

JUDGMENT SHEET

ISLAMABAD HIGH COURT, ISLAMABAD,
JUDICIAL DEPARTMENT

Criminal Appeal No.151/2020

Muhammad Shahzad Khaliq

versus

The State

Appellant by: Ch. Haseeb Muhammad, Advocate.
Respondents by: Barrister Muhammad Mumtaz Ali, AAG.
Ms. Khadija Ali, State Counsel.
Mr. Umer Ali Satti, Advocate for complainant.
Tariq Pervez, Addl. Director, FIA.
Masood Ali, Dy. Director, FIA.
Arbab Arshad Saeed, A.D., FIA.
Muhammad Saqib/ASI.
Date of Hearing: 29.11.2021.

JUDGMENT

MOHSIN AKHTAR KAYANI, J: Through this criminal appeal, the appellant has called in question judgment of the learned Additional Sessions Judge (West), Islamabad / GBV Court (East/West), Islamabad, dated 02.09.2020, whereby the appellant has been convicted and sentenced in case FIR No.276, dated 25.08.2019, under Sections 337-B, 506(ii), 292-A, 292-C PPC, P.S. Aabpara, Islamabad.

2. Succinctly, Muhammad Kamran (complainant) submitted a complaint for registration of an FIR alleging that on 25.08.2019, at about 06:15 p.m., Muhammad Shahzad (appellant) came to his house i.e. House No.38, Street No.31, Sector G-6/1-3, Islamabad and asked for complainant's son namely Zain ul Abideen, as such, the complainant being mistrustful of the appellant, inquired from his son about him, whereupon his son told the complainant that he is the person who made his nude video clip in the house of Hammad along with Sohaib Satti, Shahzeb Satti and Rayyan and now they are forcing him for immorality, else they will viral the video clip. On this, the complainant along with his brother Ahsan Abbasi apprehended the appellant and took his pistol.

After registration of the aforementioned FIR No.276/2019, the learned trial Court recorded pro and contra evidence and vide impugned judgment dated 02.09.2020, convicted the appellant:

- i. Under Section 506(i) PPC and sentenced to imprisonment for two years;
 - ii. Under Section 292-A PPC and sentenced to 05 years imprisonment.
 - iii. Under Section 292-C PPC and sentenced to imprisonment for term of 14 years with fine of Rs.1,000,000/-, in default whereof, the appellant shall further undergo three (03) months simple imprisonment.
3. Learned counsel for appellant contended that the allegations leveled against the appellant are baseless and neither the alleged video has been made by the appellant nor the appellant was present at the time of making video; that the malafide on the part of complainant is apparent from the fact that the appellant was allegedly arrested from Aabpara Market but in reality he was picked up by the complainant party from elsewhere with ulterior motives; that nothing incriminating material has been recovered from the appellant but such fact has been overlooked by the learned trial Court vide passing the impugned judgment, even otherwise, the learned trial Court has also not taken into account the fact that the prosecution witnesses have recorded different versions regarding the same alleged incident, which otherwise renders the prosecution story implausible and doubtful, based on which the appellant could not be convicted and sentenced as is done by the learned trial Court.
4. Conversely, learned State Counsel as well as learned counsel for complainant stressed that the appellant was apprehended at spot having possession of mobile phones and unlicensed pistol, even otherwise, the presence of appellant at the place of occurrence is evident from the CDR placed on record; that besides complainant's son's nude video clips and photographs, the appellant also recorded such indecent contents of other minor children; that the

prosecution has produced sufficient evidence to link the appellant with the commission of offence, as such, the learned trial Court has rightly appreciated each and every aspect of the case and rightly sentenced the appellant vide the impugned judgment.

5. Arguments heard, record perused.

6. Perusal of record reveals that the appellant Muhammad Shahzad Khaliq has been convicted on the charge of making nude videos of Zain ul Abideen as well as of other minors, which is an offence of child pornography punishable under Section 292-C PPC, per se, he was also charged for seducing victims, including complainant's son Zain ul Abideen, with intent to involve him in sexual activities on the basis of his nude videos, which is an offence under Section 292-A PPC. Besides these two main charges, the appellant has also been convicted under Section 506(ii) PPC for extending life threats.

7. The prosecution in order to prove the case has produced PW-4 Muhammad Kamran Abbasi, who filed his complaint Exh.PC, based on which case FIR No.276, dated 25.07.2019, under Sections 337-B, 506(ii), 292-A, 292-C PPC, P.S. Aabpara, Islamabad, referred as Exh.PC, was lodged alleging that on 25.08.2019, at about 6:15 p.m., when he was present in his house, one young man visited his house and asked for his real son namely Zain ul Abideen (minor) / PW-6, on suspicion the complainant came out and asked his son about the visitor, who told him that he is the man who had made a nude video of him with the help Habib Satti and Rehan, as such, they also forced him for unnatural lust and extending threats that they will make viral the video. The complainant with the help of his brother Ahsan Abbasi caught hold of the said person, who had also drawn a pistol and extended life threats, though the people from neighborhood gathered there and police was called. The visitor was identified as Shahzad Khaliq (appellant), from whom pistol Exh.P4 was also recovered on spot vide recovery memo Exh.PD.

