JUDGMENT SHEET
IN THE LAHORE HIGH COURT, BAHAWALPUR BENCH, BAHAWALPUR.
(JUDICIAL DEPARTMENT)

MURDER REFERENCE No.42/2017.

CRIMINAL APPEAL No.722/2017.

Meer Nawaz alias Meero
Vs
The State

JUDGMENT

DATE OF HEARING:	29.09.2021.
APPELLANT BY:	Sardar Muhammad Usman Sharif Khosa and Muhammad Abdullah Siraj Qaisrani, Advocate.
STATE BY:	Ch. Asghar Ali Gill, Deputy Prosecutor General.
COMPLAINANT BY:	Mr. Muhammad Farooq Warind, Advocate.

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MUHAMMAD AMJAD RAFIQ, J:- Meer Nawaz alias Meero (accused/ appellant) along with Nasir Hussain faced trial in case FIR No.154/2016 dated 11.06.2016 under sections 365-B, 376, 302, 109 PPC registered at police station Kot Samaba, District Rahim Yar Khan and on conclusion of trial, Sessions Judge, Rahim Yar Khan vide judgment dated 21.12.2017 acquitted co-accused Nasir Hussain, whereas, Meer Nawaz alias Meero (accused/appellant) was convicted as follows;

> *Under Section 376 PPC and sentenced to imprisonment for 25 years with fine of Rs.100,000/- in default thereof to further undergo six months simple imprisonment.*
>
> *Further convicted under section 302(b) PPC for committing Qatl-i-amd of Mst. Rehana Bibi and sentenced to death and ordered to pay compensation of Rs.200,000/- under section 544-A Cr.P.C.*

Also convicted under section 302(b) PPC for committing Qatl-i-amd of fetus (IUD) in the womb of Mst. Rehana Bibi and sentenced to death and ordered to pay compensation of Rs.200,000/- under section 544-A Cr.P.C. Benefit of section 382-B Cr.P.C. was extended.

Through Criminal Appeal No.722/2017 the convict/appellant has challenged his above conviction and sentences, whereas, Murder Reference No.42/2017 has been sent by the learned trial court as provided by Section 374 Cr.P.C. for confirmation, or otherwise, of the death sentence. Both i.e. the Appeal and Murder Reference are subject matter of the instant judgment.

2. Precisely, penned down the story of the prosecution by the police as shall be seen from the FIR (Ex.PC) registered on 11.06.2016 at 9:20 p.m. which was intimated by husband of deceased woman (Rehana bibi aged 25 years with 27.2 weeks' pregnant). Her husband Sadiq Hussain complainant aged 40 years (PW-7) not resident on or around the place of occurrence (Kot Samaba) stated that a few days before the occurrence her wife told him that Meer Nawaz alias Meero (caste fellow of the complainant) used to throw indecent signals for immoral matting, whereupon, the complainant in the presence of Muhammad Ramzan and Muhammad Ibrahim admonished him which grudge he bored in his heart. Mst. Rehana Bibi one day before the occurrence came to Kot Samaba to meet relatives and on the day of occurrence the complainant along with above named witnesses came to Kot Samaba to take her back. At about Maghrib time while going through the street, Muhammad Ishaq informed that he has seen Meer Nawaz forcibly taking Mst. Rehana Bibi to the BETHATK of Nasir Hussain co-accused. On his information and lead, after a while they reached in the said street, they heard shrieks of Mst. Rehana which ended within their hearing. They opened the door of the BETHAK with difficulty and saw Meer Nawaz sitting on the chest of Mst. Rehana while putting a cloth around her neck pressing it hard, who on seeing them escaped from the other door. Mst. Rehana succumbed at the spot. It was alleged that Nasir Hussain had facilitated the crime by giving Meer Nawaz his residential house.

3. On receipt of information about the occurrence, Amjad Ali Sub-Inspector (PW-12) reached at the spot, recorded statement of the complainant Ex.PK and sent the same to police station for registration of FIR. The investigation was conducted by Muhammad Aslam Khan Inspector Homicide Investigation Cell (PW-14) who visited the spot, prepared injury statement Ex.PF, inquest report Ex.PG, despatched the dead body for post mortem examination, prepared rough site plan of the place of occurrence Ex.PM, recorded statements of witnesses and also recorded supplementary statement of complainant Sadiq Hussain. On 15.06.2016, he arrested accused Nasir Hussain and on 17.06.2016 accused Meer Nawaz was arrested. DNA test of Meer Nawaz accused/appellant was got conducted; on 22.06.2016 Meer Nawaz got recovered a piece of cloth P.3 form his residential house. After completing other formalities, the report under section 173 Cr.P.C. was submitted and accused persons were charge sheeted, to which they pleaded innocence and claimed to be tried, whereupon, prosecution examined Dr. Haji Ahmad Durrani who had medically examined Meer Nawaz about his potency; Dr. Asia Batool (PW-5) had conducted post mortem examination of deceased; Sadiq Hussain complainant (PW-7), Muhammad Ishaq (PW-8) and Muhammad Ibrahim (PW-9) deposed about the ocular account; Manzoor Hussain SI (PW-11) had partially investigated the case and Muhammad Aslam Khan Inspector (PW-14) had completed the investigation, whereas, Dr. Sheeraz Ahmad (PW-15) had deposed about the conduct of obstetrical ultrasound of dead body of Mst. Rehana deceased. Ghulam Abass PW-10 who dispatched all the articles to PFSA and also took Meer Nawaz to said Lab for DNA samples. Rest of the witnesses are all formal in nature and they made statements with regard to their respective functions performed during the course of investigation. On close of prosecution case, the accused when examined under section 342 Cr.P.C. denied the prosecution case and negated the allegations, however, they not opted to produce defence evidence not appeared in the witness box in terms of section 340(2) Cr.P.C. and ultimately on conclusion of trial, Nasir Hussain was

acquitted, whereas, Meer Nawaz alias Meero was convicted and sentenced as detailed in the opening paragraph of this judgment.

