JUDGMENT SHEET

LAHORE HIGH COURT, LAHORE

JUDICIAL DEPARTMENT

Criminal Revision No.71205/2021

Shakeel Akhtar

Vs.

The State etc.

JUDGMENT

Date of hearing	**17.02.2023**
For the Petitioner:	Mr Muhammad Nawaz, Advocate.
For the State:	Rai Asif Mehmood, Deputy Prosecutor General.
For Respondent No.3:	M/s Mudassar Naveed Chatha and Muhammad Waqas, Advocates.

Tariq Saleem Sheikh, J. – On 20.9.2020, Tassaduq Hussain went missing, and the following day, around noon, his body was found in Square No.54, Killa No.5 in Chak No. 146/R.B., near the Rajbah. He had marks of violence on his body and appeared to have been murdered by strangulation. His grandfather, Muhammad Aslam (Respondent No.3), lodged FIR No. 454/2020 dated 21.9.2020 at Police Station Sahianwala, Faisalabad, against unknown persons regarding his murder. A team of the Punjab Forensic Science Agency (PFSA) came to the crime site and took samples from Tassaduq Hussain, including buccal swabs, nail swabs, and the piece of cloth knotted around his neck, which are duly preserved with the PFSA.

2. On 5.10.2020, Respondent No.3 nominated the Petitioner in the above-mentioned case. The police arrested him and, during the investigation, found that he had murdered Tassaduq Hussain. On 2.3.2021, the Additional Sessions Judge, Faisalabad, indicted him. His trial is in progress, and the prosecution has recorded eight witnesses.

3. On 25.9.2021, Respondent No.3 moved the trial court for the Petitioner's DNA test and comparison with Tassaduq Hussain's samples kept at the PFSA. The Additional Sessions Judge accepted that application vide Order dated 11.11.2021 (the "Impugned Order"). The Petitioner has assailed it in this revision petition under sections 435/439 of the Code of Criminal Procedure, 1898.

4. The Petitioner's counsel contends that the Impugned Order violates Article 13(b) of the Constitution of the Islamic Republic of Pakistan, 1973 (the "Constitution") because the Petitioner cannot be forced to be a witness against himself. He submits that the Petitioner was arrested on 15.11.2020 and was held on physical remand until 30.11.2020, but the Investigating Officer did not take him to the PFSA for a DNA test. That test cannot be done now because eight prosecution witnesses have been recorded. The counsel maintains that the Impugned Order will prejudice the Petitioner as it will help the prosecution fill lacunae in its case.

5. The Deputy Prosecutor General has supported the Impugned Order. He submits that Article 164 of Qanun-e-Shahadat, 1984 ("QSO"), allows the production of evidence made possible by modern devices or techniques. It may be permitted even during the trial because the court must do justice. The Deputy Prosecutor General controverts the Petitioner's contention that the Impugned Order infringes on his fundamental right under Article 13(b) of the Constitution.

6. The counsel for Respondent No.3 states that the Petitioner's DNA test was crucial because the present case is based on circumstantial evidence. The Investigating Officer did not have it done due to oversight or a corrupt motive. The complainant party cannot be penalized for his omission/lapse. Fairness of trial means as much to it as the accused. The Petitioner's DNA test would help in the just decision of the case. It may even work in his favour because a negative report would clear him of the charge. The counsel supports the Law Officer's contention that the DNA test would not violate the Petitioner's constitutional right under Article 13(b).

Discussion

7. DNA is an abbreviation for deoxyribonucleic acid. It is a complex molecule in human cells comprising two nucleotide strands arranged differently for each individual except identical twins. New technology enables DNA analysts to determine the arrangement of these strands, creating unique DNA profiles.[1] DNA technology is helping in criminal investigations, paternity testing and genealogical and medical research. DNA fingerprinting, DNA profiling, and DNA typing are the procedures used in identification testing. Although these tests have some technical differences, the terms are sometimes used interchangeably.[2]

8. DNA is more than just a unique personal identification code. It may also provide details regarding a person's physical traits and ancestry. In law enforcement, DNA profiles serve as "genetic fingerprints" that aid in identifying the perpetrators and their crimes. Law enforcement officers collect DNA samples from specific categories of people, such as criminal suspects and convicts. Compulsory DNA collection generally involves blood or saliva samples rather than finger impressions, and DNA profiles can later be compared to any biological matter found at crime scenes. Therefore, rather than being a supplement, DNA matching is a necessary complement to fingerprint analysis in identifying criminal suspects.[3] The Supreme Court of Pakistan recognized its importance in ***Salman Akram Raja and another v. Government of Punjab and others*** (2013 SCMR 203) and more recently in ***Ali Haider alias Papu v. Jameel Hussain and others*** (PLD 2021 SC 362). It is considered "one of the strongest corroborative pieces of evidence" due to its accuracy and conclusiveness.

