

**IN THE FEDERAL SHARIAT COURT**

**(Appellate Jurisdiction)**

**PRESENT**

**MR. JUSTICE HAZIQL KHAIRI, CHIEF JUSTICE**

**MR. JUSTICE SALAHUDDIN MIRZA**

**MR. JUSTICE MUHAMMAD ZAFAR YASIN**

**CRIMINAL APPEAL NO.139/L OF 2006 (Linked with)**

**CRIMINAL MURDER REFERENCE NO.6/L OF 2007**

**Āzhar Amin @ Naji @ Mota --- Appellant**

**Son of Muhammad Amin,  
resident of House No.28, St.No.1,  
Jahangir Park Shadbagh, Lahore**

**Versus**

**The State --- Respondent**

**For the appellant --- Syed Zeshan Taimoor Gilani,  
Advocate**

**For the State --- Mr. Asjad Javaid Ghural,  
Deputy Prosecutor-General**

**FIR No., date and --- 482/03, 8.10.2003,  
Police Station P.S. Gujjarpura, Lahore**

**Date of Order of --- 6.5.2006  
the Trial Court**

**Date of Institution --- 8.6.2006**

**Date of Hearing --- 18.12.2007**

**Date of Decision --- 19-03-2008**

**JUDGMENT:**

**HAZIQUL KHAIRI, CHIEF JUSTICE.**- This appeal filed by appellant Azhar Amin alias Naji alias Mota arises out of the judgment, dated 6.5.2006, passed by the learned Additional Sessions Judge, Lahore, whereby the appellant was convicted and sentenced under section 377 PPC to ten years' R.I. and fine of Rs.50,000/- and in default whereof to further suffer six months simple imprisonment. He was also convicted under section 302(b) of PPC and sentenced to death. Further he was ordered to pay one lac rupees as compensation to the legal heirs of deceased as required under section 544-A Cr.P.C. and in default whereof to further suffer S.I. for six months.

92210

**2. Brief facts as emerged from the impugned judgment are that on 8.10.2003 complainant Hakim Ali (PW.2) lodged an FIR stating that in the night of 7.10.2003 at about 8.00 p.m. his son Hassan Raza, aged about 10/11 years, went out side the house to play but did not return. He searched for him alongwith PW.9 Nasir Iqbal, when one Iftikhar Ali coming from Moaza Karol informed him that dead body of a child was lying beside the road in the maize field of Mian Mubarik Ali. The three of them reached there and he found the dead body of his son murdered by some unknown persons by strangulation. The complainant suspected Asif Ali alias Mota, Kamran, Yasin, Gul Zaman alias Fauji and Azhar alias Naji alias Mota of murder of his son and accordingly moved an application for DNA test before**

12/10/03

**PW.9 Mukhtar Ahmad, SI. Their DNA test was taken and as per report dated 1.12.2003. The DNA profile obtained from evidence material did not match in the DNA profile of any suspect. A second DNA test was taken at the instance of PW.19 which vide report dated 3.3.2004 was positive as regards the appellant and on 7.3.2004 he was arrested, on which date he was also charge sheeted.**

**3. The appellant denied the charge and the prosecution was invited to lead evidence. PW.1 Shahid Hussain, real brother of the complainant, deposed that on 8.3.2003 he searched for the deceased but could not find him. Next day a report was lodged with Police. He identified dead body. In his presence, the appellant pointed out to the place of occurrence. PW.2 Hakim Ali,**

**complainant also stated that on 8.3.2008 he found his son missing from the house. He made search for him the whole night and in the next morning he reported the matter at the Police Station. DNA test was conducted on him and his wife. PW.3 Arshad Ali, Security Guard at Salamat Centre deposed that on 7.10.2003 while going with PW.4 Basharat on motorcycle he saw the deceased in the company of the appellant at Ganda Nala China Scheme. He asked the deceased as to where he was going to which he replied that he was going to purchase Patakhas. PW.4 Basharat Hussain corroborated the testimony of PW.3 and stated that he was going on motorcycle when he met the deceased who told them that he was going to purchase Patakhas with the appellant. PW.5 Nasrullah Khan, ASI escorted the dead**

