Form No: HCJD/C-121.

JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD
JUDICIAL DEPARTMENT

Crl. Appeal No. 154 of 2018

Raja Khurram Ali Khan and another
Vs
Tayyaba Bibi and another

DATE OF HEARING: 04-06-2018.

APPELLANTS BY: Raja Rizwan Abbasi, Sohail Akhtar, Naila Naureen and Raza Ali Shah Advocates.

RESPONDENTS BY: Mr Tariq Mahmood Jahangiri, Advocate General Islamabad.
Mr Awais Haider Malik, State Counsel.

ATHAR MINALLAH, J.- Through this consolidated judgment we intend to decide the instant appeal along with Petition for Leave to Appeal No. 02/2018 titled "The State through Advocate General, Islamabad v. Maheen Zafar and another". The instant appeal has been filed by Raja Khurram Ali Khan and his wife, namely, Maheen Zafar (hereinafter collectively referred to as the "***Appellants***"). The latter have assailed the judgment dated 17-04-2018, rendered by the

learned Single Judge in Chambers, whereby they have been convicted and sentenced in the following terms:

> *"In view of above the prosecution has been able to prove the charge under section 328-A PPC, hence the accused persons Mst. Maheen Zafar and Raja Khurram Ali Khan both are jointly responsible for it and are accordingly convicted. They are acquitted of other charges. Raja Khurram Ali Khan and Mst. Maheen Zafar are punished with imprisonment of One Year simple imprisonment with fine of Rupees 50,000/- each and in default to serve one month imprisonment. The accused shall have the benefit of section 382-B Cr.P.C. The accused are on bail hence shall be arrested immediately to serve the sentence."*

2. The State, through the connected petition has sought leave under section 411 A (2) read with clauses (b) and (c) of sub section 1 ibid of the Criminal Procedure Code, 1898 challenging acquittal under sections 201, 337 A(i), 337 F(i), 342 and 506 (ii) of PPC and enhancement of sentence handed down for the offence of section 328 A of PPC vide judgment dated 17-04-2018.

3. The facts are that the case relates to offences committed against Tayyaba Bibi who, at the relevant time, was less than ten years old. She is the eldest amongst the four children of Muhammad Azam, son of Ahmad Khan (PW-13). Tayyaba Bibi was handed over to one Ms Nadra Bibi in August, 2016 for transporting her to Islamabad for employment. The latter further handed over the child to one Ms Sehrish Bibi who is sister-in-law of Raja Khurram Ali Khan. The child was ultimately left at the house of Raja Khurram Ali Khan to be employed as a domestic worker. The responsibilities of the young child, inter-alia, included taking care of the appellants' son and working in the kitchen. An amount of Rs.18,000/- was paid to the father of Tayyaba Bibi. There was no formal contract of employment nor was the consent of the child obtained. In any case, the child lacked the capacity to contract when she was handed over for being transported to another city to be engaged in domestic work. It appears from the recorded evidence that this arrangement had taken place in October, 2016. Raja Khurram Ali Khan was a Judicial Officer in the District Judiciary of Islamabad Capital Territory while his wife, namely Maheen Zafar, was a housewife. The Appellants had young children of their own. According to the depositions of Ms Mariya Hayat, PW-2, and her mother Ms Naila Khizar, PW-3, they first saw Tayyaba Bibi on 26-12-2016. The said witnesses are the next door neighbours of the appellants. Tayyaba Bibi told them that the Appellants had left her alone and that the house was locked. She was shivering and exposed to the hazards of cold

weather. Since there was no one else at home, the said witnesses called her to their house. They tried to contact Raja Khurram Ali Khan so as to inform him about the presence of Tayyaba Bibi in their house but in vain. On his return he was informed and it was then that he took the child from the neighbour's house at about 9.30 pm the same evening. The next time the two witnesses saw Tayyaba Bibi in the house of Raja Khurram Ali Khan was on 28-12-2016 when they found her in an injured condition. They also informed another neighbour, namely Ms. Humaira Haroon wife of Haroon Khan Tareen, PW-4, who came to their house. From the other side of the wall dividing the two houses, Tayyaba Bibi told them that her injuries were caused due to beating and exposure to a burning stove by Ms Maheen Zafar. Ms. Humaira Haroon took photographs from her cellular phone. The photographs, Ex Pw 4/1-3, were later retrieved from the said phone by the National Response Centre for Cyber Crime Forensic Laboratory, Islamabad and taken into possession vide recovery memo Exh.PW-9/8. The photographs were put on the social media and were also received by the Incharge of the Police Station on his cell phone through WhatsApp. The outrageous photographs seemed to have caught the attention of the electronic media and pursuant thereto the Chief Justice of this Court ordered an enquiry into the matter on 28-12-2016. Notice under Article 183(4) of the Constitution was also taken by the august Supreme Court.

4. Pursuant to information received from Ibrar Sherazi, posted as Niab Court with Raja Khurram Ali Khan, Ruput No. 24 was recorded in the Daily Diary of the Police Station, Industrial Area on 28-12-2016. The time of receiving the information recorded in the said ruput is 10:30 a.m. The Ruput No. 24, dated 28-12-2016, was brought on record as Exh.PW-16/B. According to the information recorded therein, Tayyaba Bibi, said to be employed as a "نوکرانی"(domestic servant) was missing since 27-12-2016. As per the testimony of Khalid Mahmood Awan, Inspector/Incharge Police Station Industrial Area I-9, Islamabad, PW-16, a lady had also informed him on 28-12-2016 regarding Tayyaba Bibi's condition and that he had sent a Police Constable to search the house of the appellants. The photographs of Tayyaba Bibi in a severely injured condition were received by the Incharge Police Station on his WhatsApp account. Mr Khalid Mahmood Awan, PW-16, testified that he had contacted Raja Khurram Ali Khan on telephone on 29-12-2016 and then visited his house where he found Tayyaba Bibi in an injured condition. He took her to the Pakistan Institute of Medical Sciences (hereinafter referred to as the "***PIMS***"). The child was examined at about 11:16 a.m. by Dr Muhammad Naseer, Principal CMT and Head of Department PIMS, Islamabad, PW-5, in the presence of Dr Nasreen. The Medico Legal Report, Exh.P-5/A, was prepared on 30-12-2016. The description of the injuries recorded in the report is as follows:

> *"(i) There was swelling and blackening of right upper and lower eye lid and conjectivitis of right eye which was ecchymosed.*
>
> *(ii) There was swelling and burn marks superficial in nature on the Dorso-nedial aspect of left hand.*
>
> *(iii) An abrasion on right side of face and over left ear, the nature of injuries were declared for wound No. 1 and 3, falling under sections 337-A(1) for wound No. 2, 337-F(1) PPC.*
>
> *(iv) Probable duration of injuries was about 24 hours. This report was handed over to police on 30.12.2016 at 02.30 pm and same bears my signature and stamp as exh.PW-5/A."*

5. PW-16 further deposed that on his instructions Shakeel Ahmed, ASI (PW-10), took Tayyaba Bibi to the office of Additional Deputy Commissioner (General) where Mrs. Nishaa Ishtiak, Assistant Commissioner Potohar, PW-7, was also present. The latter took Tayyaba Bibi to her office where she narrated the facts which were reduced in writing. The said document was exhibited as PW-7/A and pursuant thereto FIR No. 483/2016, dated 29-12-2016, Exh.PW-14/B, was registered at the Police Station Industrial Area I-9 Islamabad. It was alleged in the FIR that Tayyaba Bibi who worked as a domestic servant in House No. 50 street No. 12, I-8/1, Islamabad was injured by Maheen Zafar by placing her hands on the hot stove besides being beaten by articles described therein. She was locked in a storeroom located next to the water tank and then at night in the servant quarter. It was alleged that she was consistently beaten and that food was

not provided to her. It was also alleged that Tayyaba Bibi's parents did not inquire about her. From the office of PW-7, Tayyaba Bibi was sent to the Child Protection Bureau pursuant to a written request, Exh.PW-7/B.