9. DNA test is considered a threat to a person's privacy, so there have always been voices against it. In criminal cases, it is also challenged on the ground that it violates the accused's fundamental

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[1] Compulsory DNA Collection: A Fourth Amendment Analysis (2010). https://www.everycrsreport.com/reports/R40077.html

[2] Saad, R. (2005). *Discovery, development, and current applications of DNA identity testing*. (Baylor University Medical Center), 18(2), 130-133. https://doi.org/10.1080/08998280.2005. 11928051

[3] See Note 1.

rights, including the protection against self-incrimination. Hence, the first question for consideration in the present case is whether Article 13(b) of our Constitution of 1973 allows the collection and analysis of DNA from people arrested and charged with serious crimes.

10. The international human rights instruments recognize the inter-relationship between the "right against self-incrimination" and the "right to a fair trial." Article 14(3)(g) of the International Covenant on Civil and Political Rights (ICCPR) (1966) lists the minimum protections that must be provided to an accused during a trial. It states that everyone has a right "not to be compelled to testify against himself or to confess guilt." Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) states that every person charged with an offence has a right to a fair trial, and Article 6(2) provides that "everybody charged with a criminal offence shall be presumed innocent until proved guilty according to law." The provision of "presumption of innocence" is inextricably linked to the right against self-incrimination because compelling the accused to testify would shift the burden of proof from the prosecution to the accused.[4]

11. Most countries also recognize the above-mentioned affinity between the two rights. The Fifth Amendment to the U.S. Constitution incorporates the privilege against self-incrimination, and courts have held that it is also connected to other fundamental rights, such as protection against unreasonable search and seizure (Fourth Amendment) and the guarantee of due process of law (Fourteenth Amendment).

12. In the United States, DNA tests of the people accused or convicted of crimes and the creation of law enforcement databanks and databases have generally been challenged on the basis of the Fifth and Fourteenth Amendments. Despite strong dissents, the Supreme Court has consistently maintained that the privilege against self-incrimination applies only to "testimonial" communications. Fingerprints, blood, and DNA samples are not regarded as testimonials because they are not acts of communication. Even compelled voice samples were determined not

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[4] *Smt. Selvi and others v. State of Karnataka* (AIR 2010 SC 1974).

to violate the Fifth Amendment since they were simply used to assess physical traits and "not for the testimonial or communicative content of what was to be said." Therefore, the Fifth Amendment privilege does not protect a person from being forced by the government to give blood or other biological samples. In ***Schmerber v. California,*** 384 U.S. 757 (1966), a man was arrested at a hospital while receiving treatment for injuries sustained in an accident involving the automobile he had been driving. Despite his protests, a doctor at the hospital drew a blood sample at the police officer's request. Chemical tests revealed that the man's blood alcohol level was very high. He was convicted of driving while intoxicated. The Supreme Court affirmed his conviction, notwithstanding his claim that the forced extraction of his blood compelled him to be a witness against himself. The majority explained:

> "Not even a shadow of testimonial compulsion upon or enforced communication by the accused was involved either in the extraction or in the chemical analysis. Petitioner's testimonial capacities were in no way implicated; indeed, his participation, except as a donor, was irrelevant to the results of the test, which depend on chemical analysis and on that alone. Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privilege grounds."

13. In ***Boling v. Romer***, 101 F.3d 1336, 1340 (10th Cir. 1996), the Court of Appeals for the Tenth Circuit stated that the claim that "requiring DNA samples from inmates amounts to compulsory self-incrimination fails because DNA samples are not testimonial in nature."

