JUDGMENT SHEET.

ISLAMABAD HIGH COURT, ISLAMABAD, JUDICIAL DEPARTMENT.

Crl. Appeal No.34/2016

Wishal Masih **Vs.** **The State etc.**

Appellant by:	**Mr.Rashad-ul-Musawar, Advocate.**
Respondent No.2 by:	**Ms.Zareen Kanwal, Advocate.**
State by:	**Ch. Muhammad Haseeb, Standing Counsel & Ms.Shazia Bilal, State Counsel.**
Date of hearing:	**16.05.2016.**

MOHSIN AKHTAR KAYANI, J:-Through the instant appeal, the appellant has challenged the judgment dated 25.01.2016, passed by learned Incharge/Sessions Judge (West) Islamabad, whereby the appellant was convicted and sentenced U/S 376, PPC to undergo 10 years imprisonment. The appellant was also extended benefit of section 382-B, Cr.P.C.

2. Brief facts giving rise to the filing of the instant appeal are that complainant Sadia Bibi submitted written application Exh.P.C to the police station that on 26.06.2013 her daughter Kainat aged about seven years was playing outside the house, when the appellant/accused while blind folding her daughter took her to his house, where he committed rape with her. The daughter narrated the matter to her mother/complainant. The FIR Exh.P.C/1 was lodged. After completion of the investigation report U/S 173, Cr.P.C was submitted before the learned Trial Court. The charge was framed, to which the appellant/accused pleaded not guilty, therefore, prosecution evidence was summoned.

3. The prosecution produced Naveed Akhtar 5511/HC as P.W.1, Dr.Nasreen Butt, MLO PIMS Hospital as P.W.2, Dr.Zahoor Ahmad Rana, Dental Sugeon as P.W.3, Asif Khan ASI as P.W.4, Dr.Shumaila Zainab Gardezi as P.W.5, Muhammad Kashif 8053/C as P.W.6, Kainat Shahbaz as P.W.7 & complainant Sadia Bibi as P.W.8. Muhammad Ashfaq S.I appeared as C.W.1. Statement of the appellant was recorded U/S 342, Cr.P.C. After hearing the learned counsel for the parties, learned Trial Court passed the impugned judgment.

4. Learned counsel for the appellant has contended that the sentence awarded by learned Trial Court is against the law and facts of the case; that partial trial was conducted by the Juvenile Court and remaining trial was conducted by the Incharge/Sessions Judge (West) Islamabad, which is violation of Juvenile Justice System Ordinance, 2000; that learned Trial Court against the law has extended the benefit of doubt in favour of the prosecution instead of appellant; that learned Trial Court has not appraised the contention of appellant in its true prospective; that the impugned judgment is result of mis-reading and non-reading of evidence; that the impugned judgment is whimsical; that there was no direct evidence against the appellant; that statement of the complainant has created serious doubts in the case; that in absence of motive, the appellant could not have been sentenced; that all the P.Ws were interested witnesses and no independent witness was produced; that the sentence awarded to the appellant is severe, against the evidence and is not maintainable in the eyes of law. Learned counsel for the appellant has relied upon 2016 SCMR 267, 2012 P Cr. L J 437, 2013 P Cr. L J 182, 2010 P Cr. L J 1296 and 2012 P Cr. L J 142.

5. Learned State Counsel as well as learned counsel for respondent No.2 has contended that case against the appellant was registered promptly after narration of the story by the victim to her mother/complainant; that medical evidence proved the case of prosecution, in which Dr.Shumila Zainab/P.W.5 has categorically stated that victim was raped and hymen was torn, even the other corresponding bruises on shoulders, wrist and on right thigh confirmed the incident of rape; that victim appeared as P.W.7, who in expressed terms stated before the Court that she was raped and the defence failed to discredit the testimony of the said victim, hence, it is manifestly clear that Trial Court has rightly convicted the appellant; that the appellant has not taken any defence version although he has raised certain motive part in his testimony U/S 342, Cr.P.C but no evidence has been brought on record in this regard.

6. I have heard the arguments and perused the record.

7. The complainant/P.W.8 submitted a complaint/Exh.P.C in the Women Police Station, Islamabad, in which she alleged that her daughter Kainat aged about

07 years was playing infront of her house situated at 166 quarter Katchi Abadi G-6/2, Islamabad, where Bashoo s/o Shamma Masih had blind folded her daughter took her to his house, there he committed rape with her. The complaint was entertained by the police and as a result whereof FIR No.47, dated 29.06.2013, U/S 376, PPC was registered with P.S Women Islamabad, which is Exh.PC/1. After registration of the case, the police investigated the matter, arrested the appellant and the appellant having found involved in the offence, SHO submitted the report U/S 173, Cr.P.C before the Court against the appellant to face the trial. The appellant was charge U/S 376, PPC for committing rape with Mst.Kainat aged 07 years on 30.01.2014. After framing of the charge, the prosecution produced eight witnesses and one witness appeared as Court Witness, where-after statement of appellant was recorded U/S 342, Cr.P.C. After hearing the learned counsel for the parties, the appellant was convicted and sentenced U/S 376, PPC to undergo 10 years imprisonment vide judgment dated 25.01.2016.