4. Learned counsel for the appellant raised the emblem high with a virulent criticism on prosecution evidence and its presentation was regarded by him as vague, unclear and tamed in a way that it hardly proved the case against the accused/appellant. Attacked on the presence of eye witnesses, termed the evidences that recovery being planted and inconsequential, wrecked chain of custody protocols and confused PFSA reports cannot be made basis for conviction. Prayed for acquittal of accused.

5. Learned Deputy Prosecutor General assisted by learned counsel for the complainant has mainly relied on PFSA reports wherein according to them DNA profile of accused/appellant stood matched with the DNA retrieved from vaginal swabs of deceased sent for examination. They were of the view that in the presence of forensic evidence, no doubt is left about involvement of accused in commission of crime and DNA evidence is sufficient to sustain conviction and sentence awarded to accused/appellant.

6. We have heard the respective contentions and perused the record; examined the evidence brought on record.

7. It was 11th of June, 2016 when occurrence took place at Maghrib wela and police reached at the spot with a delay of around one hour at 8:30 p.m. as admitted by PW-4 Mahboob Ahmad 1294/C who escorted the dead body to hospital for postmortem examination. Surprisingly, dead body was received in the hospital at 11:30 pm i.e. after three hours of its dispatch from place of occurrence. Inquest report was prepared before registration of FIR as it does not contain case number, similarly, it does not find mention time of information to police about death in column No.3. Though PW-7 complainant deposed arrival of police at place of occurrence at 9:00 p.m. when the complaint was drafted and FIR was registered at 9:20 p.m. Police remained at place of occurrence

till 10.00 p.m. At the time of dispatch of dead body papers were not sent to the doctor as he acknowledged it receiving at 11:30 p.m. which he mentioned in Postmortem Report, yet in the postmortem report time of death in the relevant column is not mentioned. No definite opinion was given of cause of death in the primary report. Probable time that elapsed between injury and death was not mentioned by the Doctor; however, probable time between death and postmortem was 2-24 hours; shockingly when the deceased died within the view of the witnesses at the place occurrence around Maghrib wela and postmortem was conducted within six hours at 1:00 a.m. (night); cushion of 24 hours by the doctor is highly improbable. One injury blackish semi healed abrasion present on right side of mandible was also observed by the doctor as antemortem, yet ¾ days old. After receiving the PFSA reports, doctor declared cause of death as ***"Asphyxia caused by mechanical obstruction of air-way"***, further reported that sexual assault on victim was done before death. Though witnesses when reached at the place of occurrence admitted that deceased was in her full dress and they have not seen the accused committing rape with her. Doctor also observed fetus of 27.2 weeks in the womb of Rehana bibi, yet at the place of occurrence investigating officer has not observed any marks of resistance; nor doctor observed any scratch, mark of violence or signs of fresh injury on the person of deceased who was 25 years of age and accused/appellant was also of young age of 22 years. Witnesses deposed that appellant was pressing neck of deceased with a cloth when they opened the door and entered into BETHAK, yet doctor did not observe any ligature mark around neck nor any bruise, swelling was seen on any part of neck; neck was not stretched; all that shows that prosecution story has hardly had a touch of truth.

8. Prosecution contingent who led the ocular account, was represented by PW-7 complainant Sadiq Hussain, PW-8 Muhammad Ishaq and PW-9 Muhammad Ibraheem. Place of occurrence was Kot Samaba where the deceased had gone to see her relatives; accused was also resident of same area at a distance of ½ kilometer from place of

occurrence. Whereas all three alleged eye witnesses were residents of Mouza Behshti which is at a distance of 8 kilometers from the place of occurrence. PW-7 & PW-9 deposed that they went to take back Rehana deceased and PW-8 was present in that area per chance. In the case "*NAVEED ASGHAR and 2 others versus The STATE*" (PLD 2021 Supreme Court 600), the apex Court held that testimony of chance witnesses require cautious scrutiny and was not to be accepted unless they give satisfactory explanation of presence at or near the place of occurrence at the relevant time. Here in the instant case, all the above witnesses stated that it was month of Ramadan; therefore, around Maghrib no body was present in the street where for the first time PW-7 saw the accused/appellant who was forcibly taking Rehana deceased on foot. Conduct of this witness is highly objectionable who was a grownup boy of 18 years of age and being paternal cousin of the complainant did not bother to stop the accused though he while responding to a question, stated that Rehana deceased was walking behind accused/appellant. All three witnesses admitted that when they reached at the place of occurrence, they pushed the door for its opening yet did not peep through the window of BETHAK though admitted that bulb was on lit inside. They pretended that window was at a height from the level of ground. This contention was belied through the statement of Muhammad Anwar Patwari PW-1 who says that one can easily see inside the window while standing outside. They admitted that they did not break open the door of BETHAK; further admitted that accused ran away from inside the house and then from the main gate, yet main gate of house was at a distance of four/five feet from the door of BETHAK from outside. They further admitted that accused/ appellant maintains a broken leg due to fracture. PW-7 admitted that accused was an addict person. He further admitted that he knows the accused/appellant as he is from his brotherhood and he was also told by his wife about conduct of accused. Witnesses admitted that they have not seen the accused/appellant while committing zina with Rehana deceased and she was in full dress when they reached at the BETHAK. PW-7 admitted