8. The Investigating Officer also got recovered mobile phone Honor 8X (P1) with two SIMs vide recovery memo Exh.PG. The complainant was cross examined at length, who remained consistent on all material points qua the recovery of pistol, mobile phone and two SIMs, even the Investigating Officer PW-3 Muhammad Riaz/Inspector also arrested co-accused Rehan and got recovered his mobile phone, which was also used for making the alleged nude films and pictures of several minors, though it is not the case of prosecution that on a particular date or time the alleged video films were made, but the recovered mobile phone was transmitted to forensic expert of FIA after getting permission from SSP for forensic analysis, as a result whereof, the forensic expert report (Exh.PM/1-24) as well as USB (P3) has been brought on record by the prosecution. The analysis report received from the National Response Centre for Cyber Crimes, dated 03.09.2019, reveals that:

*during the course of forensic analyses of mobile phone Honor 8X bearing IMEI 860023042006370, the data (porn videos / images, SMS, contact list with call logs) as per requirement of Investigating Officer has been extracted through forensic software and copied to USB for further proceedings. It is pertinent to mention that during analysis **child pornography videos, adult pornography videos and gay videos have been identified**. The Investigating Officer can identify more artifact as per requirement of case from attached USB. The summary of extracted data and few artifact is annexed as flag-a).*

The extraction summary of mobile phone Honor 8X reveals that 22800 images and 839 videos were recovered. However, the detailed summary appended with this case confirms making of porn videos of a hundreds of minors, who had been seduced and sexually exploited, allegedly raped by the appellant, who was also present in majority of the videos and photo images, with minor girls and boys.

9. The above referred un-rebutted piece of evidence has further been confirmed and substantiated by the first victim i.e. complainant's son PW-6 Zain ul Abideen, who was student of 10th class, aged 17 years, stated on oath that he was seduced by Shoaib Satti and Shahzad Satti, who took off his pant and got

him laid down on a mattress in a flat, whereafter Hammad Malik and Shoaib Abbasi also reached in the room, whereafter Shoaib Satti asked Rayyan (acquitted accused) to make nude videos, which were transmitted to other mobile phones, as such, the appellant was also in possession of said nude videos and on the fateful day when the appellant visited his house, he was caught with a pistol when he pointed it out at his father, though he was caught with the help of his uncle PW-5 Ahsan Abbasi. During the course of cross-examination, PW-6 Zain ul Abideen acknowledged that he was not blackmailed by accused Rayyan or threatened him qua the nude films nor he met him after the incident, neither the video was shown by the said accused to any of the inhabitants of the locality or *Mohalla*. He also acknowledged that the other alleged perpetrators namely Shoaib Abbasi and Abdullah Abbasi belonged to his village, whereas Amaar and Abdullah are not accused in this case nor are they witnesses.

10. Another victim of this case is PW-7 Syed Noman, a 15 years old boy, also recorded his testimony that he was student of 8th class and his friend Osama resident of Sindh, introduced him with appellant, who was a police employee i.e. the appellant, who later on started making photographs on his mobile and with passage of time he lured PW-7 Syed Noman and made his nude films, whereafter the appellant started blackmailing him for fulfillment of unnatural lust. The said victim also narrated an incident where appellant took him to a farm near Bhara Kahu and committed unnatural offence during taking shower. He also narrated another occasion when the appellant took him to Murree for a visit and tried to commit sodomy while taking him into a room and also made a nude film, as such, he in categorical terms stated that he was blackmailed. The said witness has also been cross examined qua different dates and times qua alleged incident of sodomy and making of obscene videos, but no fruitful and favourable outcomes surfaced on record in favour of the appellant.

11. Now going to the legal aspect of this case, it appears that the offence under Section 506(ii) PPC is based upon the statement of PW-4 Muhammad Kamran Abbasi and PW-5 Ahsan Abbasi i.e. complainant and his brother, respectively, who are consistent on one point that the appellant had drawn a pistol from the folder of his *Shalwar* when he was being apprehended by them. The pistol P4, if seen in the scenario, it appears that these aspects have further been confirmed by PW-3 Muhammad Riaz/I.O. during the course of investigation. The Investigating Officer has also taken the CDR of both mobile phones of appellant and Rayyan Abbas, containing 36 pages (Exh.P2/1-36) and also brought on record 24 pages of two mobile phones along with one USB (P3), which has been taken into possession vide recovery memo Exh.PB. The Investigating Officer has prepared site plans of the places where nude videos were allegedly prepared on the basis of statement of victims, who have pointed out the places through pointation memo Exh.PA.

