

Present: Manzoor Ahmad Malik, Mazhar Alam Khan Miankhel and Syed Mansoor Ali Shah, JJ

ALI HAIDER alias PAPU---Petitioner

Versus

JAMEEL HUSSAIN and others---Respondents

Criminal Petition No. 513 of 2020, decided on 7th January, 2021.

(Against the judgment of Lahore High Court, Multan Bench, dated 11.02.2020, passed in Criminal Appeal No. 436 of 2017 and Capital Sentence Reference No.61 of 2017).

(a) Qanun-e-Shahadat (10 of 1984)---

---Art. 164---Importance of modern forensic techniques and science under the criminal justice system explained.

For the law to serve people in today's technologically complex society, courts needed to understand and be open to science and its principles, tools and techniques. Legal decisions of the courts must fall within the boundaries of scientifically sound knowledge. A judge and more so a trial judge, acted as a gatekeeper of the scientific evidence and must, therefore, enjoy a good sense and understanding of science. As science grows so will the forensic techniques, tools and devices; therefore, courts must be open to developments in forensic science and embrace new techniques and devices to resolve a dispute, provided the said technique and device was well established and widely accepted in the scientific community as a credible and reliable technique or device.

Third Edition, Federal Judicial Centre, National Research Council of the National Academies, Washington, DC ref.

Article 164 of the Qanun-e-Shahadat, 1984 was the gateway allowing modern forensic science to come into courtrooms. Article 164 provided that courts may allow to be produced any evidence that may have become available because of modern devices and techniques. Proviso to Article 164, provided that conviction on the basis of modern devices and techniques may be lawful. Article 164 read with Article 59, inter alia, allowed modern forensic science to enter courts through the credible and valued scientific opinions of experts as evidence, in order to arrive at the truth.

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

---Ss. 302(b), 376, 377 & 377B---Qanun-e-Shahadat (10 of 1984), Arts. 53A, 59, 164, 164A & 164B---Qatl-i-amd, rape, unnatural offence, sexual abuse---Importance and admissibility of DNA evidence to establish the guilt or innocence of an accused.

The most significant advancement in criminal investigation since the advent of fingerprint identification is the use of DNA technology to help convict criminals or eliminate persons as suspects.

Deoxyribonucleic acid (DNA) technology was widely used in many jurisdictions by police, prosecutors, defense counsel, and courts. This scientific evidence was much speedier, specific, accurate and conclusive than any other human evidence and could stand the scrutiny of the court to determine the guilt or innocence of an accused. In criminal cases, like rape, murder, etc., timely medical examination and proper sampling of body fluids followed by quality forensic analysis could offer irrefutable evidence. Through the use of DNA evidence, prosecutors could establish the guilt of accused and at the same time, DNA aided the search for truth by exonerating the innocent.

Modi. A Textbook of Medical Jurisprudence and Toxicology, 26th Edition, LexisNexis. Pp 430- 453 and Studies in the Use of DNA Evidence to Establish Innocence After Trial by Edward Connors, Thomas Lundregan, Neal Miller, Tom McEwen, June 1996, U.S. Department of Justice, Office of Justice Programs, National Institute of Justice ref.

DNA report like any other opinion of an expert under Article 59 of the Qanun-e-Shahadat, 1984 ('QSO') was relevant and thus admissible. Article 164 of the QSO further underlined the admissibility, reliability and weightage of modern scientific forensic evidence, including the DNA test, as the said Article provided that convictions may be based on modern techniques and devices.

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

---Ss. 302(b), 376, 377 & 377B---Criminal Procedure Code (V of 1898), S. 510---Qanun-e-Shahadat (10 of 1984), Arts. 59 & 164---Punjab Forensic Science Agency Act (XIII of 2007), S. 9---Qatl-i-amd, rape, unnatural offence, sexual abuse---DNA evidence/report, Per-se admissibility---Meaning---Requirement of examining the expert who prepared the DNA report explained.