14. The courts in the United States have also rejected the challenge to DNA tests based on the Fourth Amendment. They have upheld laws authorizing law enforcement agencies to collect DNA compulsorily, applying different legal standards to determine what constitutes reasonableness in terms of the said Amendment. The early cases looked at the collection of DNA from people who had been convicted of criminal charges. Recent state and federal legislation allows the collection of such samples from people who have been arrested or detained but not convicted. In ***Maryland v. King,*** 569 U.S. 435 (2013), the Maryland DNA Data Collection Act was challenged, which empowers state and local law enforcement officers to take DNA samples

from people arrested for violent crimes, burglaries or attempting to commit these offences. The issue before the U.S. Supreme Court was whether the Fourth Amendment allows it. In a 5-4 opinion authored by Justice Kennedy, the Supreme Court stated that using a buccal swab inside a person's cheek to collect a DNA sample does constitute a search within the meaning of the Fourth Amendment, but its constitutionality would depend on whether it can be termed reasonable. The "reasonableness" of a search is determined by evaluating legitimate governmental objectives against the extent to which the search intrudes on an individual's privacy. Because the government needs to know "who has been arrested and who is being tried," and DNA testing helps law enforcement officers identify the perpetrators of a crime, it is crucial in advancing the government's interests. The intrusion of a cheek swab to get a DNA sample is small compared to the significant government interest and the unique efficacy of DNA identification. Reasonableness must be considered in the context of an individual's legitimate privacy expectations, which diminish when police take him into custody. Justice Kennedy compared the DNA collection with the police practices of taking photographs and fingerprints of arrestees and stated that DNA collection performed the same function more efficaciously.

15. In India, Article 20(3) of the Constitution states: "No person accused of any offence shall be compelled to be a witness against himself." According to Basu, this clause follows the language of the Fifth Amendment to the American Constitution, but the rule laid down in the Indian Constitution is *narrower* than the American rule as expanded by interpretation.[5] In ***M. P. Sharma v. Satish Chandra and others*** (AIR 1954 SC 300), the Indian Supreme Court observed that Article 20(3) uses the phrase *"to be a witness"* rather than *"to appear as a witness."* The protection granted to an accused in relation to the expression "to be a witness" is not limited to testimonial compulsion in the courtroom but may well extend to compelled evidence obtained from him previously. Therefore, it is available to a person against whom there

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[5] Durga Das Basu, *Commentary on the Constitution of India*, 9th Edn., Vol.5, p. 4568

is a formal accusation of committing a crime, which could result in prosecution in the normal course.

16. In ***State of Bombay v. Kathi Kalu Oghad*** (AIR 1961 SC 1808), the Indian Supreme Court stated that it is as important to empower law enforcement officers to prosecute the offender as to protect an accused from being forced to incriminate himself. The Court held that the phrase "to be a witness" in Article 20(3) of the Indian Constitution means imparting knowledge or information about relevant facts, either orally or in writing, by a person who has personal knowledge thereof to a court or a person conducting an enquiry or investigation. It excludes the mechanical process of simply producing documents in the court that may shed light on any of the issues under consideration. For example, the accused person may possess a document which is in his writing or bears his signature or thumb impression. The submission of such a document to compare the writing, signature, or impression is not an accused person's statement, which can be regarded as personal testimony. Similarly, when the court or any investigating agency requires an accused person to provide his finger impression, signature, or handwriting specimen, he is not presenting "personal testimony". Giving a "personal testimony" must be voluntary on his part. He has the choice of making any statement or saying nothing at all, but despite his greatest efforts to conceal the genuineness of his handwriting or finger impressions through dissimulation, he cannot change them. Thus, the giving of finger impressions or specimen writing, or signatures by an accused person may amount to furnishing evidence in the broad sense, but it is not included in the expression "to be a witness".

17. In ***Nandini Satpathy v. Dani (P.L) and another*** (AIR 1978 SC 1025), the Indian Supreme Court ruled that the restrictive sweep of Article 20(3) begins at the stage of police interrogation, not in court. It went on to say that the prohibition on self-accusation and the right to remain silent during an investigation or trial extends beyond that case and protects the accused regarding other pending or imminent offences, which may deter him from voluntary disclosure of a

