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JUDGMENT SHEET

IN THE LAHORE HIGH COURT, BAHAWALPUR BENCH, BAHAWALPUR.

(JUDICIAL DEPARTMENT)

Criminal Appeal No.301/2021.
Muhammad Sajid.
Vs
The State, etc.

JUDGMENT

DATE OF HEARING: 08.02.2023.
APPELLANT BY: Mirza Muhammad Azam, Advocate.
STATE BY: Mr. Shahid Fareed, ADPP with Ashraf ASI.
COMPLAINANT BY: Syed Zeeshan Haider, Advocate.

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MUHAMMAD AMJAD RAFIQ, J:- Muhammad Sajid accused/ appellant being juvenile faced trial in case FIR No.353 dated 10.10.2020 under sections 377/377-B PPC Police Station City B-Division, Chishtian District Bahawalnagar and on conclusion of trial, vide judgment dated 01.07.2021, learned Juvenile Court, convicted the appellant under section 377 PPC and sentenced him to ten years' simple imprisonment along with fine Rs.10,000/-; in default whereof to undergo further two months' simple imprisonment. The appellant was also convicted under section 377B PPC and sentenced for fourteen years' simple imprisonment along with fine of Rs.10,00,000/-; in default whereof to undergo six months' simple imprisonment. Both the sentences were ordered to run concurrently and benefit of section 382-B of Cr.P.C. was extended to him. The conviction and sentences have been questioned through the instant criminal appeal.

2. Brief facts of the complaint (Exh.PB), a base for the registration of formal FIR (Exh.PD) shows that on 10.10.2020 at 5:00 p.m., when the complainant was returning to his house situated within the area of Canal Rest House, Chishtian; on hearing the noise of his child, he along with Muhammad Nasir and Muhammad Naeem Khan reached to the deserted and dilapidated quarter of Canal Rest House, saw the appellant while

committing sodomy with his son namely Muhammad Nouman Saleem who, on seeing the witnesses, ran away from the place of occurrence.

3. After observing all codal formalities, report under section 173 of Cr.P.C. was sent to learned trial court, accused was charge sheeted to which he pleaded not guilty and claimed to be tried; upon which, prosecution examined Mehboob Manzoor 1123/C (PW.1), Ghulam Haider 129/HC (PW.2), Dr. Hafiz Muhammad Mudassar Haleem, who conducted potency test of accused/appellant (PW.3), complainant of the case namely Muhammad Saleem Anwar (PW.4), victim of the case Muhammad Nouman Saleem (PW.5), Muhammad Naeem Khan, eye-witness (PW.6), Fazal Abbas, SI/I.O. (PW.7), Dr. Hafiz Humayun Rasool, M.O. (PW.8) who conducted medical examination of the victim and gave opinion about commission of sexual act and Saqib Hussain T/SI(PW.9). Learned ADPP after giving up Muhammad Nasir being unnecessary and tendering the report of DNA (Exh.PH/1-2), closed the prosecution evidence. On close of prosecution evidence, statement of accused under section 342 of Cr.P.C. was recorded, he did not opt for his statement under section 340(2) of Cr.P.C., however, produced Form-B of NADRA (Exh.DA) and School certificate (Exh.DB) in defence evidence.

4. Arguments heard. Record perused.

5. Learned counsel for the appellant though initiated the arguments but having foreseen the result, he turned to his alternate prayer that section 377 & 377-B PPC cannot be attracted simultaneously under the doctrine of merger and sentence under section 377 PPC is a harsh one; therefore, conviction and sentence u/s 377-B PPC may be set aside and he would not challenge the conviction under section 377 PPC but while referring the documents (Exh. DA & DB) prays that the petitioner is juvenile, first offender and is a student, therefore, his sentence under such section may kindly be reduced.

6. Record shows that prosecution has established its case against the appellant through the ocular account which though has a little touch of

support from the medical evidence yet positive report of PFSA proves the act of sodomy/unnatural lust and the learned trial court after proper and correct appreciation of the entire evidence has held the appellant to be guilty and no misreading or non-reading of evidence could be found to justify interference in the conviction of the appellant under section 377 PPC, but so far as applicability of section 377-B PPC relating to offence of 'Sexual abuse' is concerned and the prayer of learned counsel for the appellant to apply principle of merger, it is necessary to thrash the true intent of legislator for enacting offence of 'Sexual abuse' and its applicability in the situation when major offence overlaps the minor offence.

7. The rationale, object and circumstances that culminated into enacting the offence of 'Sexual abuse' took a rout when this Court while disposing of an appeal decided a case reported as "*THE STATE versus ABDUL MALIK alias MALKOO*" (**PLD 2000 Lah 449**); wherein this Court reproduced the following observation of the Special Court constituted under the Anti-terrorism Act 1997 in a case pertained to sexual abuse of a 7-year-old girl child: -

> The offence against the accused under Section 10 (4), Offence of Zina (Enforcement of Hudood) Ordinance 1979 is not made out. As regards the offence under Section 7, Anti-terrorism Act 1997, no such case against the accused is made out from the facts and circumstances of the case. As regards contention of the learned D.D.A about the allegation of child molestation against the accused, the said offence is neither punishable in any Section of Pakistan Penal Code nor any amendment has been made to make that offence punishable under Offence of Zina (Enforcement of Hudood) Ordinance 1979 and mere mentioning of the word child molestation in the Schedule of the Anti-Terrorism Act 1997 does not make the case against the accused triable by this court.
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> The Court further observed:
>
> As proponent of Islamic faith which lays special stress on the welfare of family and child, as a member of the United Nations and in accord with the afore-referred mandate, it is our religious, moral and constitutional duty to bring the required legislative and structural changes to honour our commitments to the rights of child and family. There is need to suitably amend the penal law with a view to make certain acts/wrong against the children punishable. There is need to create socio-economic institutions to fully realize the objectives of the International Convention. There is need to give a new and a fair deal to the child.

