



Crl.A.No.610 of 2021

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED : 30.09.2022

C O R A M

THE HONOURABLE MR.JUSTICE P.VELMURUGAN

Crl.A.No.610 of 2021

Mohammed Shabeer

... Appellant

Vs.

State Rep. by
Inspector of Police,
Anamalai Police Station,
Crime No.211/2019

... Respondents

PRAYER: Criminal Appeal is filed under Section 374(2) of Cr.P.C., to set aside the judgment made in Spl.C.C.No.46 of 2020, dated 04.05.2021 on the file of the Sessions Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Coimbatore.

For Appellant : Mr.S.N.Arunkumar

For Respondent : Mr.S.Sugendran APP



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J U D G M E N T

This Criminal Appeal has been filed by the Appellant/accused as against the order of conviction and sentence passed by the learned Sessions Special Judge, Special Court for Exclusive Trial of Cases under POCSO Act, Coimbatore dated 04.05.2021.

2. The case of the prosecution is that during the year 2018, when the victim girl was going to buy some items to market, the accused had followed the victim girl and took a photo. Furthermore, the accused has edited the photo to portray as though the victim girl is too close with accused. Thereafter, the accused in an humiliating manner shared the photo in whatsapp group and also in the Facebook. On 24.06.2019 at about 4 pm, when the victim girl's father questioned the accused for the act of humiliation, the accused scolded the victim girl's father in a filthy language and threatened to kill him.



3. Therefore, the respondent Police registered the case against the appellant for the offence under Sections 294(b), 354D(1)(i)&(ii), & 506 (i) IPC and 13 r/w 14(1) of POCSO Act, in Crime No.211 of 2019. After investigation charge sheet was laid before the learned Special Court [since the offence is committed against a child] and the same was taken on file as Spl.CC.No.46 of 2020 and after completing the formalities framed charges against the accused for the offence as stated above.

4. In order to substantiate the charges framed against the accused, on the side of the prosecution totally 12 witnesses were examined as PW-1 to PW-12 and 11 documents were marked as Exs.P.1 to Exs.P.11 and one material object was marked as MO-1 and one Court document was marked as Ex.C-1. On questioning under Section 313 Cr.P.C., the accused denied the charges as false and pleaded not guilty. On the side of the accused, no oral and documentary evidence were marked.

5. On completion of the arguments advanced on either side, the trial Court found that the accused was not guilty for the offence under Sections



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294 (b) and 506 (i) and acquitted him from the above said charges, however found guilty for the offence punishable under Section 354D(1) (i)&(ii) of IPC and convicted and sentenced to undergo 3 years imprisonment and to pay a fine amount of Rs.1000/- in default to undergo 6 months imprisonment and for the offence punishable under Section 13 r/w 14 of Pocso Act, the accused was convicted and sentenced to undergo 5 years imprisonment and to pay a fine amount of Rs.5,000/-, in default to undergo 1 year imprisonment. Aggrieved over the said order of conviction and sentence, the present Criminal Appeal has been filed.

6. The learned counsel appearing for the appellant/accused would submit that the prosecution has not established its case as projected by it. Though there is no material evidence to prove the charges levelled against the appellant/accused, none of the witnesses have spoken about the alleged occurrence except P.W.1, who is the father of the victim girl and since he belongs to a rival political party, in order to take revenge, he foisted the false case against the appellant/accused. Though the trial Court convicted the



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appellant/accused for the offence under Section 13 r/w 14 of POCSO Act, no materials have been produced, even though cell phone/MO-1 was seized from the appellant, the same was not sent to lab test and no photograph was recovered as stated by the prosecution. Therefore, in the absence of the same, the conviction rendered by the trial Court for the offence under Section 13 r/w 14 (1) of the POCSO Act is not legally sustainable. Further, except PW-2, who is the victim girl, no witness had stated that the accused has taken her photograph, however, PW-3, is said to have informed to PW-1 that he has seen the photograph of the appellant with the victim and the appellant had uploaded the same in the social media (Facebook and Whatsapp). However the same was not recovered and even from the appellant's cell phone also, no photograph was recovered by the prosecution. The learned counsel would further submit that in the absence of any materials, it is unsafe to convict the appellant/accused for the offence under Section 13 r/w 14(1) of POCSO Act. From the very same materials and evidence, the trial Court had rightly disagreed with the case of the prosecution for the offence under Section 506(i) and 294(b) and acquitted the accused, however, the trial Court has



wrongly convicted the appellant/accused for the other offence under Section 354D(1)(i)&(ii) of IPC and Section 13 r/w 14(i) of the POCSO Act. Therefore, the learned counsel for the appellant/accused would submit that the order of conviction and sentence is liable to be set aside.

7. The learned Additional Public Prosecutor submitted that the victim girl is only aged about 13 years. Further, the learned Additional Public Prosecutor submitted that when the victim girl was going to market street, the accused had followed and took a photograph and created the image as though she was too close with accused and uploaded the same in the facebook and whatsapp group, due to which the father of the victim questioned about the same with the accused and the accused scolded using filthy language and threatened him and therefore, PW-1, the father of the victim filed a complaint before the respondent Police. The learned Additional Public Prosecutor submitted that the trial Court had rightly convicted the accused and hence, prayed for confirming the judgment of the trial Court.



