

Stereo. HCJDA 38
JUDGMENT SHEET
LAHORE HIGH COURT, LAHORE
JUDICIAL DEPARTMENT

Crl. Misc. No. 20609-B/2023

Muhammad Akram

Vs.

The State etc.

S.No. of Order/ Proceeding	Date of order/ proceeding	Order with the signature of the Judge and that of parties or counsel where necessary
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13.04.2023 Sh. Waqas Javed, Advocate, for the Petitioner.
Rana Tasawar Ali Khan, Deputy Prosecutor General.

Tariq Saleem Sheikh, J. – Through this application under section 497 Cr.P.C., the Petitioner seeks post-arrest bail in case FIR No.188/2022 dated 29.07.2022 registered at Police Station Sarai Mahajir, District Bhakkar, for offences under sections 376 & 292 PPC.

2. Briefly, the allegation against the Petitioner is that he ravished the Complainant, a third-year student, at pistol point on 29.07.2022. Additionally, he made her nude video clips and threatened to put them on the internet if she told anybody about the incident.

3. The Petitioner has denied the allegation, but the Complainant's Medico-Legal Certificate and the DNA test report are against him. During the investigation, the police recovered the pistol he allegedly used and determined that he did commit the offence. On a tentative assessment, there appears to be enough incriminating evidence against the Petitioner. The offence falls within the prohibitory clause of section 497 Cr.P.C. Hence, no case for bail is made out. This application is **dismissed**.

4. Before parting with this order, I may point out something very disturbing in the Complainant's Medico-Legal Certificate. It reflects that the doctor performed the two-finger test on her during the medical examination.

5. The two-finger test, also known as the PV (per vaginal examination), is an intrusive physical examination of a woman's vagina to determine vaginal muscle laxity and whether or not the hymen is distensible. The doctor inserts two fingers into her vagina, and it is assumed that the ease with which the fingers penetrate her is directly proportional to her sexual experience. Thus, if the fingers slide easily, the woman is presumed to be sexually active. If they fail to penetrate or have difficulties penetrating, her hymen is considered intact, proving her virginity.

6. The precise origin of the two-finger test is unknown. However, Human Rights Watch states that references to the test in Britain can be found as far back as the early 18th century, and it appeared in a leading medical jurisprudence book in British India in the 1940s.¹ Over time, the test became common in this region and entered widespread practice in many hospitals. The most common descriptions of findings from finger tests in medico-legal reports are: "two fingers admitted," "two fingers easily admitted," or "two fingers not easily admitted." In some reports, these remarks are combined with observations on whether the hymenal tear is "old". Some doctors use terms like "patulous vagina" or "distended vagina" to describe the vagina. These findings are then utilized to give opinions on whether the rape survivor was "habituated", "used to" or "accustomed to sexual intercourse."²

7. In Pakistan, courts do not insist on producing direct evidence to support the victim's testimony if it inspires confidence in the facts and circumstances of a particular case.³ They treat the rape victim's evidence on the same level as that of an injured complainant or witness and look for some corroboration only by way of abundant caution to satisfy their conscience and rule out any false accusation. One cannot dispute that the medico-legal reports of rape victims are relevant. However, where the results of a two-finger test are affirmative, courts and lawyers frequently conclude that the victim is

¹ Dignity on Trial, Human Rights Watch, ISBN: 1-56432-681-0, (September 2010), pages 25-26

² See note 1.