that no one from the locality of occurrence had appeared before the police to support the prosecution version. Visit of Rehana deceased to her relative lady Haleema is also doubtful; it appears in the evidence that Haleema was mother of Ibraheem PW-9 and used to work at Lahore as maid in some house. Presence of Haleema bibi at relevant time in Kot Samaba was also not proved as she did not appear as witness to confirm the visit of Rehana bibi deceased to her house. The overall tone and tenor of witnesses not only creates serious doubts about their presence at the spot rather their desperation to hide something mysterious and suspicious and wish to book the accused/appellant at every cost is also reflected. For the above reasons, their testimony cannot be relied upon as they can safely be labelled as untruthful witnesses and their credibility was under the clouds of doubt.

9. Piece of cloth recovered at the lead of accused is of no avail for prosecution because neither it was sent for examination on any traces of DNA or finger prints nor it was blood stained or contaminated with froth of deceased which the doctor observed was present in her oral cavity.

10. Place of occurrence belonged to Nasir Hussain accused, yet witnesses said that no one was present at the time of occurrence neither Nasir accused nor his family members; no blood-stained earth is available in this case nor clothes of deceased were contaminated with soil or anything else; witnesses admitted that dead body was put on the cot which was lying inside the BETHAK yet deceased was seen with accused/ appellant on the ground by the witnesses. It is not believable that accused/appellant was committing Zina with deceased and thereafter murdered her without bolting the door from inside. Even the main gate of house was open at the time when witnesses reached there. In such a situation place of occurrence suggested by the prosecution is not believable.

11. The last resort of prosecution was of PFSA matching report. It is trite that new proviso to Article 164 of Qanun e Shahadat Order, 1984

authorizes the court to pass the conviction mere on the basis of forensic evidence. for reference relevant provision is as under;

> ***164. Production of evidence that has become available because of modern devices, etc.:*** *In such cases as the Court may consider appropriate, the Court may allow to be produced any evidence that may have become available because of modern devices or techniques.*
>
> ***Provided that conviction on the basis of modern devices or techniques may be lawful.***

Yet above proviso requires that forensic evidence must of the level that could fulfill the standard of proof required in a criminal law. Did the prosecution possess such standard in DNA matching report is to be thrashed in the light of safety protocols for collection, packaging, preservation and dispatch of concerned samples; therefore, before assessing the forensic evidence, it is necessary to see what safety protocols are prevailing which require strict adherence for above said purpose.

First protocols were introduced through High Court Rules & Orders, framed in year1931; excerpts of Chapter 18, Part B, Volume III of High Court Rules & Orders are referred as follows;

> **PART B – REFERENCES TO THE CHEMICAL EXAMINER.**
>
> ***1. Medical Officer to be consulted about articles to be sent to Chemical Examiner****: —(i) The question as to whether any, and, if so, what articles should be sent for chemical analysis, and the transmission of such articles to the Chemical Examiner will rest ordinarily with the Medical Officer *[concerned] who should, however, attend to any requisition made by the Magistrate or the Police in this matter.*
>
> ***(ii) In certain cases, Police may send articles direct****: —In cases where human subjects are not concerned the Police may send articles to, and correspond direct with, the Chemical Examiner.*
>
> *(iii) All Magistrates are at liberty to forward any articles connected with any Criminal Case before them to the Chemical Examiner, but the desirability of their consulting the Civil Surgeon or other Medical Officer before doing so is obvious.*
>
> *Everything upon which the Chemical Examiner's opinion is necessary, should be forwarded to him with the least possible delay.*
>
> *2. ***[Omitted].*
>
> ***3. Statement to accompany articles sent****: —Whenever any article is sent to the Chemical Examiner, whether by a Magistrate, Medical officer or the Police, it should be accompanied by a statement containing all possible information that may serve to guide the Chemical Examiner in his investigation.*

***4. Mode of packing of articles to be sent**: —All articles should be forwarded in separate bottles, the stomach I one, its contents in another, the liver in a third, dry particles in small phials, and when any articles liable to decomposition are sent, they should always, whether the season be hot or cold, be immersed in methylated spirits, which should be used in the proportion of one third of the bulk of the articles.*

The cork of each bottle should be tied down and sealed, and each bottle should be numbered. To ascertain that it has been securely closed, the bottle should be placed for some minutes with its mouth down.

***5. Weight of articles sent to be noted**: —The weight of each article sent, and, where the portion of an organ is sent, the weight of the whole organ, as well as of the part sent, and in the case of fluids, the total quantity of the fluid and the quantity sent, should be stated on a ticket attached to the bottle, and also in the letter of invoice *[hereinafter prescribed.]*

***6. Precautions in packing bottles**: —(i) The several bottles containing the articles sent should be enclosed in a tin or wooden box, which should be enclosed in a tin or wooden box which should be large enough to allow of a layer of raw cotton, at least three-fourths of a inch thick, being put between the bottle and the box; the box should be securely fastened and covered with wax-cloth. (ii) In cases where any of the contents of the bottles might prove offensive, the box must be of tin, and Macdougall's powder or charcoal should be dusted between the box and wax-cloth.*