The Court also observed that child molestation which is sometimes used as synonymous to child abuse is committed in the following forms: -

i. physical beatings to a child or subjecting him to severe beating, burns, strangulation, or human bites;
ii. neglecting a child by not providing the basic necessities of life including refusal or delay in providing food, clothing, shelter, medical care, education as well as abandonment and inadequate supervision;
iii. emotional abuse including constant criticizing, belittling, insulting, rejecting and providing no love, support or guidance; and
iv. sexual exploitation of a child, including rape, incest, fondling of the genitals, pornography, or exhibitionism.

8. It was also the demand of international community to legislate for children in order to prevent them from sexual abuse and other related exploitations as mentioned in "The United Nations Convention on the Rights of the Child 1989" which Pakistan ratified in 1990; related articles contemplate and stipulate as under: -

Article 19.

1. State Parties shall take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation including sexual abuse, while in the care of parents, legal guardians or any other person who has the care of the child.

2. Such protective measures should, as appropriate, include effective procedures for the establishment of social programmes to provide necessary support for the child and for those who have the care of the child, as well as for other forms of prevention and for identification, reporting, referral, investigation, treatment and follow up of instances of child maltreatment described hereafter, and, as appropriate, for judicial involvement.

Article 33.

State Parties shall take all appropriate measures, including legislative, administrative, social and educational measures, to protect children from the illicit use of narcotic drugs, and psychotropic substances as defined in the relevant international treaties, and to prevent the use of children in the illicit production and trafficking of such substances.

Article 34.

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent-

(a) the inducement or coercion of a child to engage in any unlawful sexual activity;

(b) the exploitative use of children in prostitution or other unlawful practices.

(c) the exploitative use of children in pornographic performances and materials.

Article 35.

States Parties shall take all appropriate national, bilateral and multilateral measures to prevent the abduction, the sale of or traffic in children for any purpose or in any form.

9. Taking into consideration the above decision of this Court as well as the international demand, the Law and Justice Commission of Pakistan conducted a study and formulated a Report 42, for an addition of 'Offence of Molestation' to the Pakistan Penal Code, 1860 which revealed in following terms; [1]

A perusal of our criminal statutes reveals that there was no specific law on the subject to meet various situations and acts of molestation. Some provisions of the PPC touch the subject only partially e.g.:

(i) S. 354. **Assault or criminal force to woman with intent to outrage her modesty**. - Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty shall be punished with imprisonment of either description for a term which may extend to two years or with fine, or with both;

(ii) S. 354-A. **Assault or use of criminal force to woman and stripping her of her clothes**. - Whoever assaults or uses criminal force to any woman and stripes her of her clothes and, in that condition exposes her to the public view, shall be punished with death or with imprisonment for life, and shall also be liable to fine;

(iii) S. 366-A. **Procreation of minor girl**. - Whoever by any means whatsoever, induces any minor girl under the age of eighteen years to go from any place or to do any act with intent that such girl may be or knowing that it is likely that she will be forced to illicit intercourse with another person shall be punishable with imprisonment which may extend to ten years and with fine; and

(iv) S. 509.- **Word, gesture or act intended to insult the modesty of a woman**.- Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or fine, or with both.

[1] http://www.commonlii.org/pk/other/PKLJC/reports/42.html

The above provisions of law do not fully attract various other forms/acts of molestation as observed by the High Court, hence there was need to enact a specific law on the subject. This need was also highlighted in the report of National Workshop on Child Sexual Abuse and Exploitation in Pakistan, organized by the Lawyers for Human Rights and Legal Aid (LHRLA) in April 2000 at under the action aid programme of the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP). The report states that, sexual abuse involves any violation of the rights of a child including severe forms i.e., rape or sodomy and also includes other activities of sexual nature that fall short of rape or sodomy e.g., **acts, like fondling, stroking, exposure to adult genitalia, caressing, etc.** The report further highlighted that the crucial difference between abuse and exploitation is that when a child is exposed to or abused for the purpose of monetary gain. So, the trafficking of children, sale for prostitution or any other purpose would categorize as exploitation.

In 1997, the Economic and Social Commission for Asia and the Pacific carried out a study on sexually exploited and abused children. The study was conducted with data and research from 12 countries in the South Asia Region including Pakistan. The purpose was to confirm the incidence of child sexual abuse and its redress in all provinces of the country and to follow a campaign of creating general awareness about this neglected issue. The study was carried on children under 18 and, was carried out by the National Commission for Child Welfare and Development (NCCWD) and the provinces were delegated to various N.G.Os working within the indigenous areas. This study uncovered child sexual abuse and exploitation to be one of the least acknowledged and most neglected area of development. The study revealed that there exists no monitoring bodies to investigate complaints on any level within the country and that there is a shocking lack of awareness as regards this issue. It was further stated that sexual abuse is a taboo subject, more so if girl child is the victims, and in some areas, such incidents are suppressed. Moreover, in many areas, child sexual abuse is accepted as normal and child sexual exploitation is also condoned in the name of tradition. The study goes on to state that girl children are married off, boys and girls sold into prostitution and surprisingly, despite being illegal, it is a very openly conducted vice. Certain localities and venues were found to be more renowned for such practices for example local hotels, parks, brothels, shops and transport depots. The effects of this accepted cultural trend on children's physical and mental health were found to be more disturbing, with no knowledge of HIV testing or AIDS despite the thriving demand for unprotected sexual practice being the norm. The study identified certain factors as contributing to the exploitation and vulnerability of children including the prevalence of large-scale illiteracy and lack of education in both adults and children, which further deteriorate the situation. This study finally gives recommendations for devising a national strategy and plan of action to ensure the recovery and reintegration of the victims of this practice and taking preventive measures to eradicating this evil.