8. From perusal of the record, it has been observed that complaint/mother of the victim recorded her statement as P.W.8 and identified the appellant in her evidence and re-affirmed her stance taken in complaint Exh.PC. She stated that her daughter/victim was playing in the street, where appellant Wishal Masih covered her eyes and took her to his house and took off her clothes, slapped her and committed rape with her. She conceded that victim was frightened and the said incident was reported after the delay of 02 days as the victim remained sick during the said period. She also admitted that when the victim disclosed the said incident, she approached mother of the appellant, who abused her and there after she filed complaint/Exh.PC. P.W.8 is the star witness being mother of the victim, who also brought the victim to the hospital for her medical examination, which was conducted by Dr.Shumyla Zainab Gardazi/P.W.5, who in her examination in chief stated that victim was brought in the Poly Clinic Hospital, Islamabad by Perveen Akhtar HC in the company of her mother with history of rape 03 days back. She further stated that tram track bruises on right shoulder, similar bruises on the left shoulder as well, bruises on both wrists more on the right one, tender to touch, multiple bruises on right thigh of the victim Kainat Bibi were found. On vaginal

examination of the victim, it was found that hymen appeared torn. Medical report prepared by P.W.5 is Exh.PB.

9. Besides the testimony of complaint/P.W.8, the case of prosecution rests upon the testimony of victim Kainat Bibi/P.W.7, in which she stated that when she was playing in front of her house with her friends, the accused present in the Court blind folded the victim and took her to his house and committed rape. P.W.7 (minor) straight away described the role of the appellant by stating that she was blind folded and subjected to rape.

10. In order to judge the competency of minor victim as a witness in terms of Article 3 of the Qanun-e-Shahadat, 1984, learned Trial Court questioned the minor victim and assessed that she is competent to give her evidence vide order dated 29.07.2015 and there after her statement was recorded as P.W.7.

11. The prosecution had to prove its case on the basis of statement of victim/P.W.7, if the same is corroborative with medical evidence. It has been observed that statement of Dr.Shumyla Zainab Gardezi/P.W.5 confirms the multiple bruises on different parts of the body. During cross-examination P.W.5 stated that hymen of the victim was torn and male boy of 12 to 13 years of age is capable of committing intercourse. She further stated that the victim resisted while conducting the medical examination but the details given by the said P.W is of two folds, one portion deals with swab taken for DNA, chemical analysis and the other is relating to the examination of the victim, which has been given in the report Exh.PB. Although the DNA test report Exh.P.Q was found negative but the examination of P.W.5 speaks otherwise, it is not the requirement of law to confirm the semens through the chemical analysis or DNA report to prove the ingredients of section 376, PPC rather it is the penetration, which constituted the offence although the chemical analysis report is further evidence of strong nature, which helped the prosecution to prove its case and same can be relied upon if other evidence is silent. Reliance is placed upon **2011 P. Cr. L. J. 1443 (Khadim Hussain Vs. The State)**, wherein it was held that:-

> *"Despite the fact that DNA report about the swab did not match with the profile of accused, the observations of lady doctors, were enough evidence of the fact that victim had been subjected to sexual*

> *intercourse. Opinion of the Lady Doctor lent corroboration to the statement of the victim that accused had subjected her to zina---Non-receipt of matching report of DNA test, did not negate the ocular account of prosecution witness."*

But in the instant matter the victim has directly nominated the appellant and the same has been corroborated through the statement of Dr.Shumyla Zainab Gardezi/P.W.5 and her report Exh.PB and the said statement should be read with the statement of Dr.Zahoor Ahmad/P.W.3, who confirmed the age of appellant 12 to 14 years approximately. During cross-examination he stated that age of the appellant might be 11 to 13 years.

12. Section 376, PPC defines rape and in explanation it has been mentioned that penetration is sufficient to constitute the sexual intercourse, which is necessary for evidence of rape. In the present case, it is proved that victim had not given any consent, rather she was forced. In order to prove the case of rape, the medical evidence plays key role, therefore, prosecution has to prove certain important medical features, which were observed by Dr.Shumyla/P.W.5 while examining the victim. In present case the technical evidence confirms the minimum standard to prove the case of rape as provided/notified in Medical Jurisprudence and Toxicology, especially the observations made by Dr.Shumyla. Statement of Dr.Shumyla/P.W.5 is reproduced as under:-

> *"The victim was accompanied with her mother. On examination of victim, it was found that she was fully conscious and oriented appearing frightened, pulse 90 per minute, blood pressure 90/60, afebrile, tram track bruises on right shoulder, similar bruises on the left shoulder as well, bruising on both wrists more on the right one, tender to touch, multiple bruises on right thigh. On vaginal examination, it was found that hymen appear torn admitting finger tip, highly non-cooperative during examination."*

13. Following factors were observed by Dr.Shumyla/P.W.5:-

a. Tram track bruises on right shoulder.
b. Similar bruises on the left shoulder as well.
c. Bruises on both wrists, more on right.
d. Tender to touch.
e. Multiple bruises on right thigh.
f. Hymen torn.

14. From above referred observations on injuries/marks of violence, it seems that victim was over powered by the accused by holding both writs/hands of the victim on some hard surface, which resulted into the tram track bruises on both shoulders. Similar kind of bruises were present on right thigh.

15. It is not necessary to disbelieve the prosecution evidence, if DNA report comes negative as the DNA is only meant to corroborate the other evidence/main case of the prosecution, however, DNA alone is not sufficient to prosecute the accused but the said test strengthen the prosecution case. In present case, the medical evidence if read with testimony of the victim/P.W.7, who directly nominated and stated that she was raped by the appellant and the above referred details of the injuries observed by the doctor confirm the oral testimony of the victim, even from the collective statement of Dr.Shumyla Zainab/P.W.5, Dr.Zahoor Ahmad, Dental Surgeon/P.W.3 and Dr.Naseer Butt, Medico Legal Officer/P.W.2, the appellant was 13 years of age at the time of incident and was capable of performing sexual act.

16. The appellant has not taken a specific defence as to why he was nominated as accused in the above mentioned case but he denied the prosecution story and referred the dispute between his mother and the complainant, however, no such evidence was brought on the record to prove his stance, rather appellant could not extract anything in his favour during the cross-examination of victim Kianat P.W.7 and complainant P.W.8, appellant failed to cross-examine the portion of statement of Kianat where she directly charged the appellant, whereas the appellant only gave the suggestion against the allegation.

