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IN THE FEDERAL SHARIAT COURT
(Appellate Jurisdiction)

PRESENT

MR. JUSTICE CH. EJAZ YOUSAF, CHIEF JUSTICE

CRIMINAL APPEAL NO.263/L OF 2003

Khalid Mehmood son of Haji Sher Muhammad, Resident of Bano Bazar, Bhakkar	--	Appellant

Versus

The State	--	Respondent
Counsel for the appellant	--	Mr.Iftikhar Shahid, Advocate
Counsel for the State	--	Mr.Akhtar Nawaz, Advocate
F.I.R.No., date and Police Station	--	No.124, 2.4.1999 City Bhakkar
Date of the Order of Trial Court	--	17.7.2003
Dates of Institution	--	16.9.2003
Date of hearing	--	26.12.2003
Date of decision	--	26.12.2003

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JUDGMENT:

CH. EJAZ YOUSAF, CHIEF JUSTICE.- This appeal is directed against the judgment, dated 17.7.2003, passed by the learned Additional Sessions Judge-1, Bhakkar whreby appellant Khalid Mehmood son of Haji Sher was convicted under section 377 PPC and sentenced to undergo rigorous imprisonment for five years alongwith a fine of Rs.5,000/- or in default thereof to further undergo S.I. for six months. He was also convicted under section 12 of the Offence of Zina (Enforcement of Hudood) Ordinance, 1979 (hereinafter referred to as "the Ordinance") and sentenced to undergo rigorous imprisonment for five years. Benefit of section 382-B Cr.P.C. was extended to the appellant. Both the sentences of imprisonment were ordered to run concurrently.

2. Facts of the case, in brief, are that on 2.4.1999 report was lodged by one Syed Ahsan Abbas Shah with P.S. Saddar Bhakkar wherein, it was alleged that on the said date, at Maghrib prayers time, the complainant was induced by the accused to accompany him to Dilkusha

Garden where, he i.e. the complainant was subjected to unnatural lust, forcibly by the accused. On the stated allegation formal FIR bearing No.124/99 under section 377 PPC read with section 12 of "the Ordinance was registered at the said Police Station and investigation was carried out in pursuance thereof. On the completion of investigation the appellant was challaned to the Court for trial.

3. Charge was accordingly framed against the accused/appellant to which he 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 appellant produced twelve witnesses, in all, beside, tendering report of the Chemical Examiner i.e. Ex.PG. On the conclusion of the prosecution evidence the appellant was examined under section 342 Cr.P.C. In his above statement the appellant denied the charge and pleaded innocence. He did not opt to appear as his own witness in terms of section 340(2) Cr.P.C., however, produced three witnesses i.e. DW.1 Abdul Shakoor, DW.2 Muhammad Afzal and DW.3 Amanullah, DSP, in his defence.

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5. After hearing arguments of the learned counsel for the parties, the learned trial Judge convicted the appellant and sentenced him to the punishments as mentioned in the opening para hereof.

6. I have heard Mr.Iftikhar Shahid, Advocate, learned counsel for the appellant and Mr.Akhtar Nawaz, Advocate for the State.

7. It has been mainly contended by the learned counsel for the appellant that the learned trial Judge without evaluating evidence of the prosecution has recorded conviction against the appellant by merely pointing out defects in the defence evidence which is not only in sheer in violation of section 367 Cr.PC but has greatly prejudiced the appellant as the burden of proving its case rested entirely on the prosecution. He has prayed that since due to above defect the impugned judgment cannot be sustained, therefore, the case may be remanded to the trial Court for re-writing of judgment.

8. Mr.Akhtar Nawaz, Advocate, learned counsel for the State, candidly conceded that the learned trial Judge, in fact, has omitted to discuss or asses the prosecution evidence so as to see as to whether

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prosecution was able to discharge its burden in bringing home guilt of the accused. He, in view of the omission, expressed his no objection to remand of the case.

9. Notwithstanding the fact that the learned counsel for the appellant has not controverted the contention raised by the learned counsel for the State I have carefully gone through record of the case.