In an article published in the News dated 19 September 2001, it is mentioned that, child sexual abuse plays a vital role in deforming a society's moral and emotional health. It is now scientifically proven that sexual abuse suffered during childhood causes significant harm to adult survivors of such abuse. In short child molestation should be acknowledged as not a domestic problem but a social problem.

The recommendations of the Commission were sent to the Government for amending the Pakistan Penal Code as well as for taking required administrative measures, and through a draft Ordinance following amendment was proposed:-

> 2. **Insertion of Section 354-B, Act XLV of 1860**.- In the Pakistan Penal Code 1860 (XLV of 1860), after Section 354-A, the following new Section shall be inserted, namely; -
>
> **354-B**. **Molestation with sexual motive: -** Whoever with sexual motive resorts to act of fondling, stroking, caressing, pornography, exhibitionism or inducing or intimidating any person, with or without his knowledge, to submit for such act, shall be punished with imprisonment of either description for a term which may extend to seven years or with fine or with both.

Legislature attended the above articles of The United Nations Convention on the Rights of the Child 1989 and legislated different offences to save the children, by amending the Pakistan Penal Code, 1860 in year 2016 which are like section 292-A 'exposure to seduction', section 292-B & 292-C, 'Child pornography', section 328-A, Cruelty to child' section 369-A, 'trafficking of human being', section 377-A & 377-B 'Sexual abuse'. The subject of this case, 'Sexual abuse' was drafted in following manner;

> **Section 377-A**; **Sexual Abuse;** Whoever employs, uses, forces, persuades, induces, entices, or coerces any person to engage in, or assist any other person to engage in fondling, stroking, caressing, exhibitionism, voyeurism, or any obscene or sexually explicit conduct or simulation of such conduct either independently or in conjunction with other acts, with or without consent where the age of person is less than eighteen years, is said to commit the offence of sexual abuse.

Such offence was later remained the subject of discussion in different cases reported as "*MUHAMMAD SAJID alias SAJO Versus The STATE and others*" [**2022 P.Cr.LJ 151 (Lahore)**], "*NAUMAN HUSSAIN Versus The STATE and another*" [**2022 MLD 958 (Islamabad)**], "*MUBEEN AHMAD Versus The STATE and another*" (**PLD 2021 Islamabad 431**) and "*Mst. MUMTAZ BIBI Versus QASIM and 4 others*" (**2022 PLD Islamabad 228**).

10. The offence was primarily punishable with sentence of seven years' imprisonment but later amended in a more stringent form with sentence of imprisonment up to 20 years, not less than 14 years with fine

of Rs. one million. The section 377-A PPC being definition clause of offence of 'Sexual abuse' contains more than one situation, but limit of sentence is same for all sort of acts mentioned therein. Proposing such sort of sentence was not the demand of international community nor a compulsion under a ratified United Nations Convention cited above, rather a wish of our legislative body which shows lack of proper study and care; otherwise, some countries under such covenant have proposed different types of offences with various forms of sentences. A comparative analysis of laws of some countries throws light as under;

UK government legislated 'Sexual Offences Act, 2003' to cater to the situation which entails different punishments for different types of sexual activities like as under;

> **Exposure;** he intentionally exposes his genitals, and (b) he intends that someone will see them and be caused alarm or distress.
>
> **Voyeurism;** for the purpose of obtaining sexual gratification, he observes another person doing a private act, and (b) he knows that the other person does not consent to being observed for his sexual gratification. He operates equipment with the intention of enabling another person to observe, for the purpose of obtaining sexual gratification, a third person (B) doing a private act, and(b) he knows that B does not consent to his operating equipment with that intention.
>
> Other offences include **'Causing or inciting a child under 13 to engage in sexual activity'**. **'Engaging in sexual activity in the presence of child'**. **'Causing a child to watch the sexual activity'**. **'Arranging or facilitating commission of a child sex offence'**. **'Inciting a child family member to engage in sexual activity'**.
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> All the acts differently defined in such Act are punishable with different sentences which are cited below;
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> **'Exposure'** (Section-66), imprisonment for a term not exceeding 2 years. **'Voyeurism'** (Section-67), imprisonment for a term not exceeding 2 years. **'Causing or inciting a child under 13 to engage in sexual activity'** (Section-8), imprisonment for life. **'Engaging in sexual activity in the presence of child'** (Section-11), imprisonment for a term not exceeding 10 years. **'Causing a child to watch the sexual activity'** (Section-12), imprisonment for a term not exceeding 10 years. **'Arranging or facilitating commission of a child sex offence'** (Section-14), like sentence as for offence committed. **'Inciting a child family member to engage in sexual activity'** (Section-26), if offender is above 18, imprisonment for a term no exceeding 14 years; in any other case, imprisonment for a term not exceeding 5 years.
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> **Note;** These sentences are on indictment, otherwise all above offences in summary trial is punishable for a term not exceeding 6 months or a fine not exceeding the statutory maximum or both;