While the admissibility of expert opinion was already recognized under the Qanun-e-Shahadat, 1984 ('the QSO'), section 510, Cr.P.C. dealt with special rules of evidence and made the evidentiary procedure simple by providing that certain reports of the chemical examiner, etc. may be used in any trial without calling the Government Chemical Examiner, Serologist, finger print expert or fire-arm expert as a witness. Allowing admission of reports of the said Governmental experts in evidence without their author appearing as a witness had the objective of saving time and speeding up criminal trials. This simple procedure of admission of these reports in evidence, was referred to as per se admissible. However, the court may if it considered necessary, in the interest of justice, summon and examine the person by whom such a report had been made. Section 510, Cr.P.C. referred to reports of certain experts only but did not specifically mention the expert who conducted DNA analysis, hence the DNA test report was not per se admissible but it was certainly admissible if tendered in evidence by examining as witness the expert under whose hand it was prepared as per the QSO. Additionally, under section 9 of the Punjab Forensic Science Agency Act, 2007 an expert of the Punjab Forensic Science Agency (PFSA) was considered to be an expert in terms of section 510, Cr.P.C. Therefore, DNA test report prepared by an expert of the PFSA was per se admissible

Azeem Khan v. Mujahid Khan 2016 SCMR 274 ref.

Article 164 of QSO held immense importance and demanded that the scope of expert opinions under Article 59 of QSO and the special rule of evidence under section 510, Cr.P.C. be interpreted progressively to come to give more space and recognition to modern forensic science. Supreme Court observed that use of the word "Chemical Examiner" in section 510, Cr.P.C. was almost obsolete and had no established definition; and, that it was time for the Government to consider revision of section 510, Cr.P.C. allowing reports of all the Government forensic scientists (as opposed to the specified ones under section 510, Cr.P.C.) to be per se admissible, to speed up the wheels of dispensation of criminal justice. Supreme Court directed that copy of present judgment be dispatched to the Ministry of Law and Parliamentary Affairs, for consideration of the said recommendation.

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

---Ss. 302(b), 376, 377 & 377B---Qanun-e-Shahadat (10 of 1984), Arts. 59 & 164,---Qatl-i-amd, rape, unnatural offence, sexual abuse---Concept of DNA evidence as the strongest corroborative piece of evidence explained.

DNA evidence was considered as a gold standard to establish the identity of an accused. DNA test due to its accuracy and conclusiveness was one of the strongest corroborative pieces of evidence. DNA test with scientific certainty and clarity pointed towards the perpetrator and was, therefore, considered one of the strongest corroborative evidence, especially in cases of rape. Supreme Court observed that usefulness of DNA analysis, however, depended mostly on the skill, ability and integrity shown by the investigating officers, who were the first to arrive at the scene of the crime; that unless the evidence was properly documented, collected, packaged and preserved, it would not meet the legal and scientific requirements for admissibility into a court of law.

Salman Akram Raja v. Government of Punjab 2013 SCMR 203; United States v. Yee 134 F.R.D 161 and Muhammad Shahid v. State PLD 2010 FSC 215 ref.

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

---Ss. 302(b) & 376---Qatl-i-amd, rape---Reappraisal of evidence---DNA evidence---Strong circumstantial evidence---Incident was unseen, however, the most important piece of circumstantial evidence in the present case, was the DNA test report---Furthermore wajtakkar evidence, evidence of extra-judicial confession of accused, medical evidence and DNA test report, considered together, clearly connected the accused with the rape and murder of the deceased---Chain of circumstantial evidence was

firm and continuous, leaving no margin for the hypothesis of innocence of the accused---Convictions and sentences awarded to the accused by the trial court, including death sentence, were maintained.