³ *Atif Zareef and others v. The State* (PLD 2021 SC 550).

habituated to intercourse and assume that she was violated with her consent, thus undermining her moral standing and casting doubt on the credibility of her testimony. In *Ghulam Mohay-ud-Din alias Bao v. The State* (2012 PCr.LJ 1903), because the “vagina admitted two fingers”, and the victim conceded that “she was not habitual but was subjected to sexual intercourse on many times”, the court held that “it is obvious that she is a person of dubious character.” In *Muhammad Yousaf v. The State* (2015 PCr.LJ 53), the court considered an unmarried woman “not of fair virtue” because two fingers easily penetrated her vagina during the medical examination. In *Muhammad Arif v. The State* (2012 YLR 918), the court held that if the vagina of the victim admits two fingers easily, then she is habitual to sexual intercourse.⁴ The accused in these cases were given the benefit of doubt and acquitted. In *Rafiq Ahmad v. The State and another* (2012 PCr.LJ 1321) and several other cases,⁵ the courts released the accused on bail because the victim’s sexual organs admitted two fingers.

8. Research has shown that vaginal laxity is not a clinical indicator of sexual intercourse or habituation. Therefore, medical professionals and forensic experts consider the practice of virginity testing not only outdated, unscientific and unreliable but also entirely unnecessary for the prosecution of crimes of rape and other forms of sexual assault. The UN Statement captioned “*Eliminating Virginity Testing: An Interagency Statement*”, issued in 2018,⁶ explains that the vagina is a dynamic muscular canal that varies in size and shape depending on the individual, developmental stage, physical position, and various hormonal factors such as sexual arousal and stress. Hence, an individual with an undamaged hymen may or may not have experienced penetrative sexual contact. Similarly, there may be no trace of hymenal lesions following sexual assault. Hymen

⁴ Also see: *Azhar and another v. The State* (2013 PCr.LJ 1716).

⁵ *Muhammad Shahid v. The State* (2005 MLD 1485); *Naveed Masih v. The State* (2008 YLR 1062); *Noor Samad v. The State and another* (2011 MLD 730); *Rafiq Ahmad v. The State and another* (2012 PCr.LJ 1321).

⁶ A joint statement of the United Nations Human Rights Office, World Health Organization, and UN Women. Cited as: Eliminating virginity testing: an interagency statement. Geneva: World Health Organization; 2018. Licence: CC BYNC-SA 3.0 IGO. Available at: <https://apps.who.int/iris/bitstream/handle/10665/275451/WHO-RHR-18.15-eng.pdf?ua=1#:~:text=This%20statement%20establishes%20that%20virginity,long%2Dterm%20adverse%20health%20outcomes>.

examination cannot give conclusive evidence of vaginal penetration or the woman's sexual history. The Interagency Statement advocates for the prohibition of all types of virginity testing. The relevant excerpt is reproduced below:

“The utility of hymen examination as a test for virginity was reviewed. The studies indicated, as has been described in previous reviews, that the inspection of the hymen cannot give conclusive evidence of vaginal penetration or any other sexual history. Normal hymen examination findings are likely to occur in those with and without a history of vaginal penetration. A hymen exam with abnormal findings is also inconclusive: abnormal hymenal features such as a hymenal transection, laceration, enlarged opening, or scars are found in females with and without a history of sexual intercourse. One hymenal feature commonly examined in virginity testing is hymenal opening size. Hymenal opening size also was found to be an unreliable test for vaginal penetration. Hymen opening size varies with the method of examination, the position of the examinee, the cooperation and relaxation of the examinee, and the examinee's age, weight, and height.”

The concluding part of the Interagency Statement is as follows:

“This statement establishes that virginity testing is unscientific, medically unnecessary and unreliable; it violates a woman's human rights and is associated with short and long-term adverse health outcomes. The statement expresses a commitment to support efforts to eradicate all forms of virginity testing, thereby upholding the human rights of women and girls across the globe.”

9. The World Health Organization (WHO) has also declared that the two-finger test lacks scientific validity and urges that it should be discontinued.⁷ Besides, it describes the test as invasive, degrading, and a “form of gender-based violence and discrimination”. The WHO maintains that a “woman's sexual history has absolutely no bearing on ... determining whether she was raped.”⁸

10. Sir Nigel Rodley, the former UN Special Rapporteur, classifies “virginity-testing” as “a form of gender-specific ... torture.” According to him, it violates the physical and mental integrity of survivors of sexual violence, and the discussions about whether the survivor is “habituated to sexual intercourse” constitute a form of inhuman and degrading treatment.⁹ Olson and Garcia-Moreno state that the two-finger test is not a useful clinical tool, and from a human

⁷ Health care for women subjected to intimate partner violence or sexual violence, World Health Organization, WHO/RHR/14.26 (November 2014).

