IN THE SUPREME COURT OF PAKISTAN
(APPELLATE JURISDICTION)

PRESENT:
MR. JUSTICE MUSHIR ALAM
MR. JUSTICE IJAZ UL AHSAN
MR. JUSTICE YAHYA AFRIDI

CRIMINAL APPEAL NO. 120 OF 2019
AND
CRIMINAL APPEAL NO. 121 OF 2019
AND
CRIMINAL APPEAL NO. 122 OF 2019
(On appeal against judgment dated 11.06.2018 of the Islamabad High Court, Islamabad passed in Criminal Appeal No. 154 of 2018)

Criminal Appeal No. 120/2019	:	Raja Khurram Ali Khan *versus* Tayyaba Bibi (minor) daughter of Muhammad Azam & another
Criminal Misc. Application No. 1273/2018	:	Raja Khurram Ali Khan *versus* Tayyaba Bibi (minor) daughter of Muhammad Azam & another
Criminal Appeal No. 121/2019	:	The State through A.G., Islamabad High Court, Islamabad *versus* Raja Khurram Ali Khan and another
Criminal Appeal No. 122/2019	:	Maheen Zafar wife of Raja Khurram Ali Khan *versus* Tayyaba Bibi (minor) daughter of Muhammad Azad & another
For the Appellants	:	Raja Rizwan Abbasi, ASC. (in Criminal Appeal No. 120/2019) Mr. Tariq Mehmood Jehangiri, AG, Islamabad. (in Criminal Appeal No. 121/2019) Raja Muhammad Farooq, ASC. (in Criminal Appeal No. 122/2019)
For the State	:	Mr. Tariq Mehmood Jehangiri, AG, Islamabad (in Criminal Appeals No. 120 & 122/2019)
For Respondents	:	N.R.
Date of Hearing	:	08.05.2019

JUDGMENT

YAHYA AFRIDI, J. – Through this judgment, we shall decide the three Criminal Appeals filed by the State, Mst. Maheen Zafar and Raja Khurram Ali Khan against a common judgment dated 11.06.2018 rendered by the Division Bench of the Islamabad High Court, Islamabad in the two appeals filed against the judgment rendered by the Single Bench of the Islamabad High Court, Islamabad dated 26.03.2018 in its original criminal jurisdiction arising from the crime registered as FIR No. 483 dated 29.12.2016 in Police Station Industrial Area, Islamabad (**FIR**). This Court had earlier, on 27.02.2019, granted leave in the present three appeals in terms that:

> "The learned consul for the private petitioners in Criminal Petition Nos.721 and 931 of 2018 states that the petitioners in these two petitions are husband and wife and were charged under sections 328-A and 201 of the Pakistan Penal Code (**PPC**) and the wife (petitioner in Criminal Petition No.931 of 2018) was also charged under section 337-A (i) and F(i) PPC. The couple was convicted for the said offences and the maximum sentence imposed on them was one year simple imprisonment under section 328-A, and all the sentences were ordered to run concurrently. The accused-couple and the State filed appeals against the judgment of the Trial Court. The appeal filed by the accused-couple was dismissed and that by the State was accepted to the extent that the sentence with regard to their conviction under section 328-A PPC was enhanced from one to three years simple imprisonment.
>
> 2. The learned counsel for the accused-couple state that the child Tayyaba (PW-1) in her cross-examination had contradicted many essential ingredients of the prosecution case; that her father Muhammad Azam (PW-13) supported the couple; that he did not want to pursue the case against them and had compromised the case with them, though such compromise was not accepted by the Court. Therefore, under these circumstances the Appellate Court should have extended the benefit of doubt to the couple rather than increasing their sentences from one to three years under section 328-A PPC.
>
> 3. The learned Advocate General, Islamabad (**"AG"**) states that the couple were lightly let off and the wife should also have been convicted under section 506 of the PPC and the State has preferred Criminal Petition No.823 of 2018 in this regard. He states that

> the Appellate Court did not attend to the charge under section 506 of the PPC, from which the wife was acquitted, and against which the appeal had been filed. The learned AG states that the child had twenty-two injuries on her body which showed that she was subjected to barbaric cruelty, therefore, in these circumstances the sentences of the couple were rightly increased under section 328-A PPC since there were no mitigating factors and that the wife should also have been convicted under section 506 PPC. The learned AG says that admittedly the child Tayyaba was working in the house of the accused-couple and her body bore many injuries in regard whereof the defence taken was that the injuries were from before Tayyaba was employed by them. However, no evidence was produced to prove this as required under Article 122 of the Qanun-e-Shahdat Order, 1984, the learned AG submits. He further states that the couple also did not testify on oath under section 340(2) of the Code of Criminal Procedure. The child was living with the accused and her body bore the marks of a large number of injures which was proof enough of their guilt coupled with the fact that she was not taken to hospital nor to a doctor for treatment. Reliance has also been placed upon the case of Saeed Ahmed v State (2015 SCMR 710).
>
> 4. Leave to appeal is therefore granted in all three petitions to consider amongst other the aforesaid submissions of the learned counsel.
>
> 5. The learned counsel for the accused-couple state that they have filed application for suspension of their sentences, however, these applications are not fixed for hearing. The office is directed to fix the said applications along with the appeals before a three member Bench since the impugned judgment is of a division Bench of the High Court. Since the maximum sentence awarded to the accused is three years the applications for suspension of sentences and the appeals be fixed for hearing at an early date".

2. The present appeals, in essence, revolve around the alleged ill-treatment, neglect and injuries caused to a ten year old girl, named Tayyaba Bibi (PW-1), daughter of Muhammad Azam (PW-13), while she was stated to be a housemaid at the residence of Raja Khurram Ali Khan, the then Additional District & Sessions Judge, Islamabad, situated at Sector I-8/1, Street No. 12, House No. 50, Islamabad, where she was to attend to the kitchen, and the three minor children of her employer.

3. The chronology of events leading to the registration of the crime by the local police, and the investigation that followed

leading to the trial is of the utmost importance in the present case. Accordingly, let us trace the facts leading thereto.

4. On 26.12.2016, Ms. Mariya Hayat (PW-2) and her mother Ms. Naila Khizar (PW-3) state that they, from the terrace of their house, witnessed a child (Tayyaba Bibi) in the neighbour's house, who was stated to be in a bare state. When they inquired about her condition, Tayyaba Bibi informed them that she was a maid at the house, and that her employer and his family had left her alone outside the locked house. Tayyaba Bibi was stated to have been brought to the house of Ms. Naila Khizar, where she was fed and given a blanket to keep warm. Raja Khurram Ali Khan was stated to have been contacted by Ms. Naila Khizar on his mobile phone, but to no avail. Finally, when he, along with his family, were stated to have returned at about 09.30 p.m. on the same night on 26.12.2016, Tayyaba Bibi was taken back to her employer's house.

5. On 28.12.2016 at 10.30 a.m., a complaint was lodged by Ibrar Sherazi, *Naib* Court of Raja Khurram Ali Khan, at Police Station Industrial Area, Islamabad (lodged as *Rapat* No. 24 dated 28.12.2016 Ex. PW-16) reporting the disappearance of Tayyaba Bibi since 27.12.2016. The same day, on 28.12.2016, Ms. Mariya Hayat (PW-2) and her mother Ms. Naila Khizar (PW-3) again witnessed Tayyaba Bibi across the boundary wall of their residence, and this time she had unattended injuries sustained on her person. The two ladies contacted Mrs. Humaira Haroon (PW-4), their neighbour, who, at 01.39 p.m. on 28.12.2016, took from her mobile phone three photographs of Tayyaba Bibi in her injured condition (Ex. PW-11/B).

6. On 29.12.2016, Khalid Mehmood Awan, Station House Officer (**SHO**) of Police Station Industrial Area, Islamabad (PW-16), after prior intimation to Raja Khurram Ali Khan on telephone, took custody of Tayyaba Bibi from his house, and was stated to have recorded a video of his questioning Tayyaba Bibi (Ex. PW), and thereafter, took her to PIMS Hospital, Islamabad for her medical examination. There, at 11.16 a.m. on 29.12.2016, Dr. Muhammad Naseer (PW-5) medically examined Tayyaba Bibi, and recorded four injuries on her person: swelling and blackening of right upper and lower eye lid and conjunctivitis of right eye which was ecchymosed; swelling and burn marks superficial in nature on the dorsomedial aspect of left hand; and finally, an abrasion on the right side of face and over left ear. The nature of the said injuries were later stated by the same examining doctor in the Injury Report to fall under sections 337-A(i) and 337-F(i) of the Pakistan Penal Code, 1860 (**PPC**), and that the probable duration between the injuries and the examination was about 24 hours (Ex-PW-F/A). After being medically examined, Tayyaba Bibi was taken by Shakeel Ahmad, ASI (PW-10) and lady constable Mst. Maryam Butt to the office of the Additional Deputy Commissioner, Islamabad, where Tayyaba Bibi was stated to have rendered a statement before Ms. Nisha Ishtiaq, Assistant Commissioner, Islamabad (PW-7)(Exh.PW-7/A), which became the source of the *Marasala* recorded by Shakeel Ahmad, ASI (PW-10), and based thereon, the FIR was registered on 29.12.2016 at 02.00 p.m. under sections 506, 342 and 34 of the PPC at Police Station Industrial Area, Islamabad. Later, sections 337(A)(i), 337(F)(i), 328-A and 201 of the PPC were also inserted in the FIR (Ex.PW-14/B).

7. On 04.01.2017, an application was moved by the District Magistrate, Islamabad for the constitution of a Medical Board, which resulted in her medical examination by a medical board comprising of three senior doctors, who finally formulated the report stating her to have 22 injuries (including the four injuries recorded in injury sheet Ex-PW-F/A) on her person (Ex. PW-6/A).

8. On 09.01.2017 two mobile phones of Mrs. Humaira Haroon (PW-4) were taken into possession (Ex. PW-9/1), and the Forensic Analysis Report thereon by the National Response Centre for Cyber Crime Forensic Laboratory, Islamabad, reported that the three pictures of Tayyaba Bibi recorded therein were in fact captured on 28.12.2016 at 01.39 p.m. (Ex. PW-11/1).

9. On 15.01.2017, the investigating officer (PW-16) took into possession from the house of the convicts the utensils reported to have been used to injure Tayyaba Bibi. Thereafter, the complete *challan* of the case was submitted.