In United States of America, CRIMES AND CRIMINAL PROCEDURE envisage a chapter 109-A on 'Sexual Abuse' which deals with different situations; Section 2246 defines the terms 'sexual act' which means;

> (A) contact between the penis and the vulva or the penis and the anus, and for purposes of this subparagraph contact involving the penis occurs upon penetration, however slight;
>
> (B) contact between the mouth and the penis, the mouth and the vulva, or the mouth and the anus;
>
> (C) the penetration, however slight, of the anal or genital opening of another by a hand or finger or by any object, with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person; or
>
> (D) the intentional touching, not through the clothing, of the genitalia of another person who has not attained the age of 16 years with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

likewise sexual contact means;

> the intentional touching, either directly or through the clothing, of the genitalia, anus, groin, breast, inner thigh, or buttocks of any person with an intent to abuse, humiliate, harass, degrade, or arouse or gratify the sexual desire of any person;

Such acts are punishable with sentences which are reflected below;

> 'Section 2243. **Sexual abuse of a minor, a ward, or an individual in Federal custody'**, imprisonment for not more than 15 years. 'Section 2244**. Abusive sexual contact'**, different situations but imprisonment not more than three years; however, offences involving young children, twice the punishment for different abusive sexual contact mentioned in the section.

The Protection of Children from Sexual Offences Act, 2012 (India) defines offences as 'Sexual assault' & 'Aggravated sexual assault' in following terms;

> **Section-7**; Whoever, with sexual intent touches the vagina, penis, anus or breast of the child or makes the child touch the vagina, penis, anus or breast of such person or any other person, or does any other act with sexual intent which involves physical contact without penetration is said to commit sexual assault.
>
> Aggravated sexual assault is a situation when sexual assault is committed in different situations as mentioned in **section-9** by Police Officer, member of armed forces, public servant, management or staff of jail, hospital, educational or religious institution or gang sexual assault.

It makes the 'sexual assault' and 'aggravated sexual assault' punishable as under;

> **Section-8;** Whoever, commits sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to five years, and shall also be liable to fine.
>
> **Section-10;** Whoever, commits aggravated sexual assault shall be punished with imprisonment of either description for a term which shall not be less than five years but which may extend to seven years, and shall also be liable to fine

Penal Code of Turkey labels the offence as 'Child Molestation' and Sexual molestation covers the following acts;

> a) All kinds of sexual attempt against children who are under the age of fifteen or against those attained the age of fifteen but lack the ability to understand the legal consequences of such act,
>
> b) Sexual behaviours committed against other children by force, threat, fraud or another reason affecting the willpower.

punishable as under;

> Any person who abuses a child sexually is sentenced to an imprisonment from **eight years to fifteen years.** If the said sexual abuse ceases at the level of sexual importunity, the term of imprisonment shall be from **three years to eight years.**
>
> If offence is committed by more persons, some relatives, tutor, instructor, custodial parents, at employment and in some other situations mentioned therein; sentence shall be increased by one half.
>
> In case of performance of sexual abuse by inserting an organ or instrument into a body, the offender is sentenced to a term of imprisonment no **less than sixteen years.**
>
> In case of vegetative state or death of a person as a result of the offense, the offender is sentenced to aggravated life imprisonment.

Pakistan Penal Code, 1860 through defines offence of 'Sexual Abuse' in following terms;

> **Section 377A Sexual abuse;** Whoever employs, uses, forces, persuades, induces, entices, or coerces any person to engage in, or assist any other person to engage in fondling, stroking, caressing, exhibitionism, voyeurism, or any obscene or sexually explicit conduct or simulation of such conduct either independently or in conjunction with other acts, with or without consent where the age of person is less than eighteen years, is said to commit the offence of sexual abuse.
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> **Section 377B Punishment**. Whoever commits the offence of sexual abuse shall be punished with imprisonment of either description for a term which may extend to twenty years but shall not less than 14 years and liable to fine of rupees one million.

11. The language, legislator applied to draft the offence of ‘Sexual abuse’ contains each and every thing in a boat for its omnibus sailing on all sorts of acts and that too without the definition of terms used for explaining such offences in one section of law which not only makes its applicability difficult but creates problems for investigators/ prosecutors and the courts to propose particular charge or to find out standards to evaluate the charge for appropriate sentences. While proposing sentence for all sorts of acts mentioned in the section, legislator has completely failed to attend the sentencing principles and purposes which can be like;

Principles of sentencing

- **Parsimony** – the sentence must be no more severe than is necessary to meet the purposes of sentencing.
- **Proportionality** – the overall punishment must be proportionate to the gravity of the offending behaviour.
- **Parity** – similar sentences should be imposed for similar offences committed by offenders in similar circumstances.
- **Totality** – where an offender is to serve more than one sentence, the overall sentence must be just and appropriate in light of the overall offending behaviour.

Purposes of sentencing

- **Just punishment** – to punish the offender to an extent and in a way that is just in all the circumstances.
- **Deterrence** – to deter the offender (specific deterrence) or other people (general deterrence) from committing offences of the same or a similar character.
- **Rehabilitation** – to establish conditions that the court considers will enable the offender’s rehabilitation.
- **Denunciation** – to denounce, condemn or censure the offending conduct.
- **Community protection** – to protect the community from the offender.