6. It is important to note that it is an admitted position that on 29.12.2016 Khalid Mehmood Awan, PW 16, had recorded a video statement of Tayyaba Bibi and the CDs thereof were placed on record as Ex. DA. This fact was not mentioned by him in his examination in chief, when he had entered the witness box as PW 16. However, he admitted making such a video in his cross examination. The learned counsel for the Appellants has laid great stress on this statement. We saw this recording carefully and were astonished at how a male voice was asking leading questions from a visibly traumatized and injured child while some female was interjecting. It appears that the statement was recorded before the child was taken to PIMS because the injuries had not been treated by then. PW 16 admits that he was the one who was asking the leading questions. This recording unambiguously shows that the leading questions being asked by PW 16 and the interjections by a female voice, prompting the desired answers from an injured and visibly traumatized child, were definitely aimed at achieving desired results. The failure to mention this recording during the examination in chief and the manner in which the child was dealt with raises serious concerns regarding the conduct and professionalism of the witness who, at the relevant time, was

the Incharge of the concerned Police Station. The recording of the statement in this manner was indeed despicable conduct on the part of the investigators.

7. On 30-12-2016, a Special Investigation Team was constituted to investigate the case. Several couples surfaced who claimed to be the parents of Tayyaba Bibi, despite the fact that the Appellants claimed to have known her parents. On 04-01-2017 an incomplete report under section 173 of the Code of Criminal Procedure, 1898 (hereinafter referred to as the "***Cr.P.C.***") was submitted before the learned trial Court. On 09-01-2017, PW-16 took into possession the mobile phone, Exh.PW-9/1, vide recovery memo Exh. PW-9/A, belonging to Ms. Humaira Haroon, PW-4. On 15-01-2017, PW-16 recovered a Wiper (Exh.PW-8/1), Burner Cover (Exh.PW-8/2), 'Dohi' (Exh. PW-8/3) and Stove Stand (Exh.PW-8/3) from the kitchen of the house of the appellants. The said recovery was made on the information provided by Tayyaba Bibi and according to her statement these were the articles which had been used to cause the injuries. Site plan Exh.PW-16/A was also prepared by PW-16. Sections 337-A(i), 337-F(i), 201 and 328-A of the Pakistan Penal Code, 1860 (hereinafter referred to as the "***PPC***") were also added.

8. On 04-01-2017 a Medical Board was constituted at PIMS which examined Tayyaba Bibi on 09-01-2017. The findings were recorded in the written report, Exh.PW-6/A and Exh.PW-6/B. The Medical Board was headed by Dr. Tariq

Iqbal, Professor of Burns Surgery, Head of Department, Burn Care Center, PIMS, who entered the witness box as PW-6. According to the report of the Medical Board, multiple injuries were found on the body of Tayyaba Bibi, of which injuries at serial numbers 3, 4, 5 (a, c, d & e), 6 (a, c, d & e), 9 and 11 were described as ‘healed'. The other injuries were mentioned as 'Trauma'. The interim and final reports of Forensic Analysis were brought on record as Exh.PW-11/A and Exh.PW-11/B. The charges were framed vide order dated 16-05-2017, for offences under sections 342, 337.A(1), 337-F(i), 506 (ii), 328-A and 201 of the PPC. The Appellants pleaded not guilty and, therefore, they were tried for committing the offences described in the charge. The prosecution produced sixteen witnesses while the Appellants preferred not to be examined on oath and, therefore, they recorded their respective statements under section 342 of the Cr.P.C. After the recording of evidence and affording an opportunity of hearing to the learned counsels for the Appellants and the learned Advocate General, Islamabad the trial Court, vide judgment dated 17-04-2018, convicted and sentenced the Appellants in the terms reproduced above. The Appellants were found guilty of committing the offence under section 328-A of the PPC while they were acquitted relating to the other offences by extending benefit of doubt.

9. Raja Rizwan Abbasi, ASC, appeared for the Appellants and contended that; the Appellants were falsely involved in the case for ulterior motives; Raja Khurram Ali

Khan, as a Judicial Officer, had served to the best of his abilities and had rendered judgments without fear and favour; he had rendered judgments which were detrimental to the interests of influential persons; some media houses had also been affected and, therefore, they had created an unnecessary hype which amounted to a biased media trial; Tayyaba Bibi was well looked after by the appellants; Tayyaba Bibi had given statements on three different occasions and had not alleged that she had been assaulted, tortured or in any manner ill treated by the appellants; the recorded version of the statements of Tayyaba Bibi shows that she was well looked after by the appellants; PW-7 was an interested person and had worked in a news agency which had highlighted the issue of Tayyaba Bibi through biased reporting; the police officials were influenced by the media trial and the proceedings which were taken up by the august Supreme Court; witnesses were not reliable; the neighbours of the Appellants i.e. PW-2, PW-3 and PW-4 had raised false alarms; Tayyaba Bibi remained missing since 27-12-2016; ruput no. 24, dated 28-12-2016, was not proved in accordance with law; the written complaint, on the basis whereof the criminal case was registered, was neither signed nor were the thumb impressions of Tayyaba Bibi affixed thereon; the criminal case i.e. FIR was, therefore, registered illegally; the prosecution was not able to prove the case against the appellants; the examination-in-chief of Tayyaba Bibi as PW-1 cannot be relied upon; she was tutored while she was in the custody of the officials and, therefore, she

gave a misleading statement against the appellants; Tayyaba Bibi, being a child, could not have been believed by the learned trial Court; evidence of a child witness ought to be subjected to a close and careful scrutiny and should not be relied upon until and unless it was corroborated by some strong circumstances; it is settled law that children are the most un-trustworthy class of witnesses because of their tender age; reliance has been placed on *'Jalwanti Lodhin vs. The State', [AIR 1953 PATNA 246], 'Muhammad Ali Jan vs. the State and another', [PLD 2015 PESH 134], 'Abbas Ali Shah vs. Emperor' [AIR 1933 Lah 667], 'Muhammad Feroze vs. The State', [2003 YLR 2234], 'Muhammad Feroze vs. The State', [PLD 2003 KAR 355]* & *'Muhammad Feroze vs. The State', [NLR 2003 CRI 474]*; the contents of the complaint attributed to Tayyaba Bibi were later denied by her when she entered the witness box as PW-1; the Appellants have been made scapegoats; cross examination is a continuation of the statement and more important than the examination in chief; the learned trial Court has misread the evidence; a single circumstance creating reasonable doubt in a prudent mind about the guilt of the accused makes the latter entitled to its benefit; no offence under section 328-A of the PPC was made out; neglect, ill-treatment and abandonment in the context of 328-A has to be wilful; the expression 'wilful' requires proof that the offence was committed intentionally; no such proof was brought on record by the prosecution; reliance is placed on *"The State v. Syed Aamir Shabbir" [2016 P.Cr. L J 286], "Muhammad Irfan v. The State" [2018 P Crl. L J Note 68],*

"Rahmatullah v. The State" [2018 P Crl. L J Note 31], "Mst. Saira Bibi v. Muhammad Asif and others" [2009 SCMR 946], "Mukhtar Ahmad v. The State" [2003 SCMR 1734], "Muhammad Akram v. The State" [2009 SCMR 230],"Saleem Muhammad and another v. The State and another" [2017 P Cr. L J 1391], "State v. Ali Asghar" [2017 P Cr. L J 349], "Sarfraz alias Safu and others v. The State" [2017 YLR Note 220], "The State v. Muhammad Asif Saigol and others" [PLD 2016 S.C. 620].

