the age of the applicant. In the case of **Shamaal Khan Shah vs. The State. (2012 PCr.LJ 897),** the court held that Juvenile Justice System Ordinance, 2000 has been promulgated keeping in view the welfare of juvenile and it aimed at protecting children. If a question would arise as to age of a person and there were two opinions available, the court should lean in favour of the opinion which would go in favour of accused standing trial before it. Whereas in the case of **Sultan Ahmed vs. Additional Sessions Judge-I, Mianwali. (PLD 2004 S.C. 758),** the court held that irrespective of the fact whether the issue of the age of an accused person is or is not raised before the court, it is the obligation of the court to suspend all further proceedings in a trial and to hold an inquiry to determine the age of the accused, if and whenever it appears to be necessary. Court should always feel free to requisition the original record, to summon and examine the authors and custodians of such record and documents to determine the genuineness of the same, to summon persons if need be, who on account of some special knowledge could depose about the age of the concerned accused and to take such other further steps which could help the Court in reaching a just conclusion about the

said matter. In the case of **Muhammad Akram vs. Muhammad Haleem alias Hamayun (2004 SCMR 218)**, the court held that the trial court without ossification test found the accused under 18 years of age at the time of occurrence and directed him to be tried by the Juvenile Court. Supreme Court in the interest of justice and the legal pleas raised in the matter remanded the case to the Trial Court to re-determine the age of the accused in terms of section 7 of the Juvenile Justice System Ordinance, 2000, so as to avoid future complications in the trial of the case and to decide the matter in accordance with law.

19. To support the prosecution case, the applicant's birth certificate and the documents supplied by Aitchison College Lahore are in favour of prosecution whereas the applicant relied on the copy of B-Form and passport including the School Leaving Certificate issued by Truman Public School, Certificate of Baqai Cadet College, Karachi (a subsidiary of Baqai Foundation) and Churchie Grammar School in which the date of birth of the applicant is 27.11.1995. For the ease of convenience, the medical certificate is reproduced as under:-

PROCEEDINGS OF SPECIAL MEDICAL BOARD IN RESPECT OF ACCUSED SHAHRUKH S/O SIKANDAR ALI JATOI

As per letter No.ATC-III/K.DIV/64/2013 dated 30.01.2013, from the Honourable Judge Anti Terrorism Court No.III, Karachi Division, the Meeting of Special Medical Board was held in the office of the Medical Superintendent Services Hospital and Civil Surgeon Karachi on 06.02.2013.

Accused Shahrukh S/O Sikandar Ali Jatoi was brought before the Special Medical Board on 06-02-2013, for determination of age. He has been examined by the members of the board and advised following x-rays.

i. X-Ray Left wrist joint.
ii. X-Ray Left shoulder joint.
iii. X-Ray Left elbow joint.
iv. X-Ray Left knee joint.
v. X-Ray Left pelvis joint.
vi. O.P.G.

Aforesaid x-rays were exposed at Civil Hospital Karachi on 06-02-2013 in presence of all the members of the board.

MARKS OF IDENTIFICATION

Healed scar on the terminal phalanx, palmer aspect left middle finger.

Mole below and behind lobule of left ear.

GENERAL EXAMINATION

Height 5.9½ inches (176.7 cms).
Weight 69 Kg.

Secondary sexual characteristics are well developed.

On returning back to office of the Medical Superintendent Services Hospital Karachi it was unanimously decided by the board members to direct the Investigation Officer of the case to get the following documents by 10 A.M. on 09.02.2013 (copy already forwarded to the Honourable Court vide letter No.SHK/Med/490/91 dated 06th February 2013, photo copy enclosed herewith for ready reference). On 09.09.2013 the 2nd Meeting of the Special Medical Board was held at 11:00 A.M. in the office of the Medical Superintendent Services Hospital Karachi.

The Investigation Officer produced following documents.

1. **Photo copy of Passport.**
2. **Photo copy of Birth certificate from Samdani Hospital, Karachi.**
3. **Registration and application form from Aitchison College Lahore with photograph.**
4. **School leaving Certificate from Aitchison College Lahore.**
5. **N.I.C. B Form NADRA.**

Photo copy of Investigation Officer letter enclosed herewith.

All the documents were scrutinized by the members of the board and it was observed that documents from Aitchison College Lahore as well as birth certificate indicate date of birth to be 27-11-1993.

The Radiologist members after detailed examination of the x-rays gave their opinion of x-rays No.R-1/7083 and (SHK/MED/424/37) dated 06-02-2013 done at Civil Hospital Karachi.

1.	**X-ray left wrist:**	**Epiphyses of Metacarpals and at wrist joint fused.**
2.	**X-ray left shoulder joint:**	**Epiphyses around shoulder are fused.**
3.	**X-ray left elbow joint:**	**Epiphyses are fused.**
4.	**X-ray left knee joint:**	**All Epiphyses are fused.**
5.	**X-ray left pelvis:**	**Epiphyses around hip fused, Iliac crest fused in centre to Periphery, only a peripheral Un-fused segment seen.**

Hence according to Greulich Pyle classification method the bone age is above (19) Nineteen years and below (20) twenty years.

As per expert comments of Dental Surgeons, on Radiological studies of the OPG labeled as R-1/7083 dated 06-02-2013 and CHK/MED/424/37 taken on 06-02-2013 of Accused Shahrukh Jatoi shows all 32 teeth present from 18 to 48 FDI nomenclature. The roots of all teeth including 18, 28, 38, 48 are in complete closure however distal root of 48 is obscured by inferior dental canal.

ACCUSED SHAHRUKH S/O SIKANDAR ALI JATOI

All 3rd molar i.e. 18,28,38,48 are in full occlusion. According to the classification of stages by Olze et al (reference enclosed) all the 3rd molars including 18,28,38,48 fall under stage D. The calculated values according to this classification and clinical examination prove that the age of Accused Shahrukh Jatoi S/O Sikandar Ali Jatoi falls between (19-20) nineteen years to twenty years nearing to (20) twenty years.

IN THE OPINION OF THE BOARD

After considering all above findings the members of the Special Medical Board are of unanimous opinion that the age of Accused Shahrukh S/O Sikandar Ali Jatoi is above (19) Nineteen years and below (20) Twenty years.

Secretary/Convener sd/-
Dr.Muhammad Tofique,
Medical Superintendent,
Services Hospital and Civil Surgeon,
Karachi

Member sd/-
Professor Saba Sohail
Department of Radiology,
DUHSK/Civil Hospital, Karachi

Member sd/-
Dr.Tariq Mehmood,
Head of Radiology
Department,
J.P.M.C. Karachi

Member. sd/-
Dr.Hamid Ali Paryar,
Asstt. Professor Forensic Medicine
S.M.B.B. Medical College Lyari, Karachi

Member. sd/-
Prof.Atiq Ahmed Khan
Professor of Radiology,
DUHSK/Civil Hospital
Karachi

Member. sd/-
Dr.Muzaffar Ahmed Siddiqui
Chief Dental Surgeon
Dr.Ishrat-ul-Ebad Khan Medical College,
Karachi

Member sd/-
Prof. Dr.Mirza Muhammad Shakir
Principal
Dow Dental College,
Karachi

Chairman. sd/-
Professor (Capt.) Farhat Hussain Mirza,
Head of the Department of Forensic Medicine
DUHSK/Civil Hospital Karachi"

20. According to the definition of ossification, it is a natural process of bone formation; the hardening (as of muscular tissue) into a bony substance; a mass or particle of ossified tissue and a tendency toward or state of being molded into a rigid, conventional, sterile, or unimaginative condition. The Greulich-Pyle method is a technique for evaluating the bone age of children by using a single frontal radiograph of the left hand and wrist. The learned counsel for the applicant also cited an article based on study with regard to Greulich-Pyle Atlas showing appraisal for skeletal age assessment in Pakistan. He also cited some excerpts from Modi's Medical Jurisprudence and Toxicology vis-à-vis the age determination. For the ease of reference, the relevant portions are reproduced as under:-

"An appraisal of Greulich-Pyle Atlas for skeletal age assessment in Pakistan

Discussion

We found significant differences between SA assessed by GP atlas and CA in a subset of Pakistani children. In males, SA was advanced during early childhood, delayed during middle and late childhood and, again, advanced during adolescence. In females, the trend was similar except for advanced SA in late childhood. The confidence intervals for the mean difference were wider in the older age groups. This may be a reflection of the individual variability since the inter-observer agreement was excellent in the current study and the same may be presumed about intra-observer reliability in view of the observers' experience.

Previous explorations in Larkano, Pakistan also indicated that skeletal maturation of Pakistani children does not conform to the standards of Greulich and Pyle. In children of Larkano, SA matched CA during initial years of life. This was followed by a delay till CA of 15 years in boys and 13 years in girls, the approximate age of puberty for the respective sex. Subsequently, SA was advanced, with complete maturity being attained at 16 years in females and 18 years in males. The trends in Larkano and Karachi are almost similar, except for an earlier changeover in females in the present study. This discordance could be attributable to dissimilar categorization of study samples or to genuine variations of skeletal development between the two study populations but calls for further research to elucidate this point. Conceivably, both 'nature' and 'nurture' may play a role in the variation of skeletal maturity across diverse populations. Genetic profile, SES, nutrition and long term well-being are some of the factors that have been pointed to in this regard. Previous explorations suggest that the trends of skeletal maturity may vary across ethnicity within same locale, across geographical regions within genetically akin populations and even across time within the same population in the same country……..