12. The offences in terms of Sections 292(a)(b), 293 & 294 PPC are specifically meant to deal with the sale, distribution and publically exhibits obscene books in any manner put into circulation, exposure to seduction of any child, child pornography, sale of obscene objects to young person, and obscene acts and songs, whereas Section 292-A PPC clearly spells out that *whoever seduces a child* for any sexual activity or expose him to obscene and explicit material, document film or video shall be guilty of exposure of seduction. Similarly, Section 292-B PPC states that whoever makes, with or without the consent of the child any photograph, film, video, picture or representation or portrait through any means, whether by electronic, mechanical, or other means, of obscene or sexually explicit conduct, is considered to be guilty of offence of child pornography.

OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF THE CHILD ON SALE OF CHILDREN, CHILD PROSTITUTION AND CHILD PORNOGRAPHY

13. While going through the said provisions, this Court is mindful of the fact that Pakistan is signatory of the *Convention on the Rights of the Child*, therefore, the

international standards regarding child pornography have to be considered in terms of Article 2(c) of the *Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography*, whereby “child pornography” has been explained as “any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes”. Similarly, in terms of Article 8 of the *Optional Protocol* states the following:

“The States Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in particular by:

- (a) Recognizing the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses;*
- (b) Informing child victims of their rights, their role and the scope, timing and progress of the proceedings and of the disposition of their cases;*
- (c) Allowing the views, needs and concerns of child victims to be presented and considered in proceedings where their personal interests are affected, in a manner consistent with the procedural rules of national law;*
- (d) Providing appropriate support services to child victims throughout the legal process;*
- (e) Protecting, as appropriate, the privacy and identity of child victims and taking measures in accordance with national law to avoid the inappropriate dissemination of information that could lead to the identification of child victims;*
- (f) Providing, in appropriate cases, for the safety of child victims, as well as that of their families and witnesses on their behalf, from intimidation and retaliation;*
- (g) Avoiding unnecessary delay in the disposition of cases and the execution of orders or decrees granting compensation to child victims.*

INTERNATIONAL GUIDELINES

14. Similarly, guidelines have also been provided for implementation of the Optional Protocol of the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography, dated 10.09.2019, whereby the Committee has strongly encouraged the State parties to make full and effective use of crime scene evidence, including digital evidence and introduction of such evidence in the Courts, and of evidentiary rules, such as the Child Sexual Abuse Shield Laws. The State parties are under obligation to provide appropriate support and legal counseling to assist the child victims of offences covered under the Optional Protocol to the Convention on the Rights of the Child at all stages of criminal justice proceedings, protect their right and interest as well as to ensure that the best interest of child is the primary consideration. In essence, the guidelines are reproduced as under for better understanding of the situation:

- a) *Ensuring that legal and investigating procedure are child and gender sensitive.*
- b) *Forensic interviews should be conducted according to evidence based protocols in a child friendly environment.*
- c) *To enhance the evidential validity and to avoid secondary victimization of child.*
- d) *Confrontation with the alleged offender and multiple interviews should be avoided.*
- e) *The child testimony be taken under the conditions of due process outside the courtroom and be admissible as evidence in the Court.*
- f) *Protecting the privacy of child victim in investigation in trial procedure, as well as ensuring legal and practical measure to guarantee appropriate and sufficient protection of child victim from intimidation and retaliation*
- g) *Using, where possible, appropriate communication technology to enable the child victim to be heard during the trial without being present in the courtroom.*
- h) *If such technological means are unavailable or child's presence is absolutely necessary during the trial, the State parties should ensure that the child is not confronted with the alleged perpetrator.*

- i) *Cases concerning the sale, sexual exploitation and sexual abuse of child should be expedited through priority tracking, continuous hearing or other methods and delays should be approved only after considering the child's view and best interest.*
- j) *The State parties to extend assistance and protection measure described above to the child victim and witnesses in criminal, civil and administrative procedure as appropriate.*

LAW IN JAMAICA

15. While going through the above referred standards and guidelines having been internationally provided and widely acknowledged all around the globe, this Court has also gone through the definition of child pornography in different jurisdictions, like in the United States of America, which defines it as, *“child pornography is a form of child exploitation. Federal laws defines child pornography as any visual depiction of sexually explicit conduct involving a minor (persons less than 18 years old)”*. Similarly, in Jamaica, the Child Pornography (Prevention) Act, 2009 has been enacted defining the *“child pornography”* in the following manner: means (any visual representation that