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8. Heard the learned counsel appearing for the parties and perused the materials placed on record.

9. The specific case of the prosecution is that when the victim girl was going to buy some items to market street, the accused had followed the victim girl and took a photograph and created the image as if she was too close with accused and had circulated the photographs in social media through his mobile phone. One of the paternal uncle of victim girl informed to the PW-1, who is the father of the victim girl. When PW-1 questioned the accused about the act of humiliation, the accused scolded him in a filthy language and threatened to kill him. Based on his complaint, the respondent Police registered a case for the offences punishable under Sections as stated above. The Trial Court found that the accused was not guilty for the offence under Sections 294 (b) and 506(i) and acquitted him from the above said charges, however found guilty of the accused for the offence under Section 354D(1) (i)&(ii) of IPC, convicted and sentence him as referred above. The State has not preferred any appeal against the said acquittal, but however, the



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appellant/accused alone has filed the present appeal against the judgment of conviction and sentence passed by the Trial Court.

10. Since this Court is an Appellate Court and also final Court of fact finding, it has to re-appreciate the entire evidence and come to the conclusion independently. A careful reading of statement of the victim girl's father recorded under Section 164(5) of Cr.P.C., by the learned Judicial Magistrate No.1, Pollachi, it could be seen that the victim's father has admitted that the victim girl did not know about the case registered against the accused before the Police Station and narrated the entire occurrence and the same was marked as Ex.C-1 and also during evidence he deposed the entire occurrence.

11. As far as the charge under Section 13 r/w 14 of the Pocso Act is concerned, the prosecution has not substantiated by producing the photo, though the cell phone was alleged to have recovered from the accused, the SIM card was not recovered and the same has not been properly tested with the competent authority and expert opinion has not been obtained.



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Furthermore, though the other witnesses, PW-3 and PW-4 have stated that they had seen photographs, which have been circulated in the social media, they have not produced any material evidence and even the prosecution has not stated anything about the picture which is alleged to be available in the cell phone and the trial Court has not discussed anything about as to whether they have recovered the photograph of the victim from the cell phone of the accused.

12. Therefore, in this regard, this Court directed the prosecution to produce the cell phone and when the same was checked up, there is no such photos in the cell phone. The trial Court also has not discussed about the same in detail, but based on the evidence of PW-1, PW-2 & PW-3 only, convicted the accused under Section 13 r/w 14 (1) of the POCSO Act. In the absence of any material as there is photograph in the cell phone of the accused and no scientific evidence was let in by the prosecution to prove that the photographs emanated from the cell phone of the accused, it is unsafe to convict the appellant/accused. Moreover the prosecution has not proved its



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case beyond reasonable doubt and even presumption clause under Section 29 of POCSO Act would not attract for the offence under Section 13 r/w 14 of the POCSO Act. Therefore, it is bounden duty of the prosecution to establish the case with substantive materials, otherwise the appellant/accused cannot be convicted. The prosecution failed to prove its case beyond reasonable doubt for the offence under Section 13 r/w 14(1) of the POCSO Act and therefore, the appellant/accused is acquitted for the said charge and the judgment of conviction and sentence passed by the trial Court for the offence under Section 13 r/w 14 of the Pocso Act is hereby set aside.

13. As far as the offences under Section 354D(1)(i) and 354D(1)(ii) are concerned, the victim girl has clearly stated that the appellant/accused took the photograph, but the photograph has not been recovered. Though the offence under Section 13 r/w Section 14 of the POCSO Act would not be attracted, as the victim girl has clearly stated that the appellant/accused forcibly took the photo and this Court finds that the victim has not stated that someone else has seen the occurrence, however, for which no corroboration



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is necessary. Further, the victim girl is aged about 13 years only and therefore, the offence is against a child under the definition of POCSO Act and therefore, this Court has come to a conclusion that the appellant/accused has committed offence under Section 354D(1)(i) of IPC alone and accordingly, judgment of conviction and sentenced imposed by the trial Court for the offence under Section 354D(1)(i) is confirmed and the offence under Section 354D(1)(ii) is set aside.

14. In view of the above, the judgment passed by the trial Court for the offence under Section 13 r/w 14(1) of the POCSO Act and Section 354D(1)(ii) of IPC are concerned, the appeal is allowed and the same is set aside. However, as far as the offence under Section 354D(1)(i) is concerned, the appeal is dismissed as one which does not warrant any interference at the hands of this Court and the order of the trial Court is confirmed and accordingly, while confirming the conviction, the sentence imposed on the accused with an Imprisonment for 5 years for the offence punishable under Section 354D(1)(i) IPC is reduced to 3 years.



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15. In the result, the Criminal Appeal is partly allowed with the above modification.

16. As per order of this Court in Crl.M.P.No.12618 of 2021, dated 31.01.2022, it is seen that the appellant is on bail. Therefore, the learned Sessions Judge shall take steps to commit the accused to prison to undergo the remaining period of sentence, if any.

30.09.2022

Speaking Order / Non-speaking order

Index : Yes / No

Internet : Yes/No

pbn



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To

1. learned Special Court for Exclusive Trial of Cases under POCSO Act,
Coimbatore

2. Inspector of Police,
Anamalai Police Station,

3. The Public Prosecutor
High Court of Madras,
Chennai.



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P.VELMURUGAN, J.

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