12/10/03

**body of victim Hassan Raza to the mortuary alongwith**

**Basharat Ali/C where the last worn clothes of the**

**deceased were handed over. He alongwith Basharat**

**Ali/C attested the recovery memo. PW.6 Shaukat Ali**

**stated that in his presence the doctor took four pieces**

**of clothes of the deceased. PW.7 Babar Hussain,**

**maternal uncle of the deceased, identified his dead**

**body. PW.8 Iftikhar Ahmad deposed that on 8.10.2003**

**while he was on road his servant Muhammad Ashfaq**

**informed him that a dead body was lying in the field of**

**maize. He reported the matter to police, in whose**

**presence he found the dead body of deceased with torn**

**anal and neck tied with a 'Jarsi'. PW.9 Nasir Iqbal**

**deposed that on 8.10.2003 he was standing alongwith**

**complainant Hakim Ali (PW.2) in the field when a man**

12/10/03



**earth, last worn clothes of the deceased, one sealed envelope and two boxes. PW.14 Tanvir Ahamd, ASI, alongwith Rasheed, SI, took into possession the blood stained earth and Sandal made of Rexene. PW.15 Muhammad Hashim, Research Officer, DNA produced his reports bearing his signatures. PW.16 Rasheed Ahmad ASI and PW.19 Mukhtar Ahmad SI, Investigating Officers of the case, deposed regarding various steps taken by police during investigation. He prepared inquest report and rough site plan, memo of recovery and the dead body for postmortem examination, recorded the statements of witnesses on 31.10.2003 where after he was transferred. He did not arrest anyone. PW.17 Dr. Zahoor Ahmad conducted DNA test of accused twice and verified his reports. PW.18 Arshad**

12/11/07



**Mehmood, SI deposed lodging of FIR. PW.20 Syed Ali**

**Abbas, Judicial Magistrate deposed that he had passed order on an application moved by PW.19 Rashid Ahmad, SI for summoning Dr. Khalid Noor (not produced).**

4. **A cursory glance on the evidence adduced by the prosecution will reveal glaring discrepancies and contradictions at a number of places which would lead to in depth examination thereof. Firstly, reference may be made to FIR in which PW.2 Hakim Ali had stated that his son was missing from 7.10.2003 evening (PWs. 1, 8 & 9 stated it was 8.10.2003 evening) and in the next morning while he was in search of his son alongwith PW.9 Nasir Iqbal, he met Iftikhar Ali (not produced) who told them that the dead body of a child was lying in the maize field of Mian Muhammad Mubarik Ali. In his**

12/11

**testimony there is no reference to their said meeting with any one who told him that the dead body of a child was lying in the maize field. It is pertinent to note that he had named nobody in his F.I.R. However, in his application dated 5.11.2003 to police he suspected eight persons including the appellant of murdering his son. Here reference may also be made to another version relating to occurrence as narrated by Iftikhar Ahmad (PW.8) that on 8.3.2003 while he was present at ~~the~~ Bund Road alongwith Abdul Rashid (not produced) their servant (not produced) told them that a dead body was lying in the maize field. He informed the police of P.S. Gujjarpura, Lahore, and in his presence the dead body was recovered by the police which had been subjected to sodomy. Assuming that even if he was**

