

Eye witnesses Disbelieved

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CERTIFICATE OF THE COURT IN RECORDS

SINDHI HIGH COURT

Spl. A.A.A. - 45 / 2020.

C.P. Cr. A.A.A. - 3 / 2020

Single / D.B.

Composition of Bench.

Mr. Justice Mohammad Kassim Azhar
Mr. Justice Zulfikar Ali Sangi

Dates of hearing: 2-4-2020

Decided on 15-4-2020

(a) Judgment approved for reporting.

Yes
~~No~~

[Signature]

CERTIFICATE

Certified that the judgment */Order is based upon or enunciates a principle of law */decides a question of law which is of first impression/distinguishes/over-rules/ reverses/explains a previous decision.

*Strike out whichever is not applicable.

NOTE:—(i) This slip is only to be used when some action is to be taken.

(ii) If the slip is used, the Reader must attach it to the top of the first page of the judgment.

(iii) Reader must ask the Judge writing the Judgment whether the Judgment is approved for reporting.

(iv) Those directions which are not to be used should be deleted.

SGP., Kar.—L (iii) 1459—5,000—6-93—T.S.S.

IN THE HIGH COURT OF SINDH KARACHI

A.T.A. Appeal No. 45 of 2004

1. Muhammad Aamir S/o Muhammad Safiullah,
Muslim, Adult at Present Confined in the
Central Prison Karachi.
2. Tariq @ Bata S/o Muhammad Sadiq,
Muslim, Adult, at Present Confined in the
Central Prison
Karachi.....Appellants.

V/s

The State.....Respondent

Appeal U/s 25 of Anti-Terrorism Act 1997

Above Appellants being aggrieved with Judgment dated 15.12.2004 in Special Case No. 25/2003 given by Judge, Anti Terrorism Court No. II Karachi Division Karachi whereby the Appellants have been convicted and sentenced as under:-

- (a) For committing Qatl-e-Amd of deceased Anum Uzair and Muhammad Naeem, an offence punishable U/s 302(b) r/w 34 and r/w section 7 (a) of the Anti-Terrorism Act, 1997, each of the accused Tariq alias Bata S/o Muhammad Sadiq and absconding accused Kala Nazim S/o Muhammad Azam and Raees alias Topi son of Safiudding (in their absentia) are awarded imprisonment for life as ta'zir **on each count;**
- (b) For making murderous assault on P.W. Muhammad Shahid an offence punishable U/s 324 r/w 34 PPC and r/w section 7 (b) of the Anti-Terrorism Act, 1997, each of the accused

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IN THE HIGH COURT OF SINDH AT K A R A C H I .

Spl/ A.T.APPEAL NO. ³ OF 2005

The State through
Advocate-General Sindh, Karachi.....Appellant

Versus.

- (a) 1. Mohammad Aamir S/o Mohammad Safiullah,
2. Tariq @ Bata S/o Mohammad Sadiq,
Both muslim, adults, at present confined in Central Prison,
Karachi;
3. Kala Nazim S/o Mohammad Azam,
4. Raees @ Toopi S/o Safiuddin,
(Both are absconders).....Respondents

F.I.R.No.170/2003 under
Sections 302,324,109/34 PPC
r/w sec.7 of A.T.Act, 1997
P.S. Landhi Karachi (East).

APPEAL UNDER SECTION 25(4) OF THE
ANTI-TERRORIST ACTIVITIES ACT, 1997.

being aggrieved and dissatisfied from the judgment dated:15-12-2004
by the learned A.T. Court No.II Karachi in Spl.CaseNo.25/2003 whereby
Respondents have been convicted and sentenced as under :-

- (a) For committing Qatl-e-Amd of deceased Anum Uzair and
Mohammad Naeem, an offence punishable U/s.302(b) /34 r/w
sec.7(a) of the Anti-Terrorism Act, 1997, each of the accused Tariq
alias Bata S/o Mohammad Sadiq and absconding accused Kala
Nazim S/o Mohammad Azam and Raees alias Toopi S/o Safiuddin
(in their absentia) are awarded imprisonment for life as ta'zir on
each count ;
- (b) For making murderous assault on P.W. Mohammad Shahid, an
offence punishable U/s.324/34/PPC r/w sec.7(b) of the Anti-
Terrorism Act, 1997, each of the accused Tariq alias Bata S/o
Mohammad Sadiq and absconding accused Kala Nazim S/o
Mohammad Azam and Raees alias Topi S/o Safiuddin (in their
absentia) are sentenced to suffer R.I. for 7 years and pay fine of
Rs.1,00,000/- (one lac) eac or in default to undergo R.I. for 6
months moiré ;

Evidence Disbelieved

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IN THE HIGH COURT OF SINDH AT KARACHI

Spl. CrI. Anti-Terrorism Appeal No.45 of 2004.
Spl. CrI. Anti-Terrorism Appeal No.03 of 2005.

Present:

Mr. Justice Mohammad Karim Khan Aglu
Mr. Justice Zulfiqar Ali Sangi,

Appellants: 1. Muhammad Aamir S/o. Muhammad Saifullah through Mr. S. Mehmood Alam Rizvi, Advocate.
2. Tariq @ Bata S/o. Muhammad Sadiq through Mr. Abdul Rasheed Nizamani, advocate.

Respondent: The State through Mr. Saleem Akhtar Buriro, Additional Prosecutor General.

Spl. CrI. Anti-Terrorism Acquittal Appeal No.03 of 2005.

