IN THE FEDERAL SHARIAT COURT
( Appellate Jurisdiction )

PRESENT

MR.JUSTICE CH. EJAZ YOUSAF CHIEF JUSTICE

CRIMINAL APPEAL NO.3/Q OF 2002

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| Rab Nawaz son of Abdullah Khan,Caste Jat Soomro Resident of Tonsa Sharif | -- | Appellant |
| | Versus | |
| The State | -- | Respondent |
| Counsel for the appellant | -- | Mr.Muhammad Hassan Bilal-Buzdar, Advocate. |
| Counsel for the State | -- | Sheikh Ghulam Ahmad Advocate. |
| No.date of FIR and Police Station | -- | No.161/2000 dt:13.12.2000 P.S.City District Sibi |
| Date of institution | -- | 16.01.2002 |
| Date of hearing | -- | 27.10.2004 |
| Date of decision | -- | 27.10.2004 |

JUDGMENT

CH. EJAZ YOUSAF, CHIEF JUSTICE.- This appeal is directed against the judgment dated 12.12.2001 passed by the learned Sessions Judge Sibi, Division Sibi, whereby the appellant was convicted under section 457 PPC and sentenced to undergo R.I. for three years alongwith a fine of Rs.5,000/- or in default thereof to further suffer simple imprisonment for six months. Benefit of section 382-B Cr.P.C. was, however, extended to the appellant.

2. Facts of the case, in brief, are that on 13.12.2000, report was lodged by one Haji Muhammad Hassan son of Muhammad Ismail, with Police Station City District Sibi, wherein, it was alleged that on the said date the complainant alongwith his family members went to sleep as usual. His elder daughter namely, Mst.Sajida aged about 18/19 years, a student of class 9th was studying, in a separate room, at that juncture. At about 1.00 a.m., the complainant awoke and saw that light of the room, in which Mst.Sajida, was studying was switched off and door was closed from inside. Complainant, therefore, knocked at

the door, asked Mst.Sajida, to open the same and also to switch the light on. As she obeyed, the complainant found that the appellant was also present in the room alongwith Mst.Sajida. The complainant, therefore, immediately bolted the door from outside but in the meantime Mst.Sajida, having found an opportunity, went out of the room and also left the house. Complainant suspected that since both i.e. Mst.Sajida and the appellant were enjoying illicit relations, therefore, the appellant was found in his house. On the stated allegation formal FIR bearing No.161/2000 was registered at the said police station under section 10/18 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 read with section 457 PPC and investigation was carried out in pursuance thereof. On the completion of investigation the appellant alongwith Mst.Sajida, were challaned to the Court for trial.

3. Charge was accordingly framed to which the accused persons pleaded not guilty and claimed trial.

4. At the trial, the prosecution in order to prove the charge and substantiate the allegation leveled against the accused persons produced seven witnesses, in all. P.W.1 Haji Muhammad Hassan, is the complainant. He, at the trial, reiterated the version contained in the FIR. P.W.2 Haji Ghulam Rasool, is brother of the complainant. He deposed that in the night of occurrence he was called by the complainant and was told about the occurrence whereupon he i.e. the witness asked the complainant to lodge report with police. Consequently, the case was got registered, the appellant was taken out by the police from a room of the house belonging to the complainant and arrested. P.W.3 Mujahid Ali, is son of the complainant. He too, corroborated the statement of the complainant in all material particulars. P.W.4 Kareem Bakhsh is Naib Tehsildar. He had subsequent to the occurrence reached at the house of the complainant and recovered the appellant from a room thereof. He also recovered Mst.Sajida from the house of the appellant. P.W.5 Dr.Ghazala Waris, Medical Officer, D.H.Q Hospital Sibi, had on 13.12.2000, examined

Mst.Sajida and found that she was not subjected to sexual intercourse. She produced in Court the MLR Certificate as Exh.P/5-A. P.W.6 Dr.Meer Muhammad Bugti, Medical Officer, D.H.Q. Hospital Sibi, had on the same day i.e. 13.12.2000 examined the appellant qua the potency test. He produced the same as Exh.P/6-A. P.W.7 Munir Ahmed Gondal, is the Investigating Officer of the case.