17. Learned counsel for the appellant raised an objection that a part of trial of the appellant was conducted by the Juvenile Court and the remaining trial was conducted by Incharge/Sessions Judge, Islamabad, which is in violation of Juvenile Justice System Ordinance, 2000 has no force as section 4(2)(1) of Juvenile Justice System 2000 empowers the Court of Sessions to try a child, who is accused of commission of an offence. Non-mentioning of Juvenile Court in order sheets of Court proceedings and later on in the judgment by the learned Judge does not bar Court of Sessions to try a child, who is accused of commission of an offence and

formalities of Juvenile Justice System 2000 were fully observed, even the Sessions Court is a Juvenile Court, only word Incharge was used due to administrative purpose, which does not mean that it is not Juvenile Court.

18. The upshot of the above discussion is that learned Trial Court has rightly convicted the appellant on the basis of available evidence. Therefore, instant appeal is hereby dismissed being devoid of merits and the sentence of 10 Simple Imprisonment awarded to the appellant is maintained.

19. Important aspect of this case is the mode of punishment to a minor. The learned Trial Court convicted and sentenced the appellant 10 years Simple Imprisonment U/S 376, PPC keeping in view the juvenility of the appellant, who was approximately 13 years of age at the time of occurrence. The minimum thrash hold of the punishment is 10 years, whereas maximum limit is 25 years. Learned Trial Court while awarding the punishment to the appellant has not considered concept of diversion, in order to understand the concept, reference has been made from the book Participant's Manual Juvenile Justice Training, definition of Diversion and conditions of diversion are reproduced as under:-

> ***What is Diversion?***
>
> *Diversion involves referring cases away from formal criminal court procedures and directing child offenders towards community support. Diversion is therefore best viewed not as diversion from criminal justice but rather as diversion to appropriate services where the formal intervention of the juvenile justice system is not required. Through diversion, a child accused of committing an offence is given the opportunity to take responsibility for his or her conduct and to make good the harm caused. Diversion is closely linked to restorative justice and may involve a restorative justice component, depending on the nature of the diversion.*
>
> *Diversion can occur at any point of decision-making, either as a generally applicable procedure or on the decision of the police, prosecutor, court or similar body. In theory, it can be used for any kind of offender, though in practice it is rarely used for the most serious or persistent offenders. States should ensure that the diversionary measures comply with the human rights of the child, including the right to due process.*

Conditions of Diversion.

To be consonant with the rights of the child, diversion procedures must follow five rules:

i) Diversion options should only be used where children admit to an offence and consent to the diversion. At no stage should children be pressured either into an admission or into accepting diversions. Thus, diversion should be excluded where:

. The child has not understood his or her right to remain silent and/or has been unduly influenced in acknowledging responsibility.

. The child or his or her parents (or appropriate adult substituting for the parents) do not consent to diversion or the diversion option.

ii) Diversion must not involve deprivation of liberty in any form.

iii) The case must be referred to a normal court system if no solution acceptable to all can be reached or if the diversionary options are not appropriate.

iv) The child offender always retains the right to a court hearing or judicial review.

V) Human rights and legal safeguards must be fully respected.

Physical punishments-whether imposed by formal courts or as a result of a diversionary process-amount to inhuman or degrading treatment, which is absolutely prohibited.

In addition, in selecting a diversion option, due regard must be given to a child's cultural, religious and linguistic context, community of origin, age and his/her best interests. No child must be unfairly discriminated against on the basis of race, gender, sex, ethnic or social origin, colour, sexual orientation, disability, religion, conscience, belief, culture, language, birth or socio-economic status in the selection of a diversion program. All children must have equal access to diversion options.

20. The other aspect of Juvenile Justice System Ordinance, 2000 regarding Juvenile delinquency has to be seen with reference to conventions on the rights of the child. As it is proved from the record that the appellant was 13 years old at the time of occurrence, therefore, statutory protection provided under Juvenile Justice System Ordinance, 2000 has to be applied. Section 11 of Juvenile Justice System Ordinance, 2000 is reproduced as under:-

> ***11. Release on probation.---*** *Where on conclusion of any inquiry or trial, the Juvenile Court finds that a child has committed an offence, then notwithstanding anything to the contrary contained in any law for the time being in force, the Juvenile Court may, if it thinks fit---*
>
> *(a) direct the child offender to be released on probation for good conduct and place such child under the care of guardian or any suitable person executing a bond with or without surety as the court may require, for the good behavior and well-being of the child for any period not exceeding the period of imprisonment awarded to such child:*
>
> *Provided that the child released on probation be produced before the Juvenile Court periodically on such dates and time as it may direct.*
>
> *(b) make an order directing the child offender to be sent to a Borstal Institution until he attains the age of eighteen years or for the period of imprisonment whichever is earlier.*
>
> *(c) reduce the period of imprisonment or probation in the case where the Court is satisfied that further imprisonment or probation shall be unnecessary.*

21. Keeping in view the above statutory provisions, the concept of sentencing a juvenile has been observed from study of different reported cases and few cases are reproduced as below:-

P L D 2010 Supreme Court 1080 (Faisal Aleem Vs. The State), in which it was held that:-