Appellants The State through Mr. Saleem Akhtar Buriro, Additional Prosecutor General.

Respondents: Muhammad Aamir and others through M/s. S. Mehmood Alam Rizvi and Abdul Rasheed Nizamani, Advocates.

Date of hearing: 02.04.2020

Date of Judgment: 15.04.2020.

J U D G M E N T

MOHAMMAD KARIM KHAN AGHA, J:- Accused Muhammad Aamir Khan S/o. Muhammad Saifullah Khan and Muhammad Tarique alias Bata S/o. Muhammad Sadique were tried by learned Judge, Anti-Terrorism Court No.II, Karachi Division, Karachi in Special Case No.25 of 2003 arising out of Crime No.170/2003 u/s. 302/324/109/34 PPC read with Section 7 of Anti-Terrorism Act, 1997 registered at P.S. Landhi, Karachi East. After trial vide judgment dated 15.12.2004 the appellants were convicted and sentenced as under:-

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- (a) For committing Qatl-e-Amd of deceased Anum Uzair and Muhammad Naeem, an offence punishable u/s. 302 (b) r/w 34 and r/w section 7(a) of the Anti-Terrorism Act, 1997, each of the accused Tariq alias Bata S/o. Muhammad Sadiq and absconding accused Kala Nazim S/o. Muhammad Azam and Raees alias Topi son of Safiuddin (in their absentia) were awarded imprisonment for life as Ta'zir on each count.
- (b) For making murderous assault on P.W. Muhammad Shahid, an offence punishable u/s. 324 r/w 34 PPC and r/w section 7(b) of the Anti-Terrorism Act, 1997, each of the accused Tariq alias Bata S/o. Muhammad Sadiq and absconding accused Kala Nazim S/o. Muhammad Azam and Raees alias Topi son of Safiuddin (in their absentia) were sentenced to suffer R.I. for 7 (seven) years and to pay fine of Rs.1,00,000/- (one lac) each or in default to undergo R.I. for 6 (six) months more.
- (c) For causing damage to the Suzuki Hi-roof Van bearing Regn. No.CD-4571 an offence punishable u/s. 427 PPC r/w 7(d) of the Anti-Terrorism Act, 1997 each of the accused Tariq alias Bata S/o. Muhammad Sadiq and absconding accused Kala Nazim S/o. Muhammad Azam and Raees alias Topi son of Safiuddin (in their absentia) were sentenced to suffer R.I. for 02 (two) years and to pay fine of Rs.10,000/- (ten thousand) each or in default to undergo R.I. for 6 (six) months more.
- (d) For instigating/abetting co-accused persons Tariq alias Bata S/o. Muhammad Sadiq and absconding accused Kala Nazim S/o. Muhammad Azam and Raees alias Topi son of Safiuddin to commit the instant offence, an offence punishable u/s 114 PPC, accused Muhammad Aamir Khan son of Muhammad Safiullah Khan was however, awarded lesser sentence i.e. R.I. for 10 years.
- (e) All the four accused persons were directed to pay an amount of Rs.100,000/- (one lac) each out of which Rs.200,000/- (two lac) each be given to the legal heirs of deceased Anum Uzair and Muhammad Naeem respectively as compensation as provided u/s. 544-A Cr.P.C.

All the sentences were directed to run concurrently. The benefit of section 382-B Cr.P.C. has also been extended to the appellants.

2. Being aggrieved and dissatisfied by the judgment passed by learned Judge, Anti-Terrorism Court No.II Karachi Division, Karachi, these appeals have been preferred by the appellants, whereas the State has filed an Appeal for enhancement of sentences to the appellants.

3. The brief facts of the prosecution case in a nutshell are that on 23rd day of June 2003 at about 3:15 pm on the day of the by-election,

NA-255 Landhi, while the process of by-election was in progress, accused Tariq alias Bata and absconding co-accused Raees alias Topi, Kala Nazim and two unknown persons duly armed with T.T. Pistols came opposite Junaid Milk Shop, Bhangi Parrah, 1/D Area, Landhi No.2, Karachi in a Charade car followed by a maroon coloured Honda Civic Car in which accused Muhammad Aamir Khan, leader of M.Q.M. (H) was sitting. Accused Muhammad Aamir Khan instigated/abetted accused Tariq alias Bata and absconding co-accused Raees alias Topi and Kala Nazim and two unknown persons being the members of MQM (H) to kill Muhammad Naeem (complainant), Anum Uzair and Muhammad Shahid alias Papoo belonging to M.Q.M. (Muttahida) who were also present at the above place in connection with by-election in Hi-roof Suzuki Car bearing Registration No.CD-4571 as they were a source of trouble for the above named accused persons during the election process. At the instigation and abetment of accused Muhammad Aamir Khan, accused Tariq alias Bata, absconding co-accused Raees alias Topi, Kala Nazim and two unknown culprits started firing at the passengers of the Suzuki Hi-roof van bearing Registration No.CD-4571 during the course of which the complainant Muhammad Naeem sustained two bullet injuries on his leg and abdomen. Thereafter accused Tariq alias Bata absconding co-accused Raees alias Topi, Kala Nazim and two unknown culprits alighted from the Charade car and went near the above Suzuki Hi-roof van. Absconding co-accused Raees alias Topi and Kala Nazim dragged out Anum Uzair from its co-driver's seat and accused Tariq alias Bata fired at him and caused him serious bullet injuries. After causing bullet injuries to the complainant Muhammad Naeem and Anum Uzair accused Tariq alias Bata absconding co-accused Raees alias Topi, Kala Nazim and two unknown culprits raised slogans "Aamir Khan Zindabad", "they have complied with his directions", then all of them boarded in the said Charade car and drove it away.