⁸ UN: WHO Condemns ‘Virginity Tests’, Human Rights Watch (1 December 2014).

⁹ See note 1.

rights perspective, it is a form of gender discrimination, a violation of fundamental rights, and a kind of sexual assault when carried out without consent.¹⁰

11. Here, U.K.'s Health and Care Act of 2022 deserves a mention, although it deals with a somewhat different subject. It considers virginity testing and hymenoplasty as violence against women and girls and a part of the so-called "honour-based" abuse cycle.¹¹ The Act makes it an offence to carry out, offer or aid and abet virginity testing¹² (with or without physical contact) and/or hymenoplasty¹³ in any setting, including medical community and home environments, where the purpose or purported purpose of the examination is to determine the virginity of the women or girl being examined. Since it is illegal, women and girls cannot consent to the procedures. The offences carry extra-territorial jurisdiction.

12. Rape and sexual assault victims have long-term emotional, physical and social impacts, including depression, guilt, diminished interest in sex, break-ups of relationships, obsessive concern for safety and loss of trust.¹⁴ Inserting fingers into the rape survivor's vaginal or anal orifice can cause additional trauma because it not only replicates the original act of sexual violence but can also be painful. Owing to its invasive and forcible nature, the examination can cause genital injury, bleeding and infection.¹⁵ The shame, guilt, and humiliation that the victim feels during the test may lead to panic attacks, shocks and trauma.

13. Under international law, rape survivors are entitled to legal recourse that does not re-traumatize or damage their bodily or

¹⁰ Olson and Garcia-Moreno, *Virginity testing: a systematic review*, Reproductive Health (2017) 14:61. D01 10.1186/s12978-017-0319-0

¹¹ According to the Guidance issued by the Department of Health and Social Care, Government of U.K., women and girls are coerced, forced and shamed into undergoing these procedures, often pressurized by family members or their intended husband's family in the name of supposedly upholding honour and to fulfil the requirement that a woman remains "pure" before marriage. Some practitioners issue a certificate to prove "virginity" after a virginity test or hymenoplasty, while some simply tell the family or community members whether a woman or girl has "passed" a virginity test. (<https://www.gov.uk/government/publications/virginity-testing-and-hymenoplasty-multi-agency-guidance/virginity-testing-and-hymenoplasty-multi-agency-guidance>).

¹² The law defines "virginity testing" as the examination of female genitalia, with or without consent, for the purpose (or purported purpose) of determining virginity.

¹³ The law defines "hymenoplasty" as "the reconstruction of the hymen (with or without consent)."

¹⁴ Maureen Dowd, *Rape: The Sexual Weapon*, The Time Magazine, Sept. 5, 1983.

¹⁵ See note 6.

mental integrity and dignity. They also have the right to have medical procedures performed in a way that respects their right to consent and are conducted in a compassionate, humane and non-degrading manner. According to the Interagency Statement, the two-finger test violates several international instruments¹⁶ and ethical standards of the medical profession. As per World Medical Association's Declaration of Helsinki (1964), the physician must safeguard people's health. Health professionals who perform virginity testing violate the fundamental ethical principle: "First, do no harm." Furthermore, in many cases, it is done without the victim's consent, which constitutes a form of sexual violence that, depending on the circumstances, may amount to rape or torture by the standards of international legal jurisprudence.¹⁷

14. In India, *Narayanamma v. State of Karnataka*, [(1994) 5 SCC 728] is one of the early cases that considered the legal value of the two-finger test. The Supreme Court held:

"The factum of admission of two fingers could not be held adverse to the prosecutrix for it would depend on the size of the fingers inserted. Experience tells us that when medical experts try to opine about the medical condition of a woman used to sexual intercourse, it is described as an admission of two fingers easily, but here, the doctor qualified her statement by saying that it was painful and bleeding on touch. These conditions obviously related to the hymen. The doctor was thus clear in her opinion that rape had been committed on the prosecutrix. There was no occasion for the High Court to hold it to the contrary."