> *"We have carefully examined the respective contentions as agitated on behalf of appellant, for the State and for complainant in the light of entire record and perused the judgment of learned trial and appellate Courts carefully. Let we mention here at the outset that factum of age was never disputed before the police and moreso no objection whatsoever was raised during the trial Court and besides that the question of age was never agitated before the High Court and no such ground was even incorporated in the memo of appeal. Learned counsel was asked pointedly that why objection was not raised before learned trial and appellate courts but no satisfactory answer could be given except that 'the statement of appellant got recorded under section 342, Cr.P.C. wherein his age has been mentioned as 20 years which should have been taken into consideration by the learned trial and appellate courts irrespective of the fact whether the point of age was urged or otherwise? We have perused the statement of appellant got recorded under section 342, Cr.P.C. wherein the age of appellant has been mentioned as 22 years which was subsequently converted into 20 years by interpolation, responsibility whereof could not be fixed that by whom this interpolation was made. Even for the sake of argument if it is admitted that the appellant was 20 years of age even then he could not be equated to that of a child and as such no benefit under section 2(b) and section 12 of the Juvenile Justice System Ordinance, 2000 could be extended in favour of appellant. It may not be out of place*

*to mention here that generally the trial Court mentions the age of accused at the time of recording statement under section 342, Cr.P.C., at random and in routine manner on the basis of appearance and thus it cannot be considered as gospel truth to determine the quantum of sentence. In this regard we are fortified by the dictum laid down in case titled Muhammad Saleem v. The State (2001 SCMR 536). Learned Advocate Supreme Court on behalf of appellant has laid much stress on the factum of "**tender age**" in oblivion of the fact that tender age itself would not mean that an accused should not be awarded death penalty. In this regard reference can be made to the law laid down in the following cases:--*

Din Muhammad v. the State (1985 SCMR 625), Abdullah v. Shaukat (1988 SCMR 370), Muhammad Hanif v. The State (1994 SCMR 1152), Hukamdin v. The State (1994 SCMR 2134), Noor Muhammad v. The State (1988 SCMR 1640), Mushtaq Ahmed v. The State (1988 SCMR 165) and Muhammad Siddiq v. The State (PLD SC 1079) Zulfiqar v. State (1995 SCMR 1668).

There is no cavil to the proposition that "youth of accused alone does not constitute such an extenuating circumstance as would justify imposition of lesser penalty prescribed by law" Harnamun v. Emperor (AIR 1928 Lah. 855), Maghar Singh Naghar Singh and others v. Emperor (AIR 1941 Lah. 220), The State v. Tasiruddin (PLD 1962 Dacca 46), Sher Hassan v. The State (PLD. 1959 SC (Pak) 480), Ghulam Hyder v. The State (1970 PCr.LJ 1052).”

2013 P Cr. L J 584 [Lahore] (Shahrukh Vs. Bashir Ahmad and another),

wherein it was held that:-

“After hearing the learned counsel for the petitioner, the learned Deputy Prosecutor-General, the learned counsel for the complainant and also after going through the record it has straightaway been noticed by this Court that the petitioner was tried as a juvenile offender by the learned trial Court and he was convicted to life imprisonment after a regular trial. It has also been noticed that major role has been ascribed to the petitioner which is proved through confidence-inspiring evidence of P.Ws. and the role attributed to the petitioner is also borne out from the Post-mortem Examination Report of the deceased. The conduct of the petitioner and the method as well as mannerism of the commission of the offence adopted by him indicates him to be an evil and a well-planned designer, which also indicates more towards the mature skill of an accused than of an innocent child. The statutory protection of the legislation on Juvenile Justice was meant for a minor who was an innocent law breaker and was not an accused having a mature mind who used the plea of minority as a ploy or shield to protect himself from the sentence of the offence committed by him.

As far as the contention of the learned counsel for the petitioner that the petitioner has not been given the benefit of section 11 of the Juvenile Justice System Ordinance, 2000 is concerned, suffice it to observe that the petitioner has been convicted for life imprisonment

under section 302, P.P.C. and not in offences of petty nature. If such like offenders are given benefit of section 11 of ibid Ordinance it would open the Pandora box."

2011 Y L R 341 [Peshawar] (Muhammad Alamgir Vs. The State), wherein it was held that:-

"This leads us to another important aspect of release of appellants on probation being "Juvenile" or "child" under the Ordinance. It is admitted by all parties that appellants Muhammad Alamgir and Raham Zaib, were both "Juvenile", at the time of commission of the offence.

The circumstances for a "juvenile" to be released on probation has been provided in section 11 of the Ordinance which reads:

"Release on probation.---……..

(a) ……

(b) ……

(c) ……"

2015 P Cr. L J 1163 [Balochistan] (Rehmatullah Vs. The State), wherein it was held that:-

"With regard to quantum of sentence, it is to be appreciated that normal penalty for the offence under section 302(b), P.P.C., if proved, is death sentence, but the appellant being a Juvenile has been awarded sentence of imprisonment for life. Even otherwise, according to settled principles of law the age factor can only been seen in case of minor offences, but case of a heinous offence of murder cannot be treated at par with the minor offences. Though, the age, type and seriousness of offences and the past record of criminal activities of an accused, at the time of his conviction is a relevant factor, which shall also be adhered to Juvenile Justice System, which is certainly meant to treat a child accused with care offering him a chance to reform and settle into the mainstream of society but the same cannot be allowed to be used as a ploy to dupe the course of justice while conducting trial and treatment of heinous offences. In view of the above, the contention of the learned counsel for the appellant is unpersuasive."