10. An application titled Noor Ijaz Chaudhry v. Maheen Zafar and others (Criminal Misc. No. 162-T/2017) was moved before the Islamabad High Court for transfer of the trial from the Court of Magistrate, Islamabad, to that of the Single Bench of the Islamabad High Court, which was allowed *vide* order dated 24.03.2017. Thereafter, the Single Bench of the Islamabad High Court, exercising its original criminal jurisdiction, proceeded with the trial. Maheen Zafar was charged for committing offences punishable under sections 342, 337-A(i), 337(F)(i) 506 and 328-A of the PPC, while Raja Khurram Ali Khan was charged for committing offences punishable under sections 342, 328-A and

201 of the PPC. After they pleaded not guilty, Raja Khurram Ali Khan and Maheen Zafar were tried. During the course of the trial, the prosecution produced sixteen (16) witnesses, whereafter the statements of the accused was recorded, who refused to produce any evidence, and thus, the trial culminated in the conviction of Raja Khurram Ali Khan and Maheen Zafar *vide* judgment dated 17.04.2018 in terms that:

> "In view of the 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."

11. Aggrieved, Mst. Maheen Zafar and Raja Khurram Ali Khan challenged the conviction and sentence passed against them before the Division Bench of the Islamabad High Court under section 411-A(1) of the Code of Criminal Procedure, 1898 (**Cr.P.C.**) (Cr P. No.154/2018). The State also filed a petition for leave to appeal under section 411-A(2) Cr.P.C. read with section 561-A Cr.P.C against the acquittal of Mst. Maheen Zafar and Raja Khurram Ali, and for the enhancement of their sentences awarded in committing the offence under section 328A PPC (PSLA No.2/2018).

12. The Appellate Court, after hearing the parties, granted leave to the State, and converted and allowed their appeals in terms that:

> "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 Mst. 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."

13. We have heard the learned counsel for the parties and with their valuable assistance gone through the available record.

14. Let us first set out the crucial issues which require to be addressed in resolving the instant appeals. They are: whether the appeal filed by the State for enhancement of sentence under section 411-A(2) Cr.P.C., or any other provision of law, was competent before the Division Bench of the High Court; whether the two Courts below were correct in convicting Raja Khurram Ali Khan and Mst. Maheen Zafar for the offences they were charged for; and finally, whether the acceptance of appeal against the acquittal by the Appellate Court was in consonance with the settled principle of law for adjudication of appeal against acquittal. We intend to discuss each issue *in seriatim*.

Maintainability of Appeal before the Division Bench of the High Court Against Enhancement of Sentence Passed by a Single Bench of the High Court in its Original Criminal Jurisdiction

15. The State filed appeals for enhancement of sentences awarded to Raja Khurram Ali Khan and Mst. Maheen Zafar for the commission of offence punishable under section 328-A of the PPC.

The appeals were entertained by the Division Bench of the High Court, as the appellate court, under section 411-A of Cr. P.C. The said provision of law reads as under:

> "**411-A. Appeal from sentence of High Court**
> (1) [Except in cases in which an appeal lies to the Supreme Court under [Article 185 of the Constitution] **any person convicted** on a trial held by the High Court in the exercise of its original criminal jurisdiction may, notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent of any High Court, appeal to the High Court-
> a. Against the conviction on any ground of appeal which involves a matter of lay only;
>
> b. With the leave of the Appellate Court, or upon the certificate of the Judge who tried the case that it is a fit case for appeal, against the conviction on any ground of appeal which involves a matter of fact only, or a matter of mixed law and fact, or any other ground which appears to the Appellate Court to be a sufficient ground of appeal; and
>
> c. With the leave of the Appellate Court, against the sentence passed unless the sentence is one fixed by law.
>
> (2) Notwithstanding anything contained in section 417, the **Provincial Government may direct the public prosecutor to present an appeal to the High Court from any order of acquittal passed by the High Court** in the exercise of its original criminal jurisdiction, and such appeal may, notwithstanding anything contained in section 418 , or section 423, sub-section (2), or in the Letters Patent of any High Court, but subject to the restrictions imposed by clause (b) and clause (c) of sub-section (1) of this section on an appeal against a conviction, lie on a matter of fact as well as a matter of law.
>
> (3) Notwithstanding anything elsewhere contained in any Act or Regulation, an appeal under this section shall be heard by a Division Court of the High Court composed of not less than two Judges, being Judges other than the Judge or Judges by whom the original trial was held; and if the constitution of such a Division Court is impracticable, the High Court shall report the circumstances to the Provincial Government which shall take action with a view to the transfer of the appeal under section 527 to another High Court.
>
> (4) Subject to such rules as may from time to time be made by [the [Supreme Court]]in this behalf, and to such conditions as the High Court may establish or require, an appeal shall lie to [the [Supreme Court]]from any order made on appeal under sub-section (1) by the Division Court of the High Court in respect of which order the High Court declares that the matter is a fit one for such appeal.]"
>
> (emphasis provided)

16. A careful reading of the above referred provision reveals that sub-section (1) (*supra*) provides the right of appeal only to a convicted person, and that too, in three situations. Firstly, the appeal can be filed by a convict as a matter of right "on a question of law" (under clause a); secondly, with the leave of the Court, a convict can file an appeal on a question of fact or on a mixed question of law and fact (under clause b); and thirdly, with the leave of the Court, an appeal can also be filed by a convict against a sentence, where the law has not provided any fixed quantum of sentence (under clause c). This right of appeal before the Division Bench of the High Court under the sub-section 1 of section 411-A is, however, made subject to the condition that the convict should not have the remedy of appeal against the impugned judgment, sentence, or order passed by the Single Bench of the High Court, before the Supreme Court under Article 185 of the Constitution of the Islamic Republic of Pakistan, 1973 (**Constitution**), which provides:

> "**Article 185**
> (1) Subject to this Article, the Supreme Court shall have jurisdiction to hear and determine appeals from judgments, decrees, final orders or sentences.
> (2) An appeal shall lie to the Supreme Court from any judgment, decree, final order or sentence
> (a) if the High Court has on appeal reversed an order of acquittal of an accused person and sentenced him to death or to transportation for life or imprisonment for life; or, on revision, has enhanced a sentence to a sentence as aforesaid; or
> (b) if the High Court has withdrawn for trial before itself any case from any court subordinate to it and has in such trial convicted the accused person and sentenced him as aforesaid; or
> (c) if the High Court has imposed any punishment on any person for contempt of the High Court; or
> (d) if the amount or value of the subject matter of the dispute in the court of first instance was, and also in dispute in appeal is, not less than fifty thousand rupees or such other sum as may be specified in that behalf by Act of 432[Majlis-e-Shoora (Parliament)] 432 and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below; or

> (e) if the judgment, decree or final order involves directly or indirectly some claim or question respecting property of the like amount or value and the judgment, decree or final order appealed from has varied or set aside the judgment, decree or final order of the court immediately below; or
> (f) if the High Court certifies that the case involves a substantial question of law as to the interpretation of the Constitution.
> (3) An appeal to the Supreme Court from a judgment, decree, order or sentence of a High Court in a case to which clause (2) does not apply shall lie only if the Supreme Court grants leave to appeal."

17. A review of the above referred provision of the Constitution reveals that, apart from the expressed category of appeals provided under sub-clause 2 of Article 185, where the forum of redressal is the Supreme Court, the aggrieved person may in other cases seek his remedy against the conviction and sentence before the Division Bench of the High Court only under the grounds stated in clauses (a) to (c) of sub-section 114-A of the Cr.P.C.

18. Sub-section 2 of section 411-A of the Cr.P.C., on the other hand, provides a right of appeal to the Provincial Government to file an appeal before the Division Bench of the High Court against an order of acquittal of an accused passed by the Single Bench of the High Court while exercising its original criminal jurisdiction.

19. It is a settled principle of law that a right of appeal is a substantive right, which can only be granted by an express provision of an enactment, and cannot be inferred or implied therefrom. It appears that there was a conscious omission on the part of the legislature not to provide the remedy of enhancement of sentence to a Division Bench of the High Court against one passed by a Single Bench of the High Court in its criminal original jurisdiction. This can be gauged on reviewing the provisions of

Appeals, Reference and Revisions (Chapter-XXXIX Part-VII) of the Cr.P.C, and more particularly, the specific placement of section 411-A therein. A careful review of the provisions contained in the said chapter suggests that four distinct rights to appeal have expressly been provided therein: first, against the conviction and sentence passed by the Assistant Sessions Judge and by the Judicial Magistrate (section 408); second, against the conviction and sentence passed by the Sessions Judge (section 410); third, against an acquittal order passed by the Trial Court other than the High Court (section 417); and finally, against the conviction and sentence passed by the High Court (section 411-A). Also relevant for resolution of the matter in hand is the separate provision provided in section 411-A Cr.P.C. for appeal against the judgment and sentence passed by the High Court in its original jurisdiction. There is an express right of appeal to a convict against conviction and sentence under sub-section 1 (*supra*) subject to the conditions mentioned therein, and discussed above. While the Provincial Government has been vested with the right of appeal against an order of acquittal of an accused under sub-section 2 (*supra*), the omission of providing a right of appeal to the complainant and/or to the State for seeking enhancement of sentence in the said section or chapter of the Cr.P.C. is conspicuously indicative of legislative intent.