The words used in section 377-A PPC for describing different types of offences require different sentencing zones to meet above principles and purposes of sentencing, but legislator has not taken care of such requirement which is causing serious prejudice, damage and injustice to oppressed people who are easy prey for false implication as scapegoat. So much so legislator has not defined the words ‘fondling, stroking, caressing, exhibitionism, voyeurism’ used in section

377-A PPC, therefore, its self-interpretation can produce inconsistent approaches to reach out for proof of such offence. However, what they stand for in its ordinary dictionary meanings reflect something like as below;

> **Fondling:** The touching of private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental capacity.
>
> **Stroking:** to move a hand, on another part of body or an object gently over something or someone, usually repeatedly and for pleasure.
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> **Caressing:** to touch or kiss someone in a gentle and loving way.
>
> **Exhibitionism:** involves exposing the genitals to become sexually excited or having a strong desire to be observed by other people during sexual activity.
>
> **Voyeurism:** is the act of gaining sexual pleasure through watching or recording someone in a private act. To fall under this offence, it must be non-consensual.

These terms have also been defined like as under;

Sr.	Word	Dictionary name	Dictionary Meaning
1	**Fondling**	Cambridge Advanced Learner's Dictionary Low Price Editions Year 2003	To touch gently and in a loving way, or to touch in a sexual way.
		The Chambers Dictionary 12th Edition Year 2011	To handle with fondness; to caress.
		Merriam-Webster	To handle tenderly, lovingly, or lingeringly: caress: to touch (someone or something) sexually.
2	**Stroking**	Cambridge Advanced Learner's Dictionary Low Price Editions Year 2003	To move a hand, another part of the body or an object gently over something, usually, repeatedly and for pleasure
		The Chambers Dictionary 12th Edition Year 2011	To rub gently in one direction; to rub gently in kindness or affection; to put or direct by such a movement; to reassure or flatter with attention.
3	**Caressing**	Oxford 7th edition	To touch sb/sth gently, especially in a sexual way or in a way that shows affection"
		Cambridge Advanced	To touch or kiss someone in a gentle and loving way.

		Learner's Dictionary Low Price Editions Year 2003	
		Merriam-Webster	1: to treat with tokens of fondness, affection, or kindness: 2: to touch or stroke lightly in a loving or endearing manner.
4	**Exhibitionism**	Oxford 7th edition	The mental condition that makes sb want to show their sexual organs in public
		The Chambers Dictionary 12th Edition Year 2011	Extravagant, behavior, aimed at, drawing attention to oneself, perversion, involving public exposure of one's sexual organs.
		Black's Law Dictionary with Pronunciations 6th Edition	Indecent exposure of sexual organs; 'indecent' means by the similar dictionary, offending against modesty or delicacy; grossly vulgar; obscene; lewd; unseemly; unbecoming; indecorous; unfit to be seen or heard.
		Black's Law Dictionary Ninth Edition	The indecent display of one's body.
5	**Voyeurism**	The Chambers Dictionary 12th Edition Year 2011	Derives, gratification from surreptitiously watching sexual acts or objects.
		Black's Law Dictionary with Pronunciations 6th Edition	The condition of one who derives sexual satisfaction from observing the sexual organs or acts of others, generally from a secret vantage point.
		Black's Law Dictionary Ninth Edition	Gratification derived from observing the genitals or sexual acts of others, usu., Secretly.

In addition to above it is also mentioned in section 377-A PPC that any other obscene act shall also be included in the definition of sexual abuse. The above definitions clearly reflects that they cannot be offences of same gravity but all of them entail minimum sentence of 14 years; therefore, do not cater to the requirement of sentencing for an offence in true sense. Thus, it can be termed as a bad piece of legislation, consequently a bad law, open to exploitation very easily.

12. This type of legislation give rise to consideration that in fact, it may be said that all newly-made statutes are at first merely nominal law, and it requires a further process of growth, adaptation to the actual conditions of society, and confirmation by tacit consent of the members

of the community, before they can attain the rank of essential law; however, instead of ripening gradually into essential law, such statutes are eliminated in the course of time by one of the three processes: repeal; obsolescence; and destructive interpretation by the courts.

In one German principality it became a proverb that "storms from the East and laws from Bayreuth last three days." And long before the days of imperial Rome even, Aristotle had said: " Law derives its authority from nothing but custom, and this grows only in the course of a long time, so that an easy changing from existing laws to different and new ones is to weaken the force of law."

An article “Some Neglected Factors in Law-Making” Authored by Ernest Bruncken; **Source:** The American Political Science Review, May, 1914, Vol. 8, No. 2 (May, 1914), pp. 222-237 Published by: American Political Science Association, has aptly throws light on requirement of law making with following expression;

> “Somewhere in the Corpus juris civilis I found the sentence: "Non ex regula jus sumatur, sed ex jure quod est regula fit-The law is not to be gathered from rules, but the rules grow out of the existing law." And the distinguished president of Yale, speaking of the true character of our constitution, puts a similar thought into a striking metaphor when he says: "A fence does not make a boundary-it marks it. The constitution is the evidence of a limitation, not the cause." Both sentences, the one referring to the body of the unwritten, the other to a written law, express the same idea: That the mere enactment of a statute, or the enunciation of a rule by a court, is not of itself sufficient to make law in any true sense. Of itself, it is merely what I should like to call nominal law. It will not be true or essential law until it has proven itself to be founded upon the sense of right generally prevailing in the community, or, to use the words of Isidore of Sevilla, until it is seen to be " secundum naturam, secundum contudinem patriae, loco temporique conveniens" "in accordance with human nature, in accordance with the settled habits of the people, fit for the place and the time." As long as it lacks these qualities, it may indeed be enforced for a while by courts and executive officers, but it is certain, within no distant period, to be repealed, to become disregarded and obsolete, or to be modified by judicial interpretation and construction until it has been brought into conformity with the requirements of essential law.”