“child pornography” means:

- (a) *any visual representation that:*
 - (i) *shows a person who is, or is depicted as being, a child and is engaged in, or is depicted as being engaged in, sexual activity;*
 - (ii) *depicts, for a sexual purpose, the genitals, breast, pubic area or anal region of a child; or*
 - (iii) *depicts a child being subjected to torture, cruelty or physical abuse in a sexual context;*
- (b) *any audio recording or written material that has as its dominant characteristic the description, presentation, or representation, for a sexual purpose, of sexual activity with a child; or*
- (c) *any visual representation, audio recording, or written material, that advocates or counsels sexual activity with a child;*

“sexual activity” means actual or simulated:

- (a) *sexual intercourse;*

- (b) *activity other than sexual intercom, whether involving persons of the same or opposite sex:*
 - (i) *involving the penetration of the anus, vagina or mouth with any part of a person's body, or the anus or vagina with anything else; and*
 - (ii) *which a reasonable person would consider sexual;*
- (c) *touching of a sexual organ, or the anal region, of a person with any part of the body, or with or through anything else, in a manner which a reasonable person would consider sexual;*
- (d) *bestiality;*
- (e) *masturbation; or*
- (f) *sadistic or masochistic abuse;*

"visual representation" includes:

- (a) *any image, whether made or produced by - electronic, mechanical or any other means;*
 - (b) *undeveloped film;*
 - (c) *videotape; and*
 - (d) *data stored in electronic form capable of conversion into a visual image.*
- (2) *For the avoidance of doubt, in paragraph (a) of the definition of "child pornography" in subsection (1), the reference to a person shall be construed as including a reference to an image resembling a person, which has been generated or modified electronically or otherwise, and any evidence that some of the principal characteristics shown may be those of an adult shall be disregarded, if the predominant impression conveyed is that the image shown is that of a child.*

LAW IN UNITED KINGDOM

16. Learned State counsel Ms. Khadija Ali, Advocate has further highlighted the concepts in the United Kingdom, the Protection of Children Act, 1978 has been enforced, which also covers the concept of indecent photographs or pseudo photographs of a child, whereby the making of such photographs has widely been interpreted by the Courts in a manner that, "make" is "to cause to exist", to produce by action, to bring about", as such, it has been settled that the act of opening an attaching to an e-mail containing an image has been considered a

making as held in (*R. vs. Smith [2003] 1 Cr. App. R.13*). Similarly, downloading an image from a website on to a computer screen also falls within the definition of “to make” as held in (*R. v. Jayson [2002] 1 Cr. App. R.13*). It was also held that storing an image in a directory on a computer, although depending on where that image is stored, this could also be a possession charge under Section 160 of the Criminal Justice Act, 1988 as held in (*Atkins v. DPP; Goodland v. DPP [2000] 2 Cr. App. R.248*). The accessing a pornographic website in which indecent images appeared by way of automatic “pop-up” mechanism also attracts the concept of “to make” as held in (*R. v. Harrison [2008] 1 Cr. App. R.29*). This Court has also been guided by the learned State Counsel, Ms. Khadija Ali, Advocate High Court, who has explained the concept of distribution of indecent photographs in the Protection of Children Act, 1978, wherein it was held that “*a person is to be regarded as distributing indecent photographs or pseudo photographs if he parts with possession of it to, or exposes or offers it for acquisition by another person*”. The placing of an order in response to advertisement offering, the supply of indecent photographs of children did amount to incitement of distributing such images under the common law despite willingness of those making offer to supply them as held in (*R v. Goldman [2001] EWCA Crim 1684*).

17. While dealing with the offence of child pornography, which also covers the concept of possession as a primary ingredient of those explicit pseudo photographs or any sexual explicit images of a child found in custody of the accused, the prosecution is under obligation to prove that the accused person must have the custody and control of the photographs in question, even all those persons are also to be considered accused persons who are sharing the network of those images after its downloading from any network and place them in folder on their computer or any device, including the mobile phone from which they could be accessed by other members, therefore, any person, who is transmitting those images to other, is also guilty of the offence as held in (*R v. Dooley [2006] 1*

Cr. App. R. 21). Similarly, a person who stores indecent photographs on his computer and enables others to view them via the internet by the provision of a password does possess them with a view to them being shown as held in (R v Fellows and Arnold [1997] 1 Cr. App. R. 244).

18. In UK jurisdiction, the concept of possession has not been defined separately in the Criminal Justice Act, 1988 and Protection Of Children Act ,1978, which has been developed through case law, whereby certain tests have been laid down to determine the possession, such as:

- (a) Images must be in custody or control of suspect i.e. so that they are capable of accessing or in a position to retrieve the images; and,
- (b) The suspect must have shown that they possessed the images or group of images on relevant device / devices.