Conclusions

The findings of this study suggest against the applicability of GP atlas to Pakistani children. We propose a cautious approach while employing GP atlas in this population in order to ensure appropriate clinical and medico-legal decisions. [emphasis applied]

Modi's Medical Jurisprudence and Toxicology
Twenty-Third Edition

Ossification of Bones

This sign is helpful for determining age until ossification is completed, for skiagraphy has now made it possible to determine even in living persons, the extent of ossification, and the union of epiphysis in bones. Owing to the variations in climatic, dietetic, hereditary and other factors affecting the people of the different states of India, it cannot be reasonably expected to formulate a uniform standard for the determination of the age of the union of epiphysis for the whole of India.....In ascertaining the age of young persons, radiograms of several main joints of the upper or the lower extremity of one or both sides of the body should be taken.... The method of estimating age is to calculate the approximate age after considering the (a) physical characteristics, (b) secondary sex characteristics, and (c) ossification tests and after allowing a margin of error of six months on either side. Thus, if the sum total of all these tests seems to indicate that the age is between fifteen and sixteen, a margin of error of six months on either side.

Identification of an Individual

The teeth afford a useful means of identification, especially in the case of bodies, which have been destroyed by injury, fire, air crash or decomposition. They are more resistant to destructive agents than any other structures, and are well protected....

Age Determination

The estimation of age from the teeth by noting the number of teeth erupted; location and stage of eruption, and with X-ray examination with some amount of certainty, is only possible up to 17 to 20 years of age; beyond that, it is only an approximately estimation. A careful detailed record of the teeth and the presence of any peculiarities, like decay, malposition, overlapping or rotation, broken teeth, fillings, gaps or dentures will often help in identification of the age of the individual. There are two sets of teeth, called temporary (deciduous) teeth and permanent (succedaneous) teeth. The temporary teeth, also called deciduous or milk teeth; are twenty in number, and include four incisors, two canines, and four molars in each jaw. They appear during infancy; are shed in the course of a few years, and are replaced by the permanent teeth, which are thirty-two in number, consisting of four incisors, two canines, four premolars or bicuspids, and six molars in each jaw.....

21. The report of Medical Board depicts that the appellant Shahrukh Jatoi was examined by the members of the board who advised the X-Ray of Left wrist joint, X-Ray of Left shoulder joint, X-Ray of Left elbow joint, X-Ray of Left knee joint, X-Ray of Left pelvis joint and O.P.G and said x-rays were exposed at Civil Hospital Karachi in presence of all the members of the board. On general examination his height and weight was recorded and secondary sexual characteristics were found well developed. Medical Board also examined Passport, Birth certificate from Samdani Hospital, Karachi, Registration and application form of Aitchison College Lahore with photograph, School leaving Certificate from Aitchison

College Lahore, N.I.C. and B Form NADRA. The Radiologist members examined the x-rays and opined that according to Greulich Pyle classification method the bone age is above (19) Nineteen years and below (20) twenty years. According to the expert comments of Dental Surgeons based on Radiological studies all 32 teeth were found from 18 to 48 FDI nomenclature. The roots of all teeth including 18, 28, 38, 48 were found in complete closure however distal root of 48 was found obscured by inferior dental canal. They also reached to the conclusion that according to clinical examination age of Shahrukh Jatoi falls between (19-20) nineteen years to twenty years nearing to (20) twenty years. Finally, the medical board submitted their report with unanimous opinion that the age of Shahrukh Jatoi is above (19) Nineteen years and below (20) Twenty years. The article ***"An appraisal of Greulich-Pyle Atlas for skeletal age assessment in Pakistan"*** cited by the learned counsel does not in any way throw out or discard the *Greulich-Pyle* method but their study proposed to adopt a cautious approach while employing GP atlas in order to ensure appropriate clinical and medico-legal decisions. Modi in his book "Modi's Medical Jurisprudence and Toxicology" also proposed that the method of estimating age is to calculate the approximate age after considering the (a) physical characteristics, (b) secondary sex characteristics, and (c) ossification tests and after allowing a margin of error of six months on either side. He further opined that the teeth afford a useful means of identification. The estimation of age from the teeth by noting the number of teeth erupted; location and stage of eruption and with X-ray examination with some amount of certainty is only possible up to 17 to 20 years of age; beyond that it is only an approximate estimation. Much reliance was placed on Police Surgeon certificate but it is a matter of record that his report was based on the report of

only one radiologist whereas the report submitted by the medical report unambiguously articulates that detailed medical examination was carried out by the whole board with the presence of experts in different subjects and disciplines and they rendered unanimous opinion, for that reason the report submitted by the police surgeon cannot be given any preference or weightage over the report of duly constituted Medical Board. No personal bias or mala fide alleged against the medical board or its members who have submitted their fair-minded and unbiased expert opinion with regard to the age of applicant. In our definitive view the ultimate sanctity was rightly given to the report of medical board hence we do not find any substance in this revision application which is dismissed accordingly.

22. Now we would like to dwell on the main case. We have also scanned the entire evidence led in the case. The motive of murder of Shahzeb was a brawl between him and the appellants at the reception of the Country Club Apartments. The inopportune scuffle was resonated due to bad behavior and misdemeanor of the appellant Ghulam Murtaza Lashari with Ms.Maha. The deceased was annoyed and collide with Ghulam Murtaza Lashari, however the father of the deceased tried to calm down and also asked deceased to tender apology but the appellants demanded that Ghulam Murtaza Lashari will slap him and they did not accept the apology. The deceased died as a consequence of firearm injuries which was corroborated in the postmortem examination by Dr.Dileep Khatri, PW-6 who bring to light following injuries:

"1. Punctured fire arm wound 0.5 cm in diameter on right chest posteriorly at posterior axillary fold, inverted margins and no blackening (wound of entry).

2. Punctured fire arm wound right side chest at anterior axillary fold, margins averted (wound of exit).

3. Punctured fire arm wound 0.5 cm in diameter right lumber region of abdomen posteriorly, margins inverted and no blackening (wound of entry).

4. Punctured fire arm wound 1 cm in diameter right side abdomen interiorly lumber region (wound of exit).”

23. The report discloses that Shahzeb died due to severe hypo-volumic shock and hemorrhage within 15 minutes of sustaining the firearm injuries. The trial court recorded the ocular testimony of *PW-7, the complainant, PW-3 Mst. Ambreen, PW-4 Ms. Maha, PW-18 Muhammad Shah, PW-19 Muhammad Ahmed Zuberi and PW-20 Danish Dosani*. These eyewitnesses fully reinforced and buttressed the case of prosecution while two more witnesses PW-13 Muhammad Ali Amir and PW-14 Sheheryar Ali subsequently resile their statement and avowed that they were not present at the time of quarrel and later stated that due to breakdown of electricity they could not see the appellants which statement was disbelieved by the learned trial court rightly on the notion that the said witness could see the deceased and his father at the place of incident but it is strange that they could not recognize the appellants whereas Nawab Siraj Ali Talpur and Nawab Sajjad Ali Talpur were the residents of same building. The narrative of electric breakdown was also set up only by these two witnesses.

24. All-encompassing testimony can be split up in three diversified segments. Starting from misbehavior of appellant Ghulam Murtaza Lashari with Ms. Maha, then squabble of deceased with the appellants and firing of appellants on the deceased. The ocular testament of Ms. Maha is on record that appellant Ghulam Murtaza Lashari misbehaved her but the next episode was corroborated by many witnesses and out of them, Mohammad Shah and Mohammad Ahmed Zuberi were also the eye witnesses of firing on the deceased and his death. PW-4 Ms. Maha deposed the entire incident unwaveringly in

her evidence. According to this PW, the appellant Ghulam Murtaza Lashari approached her with filthy manifestation/expression. This testament was strengthened by PW-3, Mst. Ambreen and PW-7 Orangzaib. Mst. Ambreen affirmed that she received a cell phone call from Maha who complained the misbehavior of Ghulam Murtaza Lashari so Mst. Ambreen asked her deceased son to come home immediately. The defence counsel add force to the actuality of the incident on suggestion to Ms. Maha that Ghulam Murtaza Lashari talked to her in a decent manner but this suggestion was out rightly denied by her in her cross-examination. According to (DW-1) Nawab Imdad Ali Talpur, he had also assured the complainant that he would remove the cook Ghulam Murtaza Lashari in the morning as he caused trouble to the complainant's family. So in all fairness, the bone of contention which followed and resulted to the homicide of Shahzeb is translucent and discernable.

25. The complainant, his wife and their daughter all witnessed the wrangle and their depositions were supported by the witnesses Muhammad Shah, Muhammad Ahmed Zuberi and Danish Dosani. All these six eyewitnesses account exposed and divulged that the present appellants were not satisfied with the apology tendered by the deceased and with the purpose of escaping any awkward incident, the complainant asked the deceased to exit immediately but in quest of departure of deceased in his car, the appellant Shahrukh Jatoi waved and wielded his pistol, made aerial firing and declared that he is Shahrukh Jatoi son of Sikandar Ali Jatoi and will kill the Shahzeb. In a while, all the appellants move off in silver colour Toyota car of the appellant Shahrukh Jatoi and went on the way to the Sea View. Speculating some obnoxious intents, two friends of the deceased Mohammad Shah and

Mohammad Ahmed Zuberi followed the deceased in their car on the directions of the complainant while the parents of the deceased went to the apartment of Nawab Imdad Ali Talpur father of accused Nawab Siraj Ali Talpur and Nawab Sajjad Ali Talpur. According to the evidence on the record, the appellants in league intercepted the deceased at Khayaban-e-Bahria and appellants Shahrukh Jatoi and Nawab Siraj Ali Talpur made fires upon the deceased in presence of two eyewitnesses Mohammad Shah and Mohammad Ahmed Zuberi. They further testified that on firing of appellants the car of deceased went out of the control and rolled and rested on its side where after accused Nawab Sajjad Ali Talpur and Ghulam Murtaza Lashari went to the car of the deceased and instigated Shahrukh Jatoi to kill Shahzeb as he was still alive on which they made more fires upon him. Nothing was placed on record which may demonstrate any enmity or animosity of the complainant or the eyewitnesses with the appellants. Indeed, Nawab Imdad Ali Talpur (DW-1) himself admitted that the witnesses have no enmity with the appellants. Also the appellant Shahrukh Jatoi, neither in his 342 Cr.P.C. statement nor during the cross-examination of the witnesses suggested any enmity or animosity of the prosecution witnesses with him.