20. Interestingly, when we review the general powers of the appellate Courts, while exercising their respective jurisdictions under Chapter-XXXIX Part-VII, it is noted that they are all to proceed in terms of the procedure provided under section 423 of the Cr.P.C., wherein under sub-section 1 clause (b), the appellate

Courts, including the Division Bench of the High Court exercising its jurisdiction under section 411-A, are expressly barred from enhancing a sentence passed by the trial courts. It reads:

> "**423. Powers of Appellate Court in disposing of appeal**
>
> (1) The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellate or his pleader, if he appears, and the Public Prosecutor, if he appears, **and in case of an appeal under [section 411-A**, sub-section (2) or section 417], the accused, if he appears, the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may —
>
> (a) ...
>
> (b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be retired by a Court of competent jurisdiction subordinate to such Appellate Court or [sent] for trial, or (2) alter the finding maintaining the sentence, or, with or without altering the finding reduce the sentence, or, (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of section 106, sub-section (3), **not so as to enhance the same**."
>
> (emphasis provided)

21. With respect to the case of the prosecution, it would be appropriate to also examine whether the State could have invoked the general revisional or the inherent powers of the High Court, under sections 435 or 561-A of the Cr.P.C, for the enhancement of sentence awarded by the Single Bench of the High Court in its criminal original jurisdiction. The relevant provisions read as follows:

> **"435. Power to call for records of inferior Courts**
>
> (1) The High Court or any Sessions Judge may call for and examine the record of any proceeding before **any inferior Criminal Court** situate within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court [and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that

> he be released on bail or on his own bond pending the examinations of the record.
>
> [Explanation. All Magistrate shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section.]]
>
> **"Section 561-A Saving of inherent power of High Court**
> Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such order as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of **any Court** or otherwise to secure the ends of justice."
>
> (emphasis provided)

22. With regards to section 435 Cr.P.C., it vests revisional jurisdiction in the High Court to, *inter alia*, enhance a sentence awarded by an *inferior* Court, while the procedure for exercising such authority has been provided under section 439 Cr.P.C. The judicial consensus that has developed is that the Single Bench of the High Court is not a Court *inferior* to that of the Division Bench of the High Court, within the contemplation of section 435 Cr.P.C. Similarly, the authority vested in the High Court with inherent jurisdiction under section 561-A of Cr.P.C. is to correct any illegality committed or prevent abuse of the process of any Court, which does not extend to the High Court itself.

23. These legal issues came up for consideration before this Court in the case of **Malik Firoz Khan Noon v. The State (PLD 1958 Supreme Court (Pak.) 333)**, which were addressed by a five-member bench, and it was, in essence, held that a Division Bench of the High Court in its appellate jurisdiction under Cr.P.C. (section 411-A), could not exercise its revisional (section 435) and/or inherent (section 561-A) powers in respect of proceedings and decisions rendered by a Single Bench of the High Court, while exercising its

original criminal jurisdiction. The matter was discussed in terms that:

> "the insertion of section 411A in the Criminal Procedure Code has merely enlarged the appellate powers of the High Court and has not created a new Court to which the Judge exercising original criminal jurisdiction is inferior or subordinate. Before the enactment of section 411A there was no appellate jurisdiction in the High Court over any Judge or Judges of the High Court exercising original criminal jurisdiction and it is difficult to see how a mere provision empowering a bench of the High Court in a restricted class of cases to rectify errors of members of the same Court can have the effect of making the latter inferior to the former, particularly when the two positions are not constant and can be interchanged from time to time by an order of the Chief Justice...
> It appears to me that the mere conferment of restricted additional appellate jurisdiction on a bench of the High Court does not have the effect of converting another bench, which exercises the original powers of the High Court, a subordinate or inferior Court. Section 411A confers limited appellate powers on the High Court and does not give to that Court full powers of appeal from the judgment of a Judge exercising original criminal jurisdiction...
> The Court that functions in exercise of the original criminal jurisdiction or in exercise of the appellate jurisdiction under section 411A is the same Court viz., the High Court, and not two different Courts, the respective powers possessed by the Judges while functioning in two different capacities being the powers of the same Court and the distribution of those powers being no more than an internal arrangement among the Judges of the same Court. The records of both the benches are records of the same, Court and not of two different Courts. There are of course two judgments in such a case, one by the original Judge or Judges and the other by the appellate Judges, but they are both judgments of the same Court though by law the judgment of the appellate bench in case of reversal or modification overrides the judgments of the original Judge...
> Admittedly before the enactment of section 411A no revisional powers existed and such powers are now being claimed only as a result of that enactment. But subsection (4) in its present form existed even before the insertion of section 411A and if revisional powers did not exist after that subsection had been enacted, section 411A can have nothing to do with the existence or nonexistence of those powers...
> For the reasons just stated the **Judge trying a criminal case in exercise of the extraordinary criminal jurisdiction of the high Court cannot be held to be an inferior criminal Court within the meaning of section 435 of the Code of Criminal Procedure. Nor can it be said that the record of the trial Judge in such a case otherwise comes to the knowledge of the High Court within the meaning of section 439 of the Code. The record mentioned in that section is the record of an inferior Court and not of the High Court itself which is always supposed to be within the knowledge of that Court, and to which the words in section 439 "which**

> **otherwise comes to its knowledge" are clearly inapplicable. I am therefore of the view that the bench hearing the appeal of the convicted persons under section 411A has no revisional jurisdiction over the Judge who tried this case and consequently no power to expunge any remarks or passages from his judgment**."
>
> (emphasis provided)

24. In another case, **Mir Alam Khan v. The State (1980 P Cr. L J 11452)**, which later came up before the Peshawar High Court, the complainant had filed an inter-court appeal against the judgment passed by the Single Bench of the High Court, wherein he had prayed for the enhancement of the sentence so awarded in contempt proceedings. The counsel for the convicted contemnor contended that such right was not provided to the complainant under the enacted law. The Court accepted the said objection in terms that:

> "The learned counsel for the complainant in order to meet this objection, has advanced the theory that after the conviction of an accused under the Act the position of the contemnor becomes a convicted accused undergoing a sentence and the provisions of the Criminal Procedure Code in this regard came into play. When confronted with the position that under section 411(A)(1) of the Criminal Procedure Code only a convicted person on a trial held by a High Court in the exercise of its original criminal jurisdiction has been allowed the right of appeal and under subsection (2) thereof the Provincial Government has been authorized to direct the public Prosecutor to present an appeal to the High Court from any order of acquittal passed by the High Court in the exercise of its original criminal jurisdiction, the learned counsel for the complainant submitted that the appeal any be treated as a Revision Petition under section 439 of the Criminal Procedure Code. **Learned counsel for the complainant is laboring under misconception of law in asking us to treat his appeal as a petition under section 439 (ibid), as the powers under the said section are not available to the High Court to revise an order of the Court itself passed by a Single Judge**."
>
> (emphasis provided)

25. A similar issue came up before the superior Court across the border in the Indian jurisdiction in the case of

Superintendent and Remembrancer of Legal Affairs, West Bengal v. Harold Joseph Osmond (AIR 1949 Calcutta 301), wherein an appeal was filed seeking enhancement of the sentence awarded to an accused by the trial Court. The Court held that:

> "It is somewhat curious that the Legislature, in introducing S. 411A into the Code of Criminal Procedure and providing for appeal from Sessions trials held by the High Court, should have omitted to make some provision corresponding to S. 439 of the Code under which either the Crown or a private person in certain circumstances may move the High Court in revision against an inadequate sentence. The fact, however, remains that no such provision has been made with respect to convictions at Sessions trials held by a High Court and, as the Code now stands, **there cannot possible be any appeal or application for revision for enhancement of a sentence passed at such a trial, however inadequate such sentence may be**."
>
> (emphasis provided)

26. The *dicta* laid down in the above case was considered by the Supreme Court of India in **U. J. S. Chopra v. State of Bombay (1955 Cr.L.J 1410)**, wherein S. R. Das J., though as an *obiter*, observed that:

> "Under sub-section (1) there can be a revision only of the judgment or order of Criminal Courts inferior to the High Court and it does not sanction any revision of the judgment or order of the High Court itself."

27. Later, in the case of **State v. Haridas Mundra and Anr. (AIR 1970 Cal. 485)**, the oscillating views of the different superior Courts of the Indian jurisdiction were discussed, and finally, the conclusion reached was against rendering revisional authority to the Division Bench of the High Court for enhancement of sentence passed by a Single Bench of the same High Court in terms that:

> "If the legislature intended that the High Court in the exercise of original criminal jurisdiction should be deemed to be a criminal court inferior to the High Court surely provision could have been made for it by adding an Explanation in that behalf. It is unthinkable that the legislature which introduced an express provision that Magistrates are inferior to the Sessions Judge for the purpose of Sub-section (1) of Section

> 435, in spite of unanimity of judicial opinion that they were, should remain silent over the question of inferiority of the High Court in Sessions to the High Court for the purpose of that Sub-section when there was a consensus of opinion that one was not inferior to the other. **The conclusion is inescapable that the legislature entertained no such intention ... On a careful consideration of principles and precedents, we are firmly of opinion that the High Court has no jurisdiction in revision to interfere with any judgment, order or sentence passed by a Judge of the High Court in the exercise of its original criminal jurisdiction."**
>
> (emphasis provided)

28. In view of the above judicial demarcation of the jurisdictional contours of a Division Bench of the High Court in its Appellate, Revisional and Inherent authorities under the Cr.P.C, it can safely be stated that the Division Bench of the High Court lacked the lawful authority to entertain the prayer of the State seeking an enhancement of sentence passed by a Single Bench of the same High Court exercising its original criminal jurisdiction.

29. Viewed from another angle, if one were to consider and treat the appeal filed by the State as a constitutional petition exercising its jurisdiction under Article 199 of the Constitution, it would still be of no legal avail to the State, as the High Court, while exercising its jurisdiction under Article 199 of the Constitution is expressly barred under clause 5 (*supra*) from issuing any writ to or against the High Court. The said exclusion provision reads as under:

> "**199(5)** In this Article, unless the context otherwise requires,
> **"person" includes** any body politic or corporate, any authority of or under the control of the Federal Government or of a Provincial Government, and **any Court** or tribunal, **other than** the Supreme Court, **a High Court** or a Court or tribunal established under a law relating to the Armed Forces of Pakistan; and"
>
> (emphasis provided)

30. In view of the above, we may conclude that the Division Bench of the High Court lacked jurisdiction to enhance the sentence of the convicts under any provision of law. Thus, the enhancement of sentence awarded to the accused-convicts for the offence under Section 328-A PPC by the Division Bench of the High Court in its in its impugned judgment was without lawful jurisdiction and of no legal effect.

31. Before we proceed further, it may be noted that the State did have a remedy to seek enhancement of the sentence passed by the Single Bench of the High Court by filing a petition of leave before this Court under clause 3 of Article 185 of the Constitution. However, the State did not avail the same, and instead filed an appeal before the Division Bench of the High Court.