Similarly, the concept of deleted images has also been taken into account by the UK jurisdiction in cases of (R v Porter [2006] 1 Cr. App. R. 25; R v Leonard [2012] 2 Cr. App. R. 12). The UK Courts also dealt with the concept of live streaming, though there is no forensic trace left on device used to view that image or video which has once been viewed. In such scenario, the person who has merely viewed an image or video would not retain any copy of it on their device, but they have been considered to the extent that it has been made an image by causing it to be displayed on that device, such concept has been explained in (R v. Smith and Jayson [2003] 1 Cr. App. R. 13), wherein the Court accepted that causing an image to be displayed on a computer screen amounted to making it.

19. The UK authorities also developed a Child Abuse Image Database (CAID) to assist the police with the cataloging and grading of indecent images of children and for victim identification purpose. The said database is to be called as secured database of illegal images of children, which has been maintained by UK law enforcement and they can seize those images worldwide, including the UK, by way of using a software to review the files on any device which has been

seized and then compare them against known data such as keywords or meta-data.

LAW IN INDIA

20. This Court has also been assisted by Ms. Khadija Ali, State Counsel and Barrister Muhammad Mumtaz Ali, AAG along with the FIA technical experts, whereby the regional model has also been explained, in which the child pornography has been dealt with in Indian jurisdiction under the Protection of Children from Sexual Offences Act, 2012, whereby Section 2(1)(da) explains the “child pornography” in the following manner:

“Any visual depiction of sexually explicit conduct involving a child which include photograph, video, digital or computer generated image indistinguishable from an actual child and image created, adapted, or modified, but appear to depict a child”

Similarly, Section 13 of the aforesaid Act of 2012 defines the use of a child for pornographic purposes in the following manner:

13. *Use of child for pornographic purposes. – Whoever, uses a child in any form of media (including programme or advertisement telecast by television channels or Internet or any other electronic form or printed form, whether or not such programme or advertisement is intended for personal use or for distribution), for the purposes of sexual gratification, which includes –*

(a) representation of the sexual organs of a child;

(b) usage of a child engaged in real or simulated sexual acts (with or without penetration); (c) the indecent or obscene representation of a child, shall be guilty of the offence of using a child for pornographic purposes.

Explanation. – *For the purposes of this section, the expression "use a child" shall include involving a child through any medium like print, electronic, computer or any other technology for preparation, production, offering, transmitting, publishing, facilitation and distribution of the pornographic material.*

Likewise, Section 24 of the Protection of Children from Sexual Offences Act, 2012 explains the method of recording of child victim's statement in the following manner:

24. *Recording of statement of a child. – (1) The statement of the child shall be recorded at the residence of the child or at a place where he usually resides or at the place of his choice and as far as practicable by a woman police officer not below the rank of sub-inspector.*

(2) The police officer while recording the statement of the child shall not be in uniform.

(3) The police officer making the investigation, shall, while examining the child, ensure that at no point of time the child come in the contact in any way with the accused.

(4) No child shall be detained in the police station in the night for any reason.

21. That apart, if the statement is required to be recorded by the Magistrate, the same shall be done in terms of Section 25 of the Protection of Children from Sexual Offences Act, 2012 in the following manner:

25. *Recording of statement of a child by Magistrate. – (1) If the statement of the child is being recorded under section 164 of the Code of Criminal Procedure, 1973 (2 of 1974)(herein referred to as the Code), the Magistrate recording such statement shall, notwithstanding anything contained therein, record the statement as spoken by the child:*

Provided that the provisions contained in the first proviso to sub-section (1) of section 164 of the Code shall, so far it permits the presence of the advocate of the accused shall not apply in this case.

(2) The Magistrate shall provide to the child and his parents or his representative, a copy of the document specified under section 207 of the Code, upon the final report being filed by the police under Section 173 of that Code.

22. In circumstances where the child victim is required to record his statement or attend the proceedings of the trial, he must be treated in terms of Section 36 of the Protection of Children from Sexual Offences Act, 2012, which reads that:

36. Child not to see accused at the time of testifying. (1) The Special Court shall ensure that the child is not exposed in any way to the accused at the time of recording of the evidence, while at the same time ensuring that the accused is in a position to hear the statement of the child and communicate with his advocate.

(2) For the purposes of sub-section (1), the Special Court may record the statement of a child through vide conferencing or by utilizing single visibility mirrors or curtains or any other device.