P L D 2014 Peshawar 69 (Naseebullah Vs. The State), wherein it was held that:-

"As regard the argument of the learned counsel for the appellant that at the time of incident the appellant was below the age of 18 years and thus being a juvenile, was entitled to be dealt with under section 11 of the Juvenile Justice System Ordinance, 2000, we have observed that admittedly, the appellant at the time of commission of offence was a juvenile, but at the time of arrest and conclusion of his trial and passing the impugned judgment of conviction, he had attained the age of 19/20 years. Section 11 of the Juvenile Justice System Ordinance, 2000, enunciates that where on conclusion of inquiry or trial, the Juvenile Court finds that a child has committed an offence, then notwithstanding anything to the contrary contained in any law for the time being in force, the Juvenile Court may, if it thinks fit, direct the child offender to be released on probation for

good conduct and place such child under the care of guardian or any suitable person executing a bond with or without surety as the Court may require, for the good behaviour and well-being of the child for a period not exceeding the period of imprisonment awarded to such child or make an order directing the child offender to be sent, to a Borstal Institution until he attains the age of eighteen years or for the period of imprisonment whichever is earlier. Similarly, under section 6 of the Juvenile Justice Rules, 2001, if the Juvenile Court on the conclusion of an enquiry or trial, finds that the juvenile has committed the offence, the Court may make an order directing the juvenile to be sent to a borstal institution until he attains the age of eighteen years or for such period of imprisonment as awarded to him by the Court whichever is earlier. To understand the importance of relevant provision, section 11 of the Juvenile Justice System Ordinance, 2000 is reproduced herein below:---

***"S.11. Release on Probation**.---……..*

(a) ……..

(b) ……..

(c) ……

It is manifest from the above quoted beneficial provision that mere minority or juvenile-ship is not the criteria for grant of relief under section 11 (Supra). In matter of conviction, there may be some minor offences, in which, the sentence may be normally short and if the court passed an order of conviction, in the circumstances the beneficial provision may be exercised in his favour. But, if convict is charged for a heinous offence and sentenced to life imprisonment, his case may not be treated at par with minor offences. The age type and seriousness of the offence and past record of criminal activities of the convict, at the time of conviction, shall also be a relevant factor, which shall also be adhere to Juvenile Justice System, which is certainly meant to treat a child accused with care and sensitivity, no doubt, offering him a chance to reform and settle into the mainstream of society but the same cannot be allowed to be used as a ploy to dupe the course of justice, while conducting trial and treatment of heinous offences. The court must be sensitive in dealing with the juveniles who are involved in cases of serious natures like drug lord, murder, gang rape, terrorism, sexual molestation and host of other offences. The minor/juvenile accused may never be allowed to abuse the statutory protection and concession, rather involvement in a flagitious crime, must be meted out stringent punishment to discourage the involvement of minors by the people for settling their score through them (juveniles). Thus, the above argument of the learned counsel for the appellant is unpersuasive."

(2013) 7 Supreme Court Cases 705 (Salil Bali Vs. Union of India),wherein it was held that:-

"In recent years, there has been a spurt in criminal activities by adults, but not so by juveniles, as the materials produced before us show. The age limit which was raised from sixteen to eighteen years in the Juvenile Justice (Care and Protection of Children) Act, 2000,

is a decision which was taken by the Government, which is strongly in favour of retaining Section 2(k) and 2 (1) in the manner in which it exists in the Statute Book.

One misunderstanding of the law relating to the sentencing of juveniles, needs to be corrected. The general understanding of a sentence that can be awarded to a juvenile under Section 15 (1) (g) of the Juvenile Justice (Care and Protection of Children) Act, 2000, prior to its amendment in 2006, is that after attaining the age of eighteen years, a juvenile who is found guilty of a heinous offence is allowed to go free. Section 15(1) (g), as it stood before the amendment came into effect from 22nd August, 2006, reads as follows:
"15(1)(g) make an order directing the juvenile to be sent to a special home for a period of three years:

(i) in case of juvenile, over seventeen years but less than eighteen years of age, for a period of not less than two years;

(ii) in case of any other juvenile for the period until he ceases to be a juvenile:

Provided that the Board may, if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded, reduce the period of stay to such period as it thinks fit."

It was generally perceived that a juvenile was free to go, even if he had committed a heinous crime, when he ceased to be a juvenile. The said understanding needs to be clarified on account of the amendment which came into force with effect from 22.8.2006, as a result whereof Section 15 (1) (g) now reads as follows:

"Make an order directing the juvenile to be sent to a special home for a period of three years:

Provided that the Board may if it is satisfied that having regard to the nature of the offence and the circumstances of the case, it is expedient so to do, for reasons to be recorded reduce the period of stay to such period as it thinks fit." The aforesaid amendment now makes it clear that even if a juvenile attains the age of eighteen years within a period of one year he would still have to undergo a sentence of three years, which could spill beyond the period of one year when he attained majority.

There is yet another consideration which appears to have weighed with the worldwide community, including India, to retain eighteen as the upper limit to which persons could be treated as children. In the Bill brought in Parliament for enactment of the Juvenile Justice (Care and Protection of Children) Act of 2000, it has been indicated that the same was being introduced to provide for the care, protection, treatment, development and rehabilitation of neglected or delinquent juveniles and for the adjudication of certain matters relating to and disposition of delinquent juveniles. The essence of the Juvenile Justice (Care and Protection of Children) Act, 2000, and the Rules framed thereunder in 2007, is restorative and not retributive, providing for rehabilitation and re- integration of children in conflict with law into mainstream society. The age of eighteen has been fixed on account of the understanding of experts in child psychology and behavioural patterns that till such an age the children in conflict with law could still be redeemed and restored to mainstream society, instead of becoming hardened criminals in future. There are, of course, exceptions where a child in the age group of sixteen to eighteen may have developed criminal propensities, which would make it virtually impossible for him/her to be re-integrated into mainstream society, but such examples are not

of such proportions as to warrant any change in thinking, since it is probably better to try and re-integrate children with criminal propensities into mainstream society, rather than to allow them to develop into hardened criminals, which does not augur well for the future."