Evidence of wajtakkar comprised of two witnesses, who were not chance witnesses, as they were residents of the locality and their presence near the place of occurrence, i.e., the field, was quite natural. They saw the accused coming out of that field while tightening the string of his shalwar at a time that was in line with the time of occurrence reported in the FIR and the approximate time of death of the deceased mentioned in the post-mortem report. The extra-judicial confession of accused though was a weak piece of evidence; but in the present case, it also inspired confidence when it was read in conjunction with other circumstantial evidence. The medical evidence, viz, the post mortem report and statement of the doctor who made the post-mortem examination of the deceased, supported the prosecution case. The fact established by the medical evidence that the deceased had suffered vaginal injury, as her hymen was found freshly torn with tear at 6 O'clock extending upto perineum with fresh bleeding, clearly supports the prosecution case that the deceased was raped before causing her death. The medical opinion of the doctor that the death of the deceased occurred due to throttling tallied with the DNA report regarding the swab obtained from the neck of the deceased: the DNA report stated matching of the DNA found in that swab with that of the accused.

According to the DNA test report the semen from vaginal swabs, as well as, the stain of the shalwar of the deceased matched the DNA of the accused. The DNA in the swab obtained from the neck of the deceased also matched the DNA of the accused.

The prosecution had thus proved its case against the accused beyond reasonable doubt. Convictions and sentences awarded to the accused by the trial court, including death sentence, were maintained. Petition for leave to appeal was dismissed and leave was refused.

Raja M. Shafat Khan, Advocate Supreme Court for Petitioner.

Mirza Abid Majeed, DPG for the State.

Research Assistance by Rana Shaheryar, Research Officer/Civil Judge, SCRC, Islamabad.

Date of hearing: 7th January, 2021.

JUDGMENT

SYED MANSOOR ALI SHAH, J.---This is a troubling and a gut-wrenching case of rape, murder and capital punishment. Almost eight year old, Rimsha Bibi ("deceased") who left her house for summer tuition in the neighbourhood was raped in the loneliness of a jawar (millet) field and then silenced forever by being brutally murdered. First Information Report ("FIR") was registered by the father of the deceased against an unknown person for offences under sections 302 and 376(i) of the Pakistan Penal Code, 1860 ("P.P.C.") on 29.06.2016. In the supplementary statement recorded the next day, the complainant revealed that Jabbar Hussain (PW-6) and Tufail Shah (PW-7) had seen Ali Haider alias Pappu ("petitioner") coming out of the jawar field from where the dead body of the deceased was recovered at 4:00 p.m. on the fateful day, while tightening the string of his shalwar.

2. The petitioner was indicted and tried for the alleged offences. On conclusion of the trial, he was convicted by the trial Court under section 302(b) of P.P.C., and sentenced to death and directed to pay compensation of Rs.200,000/- to the legal heirs of the deceased and in default thereof to undergo further simple imprisonment for six months. He was also convicted under section 376 of P.P.C. and sentenced to imprisonment for life with fine of Rs.30,000/- to be paid to the legal heirs of the deceased and in default thereof to further undergo simple imprisonment for three months. On appeal to the High Court by the petitioner, which was heard along with the Murder Reference sent up by the trial court, the High Court maintained the convictions and sentences of the petitioner. The murder reference was answered in the affirmative and the death sentence was confirmed through the impugned judgment.

3. We have examined the record of the case with the able assistance of the learned counsel for the parties. The gruesome incident was unseen. The circumstantial evidence pieced together by the prosecution, to tie the petitioner with the rape and murder of the deceased comprises: (i) the evidence of waj takkar of Jabbar Hussain (PW-6) and Tufail Shah (PW-7) who had seen the petitioner coming out of

the place of occurrence, i.e., jawar field, at 04:00 p.m. tightening the string of his shalwar; (ii) the extra judicial confession of the petitioner, admitting commission of rape and murder of the deceased in the presence of the complainant (PW-1) and the said two witnesses of waj takkar evidence (iii) the medical evidence including the post-mortem report (Ex-PL) and the statement of Dr. Sunia (PW-11), WHO, DHQ Hospital Vehari, who had conducted the post-mortem examination of the deceased: and (iv) the DNA Test Report regarding the vaginal swabs of the deceased as well as the swab obtained from the neck of the deceased, which reported matching of the DNA found in those swabs with that of the petitioner.