***7. Articles to be packed and sealed in the presence of the forwarding officer**: — All articles on being put up by the forwarding officer, and sealed and numbered by him, should be packed in his presence and under his immediate supervision, and the package should then be sealed by him, in accordance with the usual rules of the Post Office as to parcels, in such a manner that it cannot be opened without destroying the seal. The seal used should be a private seal, and the same throughout.*

***8. Invoice of articles and post-mortem report or statement to accompany articles**: —In all cases of transmission of articles to the Chemical Examiner, whether by a Magistrate, Medical Officer, or the Police, a letter of invoice, giving a full description of the articles sent, should be dispatched by post, together with the statement or postmortem report. A duplicate of the invoice should also be placed between the wax-cloth and the box to accompany the package. Both copies of the invoice should be stamped with an impression of the seal referred to *[above.] The Chemical Examiner should be requested to return, if possible, any articles sent to him for examination which is likely to be required at the trial.*

***9. Evidence should be taken to prove that Chemical Examiner's report refers to the subject connected with the inquiry:** —In inquiries or trials, where reference has been made to the Chemical Examiner, it will be the duty of the Magistrate to examine the official who dispatched the **[articles] for analysis with regard to the identity of the invoice and seal, and thereby establish the identity of the subjects reported on with those sent for analysis, and prove that the Chemical Examiner's report refers to the subject connected with the case under inquiry. If the decision of the case turns on the results of the Chemical Examination, a copy of the judgment, and of the evidence regarding symptoms and postmortem appearance, will be supplied to the Chemical Examiner; such copies being made at the expense of Government as a special charge.*

***10. Identity of body to be proved: —**In all cases of homicide, where the body is found, the identity of the body with the person said to be deceased must be fully established before the *[Court] trying or inquiring into the case. In such cases, where there has been a postmortem examination, evidence must be recorded by the *[Court] to prove the custody of the body of the deceased after death, and its delivery for the purpose of post-mortem examination to the medical officer.*

> ***11. Proper custody of articles to be proved:*** *—In all cases in which articles are brought up in evidence, the custody of such articles, throughout the various stages of the inquiry must be clearly traced and established. Evidence must be recorded on this point, and the evidence should never leave it doubtful as to what person or persons have had charge of the articles at any stage of the proceedings. All such articles must be distinctively marked, and any reference to them in the record must be so clear as to leave no0 room for doubt as to the special articles referred to.*
>
> ***12. Evidence of non-professional witnesses re blood and human hair should be accepted with caution****: -- ***[...] The evidence of non-professional witnesses on the subject of blood and of human hair must be accepted with the utmost caution, and where the case rests materially on the proof of such matters, the evidence of a professional witness must be taken, and reference made, if necessary, to the Chemical Examiner.*

Above rules focused on consultation with doctors about sending of samples for analysis, its proper packaging, safe custody protocols, accompanying papers like statement of possible information of case, invoice of articles and postmortem report; calling of expert witness for clarification of reports; care to rely on the evidence of non-professional witness.

Such protocols were more or less replicated in Police Rules later framed in year 1934 as under;

> ***Rule; 25.41. Chemical Examiner - Channel of communication with.*** *- (1) Superintendents of Police are authorized to correspond with and submit articles for analysis to the Chemical Examiner direct in all cases other than human poisoning cases. Any references in relation to human poisoning cases shall be made through the Civil Surgeon.*
>
> ***(2) Articles for chemical examination****. - With regard to the packing of articles sent for chemical examination, the following rules shall be observed:*
>
> > *(i) Liquids, vomit, excrement and the like, shall be placed in clean wide-mouthed bottles or glazed jars, the stoppers or corks of which shall be tied down with bladder, leather or cloth, the knots of the cord being sealed with the seal of the police officer making the investigation.*
> >
> > *Such bottles or jars shall be tested, by reversing them for a few minutes, to see whether they leak or not.*
> >
> > *(ii) Supposed medicines or poisons, being dry substances, shall be similarly tied down in jars or made up into sealed parcels.*
> >
> > *(iii) All exhibits suspected to contain stains should be thoroughly dry before being packed and dispatched for examination. The safest way of drying exhibits is to expose them to the sun. In cases of exhibits that become brittle on drying, they should be carefully packed in cotton wool and then in a wooden box.*
> >
> > *(iv) Blood-stained weapons, articles or cloth, shall be marked with a seal and made up into sealed parcels. The entire article shall be sent.*
> >
> > *(v) Sharp-edged and pointed exhibits like swords, spears, etc., should be packed in boxes and not bound up into cloth packages. In their transit through*

the post, they are liable to cut through the packing material and the exhibit is exposed.

(vi) On each bottle, jar and parcel and also on each article or set of articles contained therein, the separate identification of which has to be proved, shall be affixed a label describing the contents, giving full particulars and stating where each article was found.

On such label shall be impressed a counterpart of the seal used to secure the fastening of the bottle, jar or parcel. A copy of each label, and a counterpart impression of the seal shall be given in the inquest report, and, in the case of cattle poisoning, in the case diary.

(vii) As far as possible no letters should be glued on to exhibits as they interfere with analysis.

(viii) Exhibits such as clods of search should be packed carefully in wool and placed in a wooden box.

Notes. – (1) Cases in which death is clearly due to natural causes should not be referred to the Chemical Examiner. Medical Officers must accept the responsibility of deciding such cases.

(2) In no case should the Medical Officer attempt to apply tests for himself. Any such procedure is liable to vitiate the subsequent investigation of the case in the laboratory of the Chemical Examiner.