(2013) 13 SCC 1 (Yakub Abdul Razak Memon Vs. State of Maharashtra) Supreme Court Cases, wherein it was held that:-

Juvenile Justice and Children's Acts –Juvenile Justice (Care and Protection of Children) Act, 2000 –Generally –Punishment to juvenile – a Duty of Court –Corrective and Rehabilitative approach required –Constitution of India, Arts. 21, 19 and 39 (f)

Held:

"The Geneva Declaration of 1924 on the rights of the child adopted by the League of Nations on 26-9-1924 provided that mankind owes to the child the best that it has to give, declare and accept it as their duty. Thus, the child must be given the means requisite for its normal development, both materially and spirituality. A hungry child must be fed; and further recognized various child rights included that the delinquent child must be reclaimed.

The Declaration of the Rights of the Child adopted by the Union Nations on 20-11-1959 provides that the child by reason of his physical and mental immaturity needs special safeguards and care including his appropriate legal protection before as well as after birth. The United Nations also adopted the Standard Minimum Rules for the administration of Juvenile Justice (The Beijing Rules) dated 29-11-1985. India is a signatory to the Declaration and effectively participated in bringing the Declaration into force. The said U.N. Rules guide States to protect children's rights and respect their needs during the development of a separate and particular system of juvenile justice. It is also in favour of meeting the best interests of the child while conducting any proceedings before any authority. If children are processed through the criminal justice system, it results in the stigma of criminality and this in fact amplifies criminality of the child. The Rules say that depriving a child/juvenile of his liberty should be used as the last resort and that too, for the shortest period. These Rules direct the juvenile justice system to be fair and humane, emphasizing the well being of the child. Besides that, the importance of rehabilitation is also stressed demanding necessary assistance in the form of education, employment of shelter to be given to the child.

The Juvenile Justice Act, 1986 was enacted in pursuance of the Constitutional obligations cast under Article 39(f) of the Constitution of India as well as of the commitment to the aforesaid International Conventions. The Convention postulates that State Parties recognize that every child has the inherent right to life. State Parties shall ensure that no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below 18 years of age. Aims of juvenile justice provide that the juvenile justice system shall emphasize the well being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the

> *offence. The said Rules further lays down that restrictions on the personal liberty of the juvenile shall be imposed only after careful consideration and shall be limited to the possible minimum; and deprivation of personal liberty shall not be imposed unless the juvenile is adjudicated of a serious act involving violence against another person or of persistence in committing other serious offences and unless there is no other appropriate response.*
>
> *The Statement of Objects and Reasons of the Juvenile Justice (Care and Protection of Children) Act, 2000 (JJ Act) reveal that the Act is in consonance with the provisions under Article 21 of the Constitution read with Article 39 (f) of the Constitution which provides that the State shall direct its policy towards securing the children or given opportunities and facilities to develop in a healthy manner and in conditions of freedom and dignity and the childhood and youth are protected against exploitation and against moral and material abandonment. Children if, they come in contact with hardened criminals in jail, it would have the effect of dwarfing the development of the child, exposing him to baneful influences, coarsening his conscience and alienating him from society."*

22. In addition to above case studies, it has also been observed that issues relating to sentence of juvenile have been seen in the context of following international conventions and rules:-

i. convention of rights of child.

ii. Guidelines for action on children in the criminal justice system, recommended by Economic and Social Council Resolution 1997/30 of 21 July 1997.

iii. United Nations Rules for the Protection of Juveniles Deprived of their liberty (Havana Rules).

iv. United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules").

v. United Nation Standard Minimum Rules for Non-custodial Measures (The Tokyo Rules).

vi. United Nation Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines).

23. In view of the above international documents and standards, Pakistan being signatory of CRC and member of United Nations is under obligation to provide the protection available under the law to the juvenile offenders of the standard settled in the above referred documents. Keeping in view the Juvenile Justice System Ordinance, 2000, the procedure provided in the Punjab Borstal Act, 1926 and the Reformatory Schools Act, 1897, following guidelines are drawn from International Conventions and related documents only for reference for the Juvenile Courts for

awarding sentence to the juvenile offender on the basis of International Conventions and Rules.

CHILD SENTENCING

Standard/ nature	Reference to international convention	Wording of convention
Sentence proportionate to circumstances, gravity of the offence, age and needs of the child	CRC 400 (4) Beijing 5 and 17.1 (a)	Article 40 (4) A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; Education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence. **5. Aims of juvenile justice** 5. 1 The juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence. **17. Guiding principles in adjudication and disposition** 17.1 The disposition of the competent authority shall be guided by the following principles: (a) The reaction taken shall always be in proportion not only to the circumstances and the gravity of the offence but also to the circumstances and the needs of the juvenile as well as to the needs of the society;
Sentence of detention as a measure of last resort	CRC 37 (b); Beijing 17.1 and 19; Havana 1 and 2	37 (b) No child shall be deprived of his or her liberty unlawfully or arbitrarily. The arrest, detention or imprisonment of a child shall be in conformity with the law and shall be used only as a measure of last resort and for the shortest appropriate period of time; 17.1 The disposition of the competent authority shall be guided by the following principles: **19. Least possible use of institutionalization** 19.1 The placement of a juvenile in an institution shall always be a disposition of last resort and for the minimum necessary period. 1. The juvenile justice system should uphold the rights and safety and promote the physical and mental well-being of juveniles. Imprisonment should be used as a last resort. 2. Juveniles should only be deprived of their liberty in accordance with the principles and procedures set forth in these Rules and in the United Nations Standard Minimum rules for the Administration of Juvenile Justice (The Beijing Rules). Deprivation of the liberty of a juvenile should be a disposition of last resort and for the minimum necessary period and should be limited to exceptional cases. The length of the sanction should be determined by the judicial