26. The record reflects that after the commission of offence all the appellants were gone into veiling. Appellant Shahrukh Jatoi fled deceptively to Dubai on 27.12.2012 however he was deported after taking suo motu action by the honorable Supreme Court of Pakistan. He was arrested from Karachi Airport on 17.01.2013. Besides this case, one more FIR No. 26/2013 was lodged against Shahrukh Jatoi and some other persons at PS. FIA, AHT Circle, Karachi under Section 419/109 PPC read with 3/4 and 6 of Passport Act, 1974 in

which a charge sheet was submitted on 16.03.2013 in the Court of Civil Judge and Judicial Magistrate, Malir, Karachi. So far as Siraj Talpur and Sajjad Talpur are concerned, their father Nawab Imdad Ali Talpur (DW-1) deposed that at morning he along with his both sons had gone to Hyderabad and his sons denied to have been arrested from Dadu but according to the prosecution, the appellants Nawab Siraj Ali Talpur, Nawab Sajjad Ali Talpur and Ghulam Murtaza Lashari were arrested on 05.01.2013 from the house of Azam Bughio, District Dadu.

27. On 23.01.2013, Shahrukh Jatoi led to the recovery of 9 mm pistol with four cartridges in its magazine from the trunk of his silver colour Toyota Mark-II car bearing registration No.AHN-022. The said weapon was lying under the spare wheel and the car was found parked at Plot No.5/C, Street No.11, Badar Commercial, Phase V, DHA, Karachi. The pistol was dispatched to the ballistic experts and according to the report four of the empties recovered from the place of incident were fired from the same pistol produced by appellant Shahrukh Jatoi. The report of Examiner of Fire Arms, Forensic Division Sindh Karachi dated 16.01.2013 shows that five 9mm bore crime empties which were marked as C-1 to C-5 and four 9mm bore crime empties marked as C-6 to C-9 by the Examiner of Fire Arms were sent with two 9mm bore live cartridges on 31.12.2012. The Examiner of Fire Arms submitted his opinion that 9mm bore crime empties now marked as C-1 to C-9 were fired empties of 9mm bore fire arm/weapon and two 9mm bore live cartridges are the live cartridges of 9mm bore fire arm/weapon. According to prosecution case on 23.01.2013 Shahrukh Jatoi led the police party for the recovery of China made 9mm pistol with four cartridges in its magazine from the trunk of Silver Colour

Toyota Mark-II, bearing registration No.AHN 022. Naturally after recovery of pistol the empties and live cartridges as stated above were again sent to Examiner of Fire Arms Forensic Division Sindh Karachi on 28.01.2013 and report was submitted on 08.02.2013 by the Examiner of Fire Arms. The relevant excerpt is reproduced as under:-

"ARTICLES RECEIVED:

S.No.	DESCRIPTION	NO. OF PARCELS	NO. OF SEALS
1.	One 9mm bore pistol No. rubbed with magazine now marked/signed and four 9mm bore live cartridges as exhibits.	One	Three
2 i).	Five 9mm bore crime empties marked as "C1 to C5"	One	Three
ii).	Four 9mm bore crime empties marked as "C6 to C9"		
iii)	Two 9mm bore live cartridges as exhibits		

OPINION:

The microscopic examination of the case has led that:

i. **Four 9mm bore crime empties marked as "C6 to C9" were 'fired' from the above mentioned 9mm bore pistol No. rubbed in question, in view of the fact that major points i.e. striker pin marks, breech face marks, ejector marks and chamber marks are 'similar'.**

ii. **Five 9mm bore crime empties marked as "C1 to C5" were 'not fired' from the above mentioned 9mm bore pistol No. rubbed in question, in view of the fact that major points i.e. striker pin marks, breech face marks, ejector marks and chamber marks are 'dissimilar'.**

Note: One 9mm bore test empty is being sent in the sealed parcel of the above mentioned fire arm/weapon."

28. Both the I.Os deposed that since the day of securing spent bullet casings from the crime scene till its second time dispatch to FSL were in the custody of first I.O. SI Nafees and he had not delivered the same to second I.O. Inspector Mohammad Mubeen, therefore, the contention raised that the empties were managed after recovery of pistol is misconceived. HC Ghulam Abbas during his evidence voluntarily stated that the articles were taken away by the mobile van of the area but the fact remains that he was not mashir of the place of incident nor he was present there at the time of inspection on

the pointation of P.W. Muhammad Ahmed Zuberi by SI Nafees. The recovery of pistol from Shahrukh Jatoi was strengthened by the evidence of I.O. Inspector Muhammad Mubeen (PW-23) and Sub-Inspector Nasarullah (PW-15). However, the pointation of place in presence of PW Abid Hameed and Asghar Hussain of throwing crime weapon in the sea by the appellant Siraj Talpur was not found admissible by the trial court on the ground that they were not examined by the prosecution.

29. The learned counsel for the appellants argued that the witnesses made dishonest improvements to strengthen the prosecution case. It was contended that in the FIR the complainant did not nominate the present appellants, however, this aspect was rightly dealt with by the trial court that the statement of the complainant was recorded at Ziauddin Hospital just after the incident when the complainant was not in senses but in severe distress and grief. According to the dictum laid down by the apex court in the case of **Siraj Din vs. Kala and another (PLD 1964 S.C. 26),** it was held that first information report can only be used to contradict its maker but cannot be used as substantive evidence to belie statement of prosecution witnesses. Non-mentioning the names in the FIR not always sufficient reason for discarding the evidence of person claiming to be eyewitness. Likewise in the case of **Fazalur Rehman vs. Abdul Ghani and another (PLD 1977 S.C. 529,** it was held that mere omission of a particular fact in a previous statement cannot be treated as contradiction.

30. The counsel for the appellants further argued that the eyewitnesses of the incident have falsely deposed as the deceased could not have sustained fire arm injuries in the manner described by the eyewitnesses. According to the prosecution case some bullets had hit the car of the deceased

from front side and some from back side and some from right side. The postmortem report depicts two bullets, one at posterior axillary fold of right side chest and the other at right lumber region of abdomen posteriorly. The appellants shown to have intercepted the deceased from opposite direction and two bullets are shown to have hit the car from front side. The relevant portion of vehicle examination report submitted by Examiners Farhaj Bukhari and Nazakat Ali, Forensic Division Sindh, Karachi along with the chart reads as under:-

"03. <u>OPINION</u>:

The examination of the case has led that:

1. <u>One Suzuki Swift Color Dark Blue.</u>

The holes now marked as ENT-1 (3.5 x 3.4cm) (left side headlight), ENT-2 (1.4 x 3.1cm) (bonnet), ENT-3(0.9 x 1.1) (right side back door), ENT-3A (1.6 x 3.2cm) (back side of driving seat), ENT-4 (1.6 x 3.2cm) (right side back door), ENT-4A (1.1 x 2.8cm) (back side of driving seat headrest), ENT-5 (1.2 x 3.9) (right side of rear glass), are caused due to the passage of fired projectile of fire arm.

Note: Chart is enclosed with the report".

31. The eyewitnesses account of the incident bring forth by Mohammad Shah and Mohammad Ahmed Zuberi is somewhat comprehensible and consistent with the medical evidence. Despite conducting extensive and lengthened cross examination, nothing brought on record which may significantly demonstrate that these two eyewitness account is false or their presence at the scene of crime was doubtful or distrustful. The learned counsel for the appellants referred to the evidence of different PWs with the plea that either they have improved their statements and or they did not support the prosecution case. The PW-13 Muhammad Ali Amir and PW-14 Shahriyar Ali were not declared hostile by the prosecution. The learned counsel further pointed out that the eye witnesses Muhammad Ahmed Zuberi stated that he followed Shahzeb's car then he further stated that he left the country club apartment towards sea view whereas another eye

witness Muhammad Shah PW-18 stated that at about 1:00 a.m. we left country club apartment and followed Shahzeb in between 1:00 a.m to 1:10 a.m. and reached at Khayaban-e-Bahria at about 1:10 a.m. to 1:15 a.m. the incident at Khayaban-e-Bahria took place. The learned counsel contended that there is incongruity and inconsistency in the statements of eye witnesses recorded in court and the statements recorded by the I.O. Learned counsel also referred to the statement of PW-3 Ambreen in which she stated that Asad Gabol along with his guard arrived at country club apartments whereas the complainant (PW-7) stated that he sent him back. Learned counsel further pointed out some minor deficiencies and discrepancies in the evidence of PWs but the fact remains that the testimony of two eye witnesses recorded with regard to the murder of the deceased Shahzeb is quite noteworthy. According to the testimony of Muhammad Shah, they reached Khayaban-e-Bahria from sea-view side, the silver colour Toyota car came and applied Jam Break. Appellant Shahrukh Jatoi and Siraj Talpur did straight fires upon Shahzeb who was in his car. The car of Shahzeb had become unbalanced, collided with the tree and wall of Bungalow No. 44/1/1 and rested on side. This witness further stated that he and Muhammad Zuberi were shocked, parked their car at side and closed its headlights. He further stated that street lights and lights of bungalows were on at the crime locale and everything was clear and visible. He further stated in his examination in chief that accused Sajjad Talpur and his servant disembarked from the car went near to the car of Shahzeb they bent down, looked in the car and stated that Shahzeb is still alive and kill him then Shahrukh Jatoi and Siraj Talpur alighted from their car and fired upon Shahzeb and then fled towards Marvi Store. PW Muhammad Shah further stated that he and Muhammad Ahmed Zuberi took the injured Shahzeb from his

car and shifted him in their car and proceeded towards Ziauddin Hospital and on the way Muhammad Ahmed Zuberi made a telephone call to the mother of Shahzeb and informed her. In his cross-examination he was given a suggestion by the defense counsel that head lights of Shahzeb's car was on which he answered in affirmative. He denied the suggestion that in Shahzeb's car HIDS lights were installed. He denied the suggestion that if headlights of front car is on the same car cannot be recognized but he voluntarily stated that it would be happened if there is darkness and there is no street lights. He also affirmed the suggestion that Shahzeb was injured and blood was oozing from his injuries. The same witness voluntarily stated that when they took Shahzeb from car, they realized that blood is oozing from his injuries. Another eye witness of the incident Muhammad Ahmed Zuberi also narrated the same in his examination in chief and he was also cross examined by the defense counsel. He admitted that in Shahzeb's car HIDS lights were installed. He denied the suggestion that the car of Shahzeb was in speed therefore it collided with wall. He also denied the suggestion that if headlights of the car are on, the person sitting in the car cannot be identified during crossing. He had not noted that the blood oozing from the injuries of the Shahzeb or not, however he further stated that when they uplift Shahzeb from his car the blood came at his hand. He further stated that his car was not inspected by the police. He further denied the suggestion that his 161 Cr.P.C statement was not recorded on 25.12.2012 but the same was recorded after 01.01.2013 at P.S. Boat Basin by Inspector Mubeen. He further denied the suggestion that his 164 Cr.P.C statement was recorded by the court staff of Magistrate on direction of Inspector Mubeen. He further denied the suggestion that he had not point out the crime scene place to SIP Nafees Ahmed nor he secured nine

spent bullet casing, cover of side mirror glass, pieces of glass, two live bullets nor seized the car of the deceased Shahzeb. He also denied the suggestion that he did not took out the injured Shahzeb from his car nor brought him at Ziauddin Hospital.

