



2024/KER/43756

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE A. BADHARUDEEN

WEDNESDAY, THE 19TH DAY OF JUNE 2024 / 29TH JYAISHTA, 1946

CRL.REV.PET NO. 610 OF 2024

CRIME NO.231/2023 OF ANTHIKAD POLICE STATION, THRISSUR

AGAINST THE ORDER DATED 16.05.2024 IN CRL.M.APPL NO.88/2024 IN SC

NO.1003 OF 2023 OF FAST TRACK SPECIAL COURT II, THRISSUR

REVISION PETITIONER/PETITIONER/SOLE ACCUSED:

SEBIN THOMAS

AGED 27 YEARS

S/O.THOMAS, PULIKKAN MOOLAMKULAM VEEDU, VARIYAM LANE,
ARIMBOOR, THRISSUR, PIN - 680620

BY ADV V.A.JOHNSON (VARIKKAPPALLIL)

RESPONDENT/RESPONDENT/COMPLAINANT & STATE:

STATE OF KERALA

REPRESENTED BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
PIN - 682031

SR PP - RENJIT GEORGE

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON
19.06.2024, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

**“C.R”****ORDER****Dated this the 19th day of June, 2024**

This Criminal Revision Petition has been filed under Section 397 read with 401 of the Code of Criminal Procedure, 1973, challenging the order dated 16.05.2024 in C.M.P. No.88/2024 in S.C. No.1003/2023 on the files of the Fast Track Special Court-II, Thrissur (Sessions Division Thrissur).

2. Heard the learned counsel for the petitioner as well as the learned Public Prosecutor. Perused the relevant materials available.

3. In this matter, the prosecution case is that at about 14.00 hours on 26.02.2023, the accused stored and possessed pornographic materials involving child which was downloaded from Telegram X Application by using his Samsung SMA 307 FN mobile and sim number 8921208934. Thus, the accused alleged to have committed the offence punishable under Section 15(2) of



the Protection of Children from Sexual Offences Act [hereinafter referred as 'POCSO Act' for short] and under Section 67(B)(b) of the Information Technology Act, 2000 [hereinafter referred as 'IT Act' for short].

4. It is submitted by the learned counsel for the petitioner that tracing out the ingredients to attract offences under Section 15(2) of the POCSO Act and Section 67(B)(b) of the IT Act, there must be materials showing sharing, transmission or publishing of sexually explicit act and pornographic materials in any form involving a child. According to the learned counsel, even though pornographic materials involving a child were recovered during investigation, nothing is available in the final report to see that the accused herein either shared or transmitted the same. Similarly, there is no material to show that he has published the same so as to attract penal consequences of Section 15(2) of the POCSO Act and 67(B)(b) of the IT Act.

5. The learned counsel for the petitioner specifically pointed out the finding in the chemical



analysis report produced as Annexure.A1 and submitted that, as per the chemical analysis report also sharing, transmitting or publishing of sexually explicit act and pornographic materials by the accused are not made out. Therefore, the impugned order requires interference.

6. The learned Public Prosecutor opposed granting of the reliefs sought for.

7. In this connection, it is necessary to trace out the ingredients to attract offence under Section 15(2) of the POCSO Act and Section 67(B)(b) of the IT Act.

8. The learned counsel for the petitioner placed a decision of this Court reported in ***Manuel Benny v. State of Kerala & Anr. [2022 KHC Online 3437]*** contending that in order to attract an offence under Section 67B of the IT Act, the videos or materials have to be voluntarily downloaded into any device. He also placed another decision of this Court reported in ***Aneesh v. State of Kerala [2023(6) KHC 10]***, wherein a learned Single Judge of this Court considered the ingredients to attract an offence under Section 292 of the Indian Penal Code,



wherein this Court held as under:

“I am of the considered opinion that watching of an obscene photo by a person in his privacy by itself is not an offence under S.292 IPC. Similarly, watching of an obscene video by a person from a mobile phone in his privacy is also not an offence under S.292 IPC. If the accused is trying to circulate or distribute or publicly exhibit any obscene video or photos, then alone the offence under S.292 IPC is attracted. In this case, even if the entire prosecution case is accepted in toto, no offence under S.292 IPC is made out against the petitioner. In the light of the above principle laid down by this Court, I am of the considered opinion that, even if the entire allegations in Annexure 2 final report are accepted in toto, no offence under S.292 IPC is made out against the petitioner. Therefore, this CrI.M.C. is to be allowed.”