10. Mr Tariq Mahmood Jahangiri, learned Advocate General, Islamabad has argued that; the learned trial Court did not appreciate the evidence and has misread the same by extending benefit of doubt in favor of the Appellants except in case of the offence under section 328-A of the PPC; the witnesses were reliable and trustworthy; the witnesses were consistent and the prosecution had established its case beyond a shadow of doubt; Tayyaba Bibi was less than 10 years old and she was subjected to ill-treatment in the house of the appellants; the Appellants had deliberately subjected a child to torture; she was locked out of the house and was left all alone when the Appellants had gone out on 26-12-2016; on the same date Tayyaba Bibi was brought from the house of the neighbours by Raja Khurram Ali Khan; because the cruel and inhuman treatment attracted media attention, the Appellants tried to hide Tayyaba Bibi because of her being severely injured; a false ruput through the Niab Court was recorded in the concerned Police Station; offences under

sections 337.A(i), 337-F(i) and 201 of the PPC were made out; the offence under section 328-A of the PPC was also established by the prosecution beyond a shadow of doubt and there was no reason for awarding a reduced sentence; the Appellants had wilfully committed acts and omissions which had led to the consequences contemplated under various offences; reliance has been placed on the cases titled *"Mirza Shaukat Baig and others vs. Shahid Jamil and others" [PLD 2005 S.C. 530], "Muhammad Amin Qureshi and another vs. The State" [2007 P.Cr.L.J. 105], "Abdul Ahad vs. The State and another" [PLD 2007 Peshawar 83], "Om Parkash Gupta vs. State of U.P." [AIR 1957 S.C. 458], "Ali Ahmad and others vs. The State and others" [2013 P.Cr.L.J. 1763], "Nasir Khan vs. Qasim Khan and another" [2017 P.Cr.L.J. 130], "Said Zaman Khan and others vs. FOP through Secretary Ministry of Defence and others" [2017 SCMR 1249], "Muhammad Imran vs. The State and another" [2013 YLR 1409] and "Dad Muhammad alias Dada vs. The State" [2015 P.Cr.L.J. 944].*

11. The learned counsel for the Appellants and the learned Advocate General have been heard and the record carefully perused with their able assistance.

12. This case involves a child who, at the relevant time, was less than 10 years old. Her custody was given to a person, namely Nadra Bibi, so that she could be transported and employed as a domestic worker in another city. The object was exploitation of the child in return for gain which

was to be received by her father. Nadra Bibi initially transported and handed over custody of the child to one Sehrish Bibi and then to the appellants. Raja Khurram Ali Khan is a law graduate and, at the time the offence was committed, he was holding the post of Additional District & Sessions Judge at Islamabad. His wife, namely Maheen Zafar, is a housewife and they have children of their own who are either of the same age as Tayyaba Bibi or younger. It is established from the evidence brought on record that Tayyaba Bibi was employed to look after the child of the Appellants and to work in the kitchen. Tayyaba Bibi was thus exposed to the hazards of the kitchen such as fire, hot surfaces, sharp knives, toxic chemicals etc. She was not admitted in any school and thus her right to education was also denied. Admittedly, neither was the consent of Tayyaba Bibi sought nor was her engagement as a domestic worker (servant) governed under a contractual arrangement agreed at arm's length. There were no fixed working hours nor was she paid the minimum wage determined by the State of Pakistan. Needless to mention that because of her age she was not even competent to contract. Tayyaba Bibi had been working at the residence of the Appellants as a domestic worker since October, 2016. The Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime adopted for ratification and accession by the General Assembly resolution 55/25 dated 15-11-2000 provides under Article 3(c) that

recruitment, transportation, harboring or receipt of a child for the purpose of exploitation shall be considered 'trafficking in persons' even if it does not involve any of the means described in Article 3(a). Child has been defined under Article 3 (d) as meaning any person under eighteen years of age. This is an internationally accepted definition of 'trafficking of a child'. Child labour can tantamount to the worst form of modern day slavery. The Black's law dictionary, Eighth Edition defines the expression 'slave' as 'a person who is wholly subject to the will of another; one who has no freedom of action, but whose person and services are wholly under the control of another. One who is under the power of a master, and who belongs to him ....". Likewise, 'slavery' is defined as 'The condition of a slave, that civil relation in which one man has absolute power over the life, fortune and liberty of another'. Child slavery is referred to exploitation of a child for someone else's gain. The significance of this discussion would be highlighted later. It is sufficient to say at this stage that Tayyaba Bibi, a child less than ten years old, was brought to the house of Raja Khurram Ali Khan for being engaged in domestic work and her responsibilities were of a nature which had exposed her to physical and psychological harm. She had no freedom of action and her life and liberty were completely in the control of Raja Khurram Ali Khan as long as she worked as a domestic worker. As it would become evident later, even when she had been injured her liberty was controlled by Raja Khurram Ali Khan. In exchange the latter had paid a meager amount of Rs. 18000/- to her father. Her status was not

different from a child who is a victim of trafficking and has to endure degrading treatment of being a virtual modern day slave. Whether this was 'wilful ill treatment' or 'wilful neglect' for the purposes of section 328-A of the PPC will be discussed in more detail later.