15. In *Lillu alias Rajesh and another v. State of Haryana* [(2013) 14 SCC 643], the Supreme Court of India held:

"[Victims] are also entitled to medical procedures conducted in a manner that respects their right to consent. Medical procedures should not be carried out in a manner that constitutes cruel, inhuman, or degrading treatment and health should be of paramount consideration while dealing with gender-based violence. The State is under an obligation to make such services available to survivors of sexual violence. Proper measures should be taken to ensure their safety, and there should be no arbitrary or unlawful interference with their privacy."

¹⁶ Article 5 of the Universal Declaration of Human Rights (UDHR), Article 7 of the International Covenant on Civil and Political Rights (ICCPR), Article 12 of the International Covenant on Economic, Social and Cultural Rights (ICESCR), the Convention on the Rights of the Child (CRC), the Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), and Article 16 of the Convention Against Torture and Other Cruel, inhuman or Degrading Treatment (CAT), the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power (1985), Beijing Declaration and Platform for Action of the Fourth World Conference on Women (1995). The World Health Organization has issued detailed guidelines for medico-legal care of victims of sexual violence which are available at <https://apps.who.int/iris/handle/10665/42788>.

¹⁷ See note 6.

“Thus, in view of the above, undoubtedly, the two-finger test and its interpretation violates the right of rape survivors to privacy, physical and mental integrity and dignity. Thus, this test, even if the report is affirmative, cannot *ipso facto*, give rise to a presumption of consent.”

16. In *The State of Jharkhand v. Shailendra Kumar Rai alias Pandav Rai* [2022 SCC Online SC 1494], the Supreme Court deprecated the use of the two-finger test in cases alleging rape and sexual assault, reiterating that it has no scientific basis and neither establishes nor disproves rape charges. Instead, it re-victimizes and re-traumatizes women who may have been sexually assaulted and is an insult to their dignity. Therefore, it must not be conducted. The Supreme Court further stated:

“Whether a woman is ‘habituated to sexual intercourse’ or ‘habitual to sexual intercourse’ is irrelevant for the purposes of determining whether the ingredients of Section 375 of [Indian Penal Code] are present in a particular case. The so-called test is based on the incorrect assumption that a sexually active woman cannot be raped. Nothing could be further from the truth – a woman’s sexual history is wholly immaterial while adjudicating whether the accused raped her. Further, the probative value of a woman’s testimony does not depend upon her sexual history. It is patriarchal and sexist to suggest that a woman cannot be believed when she states that she was raped, merely for the reason that she is sexually active.”

17. In Pakistan, under section 164-A of the Code of Criminal Procedure 1898,¹⁸ the victim is required to undergo a medical examination as a part of the investigation relating to an offence committing rape, unnatural offence or sexual abuse or any attempt thereof. Section 164-B Cr.P.C. stipulates that DNA samples, where practicable, shall be collected from the victim with their consent or with the approval of their natural or legal guardian and from the accused during the medical examination and sent to a forensic laboratory at the earliest for analysis. All the reports with the doctor’s opinion are then used in the court along with the oral testimony of the doctor. However, the courts in our country have also denounced the virginity test. In *Sadaf Aziz v. Federation of Pakistan and others* (2021 PCr.LJ 205), a public interest litigation, this Court ruled that virginity testing is irrelevant, does not prove sexual violence, and is a humiliating practice. It stated:

¹⁸ Inserted by the Criminal Law Amendment (Offences Relating to Rape) Act, XLIV of 2016.