23. On the other hand, the trial involving offences relating to child pornography and recording of the child victim's statement, Section 37 of the Protection of Children from Sexual Offences Act, 2012 enunciates to conduct the trial in-camera in the following manner:

"37. Trials to be conducted in camera.---The Special Court shall try cases in camera and in the presence of the parents of the child or any other person in whom the child has trust or confidence:

Provided that where the Special Court is of the opinion that the child needs to be examined at a place other than the Court, it shall proceed to issue a commission in accordance with the provisions of Section 284 of the Code of Criminal Procedure, 1973 (2 of 1974)."

COMPARISON OF OFFENCES IN PAKISTAN PENAL CODE, 1860 AND PREVENTION OF ELECTRONIC CRIMES ACT, 2016

24. Putting in juxtaposition the commandments settled by the USA, UK, Jamaica and India, this Court is of the view that our legal system has not yet secured the rights of the child victim, who has sexually been abused in the offences like child pornography, though the offence under Section 292-B PPC, if compared with offence under Section 22 of Prevention of Electronic Crimes Act, 2016, both convey a different meaning and provide different scope, therefore, in

order to settle this question, both these provisions have been placed in juxtaposition for comparative analysis:

Sections 292-B & 292C PPC	Section 22 of Prevention of Electronic Crimes Act, 2016
<p>292 B. Child pornography.—(1) Whoever takes, permits to be taken, with or without the consent of the child or with or without the consent of his parents or guardian, any photograph, film, video, picture or representation, portrait, or computer-generated image or picture, whether made or produced by electronic, mechanical, or other means, of obscene or sexually explicit conduct, where---</p> <p>(a) the production of such visual depiction involves the use of a minor boy or girl engaging in obscene or sexually explicit conduct;</p> <p>(b) such visual depiction is a digital image, computer image, or computer-generated image that is, or is indistinguishable from, that of a minor engaging in obscene or sexually explicit conduct; or</p> <p>(c) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in obscene or sexually explicit conduct; is said to have committed an offence of child pornography.</p> <p>(2) The preparation, possession or distribution of any data stored on a computer disk or any other modern gadget, shall also be an offence under this section.</p> <p>Section 292C PPC</p> <p>292C. Punishment for child pornography.---Whoever commits an offence of child pornography shall be <u><i>punished with imprisonment of either description for a term which shall not be less than fourteen years and may extend upto twenty years with fine which shall not be less than one million rupees.</i></u></p>	<p>22. Child pornography.—(1) Whoever intentionally produces, offers or makes available, distributes or transmits through an information system or procures for himself or for another person or without lawful justification possesses material in an information system, that visually depicts,---</p> <p>(a) a minor engaged in sexually explicit conduct;</p> <p>(b) a person appearing to be a minor engaged in sexually explicit conduct; or</p> <p>(c) realistic images representing a minor engaged in sexually explicit conduct; or</p> <p>(d) discloses the identity of the minor,</p> <p><u><i>shall be punished with imprisonment for a term which may extend to seven years, or with fine which may extend to five million rupees or with both.</i></u></p> <p>(2) Any aggrieved person or his guardian, where such person is a minor, may apply to the Authority for removal, destruction of or blocking access to such information referred to in sub-section (1) and the Authority, on receipt of such application, shall forthwith pass such orders as deemed reasonable in the circumstances, including an order for removal, destruction, preventing transmission of or blocking access to such information and the Authority may also direct any of its licensees to secure such information including traffic data.</p>

25. The comparative analysis of above referred two provisions in the Pakistan Penal Code, 1860 and the Prevention of Electronic Crimes Act, 2016 clearly establishes that the offence in PECA starts with the information system, whereas in terms of PPC it is of different context, rather the PPC has given a wider meaning, where any photograph, film, video, portrait or computer generated images have been prepared with or without the consent of child through any electronic or other mechanical means, in which any minor, boy or girl, is engaged in obscene and sexually explicit conduct, is guilty of child pornography, as such, Section 292-B PPC also covers the concept of computer generated images. On the other hand, the offence under Section 22 of the PECA, 2016, though provides some similar concept, but it should have been routed through computer generated or information system, which has been used by the accused person, but the other mark difference is the dissimilarity of sentences, though the legislature has enacted PECA, 2016 with special reference to *“prevent unauthorized acts with respect to information systems and provide for related offences as well as mechanisms for their investigation, prosecution, trial and international cooperation with respect thereof and for matters connected therewith or ancillary thereto”*, but surprisingly, the child pornography in PECA provides sentence of 07 years or fine, which is much less than the punishment provided in Section 292-B PPC, where sentence of 14 years, which may extend up to 20 years with fine not less than Rs.1 Million, has been fixed. Such disharmony amongst the two laws extends certain extraordinary benefit to the accused person, though the Pakistan has ratified the Child Rights Convention, which is equally enforced in Pakistan and applicable, whereby Article 3 of the Child Rights Convention reads as under:

Article 3

1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.