criminatory matter. Krishna Iyer J. wrote that compelled testimony is "evidence procured not merely by physical threats or violence, but by psychic torture, atmospheric pressure, environmental coercion, tiring interrogative prolixity, overbearing and intimidatory methods and the like – not the legal penalty for violation. So, the legal perils following upon refusal to answer, or answer truthfully, cannot be regarded as compulsion within the meaning of Article 20(3). The prospect of prosecution may lead to legal tension in the exercise of a constitutional right, but then, a stance of silence is running a calculated risk. On the other hand, if there is any mode of pressure, subtle or crude, mental or physical, direct or indirect, but sufficiently substantial, applied by the policeman for obtaining information from an accused strongly suggestive of guilt, it becomes 'compelled testimony', violative of Article 20(3). A police officer is clearly a person in authority. Insistence on answering is a form of pressure, especially in the atmosphere of the police station, unless certain safeguards erasing duress are adhered to. Frequent threats of prosecution, if there is failure to answer, may take on the complexion of undue pressure violating Article 20(3)."

18. In ***Ritesh Sinha v. State of U.P.*** (AIR 2013 SC 1132), the Indian Supreme Court ruled that directing the accused to give his voice sample was not a testimony by itself to infringe Article 20(3).

19. It is necessary to refer to ***Gautam Kundu v. State of West Bengal*** (AIR 1993 SC 2295), which is often cited for opposing a request for a blood test. This case has some unusual facts and must be read in that context. The girl lived with her husband for some time after marriage before returning to her parents' house to study for the Higher Secondary Examination. In the meantime, she became pregnant. The husband and his family asked her to have an abortion, but she refused and gave birth to a child. The girl petitioned for maintenance under section 125 of the Indian Code of Criminal Procedure 1973. The husband denied paternity and wanted a blood group test. He argued that if it was shown that he was not the child's father, he would not be obligated to pay maintenance. The Supreme Court ruled that the

husband's motion could not be granted because it was to avoid the payment of maintenance. It further stated that (i) the courts in India cannot order blood tests as a matter of course; (ii) wherever applications are made for such prayers to have a roving inquiry, the prayer for a blood test cannot be entertained; (iii) there must be a strong *prima facie* case in which the husband must establish non-access to dispel the presumption arising under section 112 of the Evidence Act;[6] (iv) the court must carefully examine as to what would be the consequence of ordering the blood test; whether it will have the effect of branding a child as a bastard and the mother as an unchaste woman; and (v) no one can be compelled to give a sample of blood for analysis. And, no adverse inference can be drawn against him for his refusal.

20. India has enacted the Criminal Procedure Code (Amendment) Act, 2005 to facilitate the investigation of criminal cases and overcome the obstacles of gathering evidence by utilizing cutting-edge techniques. The said Act has introduced two additional provisions in the Indian Code of Criminal Procedure 1973 that allow medical examination of the accused and the victim of sexual assault and taking samples from their person for DNA profiling.

21. Article 13(b) of the Constitution of 1973 is relevant to the discourse in Pakistan. It is similar to Article 20(3) of the Indian Constitution and reads as under:

> **13. Protection against double punishment and self-incrimination.** No person –
>
> (a) …
>
> (b) shall, when accused of an offence, be compelled to be a witness against himself.

22. In ***Syed Ikram Gardezi v. The State and another*** (1980 PCr.LJ 941), this Court held that Article 13 of the Constitution, which guarantees that no person shall be forced to be a witness against himself when accused of an infraction, has given constitutional status to the rule previously codified in section 340(2) Cr.P.C. Calling upon an accused to produce a document is one thing, and to compel him to testify

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[6] Refer to Article 128 of Qanun-e-Shahadat, 1984.

against himself is quite another. The two cannot be equated. If the argument is accepted that the material collected from the accused under section 94 or 96 Cr.P.C. cannot be used as evidence against the accused for being *ultra vires* of Article 13 of the Constitution, a slew of other statutory provisions will have to be struck down. The learned Judge added that the term "person" in section 94 of Cr.P.C. includes an accused. Limiting the said term's meaning would amount to legislation, which judges cannot do under the guise of interpreting the statutory provisions. Any judgment of the Indian courts holding otherwise is not binding on the courts in Pakistan.