Importance of modern forensic science and DNA

4. Before analyzing the circumstantial evidence, it might be useful to underline the role of science, modern forensic techniques and devices under our criminal justice system. For the law to serve people in this technologically complex society, courts need to understand and be open to science and its principles, tools and techniques. Legal decisions of the courts must fall within the boundaries of scientifically sound knowledge. A judge and more so a trial judge, acts as a gatekeeper of the scientific evidence and must, therefore, enjoy a good sense and understanding of science. As science grows so will the forensic techniques, tools and devices; therefore, courts must be open to developments in forensic science and embrace new techniques and devices to resolve a dispute, provided the said technique and device is well established and widely accepted in the scientific community as a credible and reliable technique or device.¹ Article 164 of the Qanun-e-Shahadat Order, 1984 (QSO) is our gateway allowing modern forensic science to come into our courtrooms. Article 164 provides that courts may allow to be produced any evidence that may have become available because of modern devices and techniques. Proviso² to Article 164, added in the year 2017, provides that conviction on the basis of modern devices and techniques may be lawful. Article 164 read with Article 59, inter alia, allows modern forensic science to enter courts through the credible and valued scientific opinions of experts as evidence, in order to arrive at the truth.

5. The most significant advancement in criminal investigation since the advent of fingerprint identification is the use of DNA technology to help convict criminals or eliminate persons as suspects. DNA as a scientific evidence means 'deoxyribonucleic acid.' DNA can be found in the human body and samples from semen, hair, blood, flesh can establish a DNA matching with the DNA of another human being. Each human being has a unique DNA pattern, which is acquired by inheriting it from the biological parents. DNA analyses on saliva, skin tissue, blood, hair, and semen can now be reliably used to link criminals to crimes. Increasingly accepted during the past 10 years, DNA technology is now widely used in many jurisdictions by police, prosecutors, defense counsel, and courts.³ This scientific evidence is much speedier, specific, accurate and conclusive than any other human evidence and can stand the scrutiny of the court to determine the guilt or innocence of an accused. In criminal cases, like rape, murder, etc., timely medical examination and proper sampling of body fluids followed by quality forensic analysis can offer irrefutable evidence. Criminal justice system is in search for the truth. The development of DNA technology furthers the search for truth by helping police and prosecutors in the fight against violent crimes. Through the use of DNA evidence, prosecutors can establish the guilt of accused and at the same time, DNA aids the search for truth by exonerating the innocent.⁴ An authoritative study on the forensic uses of DNA, conducted by the National Research Council of the National Academy of Sciences, USA has noted that:

"...the reliability of DNA evidence will permit it to exonerate some people who would have been wrongfully accused or convicted without it. Therefore, DNA identification is not only a way of securing convictions; it is also a way of excluding suspects who might otherwise be falsely charged with and convicted of serious crimes."⁵

Admissibility of DNA Test

6. DNA Report like any other opinion of an expert under Article 59 is relevant and thus admissible. Article 164 of the QSO further underlines the admissibility, reliability and weightage of modern scientific forensic evidence, including the DNA test, as the said Article provides that convictions may be based on modern techniques and devices. Over the years DNA test has also come to be recognized by our statutory