13. The Appellants had been living in the house where the events had taken place for about one and a half years. The house next door had been occupied by the occupants for more than twelve years. Having lived as neighbours for almost one and a half years, admittedly, none had any complaint against each other. Moreover, there was hardly any interaction till 26-12-2016 when Raja Khurram Ali Khan had visited the neighbours for the purpose of bringing Tayyaba Bibi back to his house. Ms Maria Hayat, PW-2, and her mother Ms Naila Khizar, PW-3, were the next door neighbours. Ms Nishaa Ishtiak, PW-7, was, at the relevant time, an Executive Magistrate/Assistant Commissioner and was closely known to them. Guldaraz Khan, PW-12, at the time of registration of the criminal case, was employed as a cook in the house of the next door neighbours i.e. PW-3 and PW-2. By the time he had entered the witness-box as PW-12 he was no more employed. What is established from the evidence without doubt is that there was no reason whatsoever for PW 2, PW 3, PW 4, PW 7, and PW 12, all independent witnesses, to depose falsely. Moreover, despite being cross examined, the veracity and truthfulness of their depositions could not be shaken. It was understood that Raja Khurram Ali Khan, holding a law degree

and an exalted position in the District Judiciary of Islamabad, would have known the consequences of his actions and omissions more than a person of ordinary prudence. Needless to mention that it is settled law that a Judge must wear all the laws of the country on the sleeves of his robe. Reliance is placed on the cases titled *"Iffat Jabeen vs. District Education Officer (M.E.E.) Lahore and another" [2011 SCMR 437], "Section Officer, Government of Punjab, Finance Department and others vs. Ghulam Shabbir" [2010 SCMR 1425], "Land Acquisition Collector and 06 others vs. Muhammad Nawaz and 06 others" [PLD 2010 SC 745].*

14. As noted above, the first interaction of the child Tayyaba Bibi with Ms Maria Hayat and Ms Naila Khizar was on 26-12-2016. They were not cross examined regarding two crucial facts which they had stated in their respective examinations in chief, firstly, the events of 26-12-2016 and secondly, that they saw Tayyaba Bibi in an injured condition on 28-12-2016 and the statement attributed to her. Guldaraz Khan, PW-12, further corroborated the statements of PW 2 and PW 3. There is also no reason to disbelieve the deposition of PW 7 namely Nishaa Ishtiak. The depositions of Ms Maria Hayat, PW-2, Mst Naila Khizar, PW-3, Ms Humaira Haroon, PW-4 and Guldaraz Khan, PW-12, remained consistent despite having been subjected to cross examination. Their testimonies are definitely reliable, trustworthy and unshaken. It is settled law that when a witness is not cross examined regarding a material part of his/her evidence then the

inference would be that the truth of the same was accepted by the other side, particularly when the statement is material to the controversy of the case. When not challenged in cross examination then such an unchallenged statement is required to be given full credit and usually accepted as true unless discarded by reliable and cogent evidence. Reliance is placed on the cases titled *"Mst. Nur Jehan Begum through Legal Representatives v. Syed Mujtaba Ali Naqvi" [1991 SCMR 2300] and "Dr. Javaid Akhtar v. The State" [PLD 2007 S.C. 249].*

15. The above consistent, reliable and trust worthy evidence of independent key witnesses, who had no ill will whatsoever towards the appellants, was further corroborated by testimonies of other witnesses who had entered the witness box. It is evident from the deposition of Khalid Mahmood Awan, PW-16, who at the relevant time was the Incharge of the Police Station Industrial Area, I-9, Islamabad, that the photographs showing Tayyaba Bibi in an injured condition were circulating on the social media, so much so that he had also received them on his WhatsApp. He had also deposed that some lady had specifically informed him on 28-12-2016 regarding the treatment and condition of the child. Khalid Mahmood Awan, PW-16, had unambiguously deposed that when he picked up Tayyaba Bibi from the house of Raja Khurram Ali Khan she was in an injured condition. She was taken to PIMS and, pursuant to her medical examination, the injuries reproduced above were confirmed in the Medico Legal

Report, Exh.PW-5/A, by Dr. Muhammad Naseer, who appeared as PW-5. Shakeel Ahmed, ASI (PW-10), who was present at the Hospital along with Tayyaba Bibi, confirmed during his cross examination as follows:

> *"It is correct that I prepared the injury sheet, however, I and doctor were not satisfied as to the cause of injury as she had not suffered those injuries from fall from the stairs or otherwise. Again volunteered that the injuries or the burn marks were not because of any fall but were caused by deliberate act."*

16. The medical evidence confirms the testimonies of PW 2, 3, 4 and 12. The appellants, in their statements recorded under section 342 of the Cr.P.C, have vaguely stated that "wounds over hand and face were accidental, the contact burn over back were inflicted in the crisis management centre because the wounds were not even complained of in the complaint in Ex-PW 7/A and MLR Ex-PW 5/A". No explanation was given regarding the accident which had caused the injuries on the face and hands. Nonetheless, this statement acknowledges that the injuries were caused while Tayyaba Bibi was in their house. It would be pertinent to refer to the judgment of the august Supreme Court in the case titled "Saeed Ahmed v. The State" [2015 SCMR 710] wherein it has been held as follows:

> *"That with regard to vulnerable members of Society, such as children, women and the infirm, who were living with the accused or were last in his company the accused ought to offer some explanation of what happened to them. If instead he remains silent or offers a false explanation he casts a shadow upon himself. This does not mean that the burden of proof has shifted onto the accused as it is for the prosecution to prove its case, however, in respect of the helpless or the weak that require protection or care it would not be sufficient for the accused to stay silent in circumstances which tend to incriminate him, and if he elects to do so he lightens the burden of the prosecution."*

17. Moreover, Tayyaba Bibi's examination in chief to the extent that her injuries were not caused accidentally is corroborated by medical evidence, her photographs, the depositions of witnesses and the narration of facts in the FIR. The learned trial Judge had explicitly noted that during the cross examination she was answering every question in the affirmative. This mechanical response during the cross examination was obviously because of the extreme trauma which she had to endure and the manner in which she had been initially dealt with by the investigators, particularly PW 16, as is evident from the recorded statement on the CD Ex. DA which is not disputed. The entire cross examination was

based on this very statement. The recovery of items used for causing the injury and burns vide recovery memo Ex. PW 8/A was pursuant to having been led by Tayyaba Bibi herself.

18. There is no force in the argument raised by the learned counsel for the Appellants that since the written complaint was not signed by Tayyaba Bibi, therefore a case could not have been registered pursuant thereto. It is settled law that a first information report under section 154 of the Cr.P.C. can be registered by the Incharge of a Police Station regardless of how and in what manner the information has been received. The First Information Report is neither substantive evidence nor an exhaustive document. It is merely a first information report regarding the commission of a cognizable offence. Moreover, PW 16 admits to have received information and photographs of the injured child on 28.12.2016. He picked up the child on 29.12.2016 in an injured state and this in itself was sufficient for the recording of a First Information Report.

19. There is yet another crucial dimension i.e. the mystery of ruput no. 24, dated 28-12-2016, ex PW 16/8. Interestingly, Raja Khurram Ali Khan, in his statement recorded under section 342 of the Cr. P. C, did not deny its recording. He rather stated that it was not investigated. It was recorded at about 10.30 am on 28.12.2016. On the same day the witnesses PW 2, PW 3, PW 4 and PW 12 saw her in an injured condition and this material part of the examination in

chief was not cross examined. Khalid Mehmood Awan, PW 16, had deposed during cross examination that on 28.12.2016 some lady had informed him regarding the condition of the child and had received photographs of an injured Tayyaba on his WhatsApp. Raja Khurram Ali Khan, in his statement recorded under section 342, gave an evasive response relating to Tayyaba having gone missing on 27.12.2016. However, he did not give any explanation regarding the presence of Tayyaba in his house on 28.12.2016 when the witnesses saw her in an injured condition and in particular when she was picked up by Khalid Mehmood Awan, PW 16 on 29.12.2016. It is established on the basis of recorded evidence that in fact Tayyaba had never gone missing and false information was provided to the Police Station which had led to the recording of rupat no. 24, dated 28.12.2016. It was an attempt to hide Tayyaba Bibi because, sometime between 9.30 pm on 26.12.2016 till the witnesses saw her on 28.12.2016, she had suffered injuries and burns on her face and hands. It was obviously to conceal evidence of the commission of the offence.