We have experienced that Laws do not affect poor or rich alike, it has deteriorating effect on rich more than poor or on intellectuals than ordinary man; balance is the standpoint to raise or reduce harshness in penalties. The ideal would be, that all bills introduced and all statutes passed should be adapted perfectly to the common sense of right.

Ernest Bruncken in cited article has well expressed that "I may be permitted to offer a bit of advice to those who dislike the activity of the courts in revising our nominal law. They might forestall the greater part of all this judicial work by promoting better work on the part of the legislatures. If all statutes, before being adopted, were skill- fully drawn by trained draughtsman; if the present anarchy in our legislative bodies could give way to responsible leadership, so as to make a consistent policy feasible at least within each legislative session; and if lawyers, and other men in positions of influence, had some knowledge of the theory of legislation, there would be very little need for censorship by the courts." In the cited article it has been recommended as under;

> "The process of making law is not exclusively the work of legislative bodies, as the formal juridic theories would make us believe; nor even the work of the legislative combined with that of the judicatory organs of the state. The really determining factor is not the arbitrary will of individual men, nor even of groups of individual men acting consciously and with a deliberate purpose. The most important element in the entire process of law formation is that silent working of a million individual minds, each forming and expressing opinions, beliefs, feelings; setting up ideas, analyzing and judging the myriad facts and events of daily life; having all the time no conscious purpose of helping in any task of making laws, yet creating by their combined influence that environment which moulds the minds and shapes the purposes of those who at one time or other act in the capacity of legislators and judges. These silent forces have sometimes been called the folk-spirit, a term convenient and brief, yet one which will have to be used circumspectly by political scientists, on account of certain speculative and fanciful notions clustered around it. This folk-spirit is at work in the legislature as well as in the court, and the words applied to judicial decisions by an eminent American lawyer apply equally to the statutes: ".... these .... changes have usually been in accord with and due to the spirit of the age. The court really doing little more than registering the modifications of the national common consciousness. Hence these changes, in most cases, have passed unnoticed."

13. Law does not work properly if the punishments prescribed do not meet the standards which the jurists suggest depending upon the nature of offence and composition of society. JEREMY BENTHAM expressed his view about the Punishments which ought not to be inflicted; according to him it may be reduced to four heads: when punishment would be—1st, Misapplied; 2nd, Inefficacious; 3rd, Superfluous; 4th, Too expensive.

> I. PUNISHMENTS MISAPPLIED. — Punishments are misapplied wherever there is a no real offence, no evil of the first order or of the second order; or where the evil is more than compensated by an attendant

> good, as in the exercise of political or domestic authority, in the repulsion of a weightier evil, in self-defence, & c.

If the idea of what constitutes a real offence has been clearly apprehended, it will be easy to distinguish real from imaginary offences—from those acts, innocent in themselves, which have been arranged among offences by prejudice, antipathy, mistakes of government, the ascetic principle, in the same way that several wholesome kinds of food are considered among certain nations as poisonous or unclean. Heresy and witchcrafts are offences of this class.

> II. INEFFICACIOUS PUNISHMENTS. - I call those punishments *inefficacious* which have no power to produce an effect upon the will, and which, inconsequence, have no tendency towards the prevention of like acts. Punishments are inefficacious when directed against individuals who could not know the law, who have acted without intention, who have done the evil innocently, under an erroneous supposition, or by irresistible constraint. Children, imbeciles, idiots, though they may be influenced, to a certain extent, by rewards and threats, have not a sufficient idea of futurity to be restrained by punishments. In their case laws have no efficacy.

If a man is determined to act by a fear superior to that of the heaviest legal punishment, or by the hope of a preponderant good, it is plain that the law can have little influence over him. We have seen laws against dueling disregarded, because men of honour are more afraid of shame than of punishment. Punishments directed against religious opinions generally fail to be effectual, because the idea of everlasting reward triumphs over the fear of death. According as these opinions have more or less influence, punishment in such cases, is more or less efficacious.

> III. SUPERFLUOUS PUNISHMENTS.-. Punishments are superfluous in cases where the same end may be obtained by means more mild-- instruction, example, invitations, delays, rewards. A man spreads abroad pernicious opinions: shall the magistrate therefore seize the sword and punish him? No; if it is the interest of one individual to give currency to bad maxims, it is the interest of a thousand others to refute him.
>
> IV. PUNISHMENTS TOO EXPENSIVE. - If the evil of the punishment exceeds the evil of the offence, the legislator will produce more suffering than he prevents. He will purchase exemption from a lesser evil at the expense of a greater evil.
>
> Two tables should be kept in view-- one representing the evil of offences, the other the evil of punishments.