5. On the completion of the prosecution evidence the appellant was examined under sections 342 as well as 340(2) Cr.P.C. In his above statements the appellant denied the charge and pleaded innocence. Stand taken by him, in his statement on oath, was that, in the night of occurrence, at about 1.00 a.m. the complainant and his son namely, Mujahid Ali, had taken him to their house on gun point and asked him to vacate the house which he had taken on rent. On his refusal to do the needful, the appellant was confined in the room wherefrom he was subsequently taken out by the police. He specifically pleaded that he was not enjoying illicit relations with Mst.Sajida and that the case was foisted on him. Mst.Sajida, in her

statement on oath also corroborated the statement of the appellant. The appellant also got examined one Ishfaque Ahmed, in his defence as D.W.1.

6. After hearing arguments of the learned counsel for the parties, the learned trial Court, acquitted co-accused Mst.Sajida, from the charge but convicted the appellant and sentenced him to the punishments as mentioned in the opening para hereof.

7. I have heard Mr.Muhammad Hassan Bilal Buzdar, Advocate, learned counsel for the appellant, Sheikh Ghulam Ahmed, Advocate, learned counsel for the State and have also perused the record of the case with their assistance minutely.

8. Mr.Muhammad Hassan Bilal Buzdar, Advocate, learned counsel for the appellant has, inter-alia, contended; that the instant case was foisted on the appellant in order to get the house, taken on rent by him, vacated; that all the witnesses were interested and related inter se, hence, their statements could not have been believed; that co-accused Mst.Sajida, was acquitted of the charge and it was found by

the trial Court that allegation of zina was false, therefore, the appellant also deserved to be acquitted; that an iota of evidence was not available on record to believe that the appellant was guilty of the offence. In the end, he pleaded that though the appellant having served out his sentence of imprisonment has been released from jail yet, since he was a police employee and was dismissed from service because of the incident, therefore, his appeal may be accepted and he be acquitted of the charge.

9. Sheikh Ghulam Ahmed, Advocate, learned counsel for the State, while controverting the contention raised by the learned counsel for the appellant, has submitted that though Mst.Sajida, was acquitted of the charge for committing zina-bil-raza, for want of proof yet, since the appellant was found present in the house of the complainant in odd hours of night alongwith the acquitted accused person, therefore, he was rightly convicted for the offence.

10. I have given my anxious consideration to the respective contentions of the learned counsel for the parties besides, perusing

record of the case minutely. In the instant case, the appellant has been convicted under section 457 PPC for committing lurking house trespass or house breaking by night in order to commit offence punishable with imprisonment. Though the learned counsel for the appellant, has raised a number of contentions yet, since, at the trial, the appellant has not denied his presence, recovery and arrest from a room of the house belonging to the complainant and has raised the special plea that he was taken and confined therein on gun point by the complainant and his son, therefore, in doing so, he has himself minimized the scope of controversy to the single issue "as to whether the defence plea was true." It may be noted here that in his statement recorded under section 340(2) Cr.P.C. the appellant has though stated that in the night of occurrence he was on duty from 8.00 p.m. to 12.00 p.m. and on returning home back, he in the same night at about 1.00 a.m. was on gun point, abducted by the complainant and his son namely Mujahid Ali, was asked to vacate the house occupied by him and on his refusal to do the needful was confined in the room

wherefrom he was subsequently taken out by the police but lack of reason in the defence plea is apparent on its face and can be inferred from the very fact that in the course of his cross-examination the complainant i.e. P.W.1, was never suggested that the appellant was "abducted or taken away from his house on gun point by the complainant and his son". On the contrary it was suggested that the appellant was called by the complainant on the pretext that complainant and P.W.2 Haji Ghulam Rasool, had to talk to him and a similar suggestion was made to P.W.2 Haji Ghulam Rasool, which in fact was denied. Further in his statement on oath, the appellant has stated that it was not P.W.2 Haji Ghulam Rasool but P.W.3 Mujahid Ali, who had alongwith the complainant abducted him from his house, thus stand taken by the appellant, at the trial, was obviously inconsistent with the defence plea. It would also be pertinent to mention here that D.W.1 Ishfaque Ahmed, who claimed himself to be nephew of the appellant has also stated that it were complainant and his son who had taken the appellant to their house, hence he too,