32. The sole reason that I.O. SI Nafees Ahmed failed to secure the blood from the car of deceased cannot be considered or ruminate a good ground for disbelieving the entire prosecution case in view of unshaken ocular testimony. One of the photographs of the car taken by the I.O. at the place of incident is showing the blood in car. The learned counsel further argued that the memo of inspection does not show that there was any source of light but at the same time one of the photographs taken at the place of crime clearly shows that streetlight was on. The I.O. himself stated in his cross-examination that streetlight was on. According to the postmortem report, the time between death and postmortem which was finished at about 4:15 A.M. was two to four hours approximately. Seemingly there is no disagreement of time in the midst of ocular and medical evidence vis-à-vis the time of occurrence as 1:15 A.M. A suggestion was given to the doctor by the defence counsel that the rigor mortis develops on the face between four to five hours to which doctor replied that the rigor mortis had developed on the face of deceased.

33. It was further argued by the learned counsel for the appellants that there was some inconsistency and absurdity with regard to the time of incident. This anomaly was pertinently explained by the investigation officer to have made a mistake while mentioning the time. According to the witnesses as well as the investigation officers, the main incident took place at 01:15 A.M. on 25.12.2012. The eyewitnesses and police officials including I.Os were painstakingly put to the acid test on this point during cross

examination and suggestions were also given by the defence counsel that bickering at Country Club Apartment took place at 11:30 P.M. on 24.12.2012 and after 20 minutes at about 11:50 P.M. deceased Shahzeb was killed. All witnesses denied this suggestion and noticeably stated that bickering took place at about 1215 hours whereas Shahzeb was killed at about 1:10 A.M. or 1:15 A.M. (25.12.2012). The first I.O. SI Nafees Ahmed also denied that Shahzeb was murdered at 2350 hours on 24.12.2012. Rather he stated that the murder of Shahzeb was committed at 01:15 A.M. on 25.12.2012. The version of this witness was also reinforced by the emergency registration slip of Ziauddin Hospital in which time of arrival in emergency room is 1:20 A.M. on 25.12.2012. Nothing brought on record material through the evidence of defence witnesses. In the defence it was tried to be establish that Shahrukh Jatoi went to the airport to see off his uncle but in the cross examination the advocate had himself given a suggestion to eye witness Muhammad Shah that Shahrukh Jatoi was not available at the crime scene during the incident and at that time he was purchasing meal from KFC which suggestion was denied by this eye witness.

34. The counsel for the appellants referred to a paragraph of the impugned judgment at page 92 in which the trial court has observed that the I.O. SI Nafees Ahmed has not carried out the investigation of the instant crime properly and diligently, the learned counsel in view of the above observation argued that the benefit of doubt of the weak investigation should have been given to the appellants. It is often seen that at times bushed up investigation is carried out to falsely implicate a person but quite the reverse sometimes it is set down to favour the accused. However it is nowhere stated in the impugned judgment that the entire inspirational value of evidence is

wiped out or shattered. On the contrary, such observations are confined on account of failure to mention in the memo of place of incident (Ex.34/B), the blood in car of the deceased and presence of light at the site so also for not securing the blood of the deceased from later's car. In our view, unshaken ocular testimony is otherwise available so such defects or discrepancies which otherwise proven in the evidence cannot become a ground to acquit the appellants unless such defects have seriously dented or prejudice the case of prosecution.

35. The guiding principles for administration of justice in criminal cases streaming from the judicial precedents cited by the learned counsel for and against are deducible as follows:-

i. **There may also be an element of truth in the prosecution story against the accused. Considered as a whole, the prosecution story may be true; but between 'may be true' and 'must be true' there is inevitably a long distance to travel and the whole of this distance must be covered by the prosecution by legal, reliable and unimpeachable evidence before an accused can be convicted.**

ii. **Eye-witnesses who gave evidence with a motive other than telling the truth, in that they even suppressed the facts which they were supposed to know in the ordinary course of events were basically dishonest and not worth reliance.**

iii. **Purpose of F.I.R. is to set criminal law in motion and to obtain first hand spontaneous information of occurrence, in order to exclude possibility of fabrication of story or consultation or deliberation or complainant has time to devise or contrive anything to his advantage.**

iv. **First information report and subsequent statement made by first informant. F.I.R. is the document which is entered into Book maintained at the police station at the complaint of informant and brings the law into motion whereby police starts investigation.**

v. **Any statement or further statement of the first informant recorded during investigation by police would neither be equated with F.I.R. nor read as part of it.**

vi. **First Information Report under Section 154, Cr.P.C. is normally considered as a corner stone of the prosecution case unless it is shown that on account of some mala fide intention a wrong version of the complainant was recorded by the investigating agency with a view to allow the real culprits to go escort free**

vii. **Recording of supplementary statement by the informant with different version after lodging the F.I.R. Value of such supplementary statement was not more than a statement of a witness under Section 161, Cr.P.C.**

viii. **Witness who had made glaring contradictions, omissions and improvements in his Court statement qua the statement recorded by him before the police either as per the contents of the F.I.R. if he**

was complainant or if he was a witness and his statement was recorded under Section 161, Cr.P.C., such witness was to be considered to be wholly unreliable witness and it was not advisable to place explicit reliance upon his evidence.

ix. Where evidence of said witness itself was not trustworthy, confidence-inspiring and consistent to establish accusation against the accused and was totally rejected then the prosecution could not secure conviction on the basis of other evidence.

x. When a witness improves his version to strengthen the prosecution case, his improved statement subsequently made cannot be relied upon as the witness has improved his statement dishonestly, therefore, his credibility becomes doubtful on the well-known principle of criminal jurisprudence that improvements once found deliberate and dishonest cast serious doubt on the veracity of such witness.

xi. Chance witness was one who, in the normal course was not supposed to be present on the crime spot. Single doubt reasonably showing that a witness's presence on the crime spot was doubtful during the occurrence, it would be sufficient to discard his testimony as a whole. Said principle may be pressed into service in cases where such witness was seriously inimical or appeared to be chance witness.

xii. Each criminal case has its own peculiar facts and circumstances and it is the question of satisfaction of the Court which depends upon evidence produced by the parties.

xiii. Accused while raising a defence plea was only required to show that there was a reasonable possibility of his innocence and the standard of proof was not similar to that as expected of the prosecution, which had to prove its case beyond any reasonable doubt.

xiv. In a criminal case, it is the duty of the Court to review the entire evidence that has been produced by the prosecution and the defence.

xv. If after an examination of the whole evidence, the Court is of the opinion that there is a reasonable possibility that the defence put forward by the accused might be true. In these circumstances, the accused is entitled to the benefit of doubt, not as a matter of grace but as of right.

xvi. Accused not shown to have been declared as proclaimed offenders. Accused, hence, could not be said to have absconded.

xvii. Witnesses stating to have heard from others that deceased had been fired at and killed by accused but person giving such information not produced as prosecution witness. Mere fact of abscondence of accused after commission of crime does not serve to establish accused's guilt beyond reasonable doubt.

xviii. If any incriminating piece of evidence is not put to accused in his statement under Section 342, Cr.P.C. for his explanation, then the same cannot be used against him for his conviction.

xix. If there was any discrepancy in prosecution evidence or if the same required some clarification or explanation, then prosecution must explain and clarify the same failing which benefit would go to accused.

xx. Eye-witnesses produced by the prosecution, were natural witnesses because they were inmates of the house wherein one part of the occurrence had taken place. Said eye-witnesses made consistent statements before the Trial Court fully incriminating the accused

persons in the offences alleged against them and the medical evidence had provided sufficient support to them.

xxi. Motive set up by the prosecution was based upon a dispute between the parties over some landed property and the suggestions made by the defence to the eye-witnesses produced by the prosecution went a long way in accepting the motive set up by the prosecution.

xxii. Some crime-empties secured from the place of occurrence had matched with the firearms recovered from the accused persons and such aspect of the case had provided corroboration to the ocular account.

xxiii. Guilt of the accused persons had been established beyond reasonable doubt. Accused persons had demonstrated extreme highhandedness and brutality inasmuch they started firing in a mosque, chased the victims in a street and then followed them inside the complainant party's house and throughout they kept on firing and murdered three innocent persons and injured another. Such kind of conduct displayed by the accused persons surely detracted from any sympathy to be extended to them in the matter of their sentences of death.

xxiv. Ocular account in cases of qatl-i-amd played a decisive and vital role and once its intrinsic worth was accepted and believed then the rest of the evidence, both circumstantial and corroboratory in nature, would be required as a matter of caution. To the contrary, once the ocular account was disbelieved then no other evidence, even of a high degree and value, would be sufficient for recording conviction.