23. In ***Alpha Insurance Company Limited and others v. United Insurance Company of Pakistan Limited and another*** (1996 SCMR 1668), the Supreme Court of Pakistan held that for the protection of Article 13(b) to be available, there must be a person accused of an offence, there should be some sort of compulsion, and the objective should be to make the accused a witness against himself. The term "compel" connotes constraint and coercion, which can be physical or intangible. Article 13(b) expressly excludes (i) the voluntary presentation of incriminatory material; (ii) the production of non-incriminatory material that may aid the investigation or even exonerate the accused; and (iii) the production of incriminating material otherwise than through compulsion. The prohibition attaches only to the incriminating material that the accused does not want to produce. It is the accused's privilege which is exercisable against the whole world. The accused can also waive it. To exclude an accused from section 94(1) Cr.P.C. would be unjustified because the accused under that section can still be called upon to produce evidence that is not incriminating, which exonerates him, or which he is prepared to submit voluntarily. The Supreme Court added that merely asking an accused to produce a document or other things in his possession would not *ipso facto* mean he is compelled to be a witness against himself. It further said:

> "As regards the protection afforded by [Article 13(b)], if the accused considers any piece of evidence as incriminating him, the privilege granted can be claimed. He has to refer the authority, be it police or court or any other, to his privilege and the exercise of it by him. The

> police are not competent to determine whether the privilege has been properly exercised by him or not. Its exercise is sufficient for it to hold its hands. The police thereafter cannot take the coercive steps reserved for it under section 94 Cr.P.C. for getting through the accused such documents. Independently of the accused, there is no restraint on its power of recovery, seizure and custody. Just like a privileged document, a person can be asked to produce it during the proceedings, and the person exercising authority over it can claim the privilege or waive it to produce it before the authority. This choice to exercise the privilege can be adjudicated only in court and not elsewhere. Similarly, the exercise of privilege and protection against incrimination enjoyed by the accused cannot be adjudicated by any authority other than the court and the court will take note of it when the protection is claimed. There is, therefore, no need to exclude the accused from section 94 Cr.P.C."

24. In ***Abdul Latif Aassi v. The State*** (1999 MLD 1069 : 2001 PCr.LJ 548), this Court upheld the order of the Special Judge, Anti-Corruption, passed during the trial whereby he directed that certain documents be sent to the handwriting expert for comparison with the admitted documents.

25. In Pakistan, DNA tests are considered valuable for delivering justice in criminal cases. Several provisions furnish the legal framework for their admissibility. Article 59 of QSO states that expert opinion on the matters such as science and art falls within the ambit of "relevant evidence". Under this provision, the technician who conducts experiments to scrutinize DNA evidence is regarded as an expert whose opinion is admissible in court. Article 164 provides that the court may allow the reception of any evidence that may become available because of modern devices and techniques. Articles 24 and 40 of QSO are also significant. Article 24 explains when facts that are not otherwise relevant become relevant, while Article 40 describes how much of the information from the accused may be proved. Section 9(3) of the Punjab Act of 2007 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 especially skilled in a forensic material under Article 59 of the Qanun-e-Shahadat, 1984 (P.O. X of 1984)." This section reaffirms the admissibility of DNA evidence and makes the PFSA's report regarding DNA *per se* admissible

in evidence.[7] Parliament has enacted sections 53A, 164A and 164-B Cr.P.C. to specifically accord statutory recognition to the DNA test in respect of the offences under sections 376, 377 and 377-B PPC.

26. The Supreme Court's ruling in *Salman Akram Raja*, supra, is also a legal mandate for DNA testing of an accused to determine the authenticity of the allegations levelled against him. Under the Constitution, the said ruling is binding on all courts and executive authorities in the country.

27. In light of the above discussion, I conclude that the DNA test of an accused person does not offend Article 13(b) of the Constitution of 1973. DNA collection in criminal cases is analogous to the police practice of taking photographs or collecting fingerprints of the accused. It accomplishes the same function more effectively. It is not testimonial because the investigator – or the court – draws his own conclusions. One cannot claim that by providing a sample for the test, the accused imparted any information based on his own knowledge and became a witness against himself, violating Article 13(b). As the U.S. Supreme Court held in *Maryland v. King*,[8] an accused has a lower expectation of privacy. Although DNA testing may invade his privacy, society's interest in identifying and prosecuting the culprit outweighs privacy concerns.