contradicts the appellant to the extent of presence of P.W Mujahid Ali with the complainant. DW Ishfaque Ahmed, has further stated that as the appellant was taken away by the complainant and his son, after one and half hours time, the complainant raised alarm alleging that the appellant had entered in his house, meaning thereby that considerable time elapsed between the appellant's "abduction and the occurrence" but amazingly neither any report regarding his "abduction" was lodged with the police nor any other step was taken by the said DW to get his uncle "rescued" from the clutches of the complainant. Thus, the defence plea appears to be after thought and was, therefore, rightly rejected by the learned trial Judge.

It is well settled that when no prima facie case is made out then it would be open to an accused person to rely on the presumption of innocence or on the discrepancies, deficiencies and infirmities of the prosecution evidence but once prima facie case is made out and presumption of innocence is crowd out than the force of suspicious circumstances is intensified particularly when the accused attempts no

explanation of facts which he may reasonably be presumed to be able and interested to explain.

In the above context it may also be pointed out here that it is duty of the accused to place before the trial Court the true facts of the case if he considers that the version of the occurrence as given by the prosecution witnesses was incorrect and special plea with regard to existence of a particular fact is advanced. This view, receives support from the following reported judgments:-

1. Abdul Haque vs. The State and another – PLD 1996 SC1;
2. Navid Akhtar and others vs. Muhammad Saeed Khan and another – 2004 SCMR 1469;
3. Abdul Wahid vs. The State – 2003 SCJ 747;
4. Noorul Haq vs. The State – 1992 SCMR 1451;
5. Kotan Khan vs. The State – 1992 MLD 1944;
6. Shrikant Anandrao Bhosale vs. State of Maharashtra - AIR 2002 SC 3399;
7. Dulal Nayek vs. State – 1987 Cr.L.J 1561
8. Hari Narayan Ghandra and others vs. Emperor, AIR 1928-
9. Leda Bhaget vs. Emperor, 1931Patna 384,
10. Ghanshyam Singh and other vs. Emperor, AIR 1928 Patna 100,
11. The Public Prosecutor Vs. Budipiti-Devaskikamani, 106 Ind.Cases 559,
12. Ashraf Ali vs. Emperor, 43 Ind.Cases 241 and
13. Muhammad Nabi Khan and another vs. Emperor – AIR 1934 Oudh 251.

In the circumstances the omission made by the appellant was fatal, because by raising a specific plea in defence onus was shifted upon the accused to substantiate the same. In the circumstances, in my view, it was obligatory for the appellant to prove that he was deceitfully taken away by the complainant and was confined in the house. Since the appellant, at the trial, has himself admitted his presence in the house of the complainant and was unable to substantiate the plea raised in defence, therefore, in my view, he was rightly convicted by the learned trial Judge, however, since the allegation regarding his commission of zina with Mst.Sajida, at the trial, could not be established and it was also not proved by the prosecution that the appellant had entered the house in order to commit any offence punishable with imprisonment, therefore, in my view, section 457 PPC was not attracted in his case and instead he should have been convicted under section 456 PPC for committing lurking house trespass by night. Irony of the situation is that the appellant has already undergone three years sentence of

imprisonment. He has gone through the rigours of trial as well and according to the learned counsel for the appellant, has also been dismissed from service sequel to the occurrence and at this stage any reduction in his sentence would be purely notional but in the circumstances of the case, in my view, infliction of a sentence of one year's R.I. on him would be sufficient to meet the ends of justice. The conviction and sentences recorded against the appellant under section 457 PPC, therefore, are set aside and instead, he is convicted under section 456 PPC and sentenced to undergo R.I. for one year. The amount of fine or the quantum of term of imprisonment in default thereof shall remain the same as ordered by the learned trial Judge. In view of above discussion the rest of contentions raised by the learned counsel for the appellant, need not to be attended to.

With the above modification in the conviction and sentence of imprisonment of the appellant this appeal is hereby dismissed.

( Ch. Ejaz Yousaf )
Chief Justice

Quetta,dated the
27th October, 2004

FIT FOR REPORTING

CHIEF JUSTICE

ABDUL RAHMAN /***