xxv. Medical evidence can only establish the type of weapon used, the seat of injury and the time elapsed between receipt of injury and the medical examination. Medical evidence can never be a primary source of evidence for the crime itself, but is only corroborative of the same.

xxvi. While giving the benefit of doubt to an accused it was not necessary that there should be many circumstances creating doubt. If there was a circumstance which create reasonable doubt in a prudent mind about the guilt of the accused, then the accused would be entitled to the benefit of such doubt, not as a matter of grace and concession but as a matter of right.

xxvii. Dishonest improvements in statement of witness in order to bring the case in line with the medical evidence or to strengthen the prosecution case. Such testimony was not worthy of credence.

xxviii. Presence of eye-witnesses at the spot at the relevant time and their accompanying the deceased to the Court on the day of occurrence was doubtful. Ocular testimony was in conflict with medical evidence.

xxix. Eye-witnesses were inimical towards the accused and they had made improvements and changes in their statements so as to bring them in accord with the post-mortem report and justify the non-recovery of the crime empties from the place of occurrence. Eye-witness account was so unreasonable and inherently improbable that no amount of corroboration could rehabilitate the same.

xxx. Weapon used in commission of crime had allegedly been recovered from a place which was open and accessible to all and, thus, it was unsafe to place reliance upon such recovery. Apart from that no one had seen accused firing at the deceased and, thus, mere recovery of a weapon of offence matching with a crime-empty was not sufficient to provide corroboration to the other pieces of circumstantial evidence.

xxxi. **Crime empties were sent to Forensic Science Laboratory with crime weapons, twelve days after the recovery of alleged weapons. Delay had destroyed the evidential value of such piece of evidence.**

xxxii. **Dagger used by accused to commit murder was recovered from his shop. Human prudence would not accept that the accused, after committing murder with a dagger, would choose to preserve it in his own shop rather than throwing it away in any field, water canal, well or other place.**

xxxiii. **For placing reliance on circumstantial evidence, in cases involving capital punishment, such evidence must be of the nature, where, all circumstances must be so inter-linked, making out a single unbroken chain, where one end of the same touches the dead body and the other the neck of the accused. Any missing link in the chain would destroy the whole and would render the same unreliable for recording a conviction on a capital charge.**

xxxiv. **In cases of circumstantial evidence, there were chances of procuring and fabricating evidence, therefore, Courts were required to take extra care and caution to narrowly examine such evidence with pure judicial approach to satisfy itself, about its intrinsic worth and reliability, also ensuring that no dishonesty was committed during the course of collecting such evidence by the investigators.**

xxxv. **Occurrence took place in the dead of the night, i.e. at 11.30 p.m., outside a house and the investigating officer had stated before the Trial Court that no electric light was available at the spot. In the absence of any source of light at the spot the question regarding identification of the accused had assumed pivotal importance but the prosecution failed to establish the same. Motive set up by the prosecution had not been established.**

xxxvi. **Occurrence took place around midnight but the source of light at the spot had never been established by the prosecution. Courts below had incorrectly presumed that as the occurrence had taken place at a medical store, therefore, some electric light must be available at the spot. During the investigation the present accused persons had been implicated but the record of the case was not clear as to how and on what basis the accused persons had been roped into present case.**

xxxvii. **First information report. F.I.R. is not a substantive piece of evidence as it only sets the law into motion. F.I.R., no doubt, is an important piece of evidence, but the absence of individual role in it would not make its maker as liar if otherwise such witness is proved to have seen the occurrence.**

xxxviii. **All variations in the evidence does not destroy the intrinsic value of the evidence of such witnesses. Variations which do not relate to material part of the prosecution story or the salient and important features of the case can be ignored.**

xxxix. **Only material contradictions are to be taken into consideration by the Court while minor discrepancies found in the evidence of witnesses, which generally occur are to be overlooked. Mere omission by witness to disclose a certain fact to the Investigating Officer would not render his testimony unreliable unless the improvement made by the witness while giving evidence before the Court, had sufficient probative force to bring home the guilt to the accused**

xl. **The statements recorded under section 161, Cr. P. C. are not evidence. Strictly speaking an omission from the statement recorded by police does not amount to a contradiction. An omission of a fact from the statement is only of value if it is of such**

importance that the witness would have almost certainly made it and the police officer would have certainly recorded it, had it been made. The practice of proving such omissions of statements is generally to be discouraged. The case of Tera Mia v. The Crown (7DLR539) supports the above view.

xli. Section 302(b). Corroboration is only rule of caution and not a rule of law. If the eye-witness account is found reliable and trustworthy then there is hardly any need to look for any corroboration.

Ref: A.I.R 1957 S.C. 637 (Sarwan Singh Rattan Singh vs. State of Punjab), 1995 SCMR 599 (Ata Muhammad vs. The State), 2011 SCMR 45 (Mushtaq Hussain vs. The State), 1995 SCMR 1350 (Falak Sher alias Sheru vs. The State), 2003 SCMR 1419 (Khalid Javed vs. The State), 2008 SCMR 6 (Akhtar Ali vs. The State), 2017 SCMR 596 (Mst. Rukhsana Begum vs. Sajjad), 1993 SCMR 550 (Syed Saeed Muhammad Shah vs. The State), 2013 SCMR 106 (Mehboob Ur Rehman vs. The State), 1985 SCMR 510 (Nadeem-Ul-Haq Khan vs. The State), 1981 SCMR 959 (Fazal Muhammad vs. Muzaffar Hussain), 1971 SCMR 256 (Abdul Rauf vs The Crown), 2010 SCMR 1009 (Muhammad Shah vs The State), 1992 SCMR 96 (Yar Muhammad vs. The State), PLD 2017 S.C. 661 (Amjad Ali vs. The State), 2018 SCMR 71 (Muhammad Saddique vs. The State), 2018 SCMR 344 (Imtiaz alias Taj vs. The State), 2015 SCMR 1142 (Mst. Sughra Begum vs. Qaiser Pervez), 2009 SCMR 916 (Ghulam Mustafa vs. The State), 2018 SCMR 772 (Muhammad Mansha vs. The State), 1999 SCMR 1220 (Muhammad Khan vs. The State), 2009 SCMR 230 (Muhammad Akram vs. The State), 2016 SCMR 1605 (Muhammad Saleem vs. Shabbir Ahmed), PLD 2008 S.C. 1 (Mushtaq vs. The State), 2008 SCMR 707 (Ali Sher vs. The State), 2017 SCMR 486 (Muhammad Asif vs. The State), 2017 SCMR 986 (Hashim Qasim vs. The State), 2017 SCMR 622 (Usman alias Kaloo vs. The State), 2017 SCMR 1189 (Gulfam vs. The State), 2000 SCMR 400 (Gul Khan vs. The State), PLD 1995 S.C. 46 (Mushtaq alias Shaman vs. The State), 1995 SCMR 1793 (Zakir Khan vs. The State), 1971 PCr.LJ 275 (Ekabbar Ali vs. The State), 2008 SCMR 784 (Muhammad Waris vs. The State).

36. We have surveyed the aforesaid judicial precedents and fortified by the illuminated and enlightened dictums laid down to administer justice in criminal cases. It is well settled exposition of law that each criminal case has its own peculiar facts and circumstances and it is the question of satisfaction of the court which depends upon evidence produced by the parties. It is also deep-rooted revelation of law that the purpose of F.I.R. is to set criminal law in motion and to obtain first hand spontaneous information of occurrence in order to exclude possibility of fabrication of story or

consultation or deliberation to devise or contrive anything to the advantage. It is also considered as a corner stone of the prosecution case unless it is shown that on account of some mala fide intention a wrong version of the complainant was recorded by the investigating agency with a view to allow the real culprits to go escort free. The nucleus is that the first information report. F.I.R. is not a substantive piece of evidence as it only sets the law into motion. F.I.R., no doubt, is an important piece of evidence, but the absence of individual role in it would not make its maker as liar if otherwise such witness is proved to have seen the occurrence. The statements recorded under section 161, Cr. P. C. are not evidence. Strictly speaking an omission from the statement recorded by police does not amount to a contradiction. An omission of a fact from the statement is only of value if it is of such importance that the witness would have almost certainly made it and the police officer would have certainly recorded it, had it been made so far as supplementary statement by the informant with different version values not more than a statement of a witness under Section 161 Cr.P.C. The glaring contradictions, omissions and improvements of the witness in the court's statement is to be considered to be wholly unreliable but all variations in the evidence does not destroy the intrinsic value of the evidence of such witnesses. Variations which do not relate to material part of the prosecution story or the salient and important features of the case can be ignored. Only material contradictions are to be taken into consideration by the Court while minor discrepancies found in the evidence of witnesses, which generally occur are to be overlooked. Mere omission by witness to disclose a certain fact to the Investigating Officer would not render his testimony unreliable unless the improvement made by the witness while giving evidence before the Court, had sufficient probative force to

bring home the guilt to the accused. So far as medical evidence is concerned it only establishes the type of weapon used, the seat of injury and the time elapsed between receipt of injury and the medical examination. This can never be a primary source of evidence but it is only corroborative of the same. The incriminating piece of evidence not put to accused in his statement under Section 342, Cr.P.C. for his explanation the same cannot be used against him for his conviction and while giving the benefit of doubt to an accused it was not necessary that there should be many circumstances creating doubt.