“When seen in the context of an investigation into the incident of sexual violence, whether the victim was previously accustomed to sexual intercourse is hardly the determinative question. The issue is whether the accused committed rape on the victim in the time and circumstances complained of. If the victim is found to not be a virgin, it cannot and does not suggest that she was not raped or sexually abused. What it does is place the victim on trial in place of the accused and shift the focus on her virginity status. In this regard, the victim’s sexual behaviour is totally irrelevant as even the most promiscuous victim does not deserve to be raped, nor should the incident of sexual violence be decided on the basis of a virginity test.”

18. In *Sadaf Aziz*, this Court determined that virginity testing contravenes women’s fundamental rights and, *inter alia*, made the following declarations:

- “(i) It is declared that the two-finger test and the hymen test carried out for the purposes of ascertaining virginity of a female victim of rape or sexual abuse is unscientific having no medical basis; therefore, it has no forensic value in cases of sexual violence;
- (ii) It is further declared that the virginity test offends the personal dignity of the female victim and, therefore, is against the right to life and right to dignity enshrined in Articles 9 and 14 of the Constitution;
- (iii) It is also declared that virginity tests are discriminatory against the female victim as they are carried out on the basis of their gender, therefore offends Article 25 of the Constitution;
- (iv) Consequently, to the extent that the 2020 Guidelines,¹⁹ SOPs²⁰ and the 2015 Instructions²¹ mandate the two-finger test or the hymen test for the purposes of ascertaining virginity of the victim are declared to be illegal and against the Constitution and the Federation and Provincial Government should take necessary steps to ensure that virginity tests are not carried out in the medico-legal examination of the victims of rape and sexual abuse.”

19. In *Atif Zareef and others v. The State* (PLD 2021 SC 550), the Supreme Court of Pakistan ruled that rape is a crime, not a medical condition. Instead of burdening himself with reporting the sexual history of the victim, the doctor should gather medical evidence. He should check for signs of recent sexual activity and see whether the victim has any bodily injuries, particularly to private parts, or has seminal stains etc. The Supreme Court said that bringing the rape survivor’s sexual history into the case by making comments about their body like “the vagina admits two fingers easily” or “old raptured hymen” is an affront to the reputation, honour and

¹⁹ Guidelines for the Examination of Female Survivors/Victims of Sexual Abuse (2020).

²⁰ Standard Operating Procedures for Medico Legal Examination of Women Survivors.

²¹ Instructions regarding the Conduct of Medico-legal and Postmortem Examination, 2015.

dignity of the rape survivor and violates Articles 4(2)(a) and 14 of the Constitution. It stated:

“A woman, whatever her sexual character or reputation may be, is entitled to equal protection of law. No one has the licence to invade her person or violate her privacy on the ground of her alleged immoral character. Even if the victim of rape is accustomed to sexual intercourse, it is not determinative in a rape case; the real fact-in-issue is whether or not the accused committed rape on her. If the victim lost her virginity earlier, it does not give anyone the right to rape her. In a criminal trial relating to rape, it is the accused who is on trial and not the victim. The courts should also discontinue the use of painfully intrusive and inappropriate expressions, like “habituated to sex”, “woman of easy virtue”, “woman of loose moral character”, and “non-virgin”, for the alleged rape victims even if they find that the charge of rape is not proved against the accused. Such expressions are unconstitutional and illegal.”

