



2023/KER/53584

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE P.V.KUNHIKRISHNAN

TUESDAY, THE 5TH DAY OF SEPTEMBER 2023 / 14TH BHADRA, 1945

CRL.MC NO. 7421 OF 2022

AGAINST THE ORDER/JUDGMENT CC 1248/2016 OF JUDICIAL MAGISTRATE OF
FIRST CLASS -I, ALUVA

PETITIONER/ACCUSED:

ANEESH



BY ADVS.

BOBBY RAPHEAL.C

E.C.POULOSE

RESPONDENTS/STATE & DEFACTO COMPLAINANT:

1 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF
KERALA, ERNAKULAM, PIN - 682031

2 THE STATION HOUSE OFFICER,
ALUVA EAST POLICE STATION, ALUVA, ERNAKULAM DISTRICT,
PIN - 683101

BY ADV.

SRI.VIPIN NARAYAN, PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
05.09.2023, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:



CR

P.V.KUNHIKRISHNAN, J.

CrI.M.C.No.7421 of 2022

Dated this the 05th day of September, 2023

ORDER

Pornography has been in practice for centuries. The new digital age has made it more accessible than ever before and it is available even to children and adults at their fingertips. The question to be decided in this case is whether a person watching a porn video in his private time without exhibiting it to others amounts to an offence? A court of law cannot declare that the same amounts to an offence for the simple reason that it is his private choice and interference with the same amounts to an intrusion of his privacy. But God designed sexuality as something for a man and a



woman within marriage. It is not only a lust but also a matter of love and for having children too. But a male and female who have attained majority, doing sex with consent is not an offence. Consensual sex between a man and woman is not an offence in our country, if it is within their privacy. A court of law need not recognise consensual sex or watching of a porn video in privacy because these are within the domain of the will of society and the decision of legislature. The duty of the court is only to find out whether it amounts to an offence.

2. Petitioner is the sole accused in Crime No.2550/2016 of Aluva Police Station which is now pending as C.C.No.1248/2016 on the file of the Judicial First Class Magistrate Court-I, Aluva. The above case is charge sheeted against the petitioner alleging offence punishable under Section 292 IPC. The prosecution case is that, while the defacto complainant



and his associates were on patrol duty on 11.7.2016 at 8.40. p.m., the accused was seen standing on the road side near Aluva palace, watching obscene videos in his mobile phone and hence he was arrested and his mobile phone was seized. Annexure 1 is the FIR. Thereafter, the police laid a charge sheet before the Judicial First Class Magistrate Court-I, Aluva and the learned Magistrate has taken cognizance of the offence based on Annexure 2 Final Report. According to the petitioner, even if the entire allegations in Annexure 2 are accepted in toto, no offence under Section 292 IPC is made out.

3. The short point to be decided in this case is whether the offence under Section 292 IPC is made out in this case. It will be better to extract Section 292 IPC for a proper understanding of the ingredients of the Section:

"292. Sale, etc., of obscene books, etc.-- (1)



For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.

(2) Whoever--

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) imports, exports or conveys any obscene object for any of the purposes aforesaid, or knowing or having reason to believe that such object will be sold, let to hire, distributed or publicly exhibited or in any manner put into circulation, or

(c) takes part in or receives profits from any business in the course of which he knows or has reason to believe that any such obscene objects are, for any of the purposes aforesaid, made, produced, purchased, kept, imported, exported, conveyed, publicly exhibited or in any manner put into circulation, or

(d) advertises or makes known by any means whatsoever that any person is engaged or is ready to



engage in any act which is an offence under this section, or that any such obscene object can be procured from or through any person, or

(e) offers or attempts to do any act which is an offence under this section,

shall be punished on first conviction with imprisonment of either description for a term which may extend to two years, and with fine which may extend to two thousand rupees, and, in the event of a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and also with fine which may extend to five thousand rupees.

Exception.--This section does not extend to

(a) any book, pamphlet, paper, writing, drawing, painting, representation, or figure--

(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 *bona fide* for religious purposes;

(b) any representation sculptured, engraved, painted or otherwise represented on or in--

(i) any ancient monument within the meaning of the Ancient Monuments and Archaeological Sites and Remains Act, 1958 (24 of 1958), or

(ii) any temple, or on any car used for the conveyance of idols, or kept or used for any religious purpose.