**wrongly named as Iftikhar Ali instead of Iftikhar Ahmad**

**by the complainant (PW.2) he (PW.8) did not mention**

**meeting the complainant (PW.2) or PW.1, his brother,**

**which led to lodging F.I.R. by PW.2 and recovery of dead**

**body. Similarly according to PW.1 Shahid Hussain on**

**10.3.2004 after two days of recovery of dead body of**

**the deceased the appellant in his presence, and also in**

**presence of his brother, Hakim Hussain (not produced)**

**and police official ASI Tanvir Ahmad (PW.14), made**

**disclosure of the place of occurrence. Nowhere PW.14**

**in his testimony mentioned the said disclosure by the**

**appellant nor he referred to the presence of PW.1**

**Shahid Hussain and PW.2 Hakim Ali. His deposition is**

**only to the extent that he alongwith S.I Rasheed took**

**into possession blood stained earth and a Sandal from**

12/1

**the place of occurrence. There was nothing to the effect that the dead body of the deceased was pointed out by the appellant or his blood stained clothes recovered at the appellant's instance. It was Iftikhar Ahmad (PW.8) who disclosed to the police on 8.10.2003 that a dead body was lying in the field of maize and he alongwith police reached there and found that the dead body was lying facing the mouth towards earth and his neck was tied with a Jarsi. Much afterwards on 7.3.2004 Mukhtar Ahmad (PW.19) arrested him after the receipt of DNA report where after the appellant pointed out to him wherefrom the dead body was found. Surely during these five months every body in the surrounding area would have known where the dead body was lying. No credibility could be attached to such pointation.**

12/16

**5. However, the next stage of the case began when the appellant was subjected to DNA test on an application dated 5.11.2003 of the complainant. DNA test of the five accused was conducted by PW.17 Dr. Zahoor Ahmad, CAMB Forensic Services Laboratory with the following results and conclusion:-**

**Result:**

**DNA profile obtained from D8 (semen spot # 3 and 4 of Evidence Material) has match with DNA profile of D1, D2, D3, D4 and D5. No.DNA profile was found from D6 and D7 (semen spot # 1 and 2 of Evidence Material).**

**Conclusion:**

**DNA profile obtained from the evidence material does not match with DNA profile of any suspect provided.**

**DNA profile obtained from the evidence material shows the presence of some other male suspect excluding all the provided suspect.”**

**Despite the appellant having been cleared in the said**

**DNA test, PW.19 at his own accord requested PW.17**

12/11/03

**once again to carry out DNA test of the appellant and others. This time DNA profile of the deceased through the blood sample of his parents was compared with blood samples of all the accused and also with the material (piece of cloth/trouser) brought by PW.17. In conclusion he stated as under:-**

12/1  
“Previously prominent spots from D8 evidence were analyzed and reported that one spot gave a mixture of victim and another as partial profile out of sixteen loci. This partial profile matched with the standard blood profile of Mr. Azhar Amin Urf Naji son of Muhammad Amin (D5). This may not determine whether the partial profile belongs to one of the suspects provided or some other assailant unless all sixteen loci of DNA match occurs. Therefore, the evidence martial (D13) was analyzed for other biological spots. Now one of the spots which was not analyzed previously gave a complete profile of sixteen loci and this profile matches with Mr. Azhar Amin Urf Naji son of Muhammad Amin (D5).”

**In cross examination he admitted that when the request of DNA test was made no report of Serologist was appended with the request. He further admitted that when he received the request (first time) he was not sure whether the semen were present on the pieces. He also admitted that it is correct that his report dated 1.12.2003 did not carry the fact that the semen shot was available on the material or not. Further that he generally received the material himself but in this case (second time) he received the material from police. He also admitted that both his reports dated 1.12.2003 and 3.3.2004 were altogether different from one another. It may be recalled that in his first report dated 1.12.2003, he had specifically stated that "DNA profile obtained from the evidence material shows the presence of some**