		authority, without precluding the possibility of the his or her early release.
Non-custodial measures available	CRC 40 (3) (b); Beijing 18 (1); Tokyo 5,6.2, 8 and 9	40-3 (b) Whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected. 4.A variety of dispositions, such as care, guidance and supervision orders; counseling; probation; foster care; education and vocational training programmers and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence. **18. Various disposition measures** 18.1 A large variety of disposition measures shall be made available to the competent authority, allowing for flexibility so as to avoid institutionalization to the greatest extent possible. Such measures, some of which may be combined, include: (a) Care, guidance and supervision orders; (b) Probation; (c) Community service orders; (d) Financial penalties, compensation and restitution; (e) Intermediate treatment and other treatment orders; (f) Orders to participate in group counseling and similar activities; (g) Orders concerning foster care, living communities or other educational settings; (h) Other relevant orders. **5. Pre-trial dispositions** 5.1 Where appropriate and compatible with the legal system, the police, the prosecution service or other agencies dealing with criminal cases should be empowered to discharge the offender if they consider that it is not necessary to proceed with the case for the protection of society, crime prevention or the promotion of respect for the law and rights of victims. For the purpose of deciding upon the appropriateness of discharge or determination of proceedings, a set of established criteria shall be developed within each legal system. For minor cases the prosecutor may impose suitable non-custodial measures, as appropriate. 6.2 Alternatives to pre-trial detention shall be employed at as early a stage as possible. Pre-trial detention shall last no longer than necessary to achieve the objectives stated under rule 5.1 and shall be administered humanely and with respect for the inherent dignity of human beings. **8. Sentencing dispositions** 8.1 The judicial authority, having at its disposal a range of non-custodial measures, should take into consideration in making its decision the rehabilitative needs of the offender, the

		protection of society and the interests of the victims, who should be consulted whenever appropriate. 8.2 Sentencing authorities may dispose of cases in the following ways: (a) Verbal sanctions, such as admonition, reprimand and warning; (b) Conditional discharge; (c) Status penalties; (d) Economic sanctions and monetary penalties, such as fines and day-fines; (e) Confiscation or an expropriation order; (f) Restitution to the victim or a compensation order; (g) Suspended or deferred sentence; (h) Probation and judicial supervision; (i) A community service order; (j) Referral to an attendance centre; (k) House arrest; (l) Any other mode of non-institutional treatment; 4 (m) Some combination of the measures listed above. **9. Post-sentencing dispositions** 9.1 The competent authority shall have at its disposal a wide range of post-sentencing alternatives in order to avoid institutionalization and to assist offenders in their early reintegration into society. 9.2 Post-sentencing dispositions may include: (a) Furlough and half-way houses; (b) Work or education release; (c) Various forms of parole; (d) Remission; (e) Pardon. 9.3 the decision on post-sentencing dispositions, except in the case of pardon, shall be subject to review by a judicial or other competent independent authority, upon application of the offender. 9.4 Any form of release from an institution to a non-custodial programme shall be considered at the earliest possible stage.

24. In view of above, the juvenile offender have to be dealt under the Probation of Offenders Ordinance, 1960, The Reformatory Schools Act, 1897 and Punjab Borstal Institution Act 1926 in the following manner:-

PLD 2014 Peshawar 127 (Mian Khan Vs. The State), wherein it was held that:-

> *"Bare perusal of Section 11 of the ibid Ordinance transpires that by use of word "may" and phrase "if it thinks fit", a discretion has been vested in the juvenile Court to release a juvenile on probation or to send him to borstal institution. It may reduce the period of*

probation or imprisonment in case the court is satisfied that further imprisonment or probation is unnecessary. There is no absolute duty cast on the juvenile court to release the convict in all circumstances on probation. A discretion, vested in the court, is to be exercised justly, fairly, honestly and with all reasonableness and sound application of judicial mind. It follows that the court is required to consider all attending circumstances of the case including the behavior, conduct, aptitude and antecedents of the juvenile convict. The vesting of discretion never ever meant to release a juvenile convict in all circumstances regardless of pre-conditions enumerated hereinabove. Had it been the intention of the Legislature to exercise a discretion in such arbitrary manner, it could have easily inserted the word "shall" in the section itself, leaving no room of assessment with the court. In the instant case, according to findings of the learned trial court/Juvenile Court in its judgment dated 24.01.2012, he was found of the age of 20 years at the time of his arrest. He was also found in possession of his CNIC which can only be issued on attaining the age of 18 years. However, on the basis of report of Standing Medical Board, he was around 18 years, hence he was referred to the Juvenile Court for trial. Case was registered in 2010 when he was found at the border line of juvenility whereas at the moment he is no more juvenile. Section 11(b) of the Juvenile Justice System Ordinance, 2000, squarely copes with such situation, stipulating that a child offender may be sent to borstal institution, until he attains the age of 18 years or for the period of his imprisonment whichever is earlier. The statutory provision is clear manifestation of the intention of the Legislature that on attaining the age of 18 years, the convict/juvenile is no more entitled to any such leniency as he loses his status of juvenile accused in that eventuality. In view of above scanning of the law, it can safely be concluded that; firstly, release of juvenile convict on probation is a discretionary matter only to be decided by the trial court/Juvenile Court and; secondly, the Juvenile Court too cannot exercise such discretion on extinguishment of the status of the convict as juvenile. The learned trial court has turned down the plea of the appellant on the same ground which is in accordance with law and within the parameters of Section 11 of the Ibid Ordinance."