9. In order to see the ingredients to attract section 15(2) of the POCSO Act, extraction of the said provision is necessary and the same is provides as under:

“Any person, who stores or possesses pornographic material in any form involving a



child for transmitting or propagating or displaying or distributing in any manner at any time except for the purpose of reporting, as may be prescribed, or for use as evidence in court, shall be punished with imprisonment of either description which may extend to three years, or with fine, or with both.”

10. Reading the provision, it is emphatically clear that storing or possessing pornographic materials in any form involving a child for the purpose of transmitting or propagating or displaying or distributing in any manner is an offence. Therefore, mere storing or possessing pornographic materials by itself is not an offence. In order to bring home an offence under Section 15(2) of the POCSO Act, there should be materials to show that the accused stored or possessed pornographic materials for the purpose of transmitting or propagating or displaying or distributing the same.

11. Going by the facts of this case with reference to the chemical analysis report, it could be noticed that no evidence available in this matter to show transmitting or



propagating or displaying or distributing pornographic materials. Thus, the offence under Section 15(2) of the POCSO Act could not be made out.

12. Coming to Section 67(B)(b) of the IT Act also, the same provides as under:

67B. Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form.-- Whoever -

(a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct; or

(b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner; or

(c) cultivates, entices or induces children to online relationship with one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource; or

(d) facilitates abusing children online, or



(e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees:

Provided that provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting representation or figure in electronic form-

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing drawing, painting representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or

(ii) which is kept or used for bona fide heritage or religious purposes.

Explanation.-For the purposes of this



section "children" means a person who has not completed the age of 18 years."

13. Publishing, transmitting or causing any material in electronic form which depicts children engaged in sexually explicit act or conduct or creation of text or digital images etc. are the ingredients under Section 67B of the IT Act also.

14. In paragraph 5 of **Manuel Benny's** case (supra), this Court held as under:

"A perusal of the final report would show that the only allegation against the petitioner is that he downloaded and enjoyed material depicting children in obscene, indecent and sexually explicit manner from the application called 'Telegram'. In order to attract the offence under Section 67B of the IT Act, the videos or material has to be voluntarily downloaded into any device. In other words, there should be intention on the part of the petitioner to download the material in order to view it. The definite case of the petitioner is that he did not download any offensive material. Even in Annexure A3 FSL report it



is seen that the path of those images is from Android backup and the child pornographic videos were accessed through 'Telegram'. The learned Additional DGP submitted that the contents transmitted in the 'Telegram' can be automatically downloaded in the mobile phone by default. Hence, it cannot be said that the petitioner has intentionally downloaded the material, considering the features of the 'Telegram' App.

Since there is no material so show that the petitioner has browsed or downloaded child pornographic material, the offence under Section 67B of the IT Act is not attracted.

15. Therefore, going by the decision, automatic or accidental downloading of children engaged in sexually explicit act or conduct is not an offence under Section 67B, once the specific intention to do so is not established, by the materials which form part of the prosecution records.

16. In the present case, the materials collected during investigation would show that some pornographic



messages, which would depict children engaged in sexually explicit act or conduct were found in the devise of the accused. But there are no materials to show that the petitioner intentionally downloaded or browsed or recorded the same. More particularly there are no materials to show that the petitioner had either shared or transmitted or propagated or displayed or distributed the same in any manner.

17. Thus, the materials available do not suggest the ingredients to find *prima facie*, commission of offence under Section 67(B)(b) of the IT Act also.

18. To sum up, it is found that none of the offences alleged against the petitioner are made out *prima facie*, and the contra view taken by the Special Judge is not justifiable. In such view of the matter, this revision petition seeking to set aside the order impugned would succeed.

19. In the result, the order dated 16.05.2024 in C.M.P. No.88/2024 in S.C. No.1003/2023 on the files of the Fast Track Special Court-II, Thrissur (Sessions Division Thrissur) stands set aside and the accused is discharged



from the above said offences for want of materials to go
for trial.

Accordingly, this revision petition stands allowed.

**Sd/-
A. BADHARUDEEN
JUDGE**

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APPENDIX OF CRL.REV.PET 610/2024

PETITIONER ANNEXURES :

**Annexure 1 TRUE COPY OF THE FINAL REPORT IN CRIME
NO.231/2023 OF ANTHIKKAD POLICE STATION,
THRISSUR ALONG WITH THE STATEMENTS OF
CRIME WITNESSES**