139

**other male suspect excluding all the provided**

**suspects". Thus there were material contradictions in**

**his two reports and there was no satisfactory**

**explanation for lapses on his part and on the part of**

**police as aforesaid and as appearing here-in-below.**

**6. It would be interesting to mention the manner in**

**which the subject matter of DNA test was sent to PW.17**

**and received by him on both the occasions. According**

**to PW.16 Rasheed Ahmad, ASI, the dead body of Hassan**

**Raza and his last worn clothes were produced before**

**him on 8.3.2003 by Basharat Ali, PW (given up) and**

**Nusrullah (PW.5) which were trouser, shirt and Bunyan.**

**PW.5 deposed that on 8.10.2003, he and Basharat received**

**last worn clothes of the deceased from PW.16 Rasheed**

**Ahmad, ASI, after postmortem examination was conducted**



**by PW.11 Dr. Muhammad Khalid. Afterwards four pieces**

**of clothes were handed over by PW.6 Shaukat Ali**

**C/7206 to Dr. Zahoor Ahamd (PW.17) for DNA test who**

**vide report dated 1.12.2003 had exonerated all the**

**accused persons. There is nothing on record as to who**

**received back the last worn clothes or prepared**

**recovery memo and again packed and sealed the**

**clothes in safe custody. However, second time on**

**3.3.2004 a resealed envelope for DNA test was brought**

**by PW.19 Mukhtar Ahamd SI to PW.17 which was found**

**to be positive against the appellant. In reply to a**

**question put to him, PW.19 Mukhtar Ahmad, I.O. stated**

**that it is incorrect to suggest that he had allowed the**

**semen of the appellant on a part of trouser after the**

**first DNA report and then gave second DNA report.**

12/1

**Further he had stated that the pieces of trouser were taken in the presence of the Magistrate from that part of the trouser which covers the hip because the same contained stains of the blood. These pieces of trouser were not produced by the Magistrate (PW.20) and lastly and admittedly it was a clear case of tampering with evidence by the police officials by cutting a part of the trouser for DNA test.**

12/1

**7. According to National Association of Criminal Defecne (NACD) Washington M.A. Supreme Court has held that DNA testing is not a miracle fix but alongwith circumstantial evidence, eye-witness and other physical evidence, genetic analysis can decrease the chances of wrongful exoneration or convictions.**

**8. In the Criminal Law Hand Book "Know your Rights, Survive the System" by Attorney Paul Dergman and Attorney Sara Berman Barrett it is stated:-**

**"Until the 1990's the only sure-fire way to establish the identity of an individual was to examine his or her fingerprints. Because each individual's fingerprints have a unique pattern, fingerprint evidence is readily admitted into Court. Now DNA is rapidly becoming the method of choice when it comes to linking individuals with crime scenes and criminal assaults."**

**9. It is further stated that different methodologies allow experts to identify these distinguishing elements of 'DNA' and this sort of technology is extremely complex; few people are able to understand it.**

**10. In National Forensic DNA Study Report (Authors P. Larrich Ph.D, Trans c Pratt Ph.d, Michael J.**

**Gaffney JD, Charles L Johnson M.A. & 3 others) it is**

**stated that lack of appropriate storage space can lead to valuable DNA evidence becoming degraded.**

**11. Learned Counsel for the appellant Syed**

**Zeshan Taimoor Gilani brought to our notice the case of**

**“Muhammad Iqbal and another Vs. The State, PLJ 1974**

**Cr. C.(Lah) 98” followed by “Yousaf Vs. The State PLD**

**1988 Karachi 521” in which it was held that where**

**contradiction exists between medical report and ocular**

**testimony, prosecution and not accused is obliged to**

**clarify position and in case of conflict between two**

**testimonies, medical evidence would be preferred.**

**12. Another case which was brought to our notice**

**was the case of “Muhammad Azhar Vs. The State PLD**

**2005 (Lah) 589” in which a learned High Court Judge**

**while granting bail in a pending Hudood matter had rightly held that DNA test may be an important piece of evidence but Hudood Laws have its own standard of proof.**

**13. In view of the facts stated and reasons given hereinabove, we are unable to subscribe to the findings of the learned trial Court as the prosecution has miserably failed to establish its case against the appellant both on the basis of ocular evidence and DNA test. As such it is not a case of conflict between two testimonies, ocular and medical. The two DNA reports of PW.17 are inconsistent and contradictory and the least inspiring more so as the material furnished to PW.17 the second time has not only been tampered with**

12/11/07

but there is no evidence at all on record with regard to

its repacking, resealing and keeping it in safe custody.

14. Resultantly the appeal is accepted with direction to the jail authorities to release the appellant forthwith unless he is required in some other criminal case.

15. The Criminal Murder Reference No.6/L of 2007 is replied in negative.

*scj*  
*scj*  
JUSTICE HAZIQL KHAIRI  
Chief Justice 19/3/08

*scj*  
JUSTICE SALAHUDDIN MIRZA

*scj*  
*scj*  
JUSTICE MUHAMAD ZAFAR YASIN

Announced at Korchi,  
the 19th March 2008  
Bashir/\*

Approved for reporting  
*scj*