37. In totality and the composite effect of ocular testimony of two witnesses demonstrate unequivocally that ample opportunity was availed in the cross examination but their testimony was not shaken or shivered with regard to the substantive points involved in this case. The statement of eye witnesses recorded under Section 164 Cr.P.C were also quite consistent with their examination in chief recorded in the court and they were found firmed in all material aspect during cross examination. Minor contradictions and or discrepancies not fatal to the prosecution case cannot be considered crucial to dislodge and extricate their evidence. It is the responsibility of court in the administration of criminal justice that while appreciating the evidence the court has to take into consideration whether the contradiction or the alleged dishonest improvement have such enormity and weightiness that may materially affect the trial or not? The minor contradictions or alleged improvements having no aptitude or capacity to cause any dent to the prosecution case cannot be made the basis to rebuff or eliminate the whole evidence but in-depth, extensiveness and in composite form, the court has to get the drift of the credibility of witnesses after taking into

consideration entire evidence led by the prosecution to judge whether it is untruthful, dishonest and untrustworthy?. The inconsequential and trivial disparities cannot extinguish the entrenched intrinsic value of the evidence. The law of evidence, also known as the rules of evidence, encompasses the rules and legal principles that govern the proof of facts in a legal proceeding. These rules determine what evidence must or must not be considered by the trier of fact in reaching its decision. Fiat Justitia is the catchphrase of the court which means let justice be done. Appreciation of evidence involves weighing the credibility and reliability of the evidence presented in the case. In order to appreciate the ocular testimony, the court has to bear in mind that the presence of such witness or witnesses at the time and place of the occurrence is not doubtful and they have no reason to omit the real culprits and implicate falsely the accused persons. Undeniably, the evidence of witnesses has to be weighed and tested whatever their numerical strength be. If the case against the accused rests on the evidence only of a single witness to the crime and his testimony is entitled to full credit, that evidence would be sufficient to sustain conviction. The question of corroborative evidence would not then arise at all. It is a sound and well-established rule of law that the court is concerned with the quality and not with the quantity of the evidence necessary for proving or disproving a fact. Motive is the reason which induces and actuates a man to do a certain act. However, motive, though an important factor, adequacy or absence of motive may not affect the merits of a case, if there is positive evidence as to the crime which brings home the guilt of the accused. So far as the principle of constructive liability is concerned viz. a viz. Section 34, P.P.C, if several persons would unite with common purpose to do any criminal offence, all those who assist in the completion of their object,

would be equally guilty. Foundation for constructive liability was the common intention in meeting the accused to do the criminal act and the doing of such act in furtherance of common intention to commit the offence. In order to constitute an offence under section 34, P.P.C., it is not required that a person should necessarily perform any act with his own hand. If several persons had the common intention of doing a particular criminal act and if, in furtherance of their common intention all of them join together and aided or abetted each other in the commission of an act, then one out of them could not actually with his own hand, do the act but if he helps by his presence or by other act in the commission of an act, he would be held to have himself done that act within the meaning of section 34, P.P.C. Paramount consideration is whether the offence has been committed in furtherance of common object. In the case in hand all appellants followed/chased the deceased and their presence at the scene of crime was also corroborated by the eye witnesses' with their roles as a result of which a young man lost his life.

38. We have also perused exhaustively the testimony of the defence witnesses. Nawab Imdad Ali Talpur, father of Siraj Talpur and Sajjad Talpur stated that on fateful day, his sons Siraj Talpur and Sajjad Talpur were studying at home. The complainant and his wife came to meet him and complained the misbehavior of his cook to Ms.Maha. He assured the complainant that tomorrow he will terminate the servant Ghulam Murtuza Lashari from his job who was employed only two days back. He stated in his examination in chief that in the morning, he left Country Club Apartments for Hyderabad with his both sons but nothing was said whether the job of servant was terminated nor he disclosed that whether he left the servant in the apartment while moving on 25.12.2012.

During cross examination, he stated that he has no enmity with the prosecution witnesses. The crux of his evidence is that his both sons were not involved in any crime and they were not present at the place of incident. No concrete evidence in defence was produced to have faith in that at the time of bickering his both sons were not present and they did not leave their apartments with other convicts Shahrukh Jatoi and Ghulam Lashari in silver colour car of Shahrukh Jatoi. If prosecution did not feel it appropriate to add the evidence of CCTV footage of bickering to bring to light the presence of appellants and deceased Shahzeb being satisfied with the quality of ocular testimony, then defence could have produced CCTV footage if any recorded in the Country Club Apartments at the time of bickering so also the CCTV footage of the time when Nawab Imdad Ali Talpur allegedly departed from Country Club Apartments with his sons. The best evidence in defence was withheld. Quite the opposite, eye witnesses were unbendingly testified the whole narrative which we have already discussed supra including the bickering at the apartment. Appellant Shahrukh Jatoi had also produced his witness Izhar-ul-Haq who came to testify that he resides at F.No.12/C Street-19, Badar Commercial on rental basis and used to park his car at Plot No. 5/C being an open plot where some machinery and pipes were installed from 18/19 December 2012 to 15th January 2013 for soil testing. He further stated that due to installation of machine no vehicle could be parked there in the above period. This solitary evidence cannot rebuff the prosecution case that on pointation of Shahrukh Jatoi weapon was recovered from the vehicle parked at an open plot. The same appellant also produced Ashraf Ali, who stated that on 24.12.2012, he along with his uncle Ghulam Akbar Jatoi and Akbar Ali Jatoi went to airport at 9.00 P.M and reached air port at about 9.45 P.M. The flight

was scheduled for 12:35 a.m. (25.12.2012). He further stated that the appellant Shahrukh Jatoi was with him at airport till departure of the flight. On the other hand, the learned counsel for Shahrukh Jatoi in the cross-examination of the eye witness Muhammad Shah given him a suggestion that Shahrukh Jatoi was not available at the crime scene during the incident as at that time he was buying meal from KFC which was denied by the eye witness, this suggestion is itself sufficient to disintegrate the plea that Shahrukh was at airport with the said witness. This defence witness further admitted that he has not produced any CCTV footage or other proof to show that appellant Shahrukh Jatoi was with him at the airport. He further admitted that appellant Shahrukh Jatoi is his younger brother. The next defence witness was Maj. Retd. Syed Asif Nabi, Deputy Director, DHA. He only came into the witness box to testify his signature on soil testing permission which was valid from 19.12.2012 to 15.01.2013. Nothing was said by him that for such a long period soil testing may continue. He further stated that no intimation was given to him by the owner that machinery was installed for soil testing purpose at the said plot during the said period. The next defence witness Muhammad Iqbal son of Muhammad Khan who stated that on the intervening night of 24th & 25th December, 2012 at about 11:30 p.m. or 11:45 p.m., he went to market for buying grocery items. He further avowed that car was collided to house No. 44/1/1 and rested on the side and within few minutes, the area people also gathered meanwhile black colour Corolla came there, three persons disembarked from it and along with police, he uplifted the injured driver and put him in the rear seat of black colour car, blood was oozing from the said fellow, black colour car driver told him that they are taking the injured to Ziauddin Hospital. According to this witness, he was very much willing to give his statement to the

police but it was not recorded, however, in the cross examination he admitted that he never endeavored to go to the police for recording his 161 Cr.P.C. statement. He further admitted that he never informed Muhammad Mobeen, I.O of the crime to have witnessed the incident so record his statement. Though he stated that people of vicinity also gathered but we noted that he has not given the name of any person from neighborhood who had also witnessed the incident. Another defence witness, Gulzar Ahmed stated that on 24.12.2012 at about 9:00 p.m. he went with Akbar Jatoi, Azhar Jatoi, Ashraf Jatoi and Shahrukh Jatoi to the airport. Akbar Jatoi, Azhar Jatoi and Ashraf Jatoi went inside the terminal at about 0030 a.m. (25.12.2012). They made telephone call to the driver and informed him that they are boarding thereafter, this witness, Shahrukh Jatoi and driver came back at the bungalow of Shahrukh Jatoi. However, he further admitted that he has not produced any CCTV footage. The evidence of this witness is also contradictory to the suggestion that Shahrukh went to buy KFC meal. He further admitted that Sikandar Jatoi is his friend. All defence witnesses in association made every effort to set up that the appellants were not present at the scene of crime but in nutshell no trustworthy evidence was produced to catch the attention of plea of alibi. On the contrary, the eye witness account unambiguously brings to light the presence of appellants at the scene of crime and their evidence is inspiring confidence.

39. Alibi is a Latin word, which means elsewhere. It is used when the accused takes the plea that when the occurrence took place he was elsewhere. In such a situation the prosecution has to discharge the burden satisfactorily. Once the prosecution is successful in discharging the burden it is

incumbent on the accused who takes the plea of alibi to prove it with absolute certainly. The plea of alibi has to be taken at the earliest opportunity and it has to be proved to the satisfaction of the court. While weighing the plea of alibi, the same has to be weighed against the positive evidence led by the prosecution. The constituents and barebones are that the accused has to plead his presence somewhere else at the time of offence; physical impossibility of accused's presence at scene of offence due to his presence at some other place. Well-structured, convincing and credible evidence is de rigueur to bear out. The accused has to raise commonsensical suspicion in mind of court vis-à-vis his sharing in the offence to get benefit of doubt against indictment. The pith and substance lead us to finale that guilt cannot be inferred from making of false plea of alibi but at the same time the accused is not entitled to ask for the benefit as a result of plea of alibi unless reasonable doubt is created in the mind of court concerning accused's involvement in the commission of offence.