32. Now, whether this Court, at this stage, can consider the enhancement of sentences of the present accused-convicts is yet another question of law. In this regard, we have noted that this Court in some earlier cases, had enhanced sentences of convicts by invoking its jurisdiction to serve “complete justice” under Article 187(1) of the Constitution. However, while hearing the present appeals, accused-convicts were not served with the essential notices as to why their sentences not be enhanced. This aspect of the case will be dealt with in the later part of this judgement, and that too, after evaluating the merits of the prosecution’s case.

Sufficiency of Evidence to Saddle Conviction Upon Raja Khurram Ali Khan and Mst. Maheen Zafar

33. It is important to take into account the fact that the subject matter in the present appeals essentially relates to: the offences of causing “hurt”, “cruelty to a child”, and “obstruction of

justice" where the victim of the said offences was a ten-year-old girl; while Raja Khurram Ali Khan, the then Additional District & Sessions Judge, Islamabad, and his wife Mst. Maheen Zafar (**accused-convicts**), charged for the crimes were persons of authority and social position.

34. As far as the charge of "hurt" is concerned, other than the contention for sufficiency of prosecution's evidence to prove the allegation, there was no serious contest by the accused-convicts regarding the applicability or the ingredients of the offences under sections 337 A(i) and 337(F)(i) of the PPC.

35. The contest that remained central to the dispute between the parties was the charge of "cruelty to a child", a penal provision provided under Section 328-A of the PPC, (introduced *vide* Criminal Law (second Amendment) Act, 2016 [Act No. X of 2016] dated 22.03.2016), which reads:

> "**328-A. Cruelty to a child**
>
> Whoever **willfully assaults**, **ill-treats, neglects, abandons** or does an act of omission or commission, **that results in or have 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 shall not be less than twenty-five thousand rupees and may extend up to fifty thousand rupees, or with both."
>
> (emphasis provided)

36. A close review of the above provision provides that to constitute the offence of "cruelty to a child", the legislature intended the prosecution to prove the following three essential ingredients: firstly, that the act of commission, including assault and/or ill-treatment or omission, including neglect and/or abandonment of the offender was wilful; secondly, the said act of

commission or omission resulted in actual physical or had potential of harm or injury to the child; and finally, that the result of the said act of commission or omission of the offender must have caused physical or psychological injury to the child. In this regard, reference to the British law would not only be relevant, but also most appropriate, as the offence of "cruelty to a child" envisaged in section 328-A PPC has a strong resonance to the British penal laws on child cruelty, where we find its roots in the Poor Law Amendment Act, 1868. Under the said law, parents could be prosecuted for wilfully neglecting a child. This law was further advanced by The Prevention of Cruelty to, and Protection of, Children Act, 1889, under which the punishment for ill-treatment and neglect of children was enhanced. Finally, The Children and Young Persons Act, 1933 (which was lastly amended by the Serious Crimes Act, 2015) has categorically spelled out the offence referred to as child cruelty in section 1(1), which reads:

> "If any person who has attained the age of sixteen years and has responsibility for any child or young person under that age, wilfully assaults, ill-treats (whether physically or otherwise)], neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated (whether physically or otherwise), neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (whether the suffering or injury is of a physical or a psychological nature), that person shall be guilty of an offence ..."

37. The words "willfully", "assaults", "ill-treatment", "abandon", or "neglect" stated in section 328-A PPC are the key elements in determining the criminal culpability of the offender. However, the said terms have not been defined therein, and therefore, the ordinary grammatical meaning thereof would be relevant for their interpretation. Whereas, the acts of commission ("assaults" or "ill-treatment"), and of omission ("abandon" or

"neglect") are obviously distinct, and would also require different criteria for its commission. This matter came up in **R. v. Lowe, [1973] 1 Q.B. 702,** wherein Phillimore L.J., speaking for the Court observed:

> "We think that there is a clear distinction between an act of omission and an act of commission likely to cause harm. Whatever may be the position with regard to the latter it does not follow that the same is true of the former. In other words, if I strike a child in a manner likely to cause harm it is right that, if the child dies, I may be charged with manslaughter. If, however, I omit to do something with the result that it suffers injury to health which results in its death, we think that a charge of manslaughter should not be an inevitable consequence, even if the omission is deliberate."

38. In the later case of **R. v. Sheppard [1981] AC 394**, wherein the parents of a sixteen-month-old child were convicted under Section 1 of the Children and Young Persons Act 1933, for wilfully neglecting their child in a manner likely to cause unnecessary suffering or injury to health. Lord Diplock, dealing with wilful neglect of a child, said:

> "... on a charge of wilful neglect of a child under section 1 of the Children and Young Persons Act 1933 by failing to provide adequate medical aid, ...the jury must be satisfied (1) that the child did in fact need medical aid at the time at which is charged with failing to provide it (the actus reus) and (2) either that the parent was aware at the time that the child's health might be at risk if it were not provided with medical aid, or that the parent's awareness of this fact was due to his not caring whether his child's health were at risk or not (the mens rea)."

39. In the more recent case of **R. v. A.D.H., 2013 SCC 28**, the Supreme Court of Canada, while interpreting similar provisions of the Canadian Criminal Code, observed:

> "There are three main points which emerge from a careful study of the text and scheme of these provisions. First, the words "abandon", "expose" and "wilful" suggest a subjective fault requirement. Second, the use of the word "likely" in this context does not suggest an objective fault requirement. Third, what is absent from the text of s. 218 of the *Code and* the broader scheme in which it appears strongly suggest that subjective fault is require ... This approach to the fault element in the criminal negligence offences does

> not in my view suggest that a similar, objective fault approach should be taken to the child abandonment provision that concerns us in this case. Unlike the criminal negligence offences, the offence is not described as being concerned with conduct that is governed by a community standard rather than an individual appreciation of the circumstances..."

Mens rea of the said two categories of *actus rea* would also be distinct. The former (acts of commission), which includes "assault" or "ill-treatment", would require to be adjudged on the touchstone of objective societal standards, and in doing so, the profile or status of the offender, and the knowledge of the consequence of the said act of the offender would not be crucial in proving his *mens rea*. While for the latter (acts of omission), which includes "neglect" or "abandonment", would require a subjective fault criterion, wherein the previous knowledge of the offender, regarding the consequences of his "act of omission" would not only matter, but be crucial to determine his *mens rea*, and thus, the same would differ from person to person, keeping in view the profile or status of the offender.

40. The other major contention between the parties related to the charge of committing the offence punishable under section 201 PPC. The prosecution insisted that the conduct of Raja Khurram Ali Khan constituted the offence provided under section 201 PPC, while Raja Khurram Ali Khan insisted that, at best, the allegations against him would fall within the purview of section 193 PPC, and not section 201 PPC. We note that there is a distinct difference between simply making a false evidence (section 191 PPC), or even fabricating false evidence (section 192 PPC), and obstructing justice by causing disappearance of evidence or giving false information to screen accused (section 201). Section 201 of the PPC reads:

> "**201. Causing disappearance of evidence of offence, or giving false information to screen offender**
>
> Whoever, knowing or having reason to believe that an offence has been committed, causes any evidence of the commission of that offence to disappear, with the intention of screening the offender from legal punishment, or with that intention gives any information respecting the offence which he knows or believes to be false."

41. A careful reading of the above provision provides that for constituting the offence under section 201 PPC, three essential ingredients require to be fulfilled: firstly, the accused must know or should have reason to believe that an offence has taken place; secondly, the accused by his action or in-action prevents evidence of commission of the offence to be concealed; and thirdly, the action or inaction of the accused must be with the intention to prevent the actual perpetrator of the offence from being punished or, with the same intention of saving the actual perpetrator from punishment, renders information regarding the offence knowing or believing the same to be false.

42. In view of the above, we note that the offences of rendering false information (section 191) or fabricating false evidence (section 192) are in fact a part of, or put differently, are ingredients of the offence, where the offender screens the actual perpetrator, as provided under section 201 of the PPC. The latter being an offence having much wider scope than that of the former.

Prosecution's Evidence, Competency, Evidential Value and its Corroboration

43. Now, let us move on to assess whether the prosecution had produced sufficient evidence to rightly convict the accused-convicts. In order to effectively address this issue, we would require to focus on the following two issues; firstly, the competence

and evidentiary value of the testimony of a child witness; and secondly, whether the testimony of Tayyaba Bibi (PW-1) was sufficiently corroborated and supported by other evidence produced by the prosecution to rightly convict Raja Khurram Ali Khan and Mst. Maheen Zafar for the crimes they were charged for by the trial court.

Competence and Evidential Value of a Child Witness

44. A child, irrespective of his age, is competent to be a witness, subject to his fulfilling the conditions precedent provided under Articles 3 and 17 of the Qanun-e-Shahadat Order, 1984 (**Order**). The said provisions read:

> "**3. Who may testify**
>
> All persons shall be competent to testify unless the Court considers that they are prevented from **understanding the questions** put to them, or from **giving rational answers** to those questions, by tender years, extreme old age, disease, whether of body or mind, or any other use of the same kind:
>
> Provided that a person shall not be competent to testify if he has been convicted by a Court for perjury or giving false evidence:
>
> Provided further that the provisions of the first proviso shall not apply to a person about whom the Court is satisfied that he has repented thereafter and mended his ways:
>
> Provided further that the Court shall determine the competence of a witness in accordance with the qualification prescribed by the Injunctions of Islam as laid down in the Holy Quran and Sunnah for a witness, and, where such witness is not forthcoming the Court may take the evidence of a witness who may be available.
>
> Explanation. A lunatic is not incompetent to testify, unless he is prevented by his lunacy from understanding the questions put to him and giving rational answers to them."

> "**17. Competence and number of witnesses**
>
> (1) The competence of a person to testify and the number of witness required in any case shall be determined in accordance with the Injunctions of Islam as laid down in the Holy Quran and Sunnah.
>
> (2) Unless otherwise provided in any law relating to the Enforcement of Hudood or any other special law:
>
> (a) in matters pertaining to financial or future obligations, if reduced to writing, the instrument shall be attested by two men, or one man and two women, so that one may remind the other, if necessary, and evidence shall be led accordingly; and
>
> (b) in all other matters, the Court may accept, or act on, the testimony of one man or one woman, or such other

> evidence as the circumstances of the case may warrant."
>
> (emphasis provided)

45. A close reading of the above provisions reveals that the essential conditions for a child, or for that matter any person, to appear and testify as a witness, is that the child or the person must have the capacity and intelligence of understanding the questions put to him, and also be able to rationally respond thereto. This threshold has been referred to as passing the "rationality test", and the practice that has developed with time in our jurisdiction is for the same to be carried out by the presiding Judge prior to recording the evidence of the child witness. Moreover, we have noted that in our jurisdiction, the judicial acceptance of a child witness, as a safe piece of evidence, has been rather hesitant and cautious. This Court in the case of **The State through Advocate General, Sindh, Karachi v. Farman Hussain and others (PLD 1995 SC 1)**, by a majority decision, while dilating upon the competence and evidential value of a child witness, opined that:

> "Evidence of child witness is a delicate matter and normally it is not safe to rely upon it unless corroborated as rule of prudence. Great care is to be taken that in the evidence of child element of coaching is not involved ... In any case the rule of prudence requires that the testimony of child witness should not be relied upon unless it is corroborated by some evidence on the record."