4. PWs Muhammad Shahid (driver of the Suzuki Hi-roof van) with the help of Rafi Akbar, Hassan Dilawar and Muhammad Saleem shifted the injured Muhammad Naeem and Anum Uzair to the hospital situated at Korangi No.5, Karachi which provided them with emergency treatment and then they shifted them to the JPMC where injured Anum Uzair

succumbed to his injuries. On receipt of the injured persons at the JPMC, MLO on duty Dr. Kaleem flashed such wireless message at P.S. Landhi which was entered in the Station's House Diary at serial No.32 on 23.06.2003 at 5:10 p.m. by SI Malik Muhammad Amin who in response went to the JPMC and moved letter of request for recording statement of the injured persons upon which he was informed that injured Anum Uzair had expired while the other injured Muhammad Naeem was not in a position to make a statement. Thereafter S.I. Muhammad Amin moved letter of request for permission to inspect the dead body of deceased Anum Uzair and to conduct inquest on it and after getting such permission he inspected the dead body of deceased Anum Uzair and conducted inquest on it on 23.06.2003 at 7:30 pm in the presence of PWs Nasir Hussain and Waqar Hussain and then he moved another letter of request to the MLO for conducting post mortem on the dead body of deceased Anum Uzair and handed over the dead body and papers to the MLO, who after conducting the autopsy, handed over the sealed parcel of blood stained clothes to him and certified cause of death of the deceased Anum Uzair to be hemorrhagic shock on account of gunshot injury on his chest. Thereafter S.I. Muhammad Amin handed over the dead body of deceased Anum Uzair to Nasir Hussain/Mujahid Bhai, cousin of the deceased for funeral and burial under a superdaginama.

5. On 23.06.2003 at 8:30 pm S.I. Muhammad Amin inspected the place of incident wherefrom he seized and secured the Suzuki Hi-roof van bearing Registration No.CD-4571 having holes of bullets and stains of blood on seat cover and foot pad, five empty shells of the bullets of T.T. Pistol and sample of blood and prepared rough sketch of the place of incident in presence of Junaid Ahmed and ASI Javed Bhatti. On 02.7.2003 at 5:45 pm SI Muhammad Amin recorded S.154 Cr.P.C statement of injured Muhammad Naeem at the JPMC which was incorporated by him in 154 Cr.P.C. Book and registered crime No.170/2003 u/s 302/324/109/34 PPC r/w 34 PPC on 02.7.2003 at 6:45 pm and entrusted its investigation to Inspector Allah Bux. Accused Muhammad Amir Khan was arrested in connection with crime No.135/1992 u/s 17(3) Offence Against Property (Enforcement of Hudood) Ordinance, 1979 of P.S. Liaquatabad and was confined at investigation Branch, zone-I, Saddar,

Karachi, wherefrom he was formally arrested in this case by S.I. Chaudhry Muhammad Arif on 08.7.2003 at 09:35 pm in presence of S.I. Muhammad Ajmal and ASI Subhan. On 09.7.2003 injured Muhammad Naeem was shifted to Aga Khan Hospital, Karachi where he was admitted at 10:36 pm. On 12.7.2003 accused Amir Khan was put in identification parade under the supervision of Miss Zabiha Khattak, learned XVIIth Civil Judge/Judicial Magistrate, Karachi East in which he was correctly identified by eyewitnesses Hassan Dilawar, Muhammad Salim and Muhammad Rafi. On 12.7.2003, S.164 Cr.P.C. statements of PWs Hassan Dilawar, Muhammad Salim and Muhammad Rafi were recorded by the learned XVIIth Judicial Magistrate, Karachi East in which they fully implicated the accused persons in the commission of the instant offence.

6. On 13.7.2003 injured Muhammad Naeem expired at the Aga Khan Hospital, Karachi due to severe abdominal infection and multiple bowel injuries and intra-abdominal sepsis caused by firearm. On 14.7.2003 at 09:30 pm S.I. Ch. Arif inspected the dead body of deceased Muhammad Naeem and prepared inquest of his dead body in presence of Muhammad Waseem and Muhammad Ashraf. The blood stained clothes of deceased Anum Uzair, footpad, seat cover and sample of blood were sent to the chemical examiner who reported that (i) Blue coloured Jeans Pant of Deceased Anum Uzair, (ii) Black coloured Paidan (foot pad), (iii) seat covers and (iv) dried blood were stained with human blood. The Suzuki Hi-roof was sent to the Incharge FSL who reported that the entry holes marked on Suzuki Hi-roof van were caused due to the passage of the fired projectiles of firearms.

7. After expiry of the stipulated period the I.O. submitted the charge sheet before the Incharge Administrative Judge, ATCs, Karachi Division Karachi forwarding Muhammad Aamir Khan in custody and placing the names of accused Tariq alias Bata son of Muhammad Sadiq, Raees alias Topi son of Safiuddin and Kala Nazim son of Muhammad Azam in column No.2 with red ink as absconders. On the basis of the charge sheet, Special Case No.25/2003 was registered and it was assigned to the court for disposal in accordance with law.