2. States Parties undertake to ensure the child such protection and care as is necessary for his or her well-being, taking into account the rights and duties of his or her parents, legal guardians, or other individuals legally responsible for him or her, and, to this end, shall take all appropriate legislative and administrative measures.

26. While taking analogy from the above convention, the Federal Government is required to harmonize the two sentences provided in two separate laws for the same offence, as such, it is apparent that the specialized offences under the PECA, 2016 are admittedly affecting the society at large, but the sentence provided in special law is not in conformity with the heinousness of the crime against the children in this modern technological era, which requires an amendment and adjustment in line with the sentence provided in the Pakistan Penal Code, 1860. This Court has also taken note of the *Optional Protocol to the Convention on the Rights of the Child on Sale of Children, Child Prostitution and Child Pornography*, which is an implementation strategy of Child Rights Convention and it extends the measure that the State party should undertake in order to guarantee the protection of child from sale of children, child prostitution and child pornography, in order to eliminate the widespread practices of sex tourism, to which children are especially vulnerable, as it directly concerns the sale of children, child prostitution and children pornography. This optional protocol has been enforced in order to recognize the vulnerable groups, including the female children, who are at greater risk of sexual exploitation, and, as such, the concept of child pornography has been defined in Article 2 of the Convention on the Rights of the Child in the following manner:

Article 2

(c) Child pornography means any representation, by whatever means, of a child engaged in real or simulated explicit sexual activities or any representation of the sexual parts of a child for primarily sexual purposes.

27. Similarly, Article 3 imposes a duty upon the State party, who shall ensure that certain offences have to be defined in their local legislation, including sexual exploitation of child, offering, delivering or accepting the child for any such purpose, even transfer of organs of child, engagement of child in forced labor, improperly achieving the consent for the purpose of adoption of child, child prostitution, child pornography, etc. This aspect completely defines the concept of child protection in all manner.

28. This Court has already observed in Para-14 above that the State Parties shall adopt appropriate measures to protect the rights and interests of child victims of the practices prohibited under the present Protocol at all stages of the criminal justice process, in which a child victim shall not be exposed to the accused person in the Court of law nor the obscene video content or photographic image be displayed, rather such data has to be removed from all sources in order to protect the dignity of the child victim, even the identification of child victim should also be given protection in order to avoid any future intimidation or retaliation.

29. Now considering the international standards as well as the laws applicable around the globe, this Court is convinced that the evidence collected in this case and produced by the prosecution clearly spells out that both the victims PW-6 Zain ul Abideen and PW-7 Syed Noman are less than 18 years of age and fall within the definition of a child, who had been sexually exploited at the hands of appellant by way of preparing obscene photographs / videos through his mobile phone and other means and exposed them in a sexually explicit manner at the same time, as such, both the minor victims have been photographed and filmed by the appellant, which aspect has been confirmed through the forensic analysis report, referred as Exh.PM/1-24, prepared by the National Response Centre for Cyber Crimes FIA, whereby the forensic analysis of mobile phone data confirms the porn videos/images, including child

pornography, adult pornographic videos and even gay videos have been identified. All the extracted artifacts summary has been provided in the court of law containing the images of appellant with several minor children, such aspect clearly establishes that the sexual exploitation was not limited to the extent of PW-6 Zain ul Abideen and PW-7 Syed Noman, rather hundreds of children have been victimized at the hands of appellant, who has not only recorded the obscene videos or images, rather allegedly committed rape / sodomy of those minors, though the charges of rape have not been proved against the appellant as he has been acquitted in terms of Section 377 PPC, but this does not absolve the appellant from the heinousness of the crime committed with future generation of Pakistan by sexually seducing them and exploiting them through their videos and blackmailing them for his unnatural lust. This Court believes that there is no need for summoning of all those victims in such type of crimes where technical evidence of preparing of obscene photographs / videos is available from any information technology system or through any electronic means in any manner and has been confirmed from the forensic expert through technical reports though in this case two of the victims have been produced, who remained consistent qua the role of the appellant in a proper manner and justified the ingredients of the offences charged against the appellant. In such scenario, this Court is convinced that the learned Trial Court has properly appreciated the evidence and rightly awarded the sentence of 14 years to the appellant with fine of Rs.1 Million in terms of Section 292-C PPC, and five years in terms of Section 292-A PPC, though this Court is of the view that the sentences should run consecutively with other offences in such type of cases due to its severity and affect on public at large, especially the vulnerable segment of society i.e. the minors, as well as while considering the gravity of crime on the principles laid down in case reported as (2013) 5 Supreme Court Cases 546 (Shankar Kisanrao Khade v. State of Maharashtra), without any remission, but the hands of this

Court are tied up as no appeal has been filed by the State or complainant in this case, even the sentencing policy is within the domain of the trial Court, hence instant appeal is without merits and same is hereby **DISMISSED**.