(3) Exhibits in connection with cases of murder by hurt or violence may be sent direct to the Chemical Examiner. This saves time and relieves the office of the Civil Surgeon of the district of unnecessary correspondence.

(4) Endeavour to send all the exhibits in a case of murder by hurt or violence under one covering letter thereby reducing the cost of examination, etc.

(5) Nail clippings are poor exhibits to send for the detection of blood in murder cases. No court of law could be expected to attach much weight to the finding of human blood on the nails of the accused.

(6) Stomach tubes in hospitals are frequently kept in a solution of mercury. They should be carefully washed with water before use. Traces of mercury found along with another poison in stomach contents might produce such complications as would handicap the successful prosecution of a case.

(7) Carbon copies of reports are sometimes very difficult to read and should be prepared clearly.

(8) Articles of which return is required for production in court or otherwise should be distinctly specified in the forwarding letter sent with articles for chemical examination.

(3) Any document purporting to be a report from the Chemical Examiner or his assistants is admissible as evidence under Section 510, Code of Criminal Procedure. No summons can be issued to the officers of this department in their official capacity without the permission of the Hon'ble Judges of the High Court. Any question or explanation on a certain report should be done by letter or by a personal interview.

(4) Attention is also directed to the further directions for, and precaution to be taken in forwarding articles to the Chemical Examiner for examination report and the rules for preserving and packing exhibits contained in Appendix 25.41(4).

Punjab Forensic Science Agency more or less directs observance of above protocols in collection, packaging, preservation and dispatch of samples. Let's see what has done by the prosecution in this case with respect to above safety protocols for DNA evidence.

Prosecution produced concerned doctor, constable, investigating officer, moharrir, and dispatch rider (Sub Inspector) to prove the safe custody protocols about collection, packaging, preservation and dispatch of samples to be tested for forensic evidence. Doctor Asia Batool PW-5 conducted postmortem examination on the dead body and as per Postmortem Report Exh. PE handed over following articles to Mahboob Ahmad 1294/C, PW-4: -

> *i. One sealed bucket containing six sealed jars & one sealed envelope.*
> *ii. One sealed bucket containing five sealed jars & one sealed envelope.*
> *iii. One bucket sealed containing shalwar & (2) vaginal swabs*
>
> *Said Doctor when appeared as PW-5 deposed about articles as under;*
>
> *i. One sealed bucket containing six sealed jars*
> *ii. one sealed envelope.*
> *iii. Another sealed bucket containing 5 sealed jars & one sealed envelope*
> *iv. Another Sealed bucket containing shalwar and two vaginal swabs*
>
> *Almost similar articles as mentioned in Postmortem Report.*

Mahboob Ahmad 1294/C PW-4 handed over following articles to Investigating officer:

> *i. Two sealed dibbas*
> *ii. Three sealed envelopes*
> *iii. Another sealed parcel containing clothes*

The above reproduced data shows that ***sealed bucket containing shalwar and vaginal swabs are missing***. Furthermore, Investigating Officer Muhammad Aslam Khan SI, PW-14 acknowledged receiving of following item from Mehboob Ahmad 1294/C:

> *i. Two sealed dibbas*
> *ii. Three sealed envelopes*
> *iii. One sealed parcel said to contain last worn clothes*

Similar articles as handed over to him, were received by Muhammad Imran Bashir 6/HC Moharar PW-13 from investigating officer, who handed over the same to Ghulam Abass SI PW-10, yet he acknowledged receiving of following item on 19.06.2016:

> *i. Two sealed small boxes*
> *ii. Two sealed envelopes*
> *iii. One sealed parcel said to contain shalwar*
> *iv. Another sealed envelope said to contain samples for DNA*

Such articles were deposited by him in PFSA on 20.06.2016 along with accused/appellant whose buccal swabs were also taken in the PFSA on same day. *Neither such articles were handed over to I.O. nor received and handed over by the Moharrar yet receiving by Ghulam Abass makes the safe custody of parcels highly doubtful* which cannot be believed.

12. The story does not end here; what the PFSA received in piecemeal for analysis is reflected from the following excerpts of respective reports:

> *First Report was generated on **26.07.2016** which was tendered as **Ex.PR**, it reflects; that one parcel was received on 20.06.16 by the PFSA through **Ansar Abass SI** and inside contains following items;*
>
> *Specimen (Stomach with content, intestine, kidney, spleen, liver and **vaginal swabs**)*
>
> *Forensic Toxicology Analysis Report contains result that **"no drug/poison is detected in liver and stomach contents"***
>
> *This report under the head of **"Disposition of evidence"** mentions that "on physical examination, Shalwar was not found in parcel, one jar containing vaginal swabs has been transferred to Evidence Receiving unit for further analysis in Forensic DNA*

It raises so many questions:

1st, parcel contains stomach contents along with vaginal swabs, such description has not been explained by any witness of chain of custody.

2nd, Ansar Abass who deposited this parcel does not figure in the list of witnesses nor he was produced, casting doubt on such parcel.

3rd, Shalwar was also not found in the parcel which was returned to Evidence Receiving Unit. Once it was opened, its transfer to

Forensic DNA Department intact has not been explained by the prosecution.

4th, how many vaginal swabs were in the parcel, is not clear.

2nd Report was generated by PFSA on 03.08.2016 tendered as Ex.PO which relates to examination of heart, lung and brain, hyoid bone and thyroid cartilage, two pieces of skin from neck, one piece of skin from mandible/chin; this was deposited by Ghulam Abass SI, it has nothing to do with culpability of accused appellant.