46. In other common law jurisdictions, the Courts are more inter-active with the child witnesses during the recording of their entire evidence. Justice McLachlin, speaking for the Canadian Supreme Court in the case of **R. v. Marquard [1993] 4 S.C.R. 223**, has explained with precision the competency of the child

witness, by stipulating the following criteria for testing the same in terms:

> "... (1) the capacity to observe (including interpretation); (2) the capacity to recollect; and (3) the capacity to communicate.... The judge must satisfy him or herself that the witness possesses these capacities. Is the witness capable of observing what was happening? Is he or she capable of remembering what he or she observes? Can he or she communicate what he or she remembers? *The goal is not to ensure that the evidence is credible, but only to assure that it meets the minimum threshold of being receivable*.... Generally speaking, the best gauge of capacity is the witness's performance at the time of trial. .....[T]he test outlines the basic abilities that individuals need to possess if they are to testify. <u>The threshold is not a high one.</u> What is required is the basic ability to perceive, remember and communicate. [once] This established, deficiencies of perception, recollection of the events at issue may be dealt with as matters going to the weight of the evidence."

47. Reverting back to our jurisdiction, we note that, unfortunately, the standard of appreciating the testimony of a child witness, who is the victim of a crime, and the mode and manner of recording his evidence, warrants much needed change and innovation, which has been witnessed in other jurisdictions. And more particularly, the Courts are to appreciate the crucial distinction between a child witness, who is a witness to the crime, and one who is himself a victim thereof.

48. In this regard, we note that the "rationality test", which is applied by the presiding Judge at the commencement of the examination-in-chief of a child witness, should be made applicable throughout the testimony of the child witness. If at any stage, the presiding Judge observes any hindrance or reluctance in the narration of events, the evidence should be stopped, and remedial measures should be taken to ease the stress and anxiety the child witness might be under, and if required, the case be adjourned to another date. And further, in case the child witness is

still unable to narrate his testimony with ease, then the presiding Judge ought to record his findings on the demeanour of the child witness, conclude his evidence, and relieve him as a witness.

49. In other jurisdictions, we note that great care is taken to ensure that such child witnesses are able to depose their testimony at ease, by taking measures in the court room to lessen their stress and anxiety of court-room appearances in such a tender age. Such measures include child witness aid in testifying, screens in court rooms, closed courtrooms and counsellor aid before and after recording of evidence, which needs to be adopted and practiced in our jurisdiction in cases wherein a child victim is to appear as a witness. In this regard, we expect the respective governments to take appropriate legislative and administrative measures for ensuring the much needed protection and facilitation of child witnesses.

50. As for the presiding trial court judges, they should take appropriate steps during the court proceedings to ensure that the child witnesses depose their testimony with ease, and that too, in a stress-free environment. In cases where the child witness is unable to depose in the court room, and his evidence is “necessary” to find the truth, and it has a ring of “circumstantial trustworthiness”, then courts, as practiced in other common law jurisdictions, may consider in appropriate cases, allowing out-of-court evidence, as an exception to the “hearsay rule”. Wigmore, a notable American scholar on the law of evidence, in his book *Wigmore on Evidence*, Volume 5 (Chadbourn rev. 1974), identified two considerations, which may serve as an exception to the

"hearsay rule": "a circumstantial probability of trustworthiness, and a necessity for the evidence".

51. In the Canadian jurisdiction, the Supreme Court in the case of **R. v. Khan [1990] 2 S.C.R. 531**, where the appellant, who was a medical doctor, was charged with sexually assaulting a three and a half year-old girl, allowed an out-of-court statement of a child witness, as an exception to the "hearsay rule", endorsing with approval, the need for "truth", as expressed by Wigmore. The extracts of the deliberations on the issue are recorded as under:

> "The hearsay rule has traditionally been regarded as an absolute rule, subject to various categories of exceptions, such as admissions, dying declarations, declarations against interest and spontaneous declarations. While this approach has provided a degree of certainty to the law on hearsay, it has frequently proved unduly inflexible in dealing with new situations and new needs in the law. This has resulted in courts in recent years on occasion adopting a more flexible approach, rooted in the principle and the policy underlying the hearsay rule rather than the strictures of traditional exceptions.
>
> "Because of the frequent difficulty of obtaining other evidence and because of the lack of reason to doubt many statements children make on sexual abuse to others, courts in the United States have moved toward relaxing the requirements of admissibility for such statements. This has been done in the context of the doctrine of spontaneous declarations. In McCormick on Evidence (3rd ed. 1984), at p. 859, n. 49, the authors refer to this development as the "tender years" exception to the general rule, and describe it as follows:
>
> > A tendency is apparent in cases of sex offences against children of tender years to be less strict with regard to permissible time lapse and to the fact that the statement was in response to inquiry."
>
> "Similarly, Wharton's Criminal Evidence (13th ed. 1972), at p. 84, states that while "[t]he res gestae rule in sex crimes is the same as in other criminal actions", the rule "should be applied more liberally in the case of children".
>
> "These developments underline the need for increased flexibility in the interpretation of the hearsay rule to permit the admission in evidence of statements made by children to others about sexual abuse. In so far as they are tied to the exception to the hearsay rule of spontaneous declarations, however, they suffer from certain defects. There is no requirement that resort to the hearsay evidence be necessary. Even where the evidence of the child might easily be obtained without undue trauma, the Crown would be able to use hearsay evidence...

> "The first question should be whether reception of the hearsay statement is necessary. Necessity for these purposes must be interpreted as "reasonably necessary"... The next question should be whether the evidence is reliable. Many considerations such as timing, demeanour, the personality of the child, the intelligence and understanding of the child, and the absence of any reason to expect fabrication in the statement may be relevant on the issue of reliability.
>
> "I conclude that hearsay evidence of a child's statement on crimes committed against the child should be received, provided that the guarantees of necessity and reliability are met, subject to such safeguards as the judge may consider necessary and subject always to considerations affecting the weight that should be accorded to such evidence. This does not make out-of-court statements by children generally admissible; in particular the requirement of necessity will probably mean that in most cases children will still be called to give viva voce evidence."

52. Now, reverting back to the facts of the present case, it is noted with concern that Tayyaba Bibi, the victim of the crime, was not treated with due care and caution during the investigation, and the trial proceeding. Tayyaba Bibi, who at the time of being taken into custody by Khalid Mehmood Awan, SHO (PW-16) from the house of convict Raja Khurram Ali Khan, was admittedly injured and required medical attention, but she was instead subjected to the process of questioning by the SHO, which he even video recorded (Ex PW). We further note that after her medical treatment at PIMS, Tayyaba Bibi, instead of being taken to a child care centre, was subjected to another bout of questioning, and this time by Ms. Nisha Ishtiaq, Assistant Commissioner, Islamabad (PW-7). In these circumstances, it would be fair to note that Tayyaba Bibi, during the period in which she rendered her statements, was not completely free from pressure and influence of the police, local administration and the accused. In this regard, we have noted with appreciation that the trial Court applied the "rationality test", prior to commencing her examination-in-chief, by recording its finding

that Tayyaba Bibi was intelligent to understand questions put to her, and had the capacity to correctly respond thereto. Thus, her testimony during the examination-in-chief can be considered relatively free from adverse negative influences. No doubt, during her lengthy cross-examination, she wavered from the initial stance she had taken during her examination-in-chief, when she was confronted with her previous video recorded statement obtained by Khalid Mehmood (PW-16). However, in view of the findings recorded by the trial Judge, regarding her stressed un-natural demeanour during her cross-examination, the said wavering stance cannot be given the same credence, as one may give to any adult witness of a crime. In fact, her cross-examination should have been stopped the moment the trial Judge noticed her reception of questions and responses thereto lacked intelligent rationality, which in fact is an essential attribute of a competent witness under Article 3 of the Order. The trial judge then surely erred by allowing her cross-examination to continue in her said disposition. It appears that the trial Judge wrongly treated Tayyaba Bibi to be a child witness of a crime, rather than as a child witness who was herself the victim of the crime. This lack of distinction on the part of the trial Judge led to his faulty conclusion of completely discarding the evidentiary value of her testimony.

53. The law on the burden of proof, as provided in Article 117 of the Order, mandates the prosecution to prove, and that too, beyond any doubt, the guilt of the accused for the commission of the crime for which he is charged. The said provision provides:

> "**117. Burden of proof**

> Whoever desires any Court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts, must prove that those facts exist.
>
> When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.
>
> **Illustrations**
>
> A desire a Court to give judgment that B shall be punished for a crime which A says B has committed.
>
> A must prove that B has committed the crime..."

54. On a conceptual plain, Article 117 of the Order enshrines the foundational principle of our criminal justice system, whereby the accused is presumed to be innocent unless proved otherwise. Accordingly, the burden is placed on the prosecution to prove beyond doubt the guilt of the accused, generally referred to as the "legal" burden of proof, which can never be shifted to the accused, unless the legislature by express terms commands otherwise. It is only, when the prosecution is able to discharge the "legal" burden of proof by establishing the elements of the offence, which are sufficient to bring home the guilt of the accused then, the "evidential" burden is shifted upon the accused, *inter alia*, under Article 122 of the Order, to produce evidence of facts, which are especially in his exclusive knowledge, and practically impossible for the prosecution to prove, to avoid conviction. Article 122 reads as under:

> "**122. Burden of proving fact especially within knowledge**
> When any fact is especially within the knowledge of any person the burden of proving that fact is upon him..."