10. A perusal of the impugned judgment shows that the learned trial Judge without formulating the points for determination or appraising the prosecution evidence so as to assess that it was capable to bring home charge against the accused, has recorded conviction against the appellant by merely pointing out defects and weakness in the defence evidence. Para 21 of the impugned judgment is explicit in this regard. The omission so made is not only in glaring violation of the mandatory provision of law contained in section 367 Cr.P.C. but also appears to be in disregard of settled rules of the administration of criminal justice. It is well settled that burden to prove all the ingredients of the charge always lies on the prosecution and it never shifts on to the accused who is

entitled to stand on the innocence, assigned to him under the law till it is dislodged. Even, in a case where the defence plea, on its face, appears to be sham the prosecution is not absolved of the duty to prove its case. So much so if the defence set up by the accused is that he is protected by any of the exceptions, special or general, burden to disprove the charge would not shift on him unless it is proved on record by the prosecution that in the absence of such a plea he would be guilty of the offence charged.

It may be noted here that though legally, Court is required to come to a decision on the whole of the evidence laid before it and also on the plea of the accused but this exercise has to be done systematically. The Court, therefore, while deciding a case, should, at first, evaluate the prosecution evidence and see as to whether it has the capacity to bring home charge against the accused and if the answer is in the affirmative only then plea of the accused alongwith defence evidence, if any, may be weighed so as to reach at a definite conclusion. Needless to point out that perusal of defence plea/evidence may eventuate in convincing the

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Court of innocence of the accused, or it may cause the Court to doubt, in which case the accused would be entitled to acquittal, or it may, and some time does strengthen the case for the prosecution. However, it is established that unless presumption of innocence imputed to the accused is crowd out by the force of evidence produced by the prosecution at the trial, the defence evidence is not required to be looked into. What to speak of convicting an accused on the ground of weakness in his defence. In this view I am fortified by the following reported judgments:-

1. Rab Nawaz and another vs. The State – PLD 1994 SC 858.
2. Mst.Shamshad vs. The State 1998 SCMR 854.
3. Safdar Ali vs. The Crown – PLD 1953 Federal Court 93.
4. Hakim Ali and another vs. The State – 1971 SCMR 432
5. Nadeem-ul-Haq Khan and another vs. The State 1985 SCMR 510.
6. P Durugappa vs. State of Mysore – AIR 1956 Mysore 40 (V.43,C 17 May)
7. Bharadwaj Singh vs. State - AIR 1952 Calcutta 616

11. As to the second limb of argument in the contention that the learned trial Judge has also failed to formulate the points for determination it may be pointed out here that use of word "shall" in section 367 Cr.P.C. leads to the inference that compliance with the

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provision of section 367 Cr.P.C, in accordance with its terms, is mandatory. The provision is not permissive but imperative. Here it would be beneficial to have a glance at section 367 Cr.P.C. which reads as follows:-

> **"S.367. Language of judgment, contents of judgment.**(1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court or from the dictation of such presiding officer in the language of the Court, or in English; and shall contain the point or points for determination, the decision thereon and the reasons for the decision; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.
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> .....
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> ....."

A bare perusal of the above provision would indicate that a judgment must contain therein sufficient details qua facts of the case, points for determination, the decision thereon and reasons for the decision. In the case of Abdur Rashid Munshi and three others vs.The State PLD 1967 SC 498 it has been unequivocally laid down by the Hon'ble Supreme Court of Pakistan that under section 367 Cr.P.C, which by virtue of section 424 is applicable to judgments delivered by

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the Appellate Courts, as well, it is necessary that every judgment must contain the point or points for determination, the decision thereon and the reason for the decision. Further in the case of Ashiq Hussain and another Vs. The State and two others 2003 SCMR 698 it was held that section 367 Cr.P.C, cast duty upon Court to note down point for determination and then record decision.

A Division Bench of this Court in a recent judgment delivered in the case of Abdul Sattar vs. Sher Amjad and another reported as SBLR 2004 FSC 27 while, taking notice of the omission to formulate points for determination by the trial Courts too, has observed that trial Court must mention the relevant points for determination in a judgment and should give their findings on each point because cumulative effect of the decision and findings on these points would prove or disprove the charge. The omission made by the learned trial Judge, therefore, is fatal and the judgment cannot be sustained on this score,too.

13. The upshot of the above discussion is that the impugned judgment dated 17.7.2003 passed by the learned Additional Sessions Judge, is set

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aside and the case is remanded to the learned trial Judge for re-writing of judgment, in accordance with law, within a period of one month from the receipt hereof.

(**Ch. Ejaz Yousaf**)
Chief Justice

Lahore, dated the
26th December, 2003.
ABDUL RAHMAN/**

FIT FOR REPORTING
CHIEF JUSTICE