40. The recent unreported order dated 4.3.2019 shows that the honourable Supreme Court vide Criminal Miscellaneous Application No. 200 of 2019 in Criminal Appeal No. 238-L of 2013 issued notice to Police Constable Khizar Hayat son of Hadait Ullah on account of his false statement made before the trial court in a criminal case. The apex court held in main appeal that prosecution had failed to prove its case against the appellant beyond reasonable doubt therefore, the appeal was allowed and conviction and sentence of the appellant was set aside and he was acquitted of the charge by extending the benefit of doubt. The apex court however before parting with the judgment found that *Khizar Hayat (PW8) was at the time of the incident serving as a Police Constable at Police Station Wahdat Colony, Lahore and he had claimed to have seen the*

occurrence taking place at about 07.30 P.M. on 13.10.2007 in village Bathanwala in the area of Police Station Rayya Khas, District Narowal. Muhammad Waris, Moharrir/Head Constable (DW1) had appeared before the trial court and had produced official record of Police Station Wahdat Colony, Lahore quite categorically establishing that Khizar Hayat (PW8) was not on leave and was present at his duty at Police Station Wahdat Colony, Lahore at the time when the present occurrence had taken place in the area of Police Station Rayya Khas, District Narowal. [emphasis applied] The apex court held that deeper issue involved in the matter relates to the fact that the rule *falsus in uno, falsus in omnibus* had in the past been held by the superior Courts of this country to be inapplicable to criminal cases in Pakistan which had gradually encouraged and emboldened witnesses appearing in trials of criminal cases to indulge in falsehood and lies making it more and more difficult for the courts to discover truth and dispense justice. In paragraph 4, the apex court explicated that *Falsus in uno, falsus in omnibus* is a Latin phrase meaning "false in one thing, false in everything." The rule held that a witness who lied about any material fact must be disbelieved as to all facts because of the reason that the "presumption that the witness will declare the truth ceases as soon as it manifestly appears that he is capable of perjury" and that "Faith in a witness's testimony cannot be partial or fractional". The honourable Supreme Court has also referred to Pakistan Penal Code, 1860 (PPC) which contains many offences dealing with perjury and giving false testimony. The honourable supreme court has concluded as under:

> **"21. We may observe in the end that a judicial system which permits deliberate falsehood is doomed to fail and a society which tolerates it is destined to self-destruct. Truth is the foundation of justice and justice is the core and bedrock of a civilized society and, thus, any compromise on truth amounts to a compromise on a society's future as a just, fair and civilized**

society. Our judicial system has suffered a lot as a consequence of the above mentioned permissible deviation from the truth and it is about time that such a colossal wrong may be rectified in all earnestness. Therefore, in light of the discussion made above, we declare that the rule *falsus in uno, falsus in omnibus* shall henceforth be an integral part of our jurisprudence in criminal cases and the same shall be given effect to, followed and applied by all the courts in the country in its letter and spirit. It is also directed that a witness found by a court to have resorted to a deliberate falsehood on a material aspect shall, without any latitude, invariably be proceeded against for committing perjury".

41. In our judgment, the prosecution had established the charge and there is no illegality or wrongfulness in the impugned judgment. Nothing is on record to believe or doubt the presence of eye witnesses at the place of incident or to mull over or contemplate their statements false consistent with the principle of falsus in uno, falsus in omnibus which is now in line with the aforesaid dictum of the Apex Court has become an integral part of our jurisprudence in criminal cases which is to be given effect to, followed and applied by all the courts in the country in its letter and spirit and also has binding effect under Article 189 of the Constitution of Islamic Republic of Pakistan.

42. Now we would dilate upon the effect of compromise. It appears from the record that in all Criminal Appeals, separate applications were filed under Section 345(6) Cr.P.C duly signed by counsel for the appellants and counsel for the complainant on the ground that the legal heirs of deceased Shahzeb pardoned the appellants and have no objection if they are acquitted by this court. The Performa for effecting the compromise under Qisas and Diyat Ordinance was also filed duly signed by the complainant Aurangzeb Khan (father of deceased) Mst. Ambreen (mother of deceased), Ms. Maha (sister of the deceased) and Ms. Parishay Waqas (sister of deceased) and the appellants i.e. Shahrukh Jatoi, Nawab Siraj Talpur, Nawab Sajjad Talpur and Ghulam Murtaza Lashari (all

convicts), the proforma was also signed by the counsel for the complainant and appellants. On 01.07.2014, the compromise applications were fixed for orders when the learned counsel for the appellants referred to the Judgment passed by the hon'ble Supreme Court reported as PLD 2014 SC 383 in which case also the punishment was awarded under section 302 PPC and Section 7 of the ATA Act but the compromise was accepted by the Supreme Court and death sentence was converted into life imprisonment. The divisional bench sent the matter to the learned trial court for holding an inquiry and submit the report. Along with the application, the legal heirs of the deceased Shahzeb also attached their affidavits duly verified by Identity Section Management System (ISMS) of this court.

43. In all affidavits, the legal heirs clearly stated that they have pardoned the appellants outside the court without any pressure, coercion and interest but in the name of Allah. They also waived the right of Qisas and Diyat and endorsed their no objection if this court acquits the appellants. The contents of all affidavits are same. For the ease of reference, the contents of affidavit of complainant are reproduced as under:-

"AFFIDAVIT

I, Aurangzeb Khan s/o Shahjahan Khan, Muslim, adult, residing at Flat no. E-11, Country Club Apartment, Phase VI, D.H.A., Karachi, do hereby state on oath as under:

1. I say that I am the father of the deceased Muhammad Shahzeb Khan and the complainant in the above matter, hence fully conversant with the facts of the same.

2. I say that I and the other family members have pardoned the Appellant outside the Hon'ble Court without any pressure, coercion or interest but in the name of Allah.

3. I say that I and the other legal heirs of the deceased Muhammad Shahzeb Khan have waived the right of Qisas and Diyat.

4. I say that I have no objection, if this Hon'ble Court acquit the above named Appellant in the larger interest of justice.

5. I say that whatever stated above is true and correct to the best of my knowledge and belief.

Karachi
Dated: 17.07.2013 **Sd/**

DEPONENT

The deponent is identified by me.

Sd/.
ADVOCATE"

44. In order to ascertain the veracity, authenticity and genuineness of the compromise, learned trial court also recorded the statements of the complainant Aurangzeb Khan, Mst. Ambreen, mother of deceased and Maha Khan, sister of deceased, however, Parishay Khan, another sister of deceased sent same statement duly signed by her and attested by Counselor Attaché, High Commission for Pakistan, London on 02.09.2014. The statement of complainant which is identical to the statement of Mst. Ambreen, Parishay Khan and Maha Khan is reproduced as under:-

"STATEMENT ON OATH
I do statement on Oath of Allah:-

MY NAME IS:	**Aurangzeb Khan**
MY FATHER'S NAME:	**Shahjehan Khan.**
RELIGION:	**ISLAM**
CASTE:	**Yousifzai Pathan**
AGE ABOUT:	**53 YEARS**
OCCUPATION:	**DSP.**
RESIDENCE:	**E/11/7, Country Club Apartment, Phase-V, DHA**
DISTRICT:	**Karachi South**
DATE:	**24.07.2014**

I am father and one of the legal heir of the deceased namely Shahzaib. He was my son. He has left behind him the following legal heirs besides me:-

Mst. Ambreen mother of deceased

Miss Maha sister of deceased

Miss Parishay Waqas, sister of deceased

There is no other legal heirs of the deceased except above named legal heirs. I further stated on oath that I have forgiven the accused Shahrukh Jatoi s/o Sikander Jatoi, Nawab Siraj Talpur s/o Nawab Imdad Ali Talpur, Nawab Sajjad Talpur s/o Nawab Imdad Ali Talpur and Ghulam Murtaza Lashari in the name of Al- Mighty Allah without taking any consideration or amount of diyat, to the extent of my share being legal heirs of above named deceased, without any coercion pressure or threats and with my own free will and consent. I have nothing to say except above.

Sd/- 24-7-2014
Aurangzeb Khan s/o Shahjahan Khan

Sd/-24/7/2014
(Saleem Raza Baloch)
Judge,
Anti-Terrorism Court No.III,
Karachi.

45. After due verification with regard to the genuineness of compromise, the learned trial court submitted the report in this court on 23.09.2014 as under:-

> **"I have the honour to submit that in compliance of the order dated 01.07.2014 for holding inquiry regarding genuineness of compromise. I recorded statements on oath of the legal heirs namely Aurangzeb Khan (father of deceased), Mst. Ambreen (mother of deceased), Miss Maha (sister of deceased), whereas, statement on oath of Mrs. Parishay Waqas (sister of deceased) received from United Kingdom (UK) through High Commission of Pakistan (London) duly signed by the legal heirs of Mrs. Parishay Waqas and Mazhar Hussain, Consular Attaché, High Commission of Pakistan, London.**
>
> **All the above named legal heirs of the deceased Shahzeb s/o Aurangzaib Khan in their respective statements on oath stated that they are legal heirs of deceased, there is no other legal heir of the deceased and they have forgiven the accused Shahrukh Jatoi s/o Sikander Jatoi, Nawab Siraj Talpur s/o Nawab Imdad Ali Talpur, Nawab Sajjad Talpur s/o Nawab Imdad Ali Talpur and Ghulam Murtuza Lashari in the name of "Al-Mighty of Allah" without taking any consideration or amount of Diyat, to the extent of their respective shares being legal heirs of above named deceased. Publication in daily English newspaper The Nation, Daily Urdu newspaper Jang and daily Sindhi newspaper Ibrat is also published for inviting any objection on the compromise application, but none appeared to file objections on the application of compromise till today.**
>
> **Accordingly in view of statements made by above mentioned legal heirs of the deceased Shahzeb, I am of the humble opinion that the compromise between parties is genuine.**
>
> **The application u/s 345(ii) Cr.P.C and 345(vi) Cr.P.C along with annexures and statements of the legal heirs of the deceased as very respectfully submitted as desired.**
>
> **Sd. 23.09.2014**
> **(Saleem Raza Baloch)**
> **Judge**
> **Anti Terrorism Court No.III,**
> **Karachi"**

46. In the case of **Ghulam Farid alias Farida vs The State (PLD 2006 S.C. 53),** the apex court discussed two kinds of punishment existed in Islam i.e. "Hadd" and "Tazir". Punishment of Hadd is in the Will of God, whereas any other punishment is called Tazir. It was held that Islam recognized the concept of deterrent punishment and also the theory of Tazir. Islam also recognized the concept of detrimental punishment and also the theory of repentance for the purpose

of reformation and preservation of society and in the light of this concept the offences in the Islamic Penal Laws were also divided into two categories namely compoundable and non-compoundable offences either punishable as Hadd or Tazir. Offences which were compoundable in Islam had also been made compoundable under the statutory law and in compoundable offences it was permissible for the Courts to give effect to the compromise between the parties at any stage of the proceedings before or after the final conclusion of the matter whereas a compromise in non-compoundable offences could not be given legal cover at any stage. Offence of murder punishable with death under Section 302(a), P.P.C. as Qisas and under Section 302(b), P.P.C. as Tazir was compoundable under the law.... Ayat Nos. 178 and 179 of Surah Baqara of the Holy Qur'an also revealed that there was no conflict of the statutory law to the law of Islam regarding forgiveness, as the offence under Section 302, P.P.C. There is a concept of right of "Afw" and "Badal-i-sulh" in a case of Qatl-i-Amd punishable under Section 302(a), P.P.C. as Qisas and this right can also be exercised with permission of Court in a case in which punishment of death is awarded as Tazir under Section 302(b), P.P.C., but the concept of "Afw" and " Badal-i-sulh" under the existing law had not been made applicable to a case under Section 396, P.P.C. in which death was awarded for murder taken place during the course of committing dacoity.