28. The courts in Pakistan nonetheless disfavour DNA tests in civil matters. In ***Muhammad Nawaz v. Additional District & Sessions Judge, etc.*** (PLD 2023 SC 461), the Supreme Court stated:

> "These fundamental rights are subject to the law and can only be interfered with if so regulated by law … A court order for the DNA test of two persons as a means of identifying their genetic relationships interferes with their right to privacy and liberty. This test can be ordered only either with the consent of the persons concerned or without their consent if permissible under a law. We are aware of certain provisions of the criminal law which permit the DNA test of an accused person without his consent, but no civil law has been brought to our notice which allows this test in civil cases without the consent of the person concerned."[9]

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[7] *Ali Haider alias Papu v. Jameel Hussain and others* (PLD 2021 SC 362).

[8] 569 U.S. 435 (2013).

[9] Footnotes omitted.

29. Now, I come to the second question of whether the court can order an accused's DNA test during the trial.

30. A careful study of the relevant provisions of the Code of Criminal Procedure, 1898, and other applicable statutes discloses a scheme which aims at strengthening the investigator's hands. Section 2(i) of the Code states that "investigation includes all the proceedings under this Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf." Similarly, sub-rule (3) of Rule 25.2 of the Police Rules, 1934, casts a duty on the Investigating Officer to discover the truth of the matter under investigation. His object should be to find the real facts of the case and arrest the actual offender(s). Section 94 Cr.P.C. authorizes the Investigating Officer to produce any "document or thing" necessary or desirable for any investigation.

31. The Investigating Officer must use modern techniques to get to the truth. In particular, he must have the accused's DNA test done whenever required. However, where there is a lapse on his part, intentional or unintentional, the court may invoke section 94 Cr.P.C. read with Articles 24, 40, 59 and 164 of QSO to do justice. It may also draw on Rule 2 of Chapter 1-E, Volume III of the Rules & Orders of the Lahore High Court, which provides:

> **2. Duty of Court to elucidate facts.–** Magistrates should endeavour to elucidate the facts and record the evidence in a clear and intelligible manner. As pointed out in 23 P.R. 1917, a Judge in a criminal trial is not merely a disinterested auditor of the contest between the prosecution and the defence, but it is his duty to elucidate points left in obscurity by either side, intentionally or unintentionally, to come to a clear understanding of the actual events that occurred and to remove obscurities as far as possible. The wide powers given to the court by Article 161 of the Qanun-e-Shahadat, 1984, should be judiciously utilized for this purpose when necessary.

Article 161 of QSO is reproduced below for ready reference:

> **161. Judge's power to put question or order production.–** The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form, at any time, of any witness, or the parties about any fact relevant or irrelevant, and may order the production of any document or things and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the Court, to cross-

> examine any witness upon any answer given in reply to any such question:
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> Provided that the judgment must be based upon facts declared by this Order to be relevant and duly proved.
>
> Provided also that this Article shall not authorize any Judge to compel any witness to answer any question or to produce any document which such witness would be entitled to refuse to answer or produce under Articles 4 to 14, both inclusive, if the question were asked or the document was called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under Article 143 or 144; nor shall he dispense with primary evidence of any document, except in the cases hereinbefore excepted.

32. It is pertinent to note that section 94 Cr.P.C., in addition to the Investigating Officer, empowers the court to require any person to produce any "document or thing" necessary for the decision of the case it is trying. In ***Om Prakash Sharma v. CBI, Delhi*** (AIR 2000 SC 2335), while interpreting section 91 of the Indian Code of Criminal Procedure 1973, which is *pari materia* with our section 94 Cr.P.C., the Supreme Court of India held:

> "The powers conferred under Section 91 are enabling in nature aimed at arming the court or any officer in charge of the police station concerned to enforce and to ensure the production of any document or other things necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under the Code, by issuing a summons or a written order to those in possession of such material. The language of Section 91 would, no doubt, indicate the width of the powers to be unlimited, but the in-built limitation inherent therein takes its colour and shape from the stage or point of time of its exercise, commensurately with the nature of proceedings as also the compulsions of necessity and desirability, to fulfil the task or achieve the object … The court concerned must be allowed a large latitude in the matter of exercise of discretion, and unless, in a given case, the court was found to have conducted itself in so demonstrably an unreasonable manner unbecoming of judicial authority, the court superior to that court cannot intervene very lightly or in a routine fashion to interpose or impose itself even at that stage. The reason being, at that stage, the question is one of the mere proprieties involved in the exercise of judicial discretion by the court and not of any rights concretised in favour of the accused Therefore, it is to be only seen as to whether the trial court has judiciously and judicially exercised its discretion."