20. It is obvious from the above that the prosecution evidence has established beyond a reasonable doubt that on 26.12.2016 Tayyaba Bibi had been left alone by the appellants. She was found shivering because of being exposed to cold. Around 9.30 pm Raja Khurram Ali Khan took her to his house from that of his neighbours. From the evening of 26.12.2016 till 29.12.2016 she remained in the

custody of the appellants. On 28.12.2016 witnesses saw her in the house of Raja Khurram Ali Khan in an injured condition. Despite severe injuries the latter did not take her to a medical practitioner nor was medical aid given till her custody was handed over to PW 16 on 29.12.2016. There was no fall and the injuries and burns were not accidental. The Appellants had hidden the child to ensure the disappearance of the evidence of the commission of the offence against the child who had suffered injuries and burns. The offence under section 201 of the PPC stood proved. Were the injuries and burns suffered by Tayyaba Bibi inflicted by Maheen Zafar and, therefore, offences under sections 337.A(i) and 337.F(i) PPC also stood established? Were these offences proved beyond a shadow of doubt? The injuries and burns having been inflicted by Maheen Zafar have been described by Tayyaba Bibi in her examination in chief. The same was also narrated by her to the witnesses i.e. PW 2, 3 and 4 on 28.12.2016. The items which were said to have been used to inflict the injuries and burns were recovered pursuant to information provided by Tayyaba Bibi. We have no reason to disbelieve her depositions while recording of her examination in chief. Her cross examination was confined to the video recorded statement made by Khalid Mehmood Awan, PW 16. She was only asked questions relating to answers given in response to the leading questions and interjections by a lady who apparently seemed to have been known to the victim. However the material facts deposed by her during examination in chief were not cross examined. The video

statement referred to during cross examination was brought on record in the form of CD, Ex. DA. As noted above, it was an obvious attempt to intimidate and influence the already traumatized and injured child to achieve some desired results. The learned trial Judge had also observed the unusual and mechanical replies given by the child during her cross examination. Whenever the child was given an opportunity to give her version without being intimidated she narrated exactly what was deposed by her during the examination in chief and also narrated in the FIR. Interestingly, she was not cross examined on the material facts deposed by her during examination in chief and asking her regarding what was said in the video statement recorded by PW 16 under mysterious and intimidating circumstances was inconsequential. It did not challenge the facts narrated during examination in chief. The failure to cross examine PW 2 regarding the most material fact that she saw the child in an injured condition on 28.12.2016 and that the latter told her that the injuries had been caused by "Manoo Baji". The question put to her in cross examination was whether she had witnessed that the child was beaten. However, deposition regarding presence of Tayyaba in the house of Raja Khurram Ali Khan on 28.12.2016, the latter having been seen in an injured condition and that her statement relating to injuries having been caused by Maheen Zafar went unchallenged. This raises the inference that the truth thereof was accepted. As noted, there is consistent, reliable and trustworthy corroboration of the statement of Tayyaba Bibi deposed

during examination in chief that her injuries were caused by Maheen Zafar and no one else. The learned trial Court appreciated that the statement of Tayyaba Bibi recorded by PW 16, the video recording whereof was brought on record as Ex DA, was based on leading questions and that the interjections by a female were not bonafide but yet placing reliance thereon that too by excluding from consideration other material evidence rendered the conclusions perverse. The questioning was in the nature of tutoring the traumatized and frightened child while the interjections by a female were an obvious attempt to favour the Appellants' case and thus such statement could not have been relied upon. The other material evidence discussed above was also not taken into consideration. We are, therefore, of the firm opinion that on the basis of evidence brought on record the offences under sections 337 A(i) and 337 F(i) of the PPC stand established beyond a reasonable doubt against Maheen Zafar.

21. Lastly, it brings us to the commission of the offence under section 328-A of the PPC. The learned trial Court has handed down the conviction and lesser sentence of one year for this offence. The said section was inserted in Chapter-XVI of the PPC vide Act X of 2016. The said provision is reproduced as follows:

> *"[328A.* ***Cruelty to a child****.—Whoever wilfully assaults, ill-treats,. neglects, abandons or does an act of omission or commission, that results in or has,*

potential to harm or injure the child by causing physical or psychological injury to him shall be punished with imprisonment of either description for a term which shall not be less than one year and may extend upto three years, or with fine which shall not be less than twenty-five thousand rupees and may extend upto fifty thousand rupees, or with both.]"

22. The above provision was made a criminal offence in 2016 and it is in addition to the offence under section 328. Both the offences criminalize acts and omissions relating to a child. Section 328 A has a wide scope and, as is evident from its title, its object and purpose is to protect a child from cruelty. It is, therefore, a specific offense aimed at the protection of a child from the consequences of acts or omissions described therein. It is a settled principle of criminal law that for the commission of an offence two factors are mandatory. 'Actus reus' is the physical element i.e. the actual act and 'mens rea' is the mental factor which relates to the person's awareness or intention that the conduct constitutes a crime. The offence under section 328 A can be committed in one of the ways described therein i.e. 'assault', 'ill treat', 'neglect', 'abandon', 'doing of any act of omission or commission'. The consequence of such 'actus reus' has been described as actual or potential harm or injury to a child which is either physical or psychological. It is obvious, therefore, that the consequence need not actually harm or injure a child physically or psychologically but the potential of

such harm or injury to a child would also be sufficient to attract the offence under section 328 A. The adverb 'wilfully' qualifies the expressions 'assaults', 'ill treats', 'abandons' 'neglects' and 'doing of an act or omission'. The expression 'wilfully' thus manifests the mental element or, in other words, the 'mens rea' required in addition to one of the conduct factors to hold a person guilty for committing the offence under section 328 A of the PPC. The prosecution, therefore, has to prove that the accused had 'wilfully illtreated', 'wilfully assaulted', 'wilfully abandoned' or 'wilfully neglected' so as to bring about the consequences contemplated under section 328 A. The question, therefore, which needs to be answered is the appropriate test to determine the mens rea in the context of the said offence. There is no cavil to the proposition that the language employed by the legislature, the context of the particular legislation and the mischief which the offence aims at criminalizing generally determines how the element of mens rea would be satisfied. The conduct of an accused can be measured on the basis of two tests, firstly, an objective standard and secondly, the subjective mental state of the actor. The subjective test seeks to establish what was actually in the mind of the accused when the offence was committed or, in other words, was the person aware of what he or she was doing. On the other hand, the objective standard of mens rea is the test of a reasonable man without having reference of what was intended or known at the time of the commission of the offence. As will be discussed later, in other jurisdictions

and depending on the particular provision and its context, it may require as a subjective test proof of a positive state of mind such as 'recklessness' or 'wilful blindness'.

23. The learned counsel for the Appellants has laid great stress on the expression "wilfully" in support of his contention that the prosecution is required to establish beyond reasonable doubt that the action or omission contemplated in section 328-A of the PPC was actually intended to have been committed. In order to answer the question of the standard of mens rea required to be satisfied in the context of section 328 A it would be advantageous to examine the precedent law.