20. In *Atif Zareef*, the Supreme Court observed that the courts had been allowing opinion evidence of medical experts based on two-finger tests, presumably under Article 151(4) of the Qanun-e-Shahadat, 1984 (“QSO”) [section 155(4) of the erstwhile Evidence Act, 1872] which provided that “when a man is prosecuted for rape or an attempt to ravish, it may be shown that the victim was of generally immoral character to impeach her credibility.” However, the Federal Shariat Court declared that provision repugnant to the Injunctions of Islam,²² and then the Criminal Law Amendment (Offences Relating to Rape) Act, 2016 omitted it. A subsequent enactment, section 12(3) of the Punjab Witness Protection Act, 2018, specifically ordains that the court shall forbid a question relating to the past sexual behaviour of a victim. Article 146 of QSO also obligates the court to disallow any indecent or scandalous questions unless they relate to the fact-in-issue. The cumulative effect of all these provisions is that putting questions to a rape victim in cross-examination and leading any other evidence about her alleged “general immoral character” to impeach her credibility is prohibited. The Supreme Court, however, cautioned:

“... while allowing or disallowing such questions, the court must be conscious of the possibility that the accused may have been falsely involved in the case, and should balance the right of the accused to make a full defence and the potential prejudice to the complainant’s rights to dignity and privacy, to keep the scales of justice even for both.”

²² *Capt. (Retd) Mukhtar Ahmad Shaikh v. Government of Pakistan* (PLD 2009 FSC 65).

21. Lately, Parliament has enacted the Anti-Rape (Investigation and Trial) Act (XXX of 2021) to accord statutory recognition to the dicta in *Atif Zareef* and *Sadaf Aziz*. Section 13(1) thereof expressly prohibits two-finger virginity testing for the medico-legal examination of a victim and adds that no probative value shall be attached to it. Section 13(2) states that any evidence that the victim is generally immoral shall be inadmissible in relation to scheduled offences.

22. To sum up, the two-finger test is not mandated by any law. It is a medical practice which has been incorporated into legal jurisprudence as a criterion for determining a victim's character and, consequently, her consent, which is crucial in finding out whether rape occurred. However, this test has questionable probative value and infringes upon the survivor's fundamental rights.²³ A distinguished scholar writes:

“The Constitution of Pakistan guarantees various fundamental rights to its citizens. This was done precisely to create a new constitutional order wherein laws as well as customs and practices having the force of law that were inconsistent with those rights would be eliminated. Article 8 of the Constitution explicitly declares such laws and practices void. Virginity tests – a relic of past and outdated patriarchal conceptions of female autonomy – are precisely the kind of customs and practices that have no place in our polity and society under the Constitution they are entirely inconsistent with the fundamental rights guaranteed by it.”

23. Despite the above-mentioned rulings of the Supreme Court and this Court, and the statutory prohibition, doctors continue to perform two-finger tests across the province. Those who do so are liable to disciplinary action for misconduct and can also be held for contempt of court.

24. In view of the above, the Provincial Government is directed as follows:

- (a) Ensure that medical opinion in cases involving rape and sexual assaults is in tune with the current definition of rape under section 375 PPC.

²³ The Use of the Two-Finger Test in Pakistan, Centre for Human Rights, Lahore (2019).
<https://www.cfhr.ucl.edu.pk>

- (b) Ensure that the medical examinations of the victims of rape and sexual violence are conducted in accordance with section 164-A Cr.P.C. and DNA test as per section 164-B Cr.P.C.
- (c) Ensure strict compliance with section 13(1) of the Anti-Rape (Investigation and Trial) Act, 2021, and prohibit the use of the two-finger test during medical examinations of women and girls who have allegedly been victims of rape or sexual assault.
- (d) Ensure that medical examiners refrain from commenting on the victim's past sexual history unless it is relevant to their physical condition and that they do not make findings, such as whether the patient is "habituated to sexual intercourse", based on a medical examination.
- (e) Conduct workshops for healthcare professionals to communicate the procedure to be followed when examining survivors of sexual assault and rape.
- (f) Initiate appropriate proceedings against any individual who conducts the two-finger test in contravention of law.
- (g) The SOPs for medico-legal examinations of victims of sexual violence should be updated in conformity with WHO Guidelines and circulated and made readily available in all government healthcare facilities.

25. The Registrar of this Court is directed to send a copy of this order to the Chief Secretary, Punjab, for compliance.

(Tariq Saleem Sheikh)
Judge

Naeem

Approved for reporting

Judge