criminal law. Section 164-A⁶, Cr.P.C provides that where an offence of committing rape, unnatural offence or sexual abuse or an attempt to commit rape or unnatural offence or sexual abuse under section 376, section 377 or section 377B respectively of the P.P.C. is under investigation the victim shall be examined by a medical practitioner who shall examine the victim and prepare a report of examination giving, inter alia, the "description of material taken from body of the victim for DNA profiling" under section 164A(2)(c). Similarly, under section 53A⁷ where a person is arrested on a charge of committing an offence of rape or unnatural offence or sexual abuse or an attempt to commit rape or unnatural offence or sexual abuse under section 376, section 377 or section 377B respectively of the P.P.C. and there are reasonable grounds for believing that an examination of the arrested person will afford evidence as to the commission of such offence it is lawful for the medical practitioner to make such an examination of the arrested person and to use such force as is reasonably necessary for that purpose. The medical practitioner conducting examination is to examine, without delay, such person and prepare a report of the examination giving, inter alia, the description of material taken from person of the accused for DNA profiling, under section 53A(2)(d). Under section 164-B⁸ where an offence under sections 376, 377 or section 377B, P.P.C. is committed or attempted to have been committed or alleged to have been committed, DNA samples where practicable, are to be collected from the victim with his or her consent or with the consent of his or her natural or legal guardian as provided in section 164A and DNA samples of the accused under section 53A, both within optimal time period of receiving information relating to the commission of such offence. Under subsection (2) of section 164B, such DNA samples are to be sent, at the earliest, for investigation to a forensic laboratory where these are to be properly examined and preserved by observing confidentiality of such examination at all times. The above legislative framework underscores the relevancy and thus the admissibility of a DNA Test.

Admissible versus per se admissible

7. While the admissibility of expert opinion is already recognized under QSO, section 510, Cr.P.C. deals with special rules of evidence and makes the evidentiary procedure simple by providing that certain reports of the chemical examiner, etc. may be used in any trial without calling the Government Chemical Examiner, Serologist, finger print expert or fire-arm expert as a witness. Allowing admission of reports of the said Governmental experts in evidence without their author appearing as a witness has the objective of saving time and speeding up criminal trials. This simple procedure of admission of these reports in evidence, is referred to as per se admissible. However, the court may if it considers necessary, in the interest of justice, summon and examine the person by whom such a report has been made. Section 510, Cr.P.C refers to reports of certain experts only but does not specifically mention the expert who conducts DNA analysis, hence the DNA Test report is not per se admissible but it is certainly admissible if tendered in evidence by examining as witness the expert under whose hand it is prepared as per the QSO. Additionally, under section 9 of the Punjab Forensic Science Agency Act, 2007 an expert of the PFSA is considered to be an expert in terms of section 510 Cr.P.C. Therefore, DNA Test Report prepared by an expert of the PFSA is per se admissible.

8. This Court in Azeem Khan case⁹ questioned the admissibility of the DNA Test Report on the touchstone of section 510, Cr.P.C. and left it open to be discussed in some other case. It is, therefore, important to address this question and clear the air regarding the admissibility of DNA Test Report. As explained above, per se admissibility is a procedural facility for tendering evidence extended to reports of certain experts but it does not affect or have any bearing on the admissibility of a document which is governed by the QSO, and any report or opinion of an expert in matters of science, etc., which is recognized to be relevant under Articles 59 and 164 QSO and is thus admissible under the law of evidence (QSO). Besides, much water has flown under the bridge, since Azeem Khan case. There has been new legislation giving DNA Test, statutory recognition and importance. Article 164 QSO holds immense importance especially after the insertion of the proviso through Act 4 of 2017 in the year 2017¹⁰ and demands that the scope of expert opinions under Article 59 QSO and the special rule of evidence under section 510, Cr.P.C.

be interpreted progressively in the years to come to give more space and recognition to modern forensic science.

9. It is important to underline that the use of the word "Chemical Examiner" in section 510 Cr.P.C. is almost obsolete and has no established definition. Now, "forensic scientists" run and manage modern forensic laboratories. It is time for the Government to consider revision of section 510 Cr.P.C. allowing reports of all the Government forensic scientists (as opposed to the specified ones under section 510 Cr.P.C) to be per se admissible, to speed up the wheels of dispensation of criminal justice in the country. Needless to say that under the proviso to section 510 Cr.P.C the courts can always summon and examine the expert who has prepared and authored the report.