24. The expression 'wilfully' has been interpreted and understood in different ways, depending on the context and language used by the legislature in a particular provision. In the case titled *"Mirza Shaukat Baig and others vs. Shahid Jamil and others", [PLD 2005 Supreme Court 530],* the august Supreme Court has referred to various definitions of the expression "wilfully" and the relevant portion is reproduced below:

> *"The words "designed to" as used in section 6 of the Act can be equated to that of 'wilful' which means intending the result which actually comes to pass; design; intentional; not incidental or involuntary. Again it says 'wilfully' is generally used to mean with evil purpose, criminal intent or the like. In R.V. Senior, willfully, was interpreted to mean deliberately and*

intentional, not accidentally or inadvertently." [(1899) 1 Q B 283). (Words and Phrases, permanent Edn. Vol. 45, p.275).

According to Halsbury's Law of England, Fourth Edition, Vol.11, para. 1252 'wilfully' means deliberately and intentional, not accidentally or inadvertently. Frank R. Prassel in his Criminal law, Justice and Society 1979 Edition, page 150 says that "Intent is probably the most common, at least for the major traditional offences, but some codes call the proof of 'wilful' 'voluntary', 'malicious', 'corrupt', or 'purposeful' product instead. These terms are generally accorded similar legal meanings, subject to limited variation from one jurisdiction to another.

According to Black's Law Dictionary, Fifth Edition, "an act is done willfully and knowingly when the actor intends to do it and knows nature of the act. Further that an act or omission is 'wilfully' done, if done voluntarily and intentionally and with the specific intent to do something the law forbids, or with the specific intent to fall to do something the law requires to be done; that is to say, with bad purpose either to disobey or to disregard the law. It goes on to say that when used in criminal context it generally means an act done with a bad purpose, without justifiable excuse; stubbornly, obstinately, perversely. The word is also employed to characterize a thing done without ground for believing it is lawful or conduct marked by a

careless disregard whether or not one has the right so to act."

Stroud's Judicial Dictionary Vol.4, third Edition, says "that the legal meaning of willful is purposely without regard to bona fides or collusion and deliberately and intentionally but does not involve obstinacy of an obstructive kind and it means an intentional disobedience. In the Law Terms and Phrases Judicially Interpreted, by Sardar Muhammad Iqbal Khan Mokal, the term "willfully" amounts to nothing more than this that the person whose action is in question, knows that he is doing and intends to do what he is doing and is free agent. He further says that willful means wantonly, intentional, deliberately and consciously and not accidentally or by inadvertence. Reference is made there to Madras State Waqf Board v. Tajammal Hussain (AIR 1968 Mad. 332) and Kedar Nath v. The State (AIR 1965 All. 233)."

20. According to Cyclopaedic Law Dictionary, 2nd Edition, the word 'wilfully' "means in the common sense, voluntary or intentional. In criminal law the term generally means more than 'voluntary' and implies an evil mind or intent."

25. The august Supreme Court in the case titled "*The State through Chairman NAB and others vs. Muhammad Asif Saigol and others" [PLD 2016 Supreme Court 620],* while considering the expression "wilful default" used in section 9 of the National Accountability Ordinance, 1999, has examined the precedent law from

various jurisdictions. The august Supreme Court has quoted with approval a passage from the English case of *"The Queen v Senior ([1899] IQB 283)* and the same is reproduced as follows:

> *"Wilfully" means that the act is done deliberately and intentionally, or by accident or inadvertence, but so that the mind of the person who does the act goes with it. Neglect is the want of reasonable care – that is, the omission of such steps as a reasonable parent would take, such as are usually taken in the ordinary experience of mankind – that is, in such a case as the present, provided the parent had such means as would enable him to take the necessary steps."*

26. The august Supreme Court has also cited with approval the judgment reported as *[2003 PLC (C.S.) 12770] titled "Saadat Pervaz Sayan v. Chief Secretary, Government of Punjab"* wherein in the context of "wilful negligence" the objective standard of mens rea has been acknowledged.

27. It would be pertinent to refer to two judgments from foreign jurisdictions which are relevant for the adjudication of the instant petition in the context of interpreting the expression "wilfully", qualifying the verbs used in section 328-A of the PPC. The first case is *"R V Sheppard and another [1980] 3 All ER 899,* rendered by the House of Lords. The facts in that case were that a child who was 16 months old died from hypothermia associated with malnutrition. The parents were charged and subsequently convicted and sentenced for having wilfully neglected the

child. The House of Lords interpreted the standard of mens rea required for establishing an offence under section 1(1) of the Children and Young Persons Act 1933. The said provision is quite similar to section 328-A of the PPC. The majority judgment was rendered by Lord Diplock and the relevant portions are reproduced as follows:

> *"The actus reus in a case of wilful neglect is simply a failure, for whatever reason, to provide the child whenever it in fact needs medical aid with the medical aid it needs, such a failure as it seems to me could not be properly described as 'wilful' unless the parent either (I) had directed his mind to the question whether there was some risk (though it might fall far short of a probability) that the child's health might suffer unless he were examined by a doctor and provided with such curative treatment as the examination might reveal as necessary, and had made a conscious decision, for whatever reason, to refrain from arranging for such medical examination, or (2) had so refrained because he did not care whether the child might be in need of medical treatment or not."*

> *"The proper direction to be given to jury on a charge of wilful neglect of a child under s I of the Children and Young Persons Act, 1933 by failing to provide adequate medical aid is that the jury must be satisfied (I) that the child did in fact need medical aid at the time at which the parent is charged with failing to provide it (the actus reus) and (2) either that the*

parent was aware at that time that the child's health might be at risk if it was not provided with medical aid or that the parent's unawareness of this fact was due to his not caring whether his child's health was at risk or not (the mens rea)."

28. The majority, therefore, has held that two types of persons would be guilty of 'wilful neglect', one who knows that a person needs medical assistance and yet fails to make arrangements deliberately or as a conscious decision and, equally, a person who fails to do so because he or she does not care whether it is needed or not. The latter falls in the category of recklessness and thus satisfies the required test of mens rea for a guilty verdict. This test is applied particularly in the context of offences related to child protection and where the actues reus is an omission or failure to act. We see no reason why the same test may not be applied in the case of 'wilfully neglects' or 'wilfully abandons' in the context of section 328 A of the PPC, keeping in view the language used by the legislature, the context and the mischief which the offence aims at preventing.