55. It has to be kept in mind that Article 122 of the Order comes into play only when the prosecution has proved the guilt of the accused by producing sufficient evidence, except the facts

referred in Article 122, leading to the inescapable conclusion that the offence was committed by the accused. Then, the "evidential" burden is on the accused not to prove his innocence, but only to produce evidence enough to create doubts in the prosecution's case.

56. It may be noted that this issue was also dilated upon by this Court in the case of **Rehmat alias Rahman alias Waryam alias Badshah v. The State (PLD 1977 SC 515)**, where, while deliberating upon Section 106 of the Evidence Act, which is *para materia* with Article 122 of the Order, it held that:

> "As observed by M. Munir in his Law of Evidence (page 1041 Pakistan Edition) this section is designed to meet certain exceptional cases in which it would be impossible or at any rate disproportionately difficult for the prosecution to establish facts which are "especially" within the knowledge of the accused and which he could prove without difficulty or inconvenience ... Needless to emphasise that in spite of section 106 of the Evidence Act in criminal case the onus rests on the prosecution to prove the guilt of the accused beyond reasonable doubt and this section cannot be construed to mean that the onus at any stage shifts on to the accused to prove his innocence or make up for the inability and failure of the prosecution to produce evidence to establish the guilt of the accused. Nor does it relieve the prosecution of the burden to bring the guilt home to the accused. It is only after the prosecution has on the evidence adduced by it, succeeded in raising reasonable inference of the guilt of the accused, unless the same is rebutted, that this section wherever applicable, comes into play and the accused may negative the inference by proof of some facts within his special knowledge. If, however, the prosecution fails to prove the essential ingredients of the offence, no duty is cast on the accused to prove his innocence."

57. The *ratio decidendi* of the above decision was further developed by this Court in **Saeed Ahmed v. The State (2015 SCMR 710)**, wherein, after considering precedents of our and of the Indian jurisdictions on the issue, it opined that:

> "14. 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. Article 122 of the Qanun-e-Shahadat Order too stipulates that if a particular fact is especially within the knowledge of any person the burden of proving that fact is upon him. In the present case the prosecution had established its case against the appellant; two eye-witnesses had deposed against him and the medical evidence confirmed strangulation of the deceased."

58. In the Indian jurisdiction, the judicial consensus has maintained the general principle of the burden being on the prosecution to prove beyond doubt the guilt of the accused. As far as the applicability of section 106 of the Evidence Act is concerned, it was very elaborately explained in the case of **Shambu Nath Mehra v. The State of Ajmer (AIR 1956 SC 404)** as under:

> "14. This lays down the general rule that in a criminal case the burden of proof is on the prosecution and section 106 is certainly not intended to relieve it of that duty. On the contrary, it is designed to meet certain exceptional cases in which it would be impossible, or at any rate disproportionately difficult, for the prosecution to establish facts which are " especially " within the knowledge of the accused and which he could prove without difficulty or inconvenience ... If the section were to be interpreted otherwise, it would lead to the very startling conclusion that in a murder case the burden lies on the accused to prove that he did not commit the murder because who could know better than he whether he did or did not. It is evident that that cannot be the intention and the Privy Council has twice refused to construe this section, as reproduced in certain other Acts outside India, to mean that the burden lies on an accused person to show that he did not commit the crime for which he is tried. These cases are Attygalle v. Emperor A.I.R. 1936 P.C. 169 and Seneviratne v. R. [1936] 3 All E.R. 36, 49 ... The section cannot be used to undermine the well-established rule of law that, save in a very exceptional class of case, the burden is on the prosecution and never shifts."

59. The Indian Supreme Court in the more recent case of **Reena Hazarika v. State of Assam (AIR 2018 SC 5361)**, while commenting

upon the extent of what was to be proved by the prosecution in cases built essentially on circumstantial evidence, opined that:

> "8. The essentials of circumstantial evidence stand well established by precedents and we do not consider it necessary to reiterate the same and burden the order unnecessarily. Suffice it to observe that in a case of circumstantial evidence the prosecution is required to establish the continuity in the links of the chain of circumstances, so as to lead to the only and inescapable conclusion of the Accused being the assailant, inconsistent or incompatible with the possibility of any other hypothesis compatible with the innocence of the accused."

60. In the United Kingdom, the *ratio* laid down in **Woolmington v. DPP [1935] AC 462** still holds the field. The accused therein was charged with the murder of his wife by shooting her. His defence was that the gun had discharged accidentally. The trial judge directed the jury that once the prosecution proved that the deceased was killed by the accused, it was for the accused to show that the killing was not murder. This was held by the House of Lords to be misdirection. Viscount Sankey LC expressed the rule in these striking words:

> "Throughout the web of the English Criminal Law one golden thread is always to be seen, that it is the duty of the prosecution to prove the prisoner's guilt subject to what I have already said as to the defence of insanity and subject also to any statutory exception. If, at the end of and on the whole of the case, there is a reasonable doubt, created by the evidence given by either the prosecution or the prisoner, as to whether the prisoner killed the deceased with a malicious intention, the prosecution has not made out the case and the prisoner is entitled to an acquittal. No matter what the charge or where the trial, the principle that the prosecution must prove the guilt of the prisoner is part of the common law of England and no attempt to whittle it down can be entertained."

61. As far as what proof would suffice to discharge "legal" and "evidential" burdens, the Courts in the United Kingdom have very precisely provided the guiding principles, which may be safely applied to cases in our jurisdiction. For the former, the prosecution

has to discharge the burden, as Lord Devlin in **Don Jayasena (Rajapakse Pathurange) v. The Queen [1970] A.C. 618** stated that, "such evidence as if believed, and if left uncontradicted and unexplained, could be accepted by the jury as proof". While for the latter, Lord Bingham confirmed in **Sheldrake v DPP [2004] UKHL 43; [2005] 1 A.C. 264** that "evidential burden is not a burden of proof. It is a burden of raising, on the evidence in the case, an issue as to the matter in question fit for consideration by the tribunal of fact. If an issue is properly raised, it is for the prosecutor to prove, beyond reasonable doubt, that that ground for exoneration does not avail the defendant."

62. In light of what the prosecution produced in evidence during the trial of the present case, there was direct oral testimony of the victim, Tayyaba Bibi (PW-1), who in her examination-in-chief, clearly points with clarity, how and when the injuries on her person were inflicted by Mst. Maheen Zafar. She narrated her statement in these terms:

> "I worked at Maheen Baji's house, and I was tasked with managing the kitchen. I worked at her house for two to three months. She assaulted me, burnt my hand and back and hit me with a kitchen utensil. I was hit in the eye with her hand, and I sustained injuries on my back. Maheen Baji and Uncle lived in the house. The house I worked at was situated in I-8. Nadra Aunty dropped me at this house from where I worked before, and left me here. I sustained the burn injuries from the stove; she lit the stove and burnt my hands, when I sustained the injuries I went upstairs in the house. Thereafter, she hid me. I met Maria Baji in this house, she fed me and gave me a blanket because I was cold. Bhai dropped me at her house and the police picked me up from there. I first gave my statement to the police and I then gave it to Nisha Baji. The police arranged for my injuries to be treated and then Nisha Baji and Arsala Baji had my injuries treated."

63. The above direct evidence of the victim was supported by the medical evidence. Firstly, Dr. Muhammad Naseer, Ex-

Principal, CMT and Head of Department, PIMS, Islamabad (PW-5), who medically examined her at PIMS at 11.16 a.m. on 29.12.2016, had recorded four injuries in the Injury Report (ExP-5/A): one burn injury on her hand (section 337F(i)), and three on her face (section 337 A(i)) to have been sustained by her within 24 hours prior to her medical examination by him, and he stood by his said finding during his cross-examination. Secondly, Dr. Tariq Iqbal (PW-6), the chairperson of the Medical Board, and co-signatory of its finding recorded in the Report (Ex. PW-6/A, Ex. PW-6/B, and Ex. PW-6/C), and its clarifications (Ex. PW-6/D, Ex. PW-6/E, Ex. PW-6/F and, Ex. PW-6/F-1) produced the same during the trial. The said witness owned the correctness of the findings recorded in the said reports, and that the same were prepared in his supervision. The gist of the Report and its clarification was that the victim had a total of twenty-two injuries on her person, of which, thirteen wounds were stated to have been inflicted beyond the three months prior to her examination carried out by the Board on 09.01.2017; and eleven wounds were stated to have been sustained within the said three month period, four of the said injuries correspond with those recorded by Dr. Naseer (PW-5) in his Injury Report (ExP-5/A). And finally, both the medical officers confirmed that the injuries on the victim were not self-inflicted. Thus, the medical evidence adduced by the prosecution supported the direct oral testimony of the victim to the effect that she was “assaulted” and “ill-treated”, having sustained eleven injuries, within three months of her medical examination, while she was in employment and direct care of the accused-convicts, and that the injuries were not self-inflicted.

64. To further support the oral testimony of the victim, we note four independent and natural witnesses, who appeared to testify with particulars, the “abandonment”/“neglect” and “ill-treatment” of the victim Tayyaba Bibi by the present convicts on 26.12.2016 and 28.12.2016, respectively. We have Mariya Hayat (PW-2), her mother, Naila Khizar (PW-3), who were both next door neighbours, sharing a boundary wall with the accused-convicts during the crucial period, who testified to have witnessed that on 26.12.2016 the victim Tayyaba Bibi was “abandoned” and “neglected” by the accused-convicts on a cold day without food and warm clothes, and also on 28.12.2016 to have been ill-treated having injuries on her person. Their testimony is further supported by their cook, Guldaraz Khan (PW-12), another independent and natural witness who testified to have seen the victim Tayyaba Bibi in an injured condition on 28.12.2016. Finally, we have Humaira Haroon (PW-4), another neighbour of the convict, who also stated to have seen the victim Tayyaba Bibi with injuries on her person on 28.12.2016. She further admitted to have taken pictures of the victim Tayyaba Bibi on 28.12.2016. This fact is corroborated by the Forensic Analysis Report of the National Response Centre for Cyber Crime Forensic Laboratory, Islamabad, wherein the three pictures of Tayyaba Bibi, taken from Humaira Haroon’s cellular mobile phones were confirmed to have been taken on 28.12.2016 at 01.39 p.m. (Ex. PW-11/1). To further cement the prosecution’s case, the utensils, stated by the victim Tayyaba Bibi to have been used in the crime, were also recovered during investigation from the place of the crime, which was the residence of the accused-convicts (Ex. PW-8/A).