3rd Report was generated on 05.08.2016 labelled as Forensic DNA and Serology Analysis report tendered as Ex. PP showing that following items were submitted by Ghulam Abass SI:

1. One internal vaginal swab
2. One external vaginal swab
3. Shalwar of Rehana bibi

The expert declared that in all three items seminal material was identified. This report also raises serious questions:

1st, how many samples of vaginal swabs were prepared by the Doctor, it is not clear because Ansar Abass too has submitted vaginal swabs which were transferred to this unit (Forensic DNA) on 26.07.2016, yet Forensic DNA has not given any opinion about it and received direct samples from Ghulam Abass SI on the same day when Ansar Abass submitted the same in Toxicology Department i.e.20.06.2016.

2nd, Shalwar was not available in that parcel, how it came out from another parcel which has not been explained by witnesses of chain of custody.

4th Report was generated by PFSA on 31.10.2016 which was tendered as Ex. PQ, it was issued by Toxicology Department; it was about two vaginal swabs:

1. One internal vaginal swab
2. One external vaginal swab

Seminal Material was identified on internal vaginal swab only. This report also requires some clarification:

> First, Toxicology Department has already returned the samples to Forensic DNA vide its report dated 26.07.2016 yet did not mention in the report that they have also received two more vaginal swabs from Ghulam Abass SI too on the same day.

Such report even rules out presence of seminal material on external vaginal swab.

> **5th report** was generated after about a year on 12.09.2017 by Forensic DNA Department showing reference of previous Forensic DNA and Serology Analysis Report dated 05.08.2018 & Forensic DNA and Serology Analysis Report (Toxicology) dated 31.10.2016; it mentions the result as under;
>
> *Epithelial fractions of item 1 and 2 (vaginal swabs, internal & external) mixture of at least two individuals with major and minor components; Major component was consistent with DNA profile of accused/ appellant; whereas minor component was from unknown origin;*

It means that DNA on epithelial fraction on items was not found of Rehana bibi deceased.

> *DNA obtained from sperm fraction on items 1, 2 & 3.1 (Internal & external vaginal swabs, stains on shalwar) was also matched with DNA profile of accused/appellant.*

The above explanation clearly shows that prosecution at first instance did not explain, how many vaginal swabs were handed over by the doctor to police and how these samples routed from police station to different departments of PFSA; therefore, prosecution lacks evidence about intact chain of custody. Dilemma with prosecution to take the forensic evidence from the clouds of doubts could not be avoided because of missing links in chain of custody of articles right from the hands of Lady Doctor up to Punjab Forensic Science Agency. Such reports cannot be safely relied upon which are rejected. Reliance is

placed on Case Law reported as "*Abdul Razzaq versus The State and others"* (**2020 P.Cr.L.J. Note 118),** the relevant portion whereof is reproduced hereunder: -

> *17. The next piece of evidence to be considered by us is the positive result (Exh.PN) of the DNA test as conducted by the Punjab Forensic Science Agency, Lahore. Dr. Muhammad Yousaf, (PW-3) stated that on 23.01.2014 police brought a human skull and requested for sending the same to the Punjab Forensic Science Agency, Lahore for the purpose of identification and he packed the skull in a parcel. Dr. Muhammad Yousaf (PW-13) admitted in his cross-examination that the skull in question produced before him was not in a sealed parcel. He further admitted in his cross-examination that he had not observed whether the last worn clothes of the deceased were stained with mud, sand, blood or any foreign particles or whether the said clothes were torn or otherwise. A perusal of the recovery memo (Exh.PC) prepared with regard to the recovery of skull, shirt (Exh.P3) and high neck (Exh.P4) would reveal that only a remaining portion of skull (Khopree ke bachee hui haddee) was taken into possession and not the whole skull. The perusal of the scaled site plan of the place of recovery (Exh.PE) also clearly mentions at point No.1 that only the remaining portion of the skull bone (Khopree ke bachee hui haddee) was recovered. However, the report of Punjab Forensic Science Agency, Lahore (Exh.PN) reveals that a whole skull was received at the same and in addition thereto, teeth were also received in the sealed parcel which, at no occasion was the case of the prosecution. Furthermore Muhammad Nasrullah, ASI (PW-15) stated that on 23.01.2014, he received two sealed parcels said to contain skull which he handed over to Siddique Akbar 903/C (PW-11) for their onward transmission to the office of Punjab Forensic Science Agency, Lahore, however, only one parcel was received at the Punjab Forensic Science, Lahore. Thus, these serious conflicts are of such a nature, which could not be reconciled altogether, either by the learned counsel for the complainant or by the Additional Prosecutor General. This fact by itself creates sufficient doubts and on this score, the report of Punjab Forensic Science Agency, Lahore (Exh.PN) regarding forensic DNA Analysis and parentage testing is of no legal worth. The august Supreme Court of Pakistan has observed in the case of Azeem Khan and another v. Mujahid Khan and others (2016 SCMR 274) at the report of Punjab Forensic Science Agency, Lahore with regard to DNA analysis cannot be implicitly relied upon and has held as under:*
>
> > *"In the recent past many scandals in USA, UK and other countries have surfaced where desired DNA test reports were procured by the investigative by contaminating the samples. Such contamination has also been reported in some cases, while the samples remained in the laboratories. Many injuries were held on this issue and stringent law has been made by many States to prevent the contamination of samples outside and inside the laboratories. Proper procedure has been laid down for securing and carefully putting into parcel the suspected materials to co -related with the samples of the parents to establish paternity or maternity. Similarly, stringent check and procedure has been provided to avoid and prevent cross-contamination of the two samples because if both come in contact with each others then, it will give false positive appearance and the expert is thus misled. It has also been discovered that credentials of many experts, claiming possessed of higher qualification in this particular filed, were found fake and they were thus, removed from*