33. It follows that section 94 Cr.P.C. gives extensive powers to the court, and the effect of the word "whenever" used therein is that it can exercise that authority at any stage of the trial. The language of section 94 Cr.P.C. is general. It includes an accused person, as I have already discussed.

34. Section 94 Cr.P.C., Articles 24, 40, 59 and 164 of QSO and Rule 2 of Chapter 1-E, Volume III of the Rules & Orders of the Lahore High Court, must be given a purposive interpretation. In particular, the term "things" used in section 94 Cr.P.C. and Article 161 of QSO must be given a broad meaning and understood to signify *anything* connected with the offence whose production will serve the interest of justice. In ***Abdul Latif Aassi v. The State*** (1999 MLD 1069 : 2001 P.Cr.R. 548), Asif Saeed Khan Khosa J. stated that contrary to the general perception that we have an adversarial justice system, sections 245(1), 540, 428 and 561-A Cr.P.C., Article 161 of QSO and Rule 2, *supra*, cut over that paradigm and allow the courts to take an inquisitorial approach in certain circumstances. Therefore, in a criminal case, a trial court can rectify an intentional or unintentional lapse on the part of the complainant, the Investigating Officer or the prosecuting counsel by calling in evidence on its own if it can have a bearing on the determination of guilt or innocence of the accused person. Such authority must be granted to a criminal court in the larger interest of the community. The stage of the trial is irrelevant for this purpose. The only factor important for exercising such power is that the evidence called is relevant. The learned Judge wrote:

> "Looked at in the light of these express statutory provisions, the argument of the learned counsel for the petitioner that the learned trial court in the present case could not assume an inquisitorial role appears to be misconceived. The provisions like sections 540, 428 and 561-A, Cr.P.C. and other such provisions go a long way in further fortifying this conclusion. Enunciation of the law by the Honorable Supreme Court of Pakistan in the case of *Muhammad Azam v. Muhammad Iqbal* (PLD 1984 SC 95) also throws sufficient light on the subject, and I have respectfully sought guidance from the same in this regard."

35. Section 10 of the Punjab Act of 2007 authorizes the court, tribunal or authority to send a forensic material related to the investigation or proceedings before it to the PFSA for analysis and expert opinion. According to section 2(1)(g) of the Act, "forensic material" means "a document, material, equipment, impression, or any other object connected with the commission of an offence, a civil cause or any other proceedings." This description fully covers a DNA sample.

Hence, the court may also invoke section 10, *ibid*, to order an accused's DNA test.

The case at hand

36. The Deputy Prosecutor General has produced documents before this Court which *prima facie* show that the Investigating Officer purposely avoided the Petitioner's DNA test. In view of what has been discussed above, the trial court has ample powers to get it done now.

37. A fair trial is not solely a question for the accused. Lord Wheatly said: "While the law of Scotland has always very properly regarded fairness to an accused person as being an integral part in the administration of justice, fairness is not a unilateral consideration, fairness to the public is also a legitimate consideration … It is the function of the court to seek a proper balance to ensure that the rights of individuals are properly preserved.[10] In ***Zahira Habibullah H. Sheikh and another v. State of Gujarat and others*** (AIR 2004 SC 3114), the Indian Supreme Court stated that crimes are public wrongs committed in violation of public rights and duties that have far-reaching implications for the entire community. A fair trial necessitates striking a balance among the interests of the accused, the victim, and society, which the State and prosecuting agencies represent. The interests of society should not be treated with disdain. It is incorrect to assert that only the accused must be treated fairly. That would be turning Nelson's eyes to the needs of society at large and the victims, their families and relatives. In a criminal trial, each of them has an inherent right to be treated equally. Denial of a fair trial is as much injustice to the accused as it is to the victim and society.

38. The Petitioner's contention that the Impugned Order would allow the prosecution to fill lacunae in its case deserves short shrift. Since the prosecution case is based entirely on circumstantial evidence, the Petitioner's DNA test would help the court to make a correct decision.

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[10] Durga Das Basu, *Commentary on the Constitution of India*, 9th Edn., Vol.5, p. 4565

39. This petition has no merit and is therefore **dismissed.**

(Tariq Saleem Sheikh)
Judge

Announced in open Court on _____.

Judge

Approved for reporting

Judge

Naeem