65. On considering the evidence adduced before the trial Court, we are of the considered view that the prosecution was able to discharge its “legal” burden convincingly, leading us to the irresistible conclusion that the “neglect”, “abandonment”, “assault” and “ill-treatment” of Tayyaba Bibi, were at the hands of the accused-convicts Mst. Maheen Zafar, and her husband Raja Khurram Ali Khan. We are also mindful that once the prosecution discharged this “legal” burden, then the same resulted in shifting the “evidential” burden on the accused-convicts, under Article 122 of the Order to produce evidence, not to prove their innocence, but sufficient in support of alleged accidental fall of the victim, which they claimed to be the reason behind her injuries. The failure of the accused-convicts to produce any evidence to discharge their “evidential” burden was obviously a great opportunity missed by them to produce evidence to create dents in the prosecution’s case. This omission on the part of the accused-convicts to discharge the “evidential” burden under Article 122 of the Order, however, should not be considered as the determining factor leading to their conviction, which was in fact already sealed on the prosecution successfully discharging its “legal” burden.

Criminal Culpability of Mst. Maheen Zafar

66. The prosecution produced direct oral testimony of the victim Tayyaba Bibi, duly supplemented by: firstly, the medical evidence; secondly, the oral evidence of the four independent natural witnesses regarding the time and place of seeing the victim “neglected” and “abandoned” without food and warm clothing on 26.12.2016; and in an “assaulted”/”ill-treated”/injured and “neglected”/medically unattended condition on 28.12.2016;

thirdly, the forensic expert report regarding the victim's photographs corroborated the victim's presence in an injured condition at the same time and place stated in the oral testimony of all four witnesses; and fourthly, the recovery of utensils stated to have been used to inflict injuries upon the victim from the place of occurrence.

67. The above stated pieces of prosecution evidence, cumulatively proved beyond doubt the guilt of Mst. Maheen Zafar to have inflicted the four injuries (as per Dr. Naseer Injury Report Ex. PW-5) on Tayyaba Bibi, and thereby to have committed the offences punishable under sections 337 A(i) and 337 F(i) of the PPC.

68. The said evidence also proved beyond doubt the guilt of Mst. Maheen Zafar to have "wilfully" "assaulted"/"ill-treated" by inflicting four injuries on the victim's person [as per Dr Naseer (PW-5) and Dr. Tariq Iqbal (PW-6, Ex. PW-6)], and on 26.12.2016 "wilfully" "neglected"/"abandoned" her in the locked house, without food and warm clothing in the dead of winter, and from 28.12.2016 till 29.12.2016, when her custody was taken by the police, she "wilfully" "neglected" to provide Tayyaba Bibi with the much needed medical attention to her injuries, while the victim was in her direct care, and thereby also committed the offence punishable under section 328-A of the PPC.

69. Even otherwise, once the prosecution had discharged its "legal" burden to prove the said offences against her, the burden was then shifted on her to discharge her "evidential" burden, not to prove her innocence but to produce sufficient evidence to at least create doubts in the prosecution's case. The failure to do so was thus a missed opportunity, for which she was

at fault, and none other. As mentioned earlier in the judgment, this omission on the part of the Mst. Maheen Zafer to discharge the "evidential" burden envisaged in Article 122 of the Order, should not be considered as the sole reason for her conviction, which was in fact already established, when the prosecution successfully discharged its "legal" burden.

Criminal Culpability of Raja Khurram Ali Khan

70. Interestingly, Tayyaba Bibi, in her examination-in-chief, did not allege any wrong doing on the part of Raja Khurram Ali Khan. However, his conduct in relation to the "assault", "ill-treatment", "neglect", and "abandonment" of Tayyaba Bibi, while she was admittedly under his direct care in his house, leaves no doubt of his guilt in committing "cruelty of a child" under section 328-A of the PPC, and "screening the offender" under section 201 of the PPC.

71. Let us first consider the offence of "cruelty of a child", as envisaged under section 328-A of the PPC. As discussed earlier, the said offence encompasses even an act of omission, which does not necessarily result in physical harm, but may cause, or is likely to cause, psychological harm to a child. Considering the scope and extent of the offence, the very fact that Raja Khurram Ali Khan had left the child of ten years on 26.12.2016 outside his locked house without food and warm clothing till late at night during winter would suffice to prove the element of "abandon" and "neglect", not to mention "ill-treatment", constituting the said crime under section 328-A. Furthermore, he showcased "neglect" by not providing medical treatment to the injured Tayyaba Bibi, while she was under his care, which clearly reflects both recklessness as well

as his offensive intent with regards to her well-being. When we further consider the complaint registered on his behest with the police (*Mad* 24 of 28.12.2016 Ex. PW-6/B) regarding the disappearance of Tayyaba Bibi, in the face of her presence captured in photographs taken on the same day in his house, and more strikingly her custody being taken by Khalid Mehmood Awan (PW-16) on the next day from his house in an unattended injured condition, seals his *mens rea* of having committed the offence of "cruelty to a child" under section 328-A of the PPC.

72. Viewed from another perspective, we have noted that the prosecution had discharged its "legal" burden to prove the said offences against him, by adducing sufficient evidence, which leads us to the overwhelming conclusion confirming his criminal culpability. Once the prosecution had discharged its "legal" burden, then under Article 122 of the Order, the "evidential" burden shifted on him to produce evidence, not to prove his innocence, but sufficient enough to dislodge the prosecution's version by at least creating dents therein. The failure on his part to produce any evidence to do so has, in fact, left the prosecution's case against him un-rebutted.

73. As for section 201 of the PPC, we note that the *mad* report No. 24 of 28.12.2016 about the disappearance of Tayyaba Bibi, was admittedly lodged on the behest of the convict, Raja Khurram Ali Khan. And this report of her disappearance has been proved false in the face of her admitted presence in his house on the same day, and her custody being taken from his house on the next day. And most importantly, all the above stated acts of Raja Khurram Ali Khan, a law knowing person, holding a high position

of a Judge, sufficiently proves not only his making false information, but also for the same to be for screening the real offender, his wife, from justice. And again, by failing to produce any evidence in support of his stance, after the prosecution had discharged its “legal” burden, he is to be blamed for not discharging his burden, and also missing the opportunity provided to him under the law.

74. At the cost of repetition, we would like to make it clear that the omission on the part of the Raja Khurram Ali Khan to discharge the “evidential” burden under Article 122 of the Order should not be mistakenly considered as the solitary reason for his conviction. In fact, his conviction was confirmed once the prosecution successfully discharged its “legal” burden.

Principles of Deciding Appeals against Order of the Acquittal Passed by the Trial Court

75. It is by now a settled principle of criminal justice that, in appeals against acquittal, the accused has a double presumption of innocence: the first, when he was accused till the conclusion of his trial; and, the second, when he is acquitted. Thus, dislodging the same should be sparingly exercised by the Appellate Court. In fact, due credence is to be given to the findings of fact rendered by the trial Court, if the conclusion drawn is based on fair reading of evidence, and is not perverse or wholly unreasonable. In such cases, interference by the appellate Court in an acquittal order of the trial Court merely for the reason that another view of the evidence was possible, would not be legally correct. However, if the very principle of appreciation of evidence was erred, and had caused failure of justice, then the order of acquittal would warrant to be set aside.

76. In the present case, it is noted that the trial Court blatantly erred in completely discarding the oral testimony of Tayyaba Bibi, despite the support and corroboration it had from other evidence, including the medical evidence, and the testimony of four independent natural witnesses, the veracity whereof could not be shattered by the defence, despite their lengthy cross-examinations. We also find that the trial Court failed to appreciate the distinction between a child witness, who is a witness of the crime, with one who is herself a victim to the crime. This lack of distinction led the trial Court to wrongly apply the principle of appreciating evidence of an ordinary witness of a crime, and not applying the standard of proof required for appreciating the testimony of a child witness, who is herself a victim of the said crime. Even otherwise, this Court found that the prosecution had produced sufficient evidence against the accused-convicts to safely discharge its “legal” burden to prove the guilt of the accused, which was not rebutted by the accused-convicts by producing any evidence creating any doubt in the prosecution’s case.

77. In these circumstances, this Court finds that the Appellate Court was legally correct in setting aside the acquittal of Mst. Maheen Zafar in the commission of the offences punishable under sections 337 A(i) and 337 F(i) of the PPC, and that of Raja Khurram Ali Khan for committing the offence punishable under section 201 of the PPC, being based on findings contrary to the settled principles of safe administration of criminal justice.

Complete Justice

78. In view of our above discussion, we are in complete consonance with the Division Bench of the High Court on both

counts: firstly, that the trial Court seriously erred in its appreciation of the evidence, in particular, discarding the testimony of a child victim in the face of credible supporting and circumstantial evidence produced by the prosecution; secondly, that the trial court, while deciding the quantum of sentence, did not seriously take into account the position of authority the accused-convicts held, and that they had abused the same to subvert the course of justice.

79. Now, are we to let the matter relating to the quantum of sentence rest, simply for the reason that the State did not avail appropriate remedy before this Court under clause 3 of Article 185 of the Constitution? This Court, faced with similar circumstances, has assumed jurisdiction to dispense "complete justice" under the enabling provisions of Article 187 of the Constitution. In this regard, one of the leading cases was **Muhammad Aslam v. State** (**2006 PLD 465 SC)**, wherein this Court, while hearing an appeal filed by the alleged rape victim against the order of acquittal of the accused, held that:

> "6. We having examined the record would take no exception to the view of the evidence taken by the Federal Shariat Court as the reasons given by the trial Judge for the acquittal of the accused were speculative, artificial and the conclusion drawn being based on misinterpretation of evidence, was perverse and wholly unreasonable, therefore, the appraisal of evidence by the Federal Shariat Court to draw its own conclusion in appeal against acquittal was quite in accordance with law. This is correct that weight is to be given to the finding of the trial Court if the conclusion drawn is based on fair reading of evidence and is not perverse or wholly unreasonable and thus interference in the acquittal for mere reason that another view of the evidence is possible, is not proper but if the appreciation of evidence has caused failure of justice, the order of acquittal must be set aside."