JEREMY BENTHAM further says that the following evils are produced by every penal law:--

> 1st. ***Evil of coercion***. It imposes a privation more or less painful according to the degree of pleasure which the thing forbidden has the power of conferring. 2nd. ***The sufferings caused by the punishment***, whenever it is actually carried into execution. 3rd. ***Evil of apprehension*** suffered by those who have violated the law or who fear a prosecution in consequence. 4th. ***Evil of false prosecutions***. This inconvenience appertains to all penal laws, but particularly to laws which are obscure and to imaginary offences. A general antipathy often produces a frightful disposition to prosecute and to condemn upon Suspicions or appearances. 5th. ***Derivative* evil** suffered by the parents or friends of those who are exposed to the rigour of the law.
>
> Such is the table of evils or of expenses which the legislator ought to consider every time he establishes a punishment.

He concluded that it is from this source that the principal reason is drawn for general amnesties, in case of those complicated offences which spring from a spirit of party. In such cases it may happen that the law envelopes a great multitude, sometimes half the total number of citizens, and perhaps more than half. Will you punish all the guilty? Will you only decimate them? In either case the evil of the punishment is greater than the evil of the offence.

If a delinquent is loved by the people, so that his punishment will cause national discontent; if he is protected by a foreign power whose good-will it is necessary to conciliate; if he is able to render the nation some extraordinary service; - in these particular cases the grant of pardon is founded upon a calculation of prudence. It is apprehended that punishment of the offence will cost society too dear.[2]

14. In our jurisdiction, the Supreme Court and the High Court have focused on the principles of legislation which ought to be applied while defining an offence and suggesting a punishment. Some observations of the Courts are reproduced cited in the following reported judgments: -

"*JAMAT-I-ISLAMI PAKISTAN through Syed Munawar Hassan, Secretary-General versus FEDERATION OF PAKISTAN through Secretary, Law, Justice and Parliamentary Affairs*" (**PLD 2000 Supreme Court 111**).

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[2] THEORY OF LEGISLATION BY JEREMY BENTHAM. TRANSLATED FROM THE FRENCH OF ETIENNE DUMONT BY R. HILDRETH. Eighth Edition

> "12. It is well-settled that Statutes must be intelligibly expressed and reasonably definite and certain. An act of the Legislature to have the force and effect of law must be intelligibly express and statutes which are too vague to be intelligible are a nullity. Certainty being one of the prime requirements of a statutes, a statute in order to be valid must be definite and certain. Anticipated difficulty in application of its provisions affords no reason for declaring a statute invalid where it is not uncertain. Reasonable definiteness and certainty is required in statutes and reasonable certainty is sufficient. Reasonable precision, and not absolute precision or meticulous or mathematical exactitude, is required in the drafting of statutes, particularly as regards those dealing with social and economic problems.
>
> Clearly, the language of the statute and, in particular, statute creating an offence must be precise, definite and sufficiently objective so as to guard against an arbitrary and capricious action on the part of the State functionaries who are called upon to enforce the statute. It is well-settled that penal statutes contemplate notice to ordinary person of what is prohibited and what is not."

"GHULAM ABBAS NIAZI Versus FEDERATION OF PAKISTAN and others" (**PLD 2009 Supreme Court 866**).

> "12. It is settled principle of criminal jurisprudence that while legislating a penal statute that aims at creating an offence, the legislature sets down the definition in such simplest possible manner of drafting that it is capable of being comprehended by ordinary persons, of what is prohibited and what is not. The word of a penal statute is always objective and not at all subjective. It has to be intelligibly expressed and reasonably defined. The interpretation of the definition of a crime is not, therefore, needed at all and becomes so needed only when language employed is ambiguous.

"*Ch. EHSAN SABRI Versus FEDERATION OF PAKISTAN through Secretary, Ministry of Law Justice, Human Rights and Parliamentary Affairs, Islamabad*" [**2002 PLC (C.S.) 113**].

> "The statutes which are penal in nature must be definite, clear and certain so as to guard against any arbitrary and capricious action against any person."

The referred contents, in fact, are the forms of recommendations which are the eye opener for our legislator, and it is expected that a composite language used for defining offence of 'Sexual abuse' and its form of omnibus sentencing shall be reconsidered for a better way out.

15. Coming back to the case in hand, as far as the conviction and sentence under section 377-B PPC is concerned, the appellant was also charged for an offence under section 377 PPC and sentence provided thereunder has also been imposed upon the appellant for such offence, therefore, doing obscene acts, if any, during commission of offence of

sodomy/unnatural lust would definitely merge in that offence and there was no legal mandate available to the learned trial court to have convicted the accused/appellant under section 377-B PPC for a lesser offence which is contrary to the provision of section 71 PPC because the graver offence would engulf the minor under the **doctrine of merger**, it is defined as under;

> "In criminal law, if a defendant commits a single act that simultaneously fulfills the definition of two separate offenses, merger will occur. This means that the lesser of the two offenses will drop out, and the accused will only be charged with the greater offense. This prevents double jeopardy problems from arising."