8. Accused Muhammad Tariq alias Bata having been arrested in connection with crime No.133/2003 u/s. 147/148/149/435 PPC of P.S. Landhi, Karachi was remanded in judicial custody by the learned XIIIth Judicial Magistrate, Karachi East and he was confined at District Jail Malir, Karachi. Following a tip off, the I.O. approached the said learned Court and obtained NOC as well as custody of the accused for only one day viz. 29.09.2003. Subsequently accused Muhammad Tariq alias Bata was arrested in this case.

9. Formal charge was framed and read over to both the accused Muhammad Aamir Khan and Muhammad Tariq alias Bata to which they pleaded not guilty and claimed to be tried.

10. To prove its case the prosecution examined 19 prosecution witnesses and exhibited numerous documents and other items thereafter the side of the prosecution was closed. The statements of the accused were recorded u/s 342 Cr.P.C. in which they denied the allegations leveled against them and claimed false implication on account of political rivalry. Both the accused examined themselves on oath but did not call any witness in support of their defense case.

11. Learned Judge, Anti-Terrorism Court No.II, Karachi, after hearing the learned counsel for the parties and assessment of evidence available on record, vide the impugned judgment dated 15.12.04, convicted and sentenced the appellants as stated above, hence these appeals have been filed by the appellants against their convictions.

12. The facts of the case as well as evidence produced before the trial court find an elaborate mention in the judgment dated 15.12.2004 passed by the trial court and, therefore, the same may not be reproduced here so as to avoid duplication and unnecessary repetition.

13. Learned counsel for the appellant Muhammad Aamir Khan (who is currently on bail) has contended that there was a delay in filing the FIR which lead to the case being concocted against the appellants, that the prosecution eye witnesses are all put up witnesses who were not at the

scene of the offence and cannot be relied upon, that the identification parade is irrelevant as the appellant was a well known person, that there was rivalry between the two groups of the MQM which lead to the false case being concocted against the appellant and that for any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions he has placed reliance on **Shahbaz Khan Jakhrani V Lal Beg Jakhrani** (1984 SCMR 42), **Zarif Khan V The State** (PLD 1977 SC 612), **The State V Safdar and others** (2002 MLD 1698), **Mst. Zahida Bibi V The State** (PLD 2006 SC 255), **Rahim Bakhsh V The State** (1997 P Cr. LJ 1450), **Mureed V The State** (PLD 2002 Karachi 530), **Abdul Majid alias Majha V The State** (1976 P Cr. LJ 545), **The State V. Muhammad Yousuf** (PLD 1974 SC 46), **Waqar Nazir V The State** (2007 SCMR 661), **Muhammad Zubair V The State** (2007 SCMR 437), **Imran Ashraf V The State** (2001 SCMR 424), **Yar Muhammad V The State** (1992 SCMR 96), **Din Muhammad V Abdul Rehman Khan** (1992 SCMR 127), **Bagh Ali V The State** (PLD 1973 SC 321), **Syed Saeed Muhammad Shah V The State** (1993 SCMR 550), **Kazim Hussain Shah V The State** (1972 P Cr. LJ 1012) and **Budho V The State** (PLD 1965 (W.P.) Karachi 76).

14. Learned counsel for the appellant Muhammad Tariq alias Bata has adopted the arguments of learned counsel for the appellant Muhammad Aamir Khan and has additionally contended that the case is a complete fabrication, that there are many contradictions in the evidence of the prosecution witnesses, that the eye witnesses are put up witnesses, that the medical evidence does not support the eye witness evidence, that the appellant was not put before an identification parade despite the eye witnesses not knowing him and only getting a fleeting glance of him at the time of the incident, that despite being innocent the appellant had already spent 17 years in jail and that for any of the above reasons the appellant should be acquitted of the charge by extending him the benefit of the doubt. In support of his contentions in addition to the authorities relied upon by learned counsel for the appellant Muhammad Aamir Khan he has placed reliance on **Mansur Ali V The State** (1970 P Cr. L J 287), **Muhammad Younis V Muhammad Khan** (1999 YLR 2135), **Nooruddin V Nazeer Ahmed** (2011 P Cr. LJ 1370), **Bashir Ahmed V Muhammad**

Siddique (PLD 2009 SC 11) and **Asfandyar Wali V The State** (PLD 1978 Peshawar 38).

15. At the outset we were informed that Muhammed Ahsrat Kazi advocate had been appointed by the State to proceed with this matter. However we had observed from the dairy sheets that the aforesaid learned counsel had not been appearing to argue this case for many dates. Again once again today despite the learned counsel being given direct intimation notice and a reminder to his clerk he was called absent without intimation. While going through the record of this case we observed that one of the appellants, Tarique alias Bata had been in jail for around 17 years without his appeal being heard. Under these circumstances and in the interests of justice with the consent of Dr.Faiz H.Shah Learned Prosecutor General Sindh Mr.Saleem Akhtar Buriro Additional Prosecutor General Sindh was directed to argue this case on behalf of the State instead of Mr Kazi because in both our view and his view it would not be fair to keep appellant Tarique alias Bata's appeal pending any longer keeping in view Article 10 (A) of the Constitution which in our view includes the right to an expeditious hearing of an appeal as well as trial since an appeal is in effect a continuation of a trial.