30. Before parting with this judgment, this Court is of the view that Pakistan being signatory of the Convention on the Rights of the Child has to apply its optional protocol in letter and spirit while dealing with the sensitive offences, even the courts of law are also required to follow certain standards, which have not yet been highlighted in any of the legislative documents, though such aspect has been covered under the Prevention of Electronic Crimes Act, 2016, but the offences tried in terms of Sections 292-A, 292-C, 293 and 294 PPC should be dealt with under different concepts, therefore, this Court is of the view that:

- i) The Federal Government shall, at the first instance, amend Section 22 of the Prevention of Electronic Crimes Act, 2016 for enhancement of the sentence from seven years to the standards already held and fixed in the amended Act (XXVII of 2018), dated 22.05.2018, in which punishment under Section 292-C PPC for child pornography has been enhanced from seven years to fourteen years, extended up to 20 years, with fine not less than one million rupees, as awarded to the appellant in this case, such aspect will harmonize the sentences in two separate laws, though mentioned for somehow similar offences.
- ii) In all gender based violence, Courts have to protect the rights of children, who are victims of such type of cases, by following the standards settled in the international jurisdiction that the victim shall not be exposed to the accused person or the courts of law and their testimony be recorded through video link facility, if available, or through protective shield where child victim shall not be in a

direct contact with the accused in a trial. The testimony of the child victim may also be recorded through a special measure through video conferencing, while the child shall remain in a conducive and protective environment, like home or any other separate facility, if maintained by the Government, as the case may be.

- iii) It is also important to notice that there is no need to call the victim of child pornographic offence or victim of sexual offences in the Court, if the evidence is based upon video, IT Data, mobile data, information system etc. and the same are available on record and confirmed by the Forensic Science Agency through their report unless compelling circumstances emerged to the satisfaction of Trial Court, in exceptional circumstances only.
- iv) It is not necessary for the prosecuting agency to produce the victim(s) in every case, rather the prosecution can establish its case on the basis of technical evidence of the information technology being covered under the modern devices, which is admissible under the Qanun-e-Shahadat Order, 1984, even under the international standards. The State shall only ensure that a fair chance be given to the accused persons by confronting all the incriminating material, including the sexually exploited videos, images, etc., which is the minimum requirement of law, without any other direct witness, who is a victim in such type of cases.
- v) The pornographic material shall not be displayed in the Court of law and the reports submitted by the Forensic Science Laboratory or cyber crime expert be considered conclusive for the purpose of

conviction, if the report is specific to the extent of role of accused person *vis-a-vis* the victim or others.

- vi) The Investigating Officer of such type of crime has to specify the role in clear words in their examination in chief, which could be corroborated with the Forensic Science Laboratory report or technical evidence recovered during the course of investigation, including the mobile phone data or computer information system.
- vii) The learned Trial Court shall pass an order for elimination of all child pornographic data, images or videos at accessible to anyone from all sources and direction be also issued to the FIA as well as to the PTA to ensure that such data shall not be accessible in any information system in order to save dignity of victim and families.
- viii) The learned Trial Court while dealing with such kind of offences should also be considerate of the offences as heinous in nature, particularly where a minor child has been sexually exploited. In such scenario, the Court can consider that the sentences be run consecutively with other offences, if charged, in terms of deterrent theory of punishment, in order to protect the society at large from this heinous crime.
- ix) The learned Trial Court shall ensure that the trials of the cases relating to child pornography should be conducted in camera and all outsiders having no relevancy to the case or extra staff of the Court be ousted while recording the testimony of a child victim, if he is present in the Court in a separate compartment or area, in order to save the child from humiliation and embarrassment.

- x) This Court also noted that the accused in this case i.e. the appellant has also been charged under Sections 13/20 of Arms Ordinance, 1965, whose trial is pending before the Magistrate having jurisdiction in this regard, but the main case has been decided by the learned Trial Court, in such eventuality the offence triable by the learned Magistrate remained pending due to unnecessary delay as the prosecution was focusing to the extent of main case and in some cases similar evidence is to be produced before two different courts at the same time, which amounts to delay in the proceedings, loss of time and management issues of the Court, therefore, it is appropriate that all the respective Sessions Judges or the court of special jurisdiction in this regard shall pass an appropriate order while going through the report under Section 173 Cr.P.C. for transfer of minor offences like offences under Sections 13/20 of Arms Ordinance, 1965 to be tried together with the main case at the same time, per se, such administrative and legal order will save the courts from unnecessary burden of trials.

(MOHSIN AKHTAR KAYANI)
JUDGE

Announced in open Court on: 14.01.2022.

JUDGE

APPROVED FOR REPORTING.

Khalid Z.