29. The other case is that of the Supreme Court of Canada rendered in the case "*R.v. A.D.H., 2013 SCC 28, [2013]2 S.C.R. 269*". The facts were that a 22 year old girl, who did not know that she was pregnant, gave birth to a baby while using a public toilet in a Super Market. The relevant provision qualified 'abandon' with 'wilful'. The majority judgment was delivered by Cromwell J. The

Supreme Court of Canada held that the required test for determining the requisite mens rea in the context of wilfully abandoning a child was subjective. However, the subjective test was interpreted in a manner which is not different from the enunciation by the House of Lords in the above discussed case. The relevant portions are reproduced as follows;

> *"In general terms, when a fault element is assessed subjectively, the focus is on what the accused actually knew: Did the accused know that abandoning the child would put the child's life or health at risk? If, as the respondent believed, the child was dead when she abandoned him, she would not know that her abandonment of him risked putting his life or health at risk. Again to speak generally, when assessed objectively, the focus is not on what the accused actually knew, but on whether a reasonable person in those circumstances would have seen the risk and whether the accused's conduct is a marked departure from what a reasonable person would have done. If a court were persuaded that a reasonable person would have seen the risk of abandoning the child in these circumstances and concluded that the accused's conduct was a marked departure from that expected of a reasonable person, the fault element would be established even though the accused in fact did not see the risk."*

> *"On the other hand, a subjective standard means, in the context of an offense under s. 218 of the Code, that the fault element requires proof at least of recklessness, in other words that the accused persisted in a course of conduct knowing of the risk which it created. Subjective fault, of course, may also refer to other states of mind. It includes of intention to bring about certain consequences, actual knowledge that the consequences will occur, or wilful blindness ---- the knowledge of the need to inquire as to the consequences and deliberate failure to do so"*

30. We, therefore, advert to examining section 328 A of the PPC. The legislature has inserted the offence through an amendment which was made in 2016. It is aimed at protecting a child from cruelty by criminalizing particular conduct described therein. A person who wilfully assaults, abandons, ill treats, neglects or does any act of omission or commission which results in or has the potential to cause harm or injury to the child, either physical or psychological, is guilty of committing an offence under section 328 A. The language makes it obvious that the legislature has intended to protect a child from the risk of physical or psychological harm or injury even if actual harm does not occur. If the described conduct potentially exposes the child to the risk of harm or injury and the requisite mental element of mens rea is in existence, even then the person would be guilty of committing the offence. The appropriate test for the requisite

mens rea, as already noted above, would be that either the wilful neglect which had resulted in or had exposed the child to the potential risk of harm or injury was due to awareness or that the unawareness was because of not caring whether the child would be at risk or not. The expression 'ill treats' is not defined but indeed has wide meanings. Its ordinary dictionary meaning in the Chambers Dictionary (Tenth Edition) is; to treat badly or cruelly; to abuse. Concise Oxford English Dictionary (12th Edition) defines the expression as to 'act cruelly towards'. The Black's Law Dictionary (Sixth Edition) has defined 'cruelty' as the intentional and malicious infliction of physical or mental suffering upon living creatures, particularly human beings, or as applied to the latter, the wanton, malicious and unnecessary infliction of pain upon the body, or the feelings or emotions, abusive treatment, inhumanity, outrageous. The other words used in the section and qualified by the adverb 'wilfully' such as 'assault' or 'abandon' would also be interpreted in the light of the ordinary dictionary meaning unless defined in the statute. The expression 'or does an act of omission or commission' further manifests the legislative intent by enlarging the scope of the criminal offence. Children are one of the most vulnerable members of society who cannot defend themselves against the risk of harm. Section 328 A, therefore, criminalizes the creation or potential risk of harm and injury. The appropriate test or standard of mens rea required would be the same as discussed above. It is, therefore, obvious that exploitation of a child for the gain of another person; trafficking for the

purpose of exploitation; cruel, inhuman, degrading and humiliating treatment of a child, whether due to neglect or ill treatment will attract the criminal offence under section 328 A if the mental element i.e. mens rea discussed above is satisfied. This offence may also be attracted in cases where child maids are publically treated in a degrading manner such as by making them sit or stand separately e.g in an eating place while the employers have their meals. Such treatment would obviously fall within the ambit of 'wilful ill treatment' or 'wilful neglect' depending on the facts and circumstances and the satisfaction of the test of mens rea discussed above. In a nutshell, the criminal offence under section 328 A protects a child from the risk of harm or injury, physical or psychological whether actual or potential.

31. This offence is definitely intended, as is obvious from the language used by the legislature, to protect children from many cruel and inhuman practices prevalent in society and which also have a tacit social acceptability e.g. exploiting a child for the gain of another, degrading and humiliating treatment of a child, trafficking of children for exploitation, engaging a child for domestic work and creating risk of harm physically or psychologically etc. Mostly such exploitation is justified on the ground of helping the poor without realizing that the victim who suffers and is exposed to the risk of harm is an innocent and vulnerable human life. Such exploitation and ill treatment of a child invariably leads to grave physical and psychological abuse while the beneficiary is someone

else. There can be no justification for ill treatment or neglect of a child which exposes him or her to grave risk of harm. The justification of cruel and inhuman treatment of an innocent child on the ground of poverty was used as a pretext by those who were engaged in the widespread custom of infanticide of baby girls at the time of the advent of Islam. It was thus revealed in the Quran; 17;31 "You shall not kill your children due to fear of poverty. We provide for them, as well as for you. Killing them is a gross offence", and (Quran 6;140) "Losers are those who killed their children foolishly due to their lack of knowledge, and prohibited what Allah has provided for them, and followed innovations attributed to Him. They have gone astray, they are not guided". The Holy Prophet (May Peace Be Upon Him) had stressed that 'Love your children and be kind and merciful to them". The justification of ill treatment and neglect on the ground of poverty is a negation of the express command of the Quran. Moreover, this purported social acceptability of exploitation of a child on the ground of poverty is exposed as having no moral base because when those who are exposed of being engaged in keeping children as domestic servants in conditions which virtually tantamount to bondage and servitude, they refuse to publically acknowledge or own their acts because of the awareness of being stigmatized. This awareness itself is sufficient to satisfy the required standard of mens rea for ill treatment or neglect because it is conscious and deliberate.

32. In the instant case, Tayyaba Bibi was indeed a victim of the worst form of wilful neglect and ill treatment. As a child she was forced to endure the worst form of inhuman behaviour and ill treatment at the hands of adults who owed her a duty of care. From being exploited for the gain of Rs. 18000/- by her father, trafficked and forced to work in the most dangerous conditions, to being battered, beaten, burnt and then hidden to escape from being stigmatized in society, this is a classic case of manifesting the criminal conduct and ensuing consequences contemplated under section 328 A of the PPC. As discussed above, the Appellants, having left Tayyaba Bibi alone in the house and exposed to the cold weather in the evening of 26.12.2016 stands proved beyond any doubt. Hiding her while in an injured condition and causing a false report to be recorded in the concerned Police Station that she was missing since 27.12.2016 also stands proved from the evidence. Despite being injured and seen in such condition on 28. 12. 2016 by witnesses PW 2, 3 and 4 and yet not giving her medical assistance was wilful neglect and ill treatment at the hands of the appellants. Depriving her of the right of education and keeping her in virtual servitude can obviously not be justified by someone who held the position of a Judge. The deliberate attempt to hide the injured child Tayyaba Bibi between the evening of 26.12.2016 till she was picked up by PW 16 on 29. 12. 2016 and failure to give her medical assistance alone satisfies not only the actus reus contemplated under section 328 A of the PPC but also satisfies the required mens rea. The offence under section

328 A of the PPC, therefore, stands proved against both Raja Khurram Ali Khan and Maheen Zafar. The question which needs to be answered is whether the learned trial Judge was justified in handing down the lesser punishment.

33. A Division Bench of this Court in the case titled *"Regional Director Anti Narcotics Force, Rawalpindi through its Additional Director Law vs. Muhammad Aslam" (Crl. Appeal No. 151 of 2016)* has summarized the principles and law regarding the quantum of sentence and the same are as follows;

(a) The Court has the discretion to award an adequate sentence having regard to the facts and circumstances of the case at hand.