Reliance in this respect is placed on the judgments referred hereunder: -

> "BASHIR AHMAD *versus THE STATE*" [**1985 P.Cr.LJ 1516 (Lahore)]**. The learned trial Court has overlooked the provisions of section 307, PPC and has ordered two convictions in respect of the injuries to Muhammad Anwar P.W. This is not legally permitted. The graver offence would include the minor offence and, therefore, the conviction under section 326, P.P.C. is set aside.
>
> "*LASHKAR and 3 others versus THE STATE*" [**1987 P.Cr.LJ 1034 (Lahore)**]. The learned trial Magistrate has chosen to convict Lashkar and Falak Sher of offences under section 363 and 366 of the Pakistan Penal Code. It is to be noticed that the offence under section 366 is an aggravated form of the offence under section 363 and by operation of section 71 of the Pakistan Penal Code, they could not be convicted in respect of both the offences. Since the offence under section 366 is a graver one I would set aside the conviction and sentences of these two appellants for the offence under section 363. There convictions under section 366 are maintained.
>
> "*AHMAD DAUD-UL-HUSSAINI Versus THE STATE*" (**2008 SCMR 111**)**.** The petitioner was tried for more than one offence emanating from the same transaction. Section 71 of the P.P.C. inter alia Mandates that where several acts of which one or more than one would be itself or themselves constitute an offence "the offender shall not be punished with a more severe punishment than the Court which tries him could award for any one of such offences".
>
> "*FIAZ MUHAMMAD Versus THE STATE*" [**1981 P.Cr.LJ 12 (Karachi)**]. The appellant had caused both grievous and simple injuries to Hussain Bux and the learned Additional Sessions Judge, Hyderabad has convicted the appellant under both sections 326 and 324, P.P.C. and separate sentences have been awarded. The trial Court was clearly in error in giving two separate convictions and sentences for injuries given to Hussain Bux. Under the law, in these circumstances, the appellant could have been convicted only under section 326, P.P.C. and given one sentence and not two convictions and two sentences. Section 71, P.P.C. and the illustrations to this section leave no room for any doubt on this point.
>
> "*ZAFAR IQBAL alias KALA Versus THE STATE*" [**2013 P.Cr.LJ 645 (Lahore)**]. So far as contention of learned counsel for the appellant qua

reduction in his sentence under sections 396 and 460, P.P.C. is concerned, admittedly both the offence under section 396, P.P.C., as well as offence under section 460, P.P.C., though are different but fall in the same definition.

"*KHALID IQBAL Versus THE STATE*" [**1991 P.Cr.LJ 443 (Federal Shariat Court)**]. According, we lay down a rule that as and when an offender is charged for transportation or possession of different narcotics at one and the same time during the same transaction and the transportation or possession of some narcotics is punishable with enhanced sentence the offender shall be liable to the punishment for a joint offence of narcotics to the maximum sentence provided for the transportation or possession of certain narcotics and the transportation and possession of intoxicant punishable with lesser sentence shall be accordingly merged into the major offence of transportation and possession of narcotics punishable with enhanced sentence.

"*MUHAMMAD SARFRAZ Versus THE STATE*" [**2009 YLR 1131 (Lahore)**]. A combined examination of section 71, P.P.C. and its illustration (a) and the case law, referred to above provides a basis to conclude that an assailant causing different kinds of hurts to a person falling within the ambit of different and separate penal provisions of law, however, during the course of same transaction cannot be convicted and sentenced for each and every hurt separately and simultaneously and will be liable for the major injury only. We, therefore, hold that the appellant is liable to only one punishment under section 337-F(ii), P.P.C. for the whole beating. Resultantly, the conviction and sentence under section 337-F(i), P.P.C. imposed on the appellant by the learned trial Court is set aside being violative of section 71, P.P.C. and the same law discussed above.

"*KHALID ALAM Versus PROVINCE OF SINDH through Home Secretary Sindh and 5 others*" [**2022 P.Cr.LJ 1094 (Sindh)**]. As to section 71, P.P.C., it unambiguously speaks of limit of punishment to be inflicted to an accused for having committed an offence made up of part constituting separate offences instead of punishing him for each such separate offence and would be attracted only for executing sentence for that offence when the accused has been convicted, which is not the situation in hand.

"*HAFIZUDDIN AND 2 OTHERS Versus THE STATE AND OTHERS*" [**1969 P.Cr.LJ 610 (Dacca)**]. The learned Advocate for the petitioners has next contended that in view of the provisions of section 71 of the Penal Code, separate sentences under sections 147 and 324 or 325, P.P.C. for the offences or rioting and simple hurt or grievous hurt are bad in law. He wants to say that the common object alleged of the unlawful assembly being "to assault or cause hurt", separate sentences for rioting and hurt simple or grievous is illegal and contrary to the provisions of section 71, P.P.C.

16. In the light of above discussion, the conviction and sentence of appellant u/s 377-B PPC is set aside and conviction u/s 377 PPC is upheld due to credible evidence of prosecution including positive report of PFSA. However, as regards the quantum of sentence, it has been observed that medical evidence does not show any bestiality on part of

the appellant because during medical examination doctor has observed the condition of victim like as under;

> "On further examination there are no marks of violence or any injury present on cheeks or neck. A small bruise present on the back of right elbow but no marks of violence was present around knees or between legs. No fluid or any mark present around hips or anal opening. Anal tone is normal."

Further. admittedly, appellant is a juvenile and trial was conducted by the learned Juvenile Court, Chishtian District Bahawalnagar and the appellant, during trial, in order to prove the fact of juvenility has referred his birth certificate (Exh.DA) and school certificate (Exh.DB), therefore, keeping in mind that the appellant is juvenile, he is first offender and was student of class-9 at the time of commission of the offence, the sentence recorded under section 377 PPC is reduced to simple imprisonment for a period of two years with fine of Rs. 10,000/- (ten thousand rupees), in case of default in payment of fine, appellant would further undergo two months' simple imprisonment. Benefit of section 382-B Cr.P.C. is also extended. With above modification in sentence, this appeal is **dismissed**. Case property if any be disposed of in accordance with law. Record of learned trial court be sent back immediately.

(MUHAMMAD AMJAD RAFIQ)
JUDGE

Gulzar

Approved for reporting

Judge