DNA, strongest corroborative piece of evidence today

10. DNA evidence is considered as a gold standard to establish the identity of an accused. As a sequel of above discussion, it can safely be concluded that DNA Test due to its accuracy and conclusiveness is one of the strongest corroborative pieces of evidence. In *Salman Akram Raja* case¹¹ this Court has held that DNA test help provides the courts the identity of the perpetrator with high degree of confidence, and by using of the DNA technology the courts are in a better position to reach at a just conclusion whereby convicting the real culprits and excluding the potential suspects, as well as, exonerating wrongfully involved accused. DNA test with scientific certainty and clarity points towards the perpetrator and is, therefore, considered one of the strongest corroborative evidence today, especially in cases of rape. The usefulness of DNA analysis, however, depends mostly on the skill, ability and integrity shown by the investigating officers, who are the first to arrive at the scene of the crime. Unless the evidence is properly documented, collected, packaged and preserved, it will not meet the legal and scientific requirements for admissibility into a court of law.

11. Coming back to the merits of the case, we find that Jabbar Hussain (PW-6) and Tufail Shah (PW-7) were not chance witnesses. They were residents of the locality and their presence near the place of occurrence, i.e., the jawar field, was quite natural. They saw the petitioner coming out of that field while tightening the string of his shalwar at a time that is in line with the time of occurrence reported in the FIR and the approximate time of death of the deceased mentioned in the post-mortem report. The extrajudicial confession though is a weak piece of evidence; but in the present case, it also inspires confidence when it is read in conjunction with other circumstantial evidence. The medical evidence, viz, the post mortem report (Ex-PL) and statement of Dr. Sunia (PW-11) who made the post-mortem examination of the deceased, supports the prosecution case. The fact established by the medical evidence that the deceased had suffered vaginal injury, as her hymen was found freshly torn with tear at 6 O'clock extending upto perineum with fresh bleeding, clearly supports the prosecution case that the deceased was raped before causing her death. The medical opinion of Dr. Sunia (PW-11) that the death of the deceased occurred due to throttling tallies with the DNA report regarding the swab obtained from the neck of the deceased: the DNA report states matching of the DNA found in that swab with that of the petitioner. The most important piece of circumstantial evidence in the present case, we find, is the DNA Test Report (Ex-PP) of the Punjab Forensic Science Agency ("PFSA"). Three vaginal swabs, one swab taken from the neck of the deceased and stained sections of the shalwar and shirt of the deceased along with buccal swab of the petitioner were sent to the PFSA for forensic examination. According to the DNA Test Report the semen from vaginal swabs, as well as, the stain of the shalwar of the deceased matched the DNA of the petitioner. The DNA in the swab obtained from the neck of the deceased also matched the DNA of the petitioner. The waj takkar evidence, evidence of extrajudicial confession, medical evidence and DNA Test Report, together and clearly connects the petitioner with the rape and murder of the deceased, Rimsha Bibi. The chain of circumstantial evidence is firm and continuous, leaving no margin for the hypothesis of innocence of the petitioner. The rope of circumstantial evidence, adduced by the prosecution, ties the dead body of the deceased with the neck of the petitioner. The prosecution has thus proved its case against the petitioner beyond reasonable doubt. Therefore, we are not persuaded to espouse a view different from that given by

the trial court and confirmed by the High Court as to the convictions and sentences of the petitioner. Accordingly, leave is refused and this petition is dismissed.

12. Foregoing are the reasons for the short order dated 07.01.2021, which for the sake of convenience and completion of record is reproduced hereunder:-

"For the reasons to be recorded later, this criminal petition is dismissed in toto."

13. Office shall dispatch a copy of this judgment to the Ministry of Law and Parliamentary Affairs, Government of Pakistan for consideration of the recommendation made in para 9 above.

MWA/A-8/SC Petition dismissee