16. The Learned Additional Prosecutor General has fully supported the impugned judgment. In particular he has contended that the FIR was lodged promptly keeping in view the injuries caused to Naeem who was the complainant and later expired and as shown by medical certificates he was not in a position to record his S.154 Cr.PC statement any earlier and as such any delay in lodging the FIR has been explained, that all 4 PW eye witnesses are reliable, trustworthy and confidence inspiring and have correctly identified both of the appellants and the roles which they played in the double murder at the scene of the offense, that all the PW's corroborate each other in all material respects and as such the prosecution has proved its case beyond a reasonable doubt and both the appeals should be dismissed and the sentences enhanced to that of the death penalty with respect to each appellant. When he was confronted by the court he did however concede that according to the evidence there was

rivalry and enmity between the two groups of the MQM and at the time of the incident the appellants belonged to one group and the complainant party and the eye witnesses belonged to the other group.

17. We have heard the arguments of the learned counsel for the parties, gone through the entire evidence which has been read out by the appellant, the impugned judgment with their able assistance and have considered the relevant law including that cited at the bar.

18. In our view after our reassessment of the evidence based on the evidence of the PW's especially, PW MLO, post mortem reports and other medical evidence, PW police witnesses and IO, recovery of empties on the spot and Hi roof van and positive chemical report we are satisfied that the prosecution has proved beyond a reasonable doubt that on 23.06.2003 at about 3.15 pm on the day of the by election for NA 255 Landhi opposite Junaid Milk shop, Bhangi Parrah 1/D Area , Landhi No.2 Karachi persons in a charade car forced by firing at it a Suzuki Hi Roof van bearing Registration CD 4571 to stop and persons in the charade car got out and then fired upon the persons sitting in the Hi-Roof van and injured Muhammed Naeem (the complainant in the case) by firearm who later died in hospital as a result of the firearm injuries and in effect was murdered by such persons who also dragged Anum Uzair out of the van and shot him with firearm and thereby murdered him on account of political rivalry during the election for NA 255 Landhi.

19. The issues therefore, in our view, left before us are (a) whether appellant Muhammed Amir Khan instigated the murders of Muhammed Naeem and Anum Uzair by appellant Muhammad Tarique alias Bata and others and (b) whether appellant Muhammad Tarique alias Bata was one of the persons who shot and murdered by firearm either or both of Muhammed Naeem and Anum Uzair who were either in or were dragged outside the Suzuki Hi Roof van Registration CD 4571 on 26.06.03.

20. In our view after our reassessment of the evidence we find that the prosecution has **NOT** been able to prove beyond a reasonable doubt that (a) appellant Muhammed Amir Khan instigated the murders of

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Muhammed Naeem and Anum Uzair by appellant Muhammad Tarique alias Bata and others and (b) that appellant Muhammad Tarique alias Bata was one of the persons who shot and murdered by firearm either or both of Muhammed Naeem and Anum Uzair who were either in or were dragged outside the Suzuki Hi Roof van Registration CD 4571 on 26.06.03. for the following reasons;

(a) It is trite law that an FIR must be lodged with promptitude in order to give it reliability and credibility unless such delay can be explained. It is regarded as the cornerstone of the prosecution case which gets the ball rolling in a criminal case. In this respect reliance is placed on **Khalid Javed V State** (2003 SCMR 1419). In this case the incident took place on 23-06-2003 and yet the S.154 Statement of deceased complainant Muhammad Naeem which formed the basis of the FIR was recorded on 02-07-2003 i.e **after a delay of 9 days**. The prosecution has tried to justify this delay based on the fact that the complainant Muhammad Naeem was so seriously injured that it was not possible to record his S.154 statement before this time. Admittedly, the complainant Muhammad Naeem was seriously injured after the attack and he was operated on and kept in the ICU. PW 5 Dr. Kaleem who was the MLO who first received the injured Muhammed Naeem at JPMC in his cross examination on admitting the complainant to JPMC states that, *"In fact he was in a position to make a statement."* Even his MLC reveals that on admission to the JPMC he was conscious. Thus, his S.154 statement could have been recorded without delay. Even otherwise there is no evidence to suggest that the complainant was completely comatose and unable to make a statement before 02-07-03. Furthermore, it was not necessary that the S.154 statement be made by the complainant. It could have been made by any one of the PW eye witnesses who all in their evidence stated that they took the injured to the hospital. Even the police could have registered the FIR. In short there was no need to wait for the complainant to gain consciousness before recording his S.154 statement. He may have even never have regained consciousness and died. Was the registration of the FIR to be held hostage to when the complainant was conscious and well and in effect delay the formal start of the investigation? This was completely unnecessary and in our view does **not** adequately explain the delay in registering the FIR **after a lapse of 9 days** especially as there were others available who could have readily and quite capably registered the FIR as they were well aware of the basic facts of the incident. In this respect reliance is placed on **Muhammed Younis** (Supra) For example, PW 12 Muhammed Shahid who was actually driving the vehicle at the time of the attack. The basic concept behind lodging an FIR promptly is to ensure that there is no time for consultation and concoction between the complainant and the police and any other third party who might want to fix a person in a false case. In the context of this case where admittedly the accused were arch political rivals of the deceased and the eye witnesses it was essential that the FIR was

lodged without delay. Admittedly there was enmity between the parties which gave the complainant party and the police time to consult and concoct a false case against the accused and the accused in our view were prejudiced by such delay in lodging the FIR. It has been held that a delay of one hour in lodging an FIR may be fatal to the prosecution case based on the particular facts and circumstances of the case. In this respect reliance is placed on **Zeeshan @ Shani V State** (2012 SCMR 428). Thus, in our view the delay in lodging the FIR has not been adequately explained **which is near fatal** to the prosecution case. In this respect in the case of **Farman Ahmed V Muhammed Inayat** (2007 SCMR 1825) it was held as under in respect of a 17 hour delay in lodging the FIR in the presence of eye witnesses at Para 6 P.1828 as under:

"We have considered the submissions made by learned counsel for the parties and perused the record. It is admitted fact that incident took place on 30.6.1993 at 7-15 a.m. whereas FIR was got registered on a written complaint on 1.7.1993 at 12-10 a.m. The place of occurrence is at a distance of 10 miles from the police station. The FIR was lodged by the complainant after considerable delay of 17 hours without explaining the said delay inspite of the fact that complainant had stated in the written complaint that there was two eye-witnesses at the spot and none of them informed the police before filing a written complaint by the complainant. 17 hours delay in FIR provides sufficient time for deliberation and consultation when complainant has given no explanation for delay in lodging the FIR. It is enough time for complainant to fabricate the story, therefore, possibility cannot be ruled out qua false implication of the respondent. It is also a settled law that delay of 17 hours in making FIR not explained leads to inference that the occurrence was unwitnessed. It is also a settled law that unexplained delay in registration of FIR specially when the place of occurrence is at distance of 10 miles from the police station and there were two other eye-witnesses present at the spot along with the complainant, therefore, such situation indicates that the eye-witnesses were procured and induced to the eye-witnesses, therefore, finding of the learned High Court that neither the complainant nor the eye-witnesses were present at the spot. We do not find any infirmity or illegality in the finding recorded by the learned High Court in para.7 of the impugned judgment." (bold added)

(b) In our view the **foundation of the prosecution case** against the appellant is built on the evidence of the PW eye witnesses. There are 5 eye witnesses. (a) PW 1 Junaaid Ahmed who witnessed the incident outside his milk shop. He was a natural witness who had no affiliation with any political party and was unable to identify the appellants. In our view he was not a chance witness and we believe his evidence. (b) PW 12 Muhammed Shahid who was driving the Hi Roof Van at the time when two of his passengers were shot (c) PW 13 Muhammed Saleem who was busy in electioneering when he witnessed the incident (d) PW 14 Rafi Akbar who was also busy electioneering when he witnessed the incident and (e) PW 17 Hasan Dilwar who was also busy electioneering when he witnessed the

incident. After a careful consideration of the evidence on record and the relevant law we find that **we disbelieve** the eye witness evidence of (b) PW 12 Muhammed Shahid who was driving the Hi Roof Vehicle at the time when two of his passengers were shot (c) PW 13 Muhammed Saleem who was busy in electioneering when he witnessed the incident (d) PW 14 Rafi Akbar who was also busy in electioneering when he witnessed the incident and (e) PW 17 Hasan Dilwar who was also electioneering when he witnessed the incident in correctly identifying appellants Muhammed Amir Khan and Muhammad Tarique alias Bata as we do not consider the evidence of any of these eye witnesses to be reliable, trustworthy or confidence inspiring and **we cannot safely rely on their evidence in terms of them correctly identifying the appellants at the scene or even being at the scene of the incident for the following reasons;**

Firstly in respect of appellant Muhammad Tarique alias Bata;

- (i) There are doubts that these eye witnesses a part from PW 12 Muhammed Shahid who was driving the van are natural witnesses as the others came from different parts of Karachi in some cases as per PW 14 eye witness Rafi Akbar from Gulshan-e-Iqbal which was around 25 KM's away and takes over one and a half hours to reach Landhi according to his own evidence and none of them had any reason to be outside the milk shop where the incident occurred at that particular time. They **might** be seen as natural witnesses only on the basis that they were all out electioneering for a common cause but this appears to be unlikely when we consider what is set out below and especially the fact that there was no polling station near Junaid Milk shop where the incident occurred with the nearest polling station being one KM away as admitted by eye witness PW 13 Muhammed Saleem during his cross examination.
- (ii) All of these eye witnesses belonged to the same political party as the deceased and were electioneering with them for a common cause yet none of them registered the FIR even when it became apparent that complainant Muhammed Naeem may not have been able to do so as he was seriously injured. This includes PW 12 Muhammed Shahid who was the driver of the van when it was attacked. Surely, they would have wanted the investigation against their injured friends and colleagues to get started without delay especially as they **already knew** that appellant Muhammed Amir Khan had instigated the murders (who they knew by face) as they **saw him** at the scene of the incident and **heard him** give the orders to kill their friends in the Hi-roof van according to their evidence. Their failure to lodge the FIR based on the particular facts and circumstances of

this case does not appeal to logic, reason or common sense. In this respect reliance is placed on **Fayyaz Ahmed V State** (2017 SCMR 2026)

- (iii) All the above eye witnesses including PW 12 Muhammed Shahid who was driving the van took the injured to hospital by stopping a Suzuki. The question arises why they did not use the van to transport the injured to hospital which PW 12 Muhammed Shahid could have driven especially as he was its driver and was uninjured and the injured Muhammed Naeem was already sitting in the back of that van. What was the need to stop a Suzuki van which only delayed taking the injured to hospital? Even otherwise it appears that no one saw any of these eye witnesses at either Korangi Hospital or Jinnah Hospital after the incident. No document such as inquest report is signed in their name at either of the hospitals. No blood stained clothes were recovered from them to show that they took the injured to the hospital. They also did not wait to see whether their critically injured friend and complainant Muhammed Naeem would live or die. Instead they just slipped away from the hospital without telling any one about the incident for around 11 to 12 days which raises doubts that they ever transported their injured colleagues from the scene of the offence to the hospital and were even actually present at the scene of the incident. Again such conduct does not appeal to logic, reason or common sense. In this respect reliance is again placed on **Fayyaz Ahmed V State** (2017 SCMR 2026)