47. In the case of **Muhammad Nawaz Versus The State (PLD 2014 Supreme Court 383),** Criminal Review Petition No.34-L of 2009 in Criminal Petition No.651-L of 2009 was filed. The petitioner faced trial under sections 302/324/148/149/353, P.P.C. read with section 13 of Pakistan Arms Ordinance, 1965 and section 7 of Anti-Terrorism Act, 1997. He was convicted and sentenced to death. The Lahore High Court confirmed the

death sentence. The petitioner approached the apex court against the judgment of the High Court, which was dismissed vide judgment dated August 24, 2009, thereafter he filed review petition in the apex court. During pendency of review petition, the petitioner entered into a compromise with the legal heirs of the deceased and requested Supreme Court in Criminal M.A. 6 of 2011 to accept the compromise and acquit the accused. The apex court held that the question as to whether or not the offence under section 7 ATA, 1997 is compoundable in terms of section 345, Cr.P.C. or the ATA 1997, especially in presence of an earlier judgment maintaining the judgment of the High Court, when the compromise was effected during the pendency of the review petition. The apex court observed that this question is required to be decided keeping in view that as the legal heirs had forgiven the petitioner would he still be liable to capital punishment under section 7 ATA, 1997. In paragraph 9 to 11 of the judgment, apex court held as under:-

> **"9. However, this fact can also not be over sighted that in respect of murder of Muhammad Mumtaz, Constable, the petitioner was also sentenced to death and now the parties have compounded the offence under section 302(b), P.P.C. and according to the record compensation has also been paid. Therefore, question for quantum of sentence under section 7 of ATA can be examined in view of the judgment in the case of M. Ashraf Bhatti v. M. Aasam Butt (PLD 2006 SC 182) wherein after the compromise between the parties sentence of death was altered to life imprisonment.**
>
> **10. It is to be noted that both the sentences i.e. death and life imprisonment are legal sentences, therefore, under the circumstances either of them can be awarded to him. Thus in view of the peculiar circumstances noted hereinabove, sentence of death under section 7 ATA, 1997 is converted into life imprisonment without extending benefit of section 382-B, Cr.P.C. as the same was not allowed by the trial Court, first appellate Court as well as by this Court in the judgment under review.**
>
> **11. Accordingly, compromise between the parties is accepted to the extent of conviction under section 302(b), P.P.C. and the petitioner is acquitted of the charge. However, the death sentence under section 7 of ATA is converted into life imprisonment and the review petition is disposed of……" [emphasis applied]**

48. In the case of **M. Ashraf Bhatti and others versus M. Aasam Butt and others. (PLD 2006 Supreme Court 182)**,

also comprmise was accepted by the apex court, the relevant paragraph is reproduced as under:-

> **"7. In view of the facts that parties have compromised the matter and compensation has already been received by the complainants therefore, permission is accorded to compound the offence under section 345(2), Cr.P.C. Now we would advert to examine whether in the cases like one in hand where brutal murder of two young boys has been committed when they were confined in judicial lock-up, in a shocking manner which has outraged the public conscience, the convicts are liable for punishment on the principle of Fasad-fil-Arz. The facts of the case and material available on record reveal that petitioners/convicts have committed crime in a brutal manner of the deceased who were confined in lock-up. Therefore, considering them sitting ducks, they took the law in their hands, without caring that police stations or Court premises are considered such places where law protects the life of citizens. Therefore, in exercise of jurisdiction under section 311, P.P.C. the sentence of death of the two convicts namely Naheeb Butt alias Bhutto and Moazzam Butt is reduced from death to life imprisonment under section 302, P.P.C. and under section 7(b) of A.T.A. on both the counts. Similarly sentences awarded to Muhammad Aasam and Shahbaz alias Dodi for imprisonment of life under section 302(b), P.P.C. is reduced to 14 years and sentence awarded to them for life imprisonment under section 7(b) of A.T.A. is kept intact on both the counts with benefit of section 382-B of Cr.P.C., which has already been extended to them by the Lahore High Court. Remaining sentences awarded to them are kept intact. All the sentences shall run concurrently. [empahis applied]**

49. In the case of **Shahid Zafar and 3 others Versus The State (PLD 2014 Supreme Court 809) (commonly known as Sarfraz Shah and Rangers Officials Case),** Criminal Appeals were filed by the convicts in the apex court against the Judgment of this court. The learned Trial Court awarded death sentence to Shahid Zafar under Section 302(b), P.P.C. and 7(a) Anti-Terrorism Act 1997. The remaining appellants viz Muhammad Tariq, Manthar Ali, Muhammad Afzal, Baha-ur-Rehman and Afsar Khan were sentenced to imprisonment for life along with fine. According to persecution case, the complainant, Syed Salik Shah was informed by his mother that her son Sarfraz had a quarrel with someone in Shaheed Benazir Bhutto Park where police and rangers personnel were also present. He then went to Police Station Boat Basin where

S.I.P. Zulfiqar Ali duty officer informed him that a young person had been fired at by the rangers in a quarrel at the park which resulted in an injury and he had been taken to Jinnah Hospital. The complainant therefore went to the Jinnah Hospital and found his brother Sarfraz lying dead there in the emergency ward. The apex court held as under:-

> **"8. As to learned Advocate Supreme Court's contention that the incident could not be defined as an act of terrorism, we are quite clear in our minds that such a gruesome murder at the hands of a law enforcing agency would certainly create a sense of terror, insecurity and panic in the minds and hearts of those who were available at the scene and the entire public who had watched this DVD on air. In this regard a reference may be made to the definition of terrorism in Section 6(1)(b) of the Anti-Terrorism Act according to which this is the use or threat of action where the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or create a sense of fear or insecurity in society. In our opinion therefore such definition can be bifurcated into two i.e. where the use or threat is designed to coerce and intimidate or overawe the Government or the public or a section of the public or community or sect or where it creates a sense of fear or insecurity in society. Although the offence under consideration may not have been designed to coerce and intimidate or overawe the Government or a section of the public or community or sect but it certainly created a sense of fear or insecurity in the society. What could be a more grievous and heinous crime then to shoot an unarmed young boy who was begging for his life and thereafter let him bleed to death despite his pleading that he should be taken to the hospital. This certainly did create a sense of fear and insecurity in the public at large and hence we are of the opinion that the appellants were correctly charged, tried, convicted and sentenced under Section 302(b), P.P.C. and section 7(a) of the Anti Terrorism Act, 1997.**
>
> **9. Insofar as the compounding of the offences is concerned by the appellants reached through compromise with the legal heirs of the deceased, it would be seen that Section 7 (a) of the Anti Terrorism Act, 1997 is not compoundable and hence the learned High Court correctly dismissed such compromise applications. Even otherwise we are of the opinion that the cruel and gruesome murder of the deceased who had been begging for his life from the appellants certainly amounted to Fasad-Fil-Arz within the meaning of Section 311, P.P.C. and hence there could not be any question of acceptance of compromise between the parties. However having said as much we are also aware that in the case of Muhammad Nawaz (Supra) this Court had converted the sentence of death to that of life imprisonment under Section 7(a) of the Anti-Terrorism Act 1997 where the legal heirs had compounded the matter with the accused as in the present case. Consequently we would partly allow Criminal Appeal No.8-K of 2014 by directing that the sentence of death imposed upon the appellant Shahid Zafar be reduced to life imprisonment". [Emphasis applied]**

50. The whys and wherefores lead us to a finale that since the legal heirs of deceased Shahzaib have compounded the offense of Qatl-i-amad under Section 302 P.P.C, therefore, along the lines of dictums laid down by the honourable Supreme Court with regard to the impact and effect of compounding offenses under the provisions of Pakistan Penal Code and Anti-Terrorism Act 1997, the Special ATA Appeal No.19 & 25/2013 to the extent of Nawab Siraj Ali Talpur and Shahrukh Jatoi are partly allowed and as a result thereof, the death sentence awarded to Shahrukh Jatoi and Nawab Siraj Ali Talpur is reduced from death penalty to life imprisonment under Section 7 (a) of Anti-Terrorism Act 1997, which is not compoundable. The Conf. Case (A.T.A) 1/2013 is answered in negative. The sentence of life imprisonment awarded to appellants Ghulam Murtuza Lashari and Nawab Sajjad Ali Talpur though compounded under Section 302 P.P.C but these two appellants have also been convicted for life imprisonment under Section 7 (a) of the Anti-Terrorism Act 1997 which is maintained. The Special ATA Appeal No.19/2013 to the extent of (appellant No.2) and Special ATJA Appeal No.24/2013 filed by Ghulam Murtaza Lashari are disposed of accordingly. Whereas the Criminal Revision No.40/2014 filed by Shahrukh Jatoi is dismissed. The sentence awarded to the appellant Ghulam Murtaza Lashari and Shahrukh Jatoi shall run concurrently. The learned trial court has extended the benefit of Section 382-B Cr.P.C to the appellant Shahrukh Jatoi, Nawab Sajjad Talpur and Ghulam Murtuza Lashari, the same benefit is also extended to the appellant Nawab Siraj Ali Talpur. The condition of fine shall remain intact.

Karachi: **Judge**
Dated.13.05.2019

Judge