> *service. The DNA Wikipedia on web is an unrebutted testimony to these facts.*
>
> *28. In any case, it is an expert opinion and even if it is admitted into the evidence and relied upon, would in no manner be sufficient to connect the necks of the appellants with the commission of the crime when the bulk of other evidence has been held by us unbelievable thus, no reliance can be placed on it to award a capital sentence. Moreover, to ensure fair-play and transparency, the samples in the laboratories from the parents should have been taken in the presence of some independent authority like a Magistrate and also the recovered samples from the crime scene in the same way to dispel the chances of fabrication of evidence through corrupt practices and the transition of the samples to the laboratory should have also been made in a safe and secure manner. But all these safe guards were kept aside."*

Reliance is also placed on the case "*TANVIR versus The STATE and another*" (PLD 2020 Lahore 774), wherein, it has been held that: -

> *"24. In our legal framework DNA evidence is evaluated on the strength of Articles 59 and 164 of the Qanun-e-Shahadat, 1984 (QSO). The former provision states that expert opinion on matters such as science and art falls within the ambit of 'relevant evidence'. On the other hand, the latter provision provides that the Court may allow reception of any evidence that may become available because of modern devices and techniques. Under this regime the technician who conducts experiment to scrutinize DNA evidence is regarded as an expert whose opinion is admissible in Court. Subsection (3) of Section 9 of the Punjab Forensic Science Agency Act, 2007, reaffirms this legal position when it enacts that "a person appointed in the Agency as an expert shall be deemed as an expert appointed under Section 510 of the Code [of Criminal Procedure, 1898] and a person specially skilled in a forensic material under Article 59 of the Qanun-e-Shahadat, 1984 (P.O. X of 1984)." A combined reading of all these provisions shows that the report of the Punjab Forensic Science Agency (PFSA) regarding DNA is per se admissible in evidence under Section 510, Cr.P.C. Reliance is placed on Muhammad Sohail alias Samma and others v. The State and others (2019 P.Cr.L.J. 1652). Nevertheless, it must be noted, there is no express provision like Article 128 of the QSO foreclosing admissibility of evidence by articulating a conclusive presumption as in paternity disputes. Since DNA is reckoned as a form of expert evidence in criminal cases, it cannot be treated as primary evidence and can be relied upon only for purposes of corroboration. This implies that no case can be decided exclusively on its basis if there is no primary piece of evidence, like oral evidence."*

No doubt DNA reports are per se admissible and regarded as best evidence. Honourable Supreme Court of Pakistan in a case "*Ali Haider alias Papu VS Jameel Hussain and others"* (**PLD 2021 SC 362)** has regarded and valued the DNA evidence as under: -

> *"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 devise. Over the years DNA test has also come to be recognized by our statutory criminal law."*

Forensic Reports were not clear; therefore, it was incumbent upon the prosecution to seek clarification from the concerned Forensic Agency as mandated u/s 11 of Punjab Forensic Science Agency Act, 2007 which reads as under;

> ***Clarification in case of certain opinion:*** *– (1) If an expert opinion is not clear, the Court, tribunal or authority may refer it to the Agency for clarification on a specific question.*
>
> *(2) The Agency shall, on receipt of the reference, send clarification on the question to the Court, tribunal or authority.*
>
> *(3) If the condition of the forensic material or any other fact does not allow submission of a clear answer to the question, the Agency shall state its inability to answer the question.*

The court can, in case of doubtful reports, direct for re-examination of forensic material and same is permissible u/s 12 of Punjab Forensic Science Agency Act, 2007 which is as under;

> ***Re-examination of forensic material****. – (1) A person affected by the opinion of an expert, may for a sufficient cause, submit an application for re-examination before the Court, tribunal or authority other than a police officer before which the opinion is rendered or the Court or tribunal before which the opinion is submitted by the authority.*
>
> *(2) If the Court, tribunal or authority is satisfied that there are sufficient grounds for re-consideration of the opinion, it may, for reasons to be recorded in writing, direct the Agency to re-examine the forensic material.*
>
> *(3) The Director General shall, on receipt of the direction, constitute a panel of three or more experts to re-examine the forensic material or refer the same to a forensic examination facility for examination and opinion.*
>
> *(4) The Director General shall submit the finding of the expert or the forensic facility and his opinion to the Court, tribunal or authority.*

Above all, if such actions are not directed then court can call upon the expert witness to clarify the doubts in PFSA reports because such clarification was relevant in the circumstance; Article 65 of Qanun-e-Shahadat Order, 1984; is referred and reproduced as under;

> ***Article 65: Grounds of opinion when relevant:*** *Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.*
>
> ***Illustrations*** *An expert may give an account of experiments performed by him for the purpose of forming his opinion.*

It is trite that opinion of expert is best evidence and when an expert witness entered the witness box to corroborate the report submitted or prepared by him then court is left with no option, but to accept the same.