- (iv) What is **even more damning** in our view is that none of these eye witness who **knew** that appellant Muhammed Amir Khan had instigated the murder of their friends and fellow party workers came forward and gave his S.161 statement to the police until 3 to 4-07-03 **which is 10 to 12 days after the incident**. Such silence has not been explained at all and under the circumstances is quite inexplicable. It has been held that a delay in an eye witness recording his S.161 Cr.PC statement after 48 hours has been fatal to the evidence of that eye witness unless a good explanation is given. In this case no explanation is given for such delay. The inference is that the eye witnesses were busy cooking up a false case against the accused. In this respect reliance is placed on **Muhammed Asif V State** (2017 SCMR 486) and **Farman Ahmed** (Supra)

- (v) It is also rather co-incidental that all the above eye

witnesses came forward to record their S.161 statements at around the same time rather on different dates and that their statements are almost identical which again gives a strong indication that they were cooking up a false case against the accused while the FIR was being delayed.

- (vi) Again it also appears some what co-incidental that the police had no idea about who was involved in the offence until the FIR was lodged on 02.07.03 however on the very next day on 03-07-03 when the new IO PW 13 Muhammed Arif was appointed all of a sudden out of the blue all the eye witnesses come forward and their S.161 statements implicating the appellants are recorded as if on cue. How did the police all of a sudden come to know about the availability of all 4 PW eye witnesses at the same time who had all remained mum for 11 to 12 days after the incident? It was even suggested during cross examination that all the witnesses were sent by the appellant's rivals the MQM and that the MQM advisor of Home Department ordered the IO to record their statements and that he had assured his superiors that he would fix the appellants in this false case. It is to be noted that the rival MQM party was a part of the Government of Sindh at that time. Even eye witness PW 14 Rafi Akbar states during his cross examination, *"Police had contacted me in respect of this offence on 01.07.2003 or 02.07.2003. On that day a messenger came at my house and passed on the message to my family member that I should contact P.S. Landhi in connection of some matter. On receiving the above message from my mother on my return to my house, I immediately contacted my MARKAZ '90" as to why I have been called at P.S. Landhi, they directed me to approach P.S. Landhi."*(bold added). Like wise an extract of the cross examination of eye witness PW 17 Hasan Dilwar by counsel for appellant Muhammad Amir Khan is reproduced as under,

"I joined MQM in year 1987. When I was inducted in MQM at that time Mr. Afaq was the Zonal Incharge. I do not know which office Muhammad Amir Khan was holding at that time in MQM. The division had taken place in MQM perhaps in the year 1991. It is correct that one faction of the MQM headed by Mr. Altaf and other headed by Mr. Afaq. Amir Khan had joined the faction of Mr. Afaq. Where I remained with the MQM Altaf group. It is correct that presently the faction of Mr. Altaf is part of the Sindh Government. It is correct that the Home Minister Sindh is from the party of MQM Altaf group. The Governor of Sindh was also a party member of Altaf group. One or two days before my statement was recorded by police I was directed by Markaz-90

of Muttahida Quami Movement to go and appear before police for recording my statement. On 03.07.2003, I had gone to P.S. Landhi for giving my statement but I do not remember the exact time. I had not informed the I/O about my arrival of P.S. Landhi for giving statement. When I went to PS Landhi I/O was present and recorded my statement within one hour."(bold added)

In our view this evidence of these PW eye witnesses **strongly indicates** that they were working on the instructions of the MQM HQ at 90 Markaz in preparing statements against the appellants over a period of 11 to 12 days **after** the incident in order to falsely implicate them in this offense.

- (vii) It is notable that during the evidence of all these eye witnesses, including in the delayed FIR by the complainant, **significant improvements** were made in their S.161 statements and S.164 statements as shown by numerous confrontations through these statements during their cross examinations which can be considered as dishonest improvements in order to improve the prosecution case. In this respect reliance is placed on **Muhammed Saleem V Shabbir Ahmed** (2016 SCMR 1605) and **Mst Rukhsana Begum V Sajjid** (2017 SCMR 596). For example an extract of the cross examination of eye witness PW 14 Rafi Akbar by counsel for appellant Muhammad Tarique alias Bata is reproduced as under;

"My 164 Cr.P.C. statement was recorded by Magistrate by administering oath. During my statement before the Magistrate I had given the names of Tarique Bata and Amir Khan alongwith his father's name. (confronted not so recorded).I had not noted the registration number of Charade car at the time of incident. I do not know who was the candidate of Muhajir Qaumi Movement in the by-election NA-255."(bold added)

Quite incredibly he did not even know who the MQM candidate was for NA 255 being the well known Dr.Farooq Sattar who he was canvassing for.