PLD 2012 Lahore 345 (Ghulam Qadir Vs. Additional Sessions Judge and others), wherein it was held that:-

"Careful appraisal of the record transpires that offence under section 438, P.P.C does not fall within the exception provided under section 5(1)(a) of the Ordinance ibid, therefore, learned trial Court was authorized to pass the impugned order of releasing the accused on probation. Impugned order also maintains the vital ingredients in accordance with the law. I do not find any legal infirmity in the impugned order passed by the learned trial Court. Simultaneously, the revision is also lawfully dismissed by the learned Additional Sessions Judge keeping in view the fact that the same is lodged after about 15 months of passing of impugned order as well as after expiry of probation period successfully completed by the accused who have been facing agony of the trial for long seven years in the offence under section 438, P.P.C. punishment whereof is imprisonment for life or imprisonment of either description for ten years and fine. Needless to mentioned that the word "or" used before the imprisonment for either description for ten years is to be interpreted in the benefit of the accused to exclude the offence under section 438, P.P.C. from the exception envisaged under section 5(1)(a) of the Probation of Offenders Ordinance, 1960. In the instant

> *case accused have been facing agony of lengthy process of trial for long seven years besides one year period of probation, therefore, petitioner has no case to invoke the constitutional jurisdiction of this Court to interfere with the impugned orders lawfully passed by the learned Courts below."*

1989 MLD 1514 [Supreme Court of India] (Sube Singh and others Vs. State of Haryana and others), wherein it was held:-

> *"Since the offence under Section 302 is punishable with death, the provisions of the Punjab Borstal Act could not cover an offence under Section 302 of IPC and the benefit would not therefore, be available to an accused convicted for the offence under section 302, IPC."*

1985 P Cr. L J 177 [Peshawar] (Ghaniur Rehman Vs. The State), wherein it was held that:-

> *"In fact under section 5 of the Probation of Offenders Ordinance, 1960 the Court has the powers to make a probation order in case of conviction of an accused-person for certain offences if in his opinion having regard to the circumstances including the nature of the offence and the character of the offender, he considers it expedient for which he has to record reasons in writing that instead of sentencing him at once he should make a probation order placing the accused under the supervision of a Probation Officer for a period from one year to three years binding him to commit no offence and to keep peace and be of good behavior during the said period and if called upon to appear and receive the sentence during the period of bond. Thus in a way the Court passes the order of conviction as well impliedly the order of sentence but suspends the order of sentence and instead sends the offender on probation under the bond and as long he complies with the requirements of the bond not to commit an offence and to keep peace and be of good behavior and fulfils any other condition of the bond, he continues on probation while in case of contravention of the terms of the bond, the accused is called upon to appear and receive and undergo the sentence during the period of the bond."*

2013 P Cr. LJ 800 titled as Hazrat Bilal Vs. The State and another wherein it was held that:-

> *under section 11(a) of the Juvenile Justice System Ordinance the Court has discretionary powers to release on probation a child found to have committed the offence but his request is not convincing one because as per evidence the accused has committed sodomy in the holy place. Malakand Division is special area and the people over there always strive hard for implementation of Sharia laws. The appellant has committed the offence in the holy mosque which is heinous, scandalous gruesome, brutal and the punishment is one of the modes to give an impression of deterrence to the public at large and release of appellant on probation in such like cases would certainly give an impression that no law is there to restrain people from the commission of such like offences. We have to curb such like offences otherwise it would definitely affect the whole society. However, it is ordered that the appellant-convict be sent to a Borstal institution until he attains the age of eighteen years or for the period of imprisonment whichever is earlier.*

25. In view of above referred case studies, I am of the considered view that learned Trial Court while awarding the sentence has over looked the above referred concept of diversion, which is necessary for reintegration of the juvenile offender in the society after completion of the sentence.

26. At the time of commission of the offence, the age of appellant was 13 years and at the time of conviction the appellant was 16 years old, therefore, keeping in view the age, sentence, and nature of offence for which the appellant was charged and convicted. Section 11 of Juvenile Justice System Ordinance, 2000 empowers the Juvenile Court to release the accused on probation keeping in view the following points:-

a. First offender.
b. age at the time of occurrence.
c. Sentence awarded to the Juvenile.

27. In this case, the appellant is first offender, his age at the time of occurrence was 13 years and he has been awarded 10 years Simple Imprisonment, therefore, he be sent to Borstal institution until he attains the age of eighteen (18) years or for the period of imprisonment, whichever is earlier.

28. Although Section 11 of Justice Juvenile System Ordinance, 2000 provides the concept of release of Juvenile on probation but the juvenile accused has committed the offence of rape with a minor girl, therefore, at this stage it is not appropriate to release a juvenile/appellant on probation unless he completes his period in the Borstal institution and thereafter his remaining period of sentence, if any, will be subject to report of Probation Officer as well as report obtained from Borstal institution. Probation Officer shall submit the said report before the concerned Juvenile Court which has passed the sentence, the said court will thereafter pass the appropriate order, keeping in view, the report, behavior and development of the juvenile (for the period the appellant remained in Borstal) decide the said question of remaining sentence after hearing the juvenile/appellant.

29. As a sequel to above discussion, I am of the firm view that the impugned judgment does not warrant any interference, which is maintained. The punishment

provided U/S 376 PPC is death or imprisonment for either description for a term which shall not be less than ten years or more than twenty five years and shall also be liable to fine. Since the Trial Court only convicted and sentenced the appellant U/S 376 PPC for ten (10) years simple imprisonment and not imposed any fine, which is mandatory, therefore, the accused/appellant is imposed fine of Rs. 100,000/-, which shall be paid to the victim and in case of default in payment of fine, he shall further undergo simple imprisonment for six (06) months. Reliance is placed upon **2015 PLD (Lahore) 512 (Safdar Ali alias Soni Vs. The State and another).**

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on 03.06.2016.

(MOHSIN AKHTAR KAYANI)
JUDGE

R.Anjam

Approved for reporting

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