Reliance is on ***1994 CLC 479,*** *Noor Ahmad VS Meraj Bibi.* ***2005 YLR 1506,*** *Muhammad Ramzan VS Rana Talib Hussain*. ***2005 YLR 1834,*** *AG of State of J & K VS Kashmir Steel & Re-Rolling Mills.*

13. In the book THE MODERN LAW OF EVIDENCE *Third edition* by Butterworths, expert opinion has been clarified as under: -

> *"Although an expert cannot prove facts upon which his opinion is based but of which he has no personal or first-hand knowledge, because that would be a breach of the rule against hearsay, he is entitled to rely upon such facts as a part of the process of forming an opinion and, in this sense, is not subject to the rule against hearsay in the same way as a non-expert or witness of fact."*

Further that: -

> *"It is also well established that an expert may fortify his opinion by referring not only to any relevant research, tests or experiments which he has personally carried out, whether or not expressly for the purposes of the case, but also to works of authority, learned articles, research papers, letters and other similar material written by others and comprising part of the general body of knowledge falling within the field of expertise of the expert in question. (Davie v Edinburgh Magistrates 1953 SC 34 (Court of Session).* In *H v Schering Chemicals Ltd [1983] 1 All ER 849, for example, the issue being whether the drug Primodos had caused certain personal injuries and whether the defendants had been negligent in manufacturing and marketing it, it was held that expert witnesses were entitled to refer to the results of research into the drug and articles and letters about the drug published in medical journals. Bingham J said: "If an expert refers to the results of research published by a reputable authority in a reputable journal the court would, I think, ordinarily regard those results as supporting inferences fairly to be drawn from them, unless or until a different approach was shown to be proper. H v Schering Chemicals Ltd [1983] 1 All ER 853.*
>
> *In R v Abadom [1983] 1 All ER 364, the accused was convicted of robbery. The prosecution case rested on evidence that he had broken a window during the robbery and that fragments of glass imbedded in his shoes had come from the window. An expert gave evidence that as a result of a personal analysis of the samples, he found that the glass from the window and the glass in the shoes bore an identical refractive index. He also gave evidence that he had consulted unpublished statistics compiled by the Home Office Central Research Establishment which showed that the refractive index in question occurred in only 4% of all glass samples investigated. He then expressed the opinion that there was a very strong likelihood that the glass in the shoes came from the window. On appeal it was argued that the evidence of the Home Office statistics was inadmissible hearsay because the expert had no knowledge of the analysis on which the statistics had been based. The appeal was dismissed on the grounds that once the primary facts on which an opinion is based have been proved by admissible evidence, the expert is entitled to draw on the work of others as part of the process of arriving at his conclusion. The primary facts in the*

> *instant case, that is the refractive indices of the glass from the window and the glass in the shoes, had been proved by admissible evidence (as it happened by the evidence of the expert himself on the basis of his own analysis). Accordingly, the expert was entitled to refer to the Home Office statistics and this involved no infringement of the hearsay rule. Experts, it was said, should not limit themselves to drawing on material which has been published in some form: part of their experience and expertise lies in their knowledge and evaluation of unpublished material. The only proviso is that they should refer to such material in their evidence so that the cogency and probative value of their conclusions can be tested and evaluated by reference to it. [R V Bradshaw (1985) 82 Cr App Rep 79 (CA)]*

14. There were serious questions on the safe custody and secure transmission of the vaginal swabs sent for analysis and PFSA reports in this case only indicated matching of DNA profile of accused which in no case was helpful for prosecution because when there is a doubt regarding the integrity of the parcel containing the vaginal swabs, detection of DNA of accused was not sufficient. PFSA has not identified any item that contains the DNA of Rehana bibi deceased; therefore, all the reports tendered by the prosecution are of no avail to tag the appellant with criminal liability. Punjab Forensic Science Agency must passionately look into these lacunae to eliminate them or to override by following proper protocols to the hilt and that if dispatching agency does not send proper information or does not request proper testing required in a case, then the agency should come forward on the front for rescue of prosecution case by suggesting to concerned office to seek required test in the circumstance of the case. e.g. if police or doctor does not require identification of DNA Profile of Victim and request for tracking of DNA profile of accused only, and if agency feels that such test would not be helpful for building a good prosecution case, it can suggest to concerned office to send request for requisite tests. In a case when a victim of rape is dead, she cannot appear before the Agency for sampling; therefore, to avoid any objection, Agency should also retrieve the DNA profile of victim from epithelial fraction of vaginal swabs. So that it could safely be proved that vaginal swabs do contain DNA of Victim.

15. For what has been discussed above, we have no doubt to hold that here in this case the prosecution has miserably failed to establish

the charge against the accused/appellant beyond any shadow of doubt. In the case "*MUHAMMAD AKRAM vs. THE STATE*" **(2009 SCMR 230)** the Hon'ble Supreme Court of Pakistan has held that for giving benefit of doubt to an accused a single circumstance creating reasonable doubt in a prudent mind about guilt of accused is sufficient to make him entitled to such benefit. Here in this case as discussed above the prosecution has squarely failed to bring home the guilt against the accused/appellant. Consequently, the instant appeal is allowed, the impugned judgment of conviction and sentence is set-aside and the accused/appellant is acquitted of the charge against him. He shall be released forthwith if not required in any other case. The case property, if any, be disposed of in accordance with law and the record of the learned trial court be sent back immediately.

Murder Reference is answered in negative.

Sentence of death is not confirmed.

(SADIQ MAHMUD KHURRAM)
JUDGE.

(MUHAMMAD AMJAD RAFIQ)
JUDGE.

Approved for reporting

JUDGE.

JUDGE

Javed*