And cross examination for Amir Khan:

"I had stated in my 164 Cr.P.C statement that at the time of incident, Amir Khan was present in the Honda Civic Car. (confronted not so recorded). I had not given my name to the hospital officials as one of the person who had brought the injureds at hospital. It is correct that till 03.07.2003, I had not informed any body about this incident."(bold added)

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(viii) That it is an admitted position in the evidence that enmity, rivalry and ill will existed between the appellants and the eye witnesses who represented two different factions of the MQM who were electioneering for two different candidates in a hotly contested election for NA 255 Landhi on the day of the incident and these eye witnesses had every reason to falsely implicate the appellants especially as their faction of the MQM was currently a part of the Government of Sindh. Thus, they were all interested witnesses with an axe to grind against the appellants whose evidence must be regarded with great care and caution. In this respect reliance is placed on the case of **Imran Ashraf** (Supra)

(ix) None of the eye witnesses knew appellant Muhammad Tarique alias Bata before the incident. All the eye witnesses only got a fleeting glance of him from a distance of about 20 feet which is not particularly close and none of them gave any hulia of him in their S.161 statements and he was not placed before an identification parade. PW 12 Muhammed Shahid who was the driver of the van which was attacked did not even see appellant Muhammad Tarique alias Bata at the time of the incident and instead **was told about his presence** by the other eye witnesses, that during the recording of the S.161 statements appellant Muhammad Tarique alias Bata was not present and had no chance to cross examine the eye witnesses and as such in our view taking all the above mentioned factors together the correctness of the identification of appellant Muhammad Tarique alias Bata by any of the eye witnesses is found to be doubtful despite it being a day light incident as it cannot be ruled out that the eye witnesses were not even present at the scene of the incident and have concocted a false case against him.

Secondly in respect of appellant Muhammed Amir Khan

(i) Despite the FIR being lodged **9 days after the incident** it is silent in respect of the precise role played by appellant Muhammed Amir Khan. It simply says that he instigated the killers. There is no mention of him ordering any killing from another vehicle at the time of the attack and that the killers then shouted his name in praise.

(ii) Most of the same considerations apply as for appellant Muhammad Tarique alias Bata as mentioned above as to the eye witnesses and in }

particular it is just **not believable** that **knowing** that appellant Muhammed Amir Khan gave the orders to murder their friends and fellow party workers all the eye witnesses kept mum for 11 to 12 days and did not tell a soul.

- (iii) Even if all the eye witnesses were present at the scene (which we doubt) we find it **unbelievable** that whilst two vehicles were driving along persons in the charade car could hear the shouted order of appellant Muhammed Amir Khan from another car bearing in mind the distance between the cars, the noise which cars make whilst being driven and other traffic noise and the noise of other passers by that the persons in the charade car could have heard appellant Muhammed Amir Khan shouting such orders. There was no evidence that the car windows were even down and that no music was playing in any of the cars. If this was a preplanned attack then appellant Muhammed Amir Khan would not even have needed to shout such orders.
 - (iv) The identification parade where the eye witnesses picked out appellant Muhammed Amir Khan is also inconsequential as all the eye witnesses already knew appellant Muhammed Amir Khan very well as he was a senior MQM leader all of whom the eye witnesses would have known by face long before the attack.
 - (v) The Honda civic which he was driving when he allegedly gave the orders to kill the persons in the Hi roof van was not recovered from him.
- (c) In addition:
- (i) Two of the eye witnesses state in their evidence that appellant Muhammad Tarique alias Bata was only one pace away from deceased Anum Uzair when he shot him. This however is contradictory to the medical evidence of PW 5 Dr. Kaleem who found no blackening around the wounds which indicates that all fire shots were made from at least 3 feet away. Thus, the medical evidence does not corroborate the ocular evidence. In this respect reliance is placed on **Muhammed Zaman V State (2014 SCMR 749)**

(ii) That no pistol was recovered from appellant Muhammad Tarique alias Bata at the time of his arrest or anything to link him to the scene of the offense. Hence the recovery of empties at the scene is of no consequence.

(iii) If appellant Muhammed Amir Khan had given the order to kill those persons in the Hi roof van why did the appellant Muhammed Tarique also not kill the driver of the van PW 12 Muhammed Shahid instead of leaving him behind as a potential witness against him. This does not particularly appeal to reason, logic or common sense.

21. Thus, based on the above discussion where we find that we do **not consider it safe to rely on the evidence of the following prosecution eye witnesses** (a) PW 12 Muhammed Shahid who was driving the Hi Roof van at the time when two of his passengers were shot (b) PW 13 Muhammed Saleem who was busy in electioneering when he witnessed the incident (c) PW 14 Rafi Akbar was also busy in electioneering when he witnessed the incident and (d) PW 17 Hasan Dilwar who was also busy electioneering when he witnessed the incident in correctly identifying appellants Muhammed Amir Khan and Muhammad Tarique alias Bata in terms of them correctly identifying the appellants at the scene of the incident **or even being at the scene of the incident we disbelieve their evidence in so far as it relates to the appellants involvement in the murder** which coupled with the unexplained delay in lodging the FIR which based on the particular facts and circumstances of this case gave the complainant, the police and rival political party the chance to falsify a case against the appellants and which delay was not adequately explained and disadvantaged the appellants for the reasons discussed above and based on the lack of supportive/corroborative evidence by extending the benefit of the doubt to the appellants we hereby allow their appeals, acquit them of the charge and set aside the impugned judgment. Consequently the appellant Muhammad Tarique alias Bata shall be released unless he is wanted in any other custody case and the bail bonds of appellant Muhammed Amir Khan stand discharged.

22. It follows that the appeal for enhancement of sentences of the appellants filed by the State (wrongly filed as criminal acquittal appeal

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against the appellants being No.04/2005) also fails and is hereby dismissed.

23. The appeals stand disposed of in the above terms.

Arif