(b) Discretion has to be structured and exercised by applying an independent mind, uninfluenced by irrelevant or extraneous considerations. Such application of mind ought to be obvious from the reasoning recorded in each case.

(c) While determining the quantum of sentence the underlying object and purpose of the relevant statute and the gravity of offence ought to be taken into consideration. Sentence has to be proportionate to the gravity of the offence.

(d) The gravity of an offence is indicated by the maximum punishment prescribed under the relevant statute and it is for the Court to judge the extent to which an act committed falls short of the maximum punishment prescribed by the legislature.

(e) If the relevant statute prescribes two or more punishments for an offence then imposing the lesser punishment would only be justified if the Court is satisfied that extenuating or mitigating circumstances exist for doing so.

(f) The nature of proof has no relevance with the character of the punishment.

(g) All the circumstances surrounding the guilt must be carefully borne in mind. The punishment or sentence should be adequate so as to have an effective deterrence for the offender as well as the rest of the society.

(h) If the sample sent for chemical examination is not a representative sample of the entire substance recovered then the quantum of sentence would be determined on the basis of the weight of samples sent for examination.

(i) The sentence prescribed by the legislature in the relevant statute has to be applied with the same rigour to every person subjected to it regardless of his or her nationality, age, social or financial status etc.

(j) The nature of the recovered substance would be a relevant factor to consider. The quantity of recovered substance and not the weight on the basis of processing thereof will be taken into consideration.

(k) When the recovery is made from possession of more than one convict then each would be liable on the basis of the whole quantity.

Reliance is placed on the cases titled as *'Collector of Customs, Collectorate of Customs, Rawalpindi v. Khud-e-Noor and others'* [2006 SCMR 1609], *'Joshua Chigbogu v. The State'* [2006 SCMR 1539], *'Zahid Imran and others v. The State'* [PLD 2006 SC 109], *'Faisal Aleem v. The State'* [PLD 2010 SC 1080], *'Ameer Zeb v. The State'* [PLD 2012 SC 380], *'Khuda Bakhsh v. The State'* [2015 SCMR 735], *'Secretary, Government of Punjab and others v. Khalid Hussain Hamdani and 2 others'* [2013 SCMR 817], *'Hassan and others vs The State & others'*, [PLD 2013 SC 793], *'Ghulam Mohy-ud-Din alias Haji Babu and others vs. The State'*, [2014 SCMR 1034], *'The State through Director ANF Peshawar v. Rashmali Khan and others'* [PLD 2016 SC 471].

34. Keeping in view the above principles and law and the facts and circumstances of the instant case, we are satisfied that there is no mitigating factor which would call for handing down the lesser sentence. The Appellants are not worthy of

any sympathy because the ill treatment and neglect was willful and cannot be justified on any ground whatsoever. They were aware and they deliberately and consciously made an innocent and helpless child to suffer tremendously.

35. For what has been discussed above the petition filed by the State seeking leave is converted into an appeal and allowed. We, therefore, uphold the conviction of Raja Khurram Ali Khan and Ms Maheen Zafar under section 328 A and enhance the sentence to simple imprisonment of three years each along with payment of fine of Rs.50,000/- (Rupees fifty thousand). In case of default in payment of fine the defaulter shall undergo simple imprisonment for a period of two months in addition to the sentence. They are also convicted under section 201 of the PPC and sentenced to simple imprisonment of six months each. We further convict Maheen Zafar under sections 337 A(i) and 337 F(i) of PPC. There can be no compensation in monetary terms for the anguish suffered by the victim, an innocent, helpless and vulnerable child, but we feel that an amount of Rs. 500,000/- (Rs five hundred thousand only) may be a reasonable symbolic payment as 'daman' to Tayyaba Bibi as compensation for the agony which she had to suffer. We, therefore, hold Maheen Zafar liable for payment of daman under sections 337 A(i) and 337 F (i) of PPC. The payment shall be made to Tayyaba Bibi in lump sum and recovered in the manner prescribed under section 337 Y of PPC. The sentences will run concurrently. The appeal preferred by Raja

Khurram Ali Khan and Maheen Zafar having been found without merit is hereby dismissed. Their bail bonds are cancelled and they are directed to be forthwith arrested.

36. While parting we cannot restrain ourselves from recording our observations regarding the failure of the criminal justice system in protecting the most weak and vulnerable members of the society. The incharge of the concerned Police Station, namely Khalid Mehmood Awan, Inspector, PW 16 admittedly received information regarding the plight of a child, Tayyaba Bibi on 28.12.2016. He also candidly admitted having received the heart wrenching photographs of an injured child on the same day but he did not fulfill his obligations by putting the legal process into motion. He also did not bother to respond to the report which was received at the police station pursuant whereof ruput no. 24 dated 28.12.2016 was recorded. He seems to have been forced to move in the morning of 29.12.2016, apparently because of the inquiry ordered by the Chief Justice of this Court and the wide publicity of the images of an injured child on the social and electronic media. He called Raja Khurram Ali Khan and picked up an injured child who required urgent medical assistance. It, prima facie, appears from the CD Ex DA that instead of rushing the child to the hospital, he took her for the recording of her statement in the presence of some woman who kept interjecting. The traumatized, battered and frightened child was asked leading questions and the interjections by some lady made it obvious that

desired results favouring the Appellants were intended to be obtained. PW.16 accompanied the child to the hospital and in his presence she repeated the same facts which were recorded at some undisclosed location. However, the child narrated different facts when she came before Nisha Ishtiak, PW.7 which were reduced into writing. The august Supreme Court took cognizance of the matter under Article 184(3) of the Constitution and it appears that only then the system started functioning for this victim of neglect, inhuman treatment and the worst form of abuse. The Medical Board was thereafter constituted and proper investigations ensued. Without the publicity on the social and electronic media ultimately leading to the notice taken by the august Supreme Court, the criminal justice system was not responding to the plight of a battered and helpless child. This apparent collapse of the criminal justice system for the weak and vulnerable segments of the society and its efficacy for the privileged raise serious questions regarding rule of law. There should have been no need for cognizance having been taken under Article 183(4) of the Constitution for making the criminal justice system functional for a battered child regardless to the person accused of having committed an offence. The role of Khalid Mehmood Awan, PW.16 in, prima facie, attempting to subvert the course of justice is evident from the CD, Ex.D.A which requires thorough probe. If rule of law is to prevail and the criminal justice system is to be made responsive to the weak and against alleged offences committed by the stronger and privileged segments of the

society then even the slightest dereliction of duty by officials inevitably has to be dealt with sternly. The Inspector General of Police, Islamabad Capital Territory is, therefore, expected to probe the role of Khalid Mehmood Awan, PW.16, particularly regarding the making of the video placed on record as Ex.D.A. The Inspector General is also expected to take urgent and appropriate measures to ensure that professional officers, specially trained to deal with victims who are children, are entrusted with cases relating to them.

(MIANGUL HASSAN AURANGZEB) JUDGE

(ATHAR MINALLAH) JUDGE

Announced in open Court on *11-06-2018*.

JUDGE JUDGE

Approved for reporting.

*Asad K/**