> "9. This Court in the light of facts and circumstances of the present case and the nature and gravity of offence, being of the view that sentence awarded to the petitioner and his co-accused in appeal by the Federal Shariat Court under section 10(3) of the Offence of

> Zina (Enforcement of Hudood) Ordinance, 1979 was inadequate, issued notice to the accused as to why their sentence be not enhanced. The learned counsel has not been able to satisfy us that in the circumstances of the present case, the sentence of seven years R.I. was sufficient to meet the ends of justice and consequently we in exercise of the powers under Article 203-DD read with Article 187 of the Constitution in the interest F of complete justice, enhance the sentence of petitioner from seven years' R.I. to 14 years and grant him benefit of section 382(b), Cr.P.C."

80. In another case, **Muhammad Khalil v. Muhammad Abbas (2000 SCMR 1607)** this Court, while hearing an appeal against acquittal, observed as follows:

> "The Court of Session as well as the High Court, with corroborative evidence superadded, did not find any particular inconsistency in the above versions of the complainant, concerning the role of accused Muhammad Abbas, who was real brother of Nazar Abbas accused. The prosecution evidence on the point stands, by and large, accepted. It was also proved that the single incised wound, inflicted on the deceased was on a vital part of the body, with an obvious intention, at least of causing such bodily injury as was likely to cause the death of the victim."
>
> This, in the presence of the foul conduct of the accused-convict, should not have occasioned lenient sentence at the level of the Court of Session but if that happened to be so, and the High Court recognised the error, such ought to have been corrected by the High Court itself. In that the same was not done, we have heard the learned counsel on either side to convince ourselves as to whether this is a case fit for remand or the lenient sentence, awarded as above, may be converted at this level of the proceedings. Now Article 187 of the Constitution confers all necessary powers on this Court to do complete justice in a case. No useful purpose would be served by remanding the case to the High Court where the High Court had already reached the conclusion that the sentence passed was a lenient one, when put in juxtaposition with the proved offence. In the circumstances, we are inclined to alter the sentence of seven years to life imprisonment while maintaining the remaining ancillary aspects."

81. We are mindful of the fact that the essential mandatory notice for the enhancement of the sentences was not served upon the accused-convicts by this Court while hearing the present appeals. In these circumstances, rendering any finding

thereon, without serving notice upon the parties, and in particular, the convicts-accused would surely prejudice them. Therefore, ends of justice require this Court to serve the requisite notices upon the parties, in particular, the accused-convicts, to explain as to why their sentences for commission of the offence punishable under section 328-A PPC not be enhanced.

82. In order to provide a coherent summation of the complex legal issues discussed hereinabove, it is held as under:

I. The right of appeal is a substantive right, which can only be granted by an express provision of an enactment, and cannot be inferred or implied therefrom.

II. Only a convict has a right of appeal before the Division Bench of the High Court to challenge the conviction and sentence passed by the Single Bench of the High Court in its original criminal jurisdiction under the sub-section 1 of section 411-A Cr.P.C., and that too, in three circumstances. Firstly, as a matter of right “on a question of law” (under clause a); secondly, with the leave of the Court, on a question of fact or on a mixed question of law and fact (under clause b); and thirdly, with the leave of the Court, where the law has not provided any fixed quantum of sentence (under clause c).

III. This right of appeal of the convict before the Division Bench of the High Court under the sub-section 1 of section 411-A Cr.P.C. is subject to the condition that he has no remedy to challenge the decision passed by the Single Bench of the High Court, before the Supreme Court under Article

185 of the Constitution of the Islamic Republic of Pakistan, 1973.

IV. Provincial Government has a right of appeal under sub-section 2 of section 411-A Cr.P.C. to file an appeal before the Division Bench of the High Court, against an order of acquittal of an accused passed by the Single Bench of the High Court in exercise of original criminal jurisdiction.

V. The legislature has not provided any right to the State or the complainant to seek the enhancement of the sentence passed by the Single Bench of the High Court under any provision of the Cr.P.C.

VI. Single Bench of the High Court, while exercising its original criminal jurisdiction, is not a Court inferior or subordinate to the High Court. Thus, the Division Bench of the High Court under its appellate, revisional or inherent jurisdiction provided under the Cr.P.C. cannot enhance a sentence passed by a Single Bench in its original criminal jurisdiction.

VII. The State has the remedy to seek the enhancement of the sentence passed by the Single Bench of the High Court, by filing a petition of leave before this Court under clause 3 of Article 185 of the Constitution.

VIII. To constitute the offence of “cruelty to a child” under section 328-A PPC, the following three essential ingredients are required to be proved by the prosecution.

1. The act of commission, including assault and/or ill-treatment or the act of omission, including neglect and/or abandonment of the child.

2. The act of commission or omission must be wilful.
3. The said act of commission or omission results in actual physical or psychological harm/ injury to the child.

Moreover, the criteria to determine the *mens rea* for the acts of commissions or omissions would be distinct. The former would require to be adjudged on the touchstone of objective societal standards, and in doing so, the profile or status of the offender, and the knowledge of the consequence of the said act of the offender would not be crucial in proving *mens rea*. While the latter would require a subjective fault criterion, wherein the previous knowledge of the offender, regarding the consequences of his "act of omission" would be relevant and crucial to determine *mens rea*, and thus, the same would differ from person to person, keeping in view the profile or status of the offender.

IX. To constitute the offence under section 201 PPC, the following three essential ingredients are required to be proved: firstly, the accused must know or should have reason to believe that an offence has taken place; secondly, the accused by his action or in-action prevents evidence of commission of the offence to be concealed; and thirdly, the action or inaction of the accused must be with the intention to prevent the actual perpetrator of the offence from being punished or, with the same intention of saving the actual perpetrator from punishment, renders information regarding the offence knowing or believing the same to be false.

X. The essential conditions for a child, or for that matter any person, to appear and testify as a witness, under Article 3 of the Order is that the child or the person must have the capacity and intelligence of understanding the questions put to him, and also be able to rationally respond thereto.

XI. In cases where the child witness is also the victim of the crime and is unable to depose in the court room, and his evidence is “necessary” to find the truth, and the same has a ring of “circumstantial trustworthiness” attached therewith, then Courts may consider the out-of-court evidence thereof, as an exception to the “hearsay rule”.

XII. Article 117 of the Order mandates the prosecution to prove, and that too, beyond any doubt, the guilt of the accused for the commission of the crime for which he is charged.

XIII. The burden on the prosecution to prove the guilt of the accused beyond any doubt under Article 117 of the Order is referred to as the “legal” burden of proof, which can never be shifted to the accused, unless the legislature by express terms commands otherwise.

XIV. Article 122 of the Order comes into play only when the prosecution has discharged its “legal” burden to prove the guilt of the accused by producing sufficient evidence, except the facts, which were especially in the knowledge of the accused, leading to the inescapable conclusion that the offence was committed by him. Then the “evidential” burden is upon the accused to produce enough evidence to create doubt in case of the prosecution.

XV. In appeals against acquittal, the accused has a double presumption of innocence; the first when he was charged and tried and, the second arising on his acquittal. Thus, dislodging the same should be sparingly exercised by the Appellate Court, and that too, if the conclusion drawn is not based on fair reading of evidence, perverse, arbitrary or wholly unreasonable.

XVI. In order to render "complete justice", this Court may under Article 187 of the Constitution, enhance the sentence of a convict, in cases where there has been serious misdirection of appreciation of evidence or blatant miscarriage of justice.

83. Accordingly, for the reasons stated hereinabove, we hold that:

CRIMINAL APPEAL NO. 120 OF 2019
(Raja Khurram Ali Khan v. Tayyaba Bibi and another)

The conviction and sentence awarded to Raja Khurram Ali Khan for commission of the offence punishable under section 201 PPC is maintained. While maintaining his conviction under section 328-A PPC, the quantum of sentence enhanced from one year simple imprisonment to that of three years by the Division Bench of the High Court in its judgment dated 11.06.2018 is set aside. The judgment of the Division Bench of the High Court dated 11.06.2018 is, accordingly, modified. The quantum of sentence for the offence under section 328-A PPC decided herein being the subject matter of another appeal pending before

this Court (The State v. Raja Khurram Ali Khan and another (Criminal Petition No. 721 of 2018)) shall finally be decided therein.

This appeal is disposed of in the above terms.

CRIMINAL APPEAL NO. 121 OF 2018
(The State v. Raja Khurram Ali Khan and another)

Lest this Court passes any final finding on the appeal of the State regarding quantum of sentence, suffice it to state there is sufficient evidence warranting enhancement of the sentence awarded to Raja Khurram Ali Khan and Mst. Maheen Zafar for the commission of the offence punishable under section 328-A PPC by the Single Bench of the High Court in its judgment dated 26.03.2018. Accordingly, this Court, while exercising its jurisdiction under Article 187 of the Constitution to serve “complete justice”, hereby puts Raja Khurram Ali Khan and Mst. Maheen Zafar on notice, to explain as to why their sentences for commission of the offence punishable under section 328-A PPC passed by the Single Bench of the High Court in its judgment dated 26.03.2018 not be enhanced according to law. We have been informed that Raja Khurram Ali Khan and Mst. Maheen Zafar are presently serving their sentences in Adiala Jail, Rawalpindi. Accordingly, the Superintendent of Adiala Jail, Rawalpindi is directed to inform the said inmates about the present notice, with due acknowledgments to be returned to the Registrar of this Court.

Notice to the parties, for a short date.

CRIMINAL APPEAL NO. 122 OF 2019
(Mst. Maheen Zafar v. Tayyaba Bibi and another)

The conviction and sentence awarded to Mst. Maheen Zafar for commission of the offence punishable under sections 337-A(i) and 337-F(i) of the PPC are maintained. While maintaining her conviction under section 328-A PPC, the sentence enhanced from one year simple imprisonment to that of three years by the Division Bench of the High Court in its judgment dated 11.06.2018 is set aside. The judgment of the Division Bench of the High Court dated 11.06.2018 is, accordingly, modified. However, the quantum of sentence for the offence under Section 328-A PPC is the subject matter of another appeal pending before the Court (The State v. Raja Khurram Ali Khan and another (Criminal Appeal No. 121 of 2019)) shall be finally decided therein.

This appeal is disposed of in the above terms.

JUDGE

JUDGE

JUDGE

Announced in Open Court
On 10.01.2020 at Islamabad

JUDGE

Approved for reporting