4. To attract an offence under Section 292 IPC,



there must be evidence to show that the accused sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever. The allegation against the petitioner as per Annexure 2 charge sheet is like this:

“പ്രതി കാമത്തെ ഉത്തേജിപ്പിക്കുന്നതും കാമാതുരമായ ശ്രദ്ധയെ ആകർഷിക്കുന്നതുമായ അശ്ലീല വീഡിയോ ചിത്രങ്ങൾ സ്റ്റോർ ചെയ്ത SHAVOMI കമ്പനി നിർമ്മിതമായ ഒരു മൊബൈൽ ഫോണിൽ അശ്ലീല ചിത്രങ്ങൾ കണ്ടുകൊണ്ട് ആലുവ വെസ്റ്റ് വില്ലേജ് ആലുവ കരയിൽ പാലസിന് സമീപം മണപ്പുറം പാലത്തിലേക്ക് പോകുന്ന റോഡരികിൽ നിൽക്കുന്നതായി 11.7.2016 തീയതി രാത്രി 8.40 മണിക്ക് 2- ആം സാക്ഷിയാലും മറ്റും കാണപ്പെട്ട് പ്രതി മേൽ വകുപ്പ് പ്രകാരമുള്ള ശിക്ഷിക്കത്തക്ക കുറ്റം ചെയ്തു എന്നും മറ്റും”

5. Even according to the prosecution, there is



no case that the accused was watching obscene videos using a mobile phone which will attract youngsters. There is absolutely no allegation by the prosecution that the petitioner publicly exhibited the video. Even the Sec.161 Cr.P.C statement of the police officer only shows that the petitioner was watching the obscene videos looking down at his mobile phone. It will be better to extract the Section 161 statement of the CPO 10946, Saji E.J, who is the charge witness No.1 in this case:

“എനിക്ക് 11.7.16 തീയതി സ്റ്റേഷൻ എമർജൻസി ഡ്യൂട്ടിയായിരുന്നു. അന്നേ ദിവസം SI ജോസ് ജോർജ് സാറിന്റെ കൂടെ സ്റ്റേഷൻ വക ജീപ്പിൽ L/O പട്രോൾ സഞ്ചരിച്ച് വരവെ രാത്രി 8.40 മണിക്ക് ആലുവ പാലസിനു സമീപം മണപ്പുറത്തേയ്ക്കുള്ള പുതിയ പാലത്തിലേയ്ക്കുള്ള വഴിയിൽ എത്തിയ സമയം റോഡ് സൈഡിൽ ഒരാൾ കൂനിഞ്ഞ് നിന്ന് മൊബൈൽ ഫോണിൽ എന്തോ ചെയ്യുന്നതായി കാണപ്പെടുകയാൽ ജീപ്പ് നിറുത്തിച്ച് SI - യുടെ കൂടെ ഞാനും ടിയാന്റെ സമീപം ചെന്ന് നോക്കിയതിൽ



മൊബൈലിൽ അശ്ലീല ചിത്രങ്ങൾ കണ്ടു കൊണ്ടിരിക്കുന്നതായി കാണപ്പെടുകയാൽ ടിയാനെ SI അറസ്റ്റ് ചെയ്തു സ്റ്റേഷനിൽ കൊണ്ടുവന്നിട്ടുള്ളതും പേരും വിലാസവും ചോദിച്ചതിൽ [REDACTED] [REDACTED] എന്ന് പറയുകയും ചെയ്തിട്ടുള്ളതാണ്. മൊബൈൽ ഫോൺ മഹസ്സൂർ പ്രകാരം ബന്തവസ്സിലെടുക്കുകയും, ടിയാനെ അറസ്റ്റ് ചെയ്യുവാൻ SI യെ സഹായിച്ചിട്ടുള്ളതുമാണ്. മഹസ്സൂറിൽ ഞാൻ ഒപ്പ് വച്ചിട്ടുള്ളതുമാണ്. തുടർന്ന് ടിയാന്റെ പേരിൽ കേസെടുത്തതായി എനിക്കറിയാം.”

6. 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 Section 292 IPC. Similarly, watching of an obscene video by a person from a mobile phone in his privacy is also not an offence under Section 292 IPC. If the accused is trying to circulate or distribute or publicly exhibits any obscene video or photos, then alone the offence under Section 292 IPC is attracted. In this case, even if the entire prosecution



case is accepted in toto, no offence under Section 292 IPC is made out against the petitioner.

7. In **Ramesh Krishnan v. State of Kerala** [1999 (2) KLT 806] this Court considered the scope of Section 292 (2) (a) IPC. It will be better to extract the relevant portion of the above judgment:

"2. As seen above, the allegation itself is that the film was exhibited in the residence of the 1st accused. Accused 2 and 3 were the only viewers. In order to constitute an offence under S.292(2)(a) IPC., it must be a case where the obscene object was sold, let on hire, distributed or publicly exhibited or put into circulation. Production or possession of the object for any of the above said purposes will also constitute an offence. Here, there is no allegation that the blue film was sold, let on hire or distributed or publicly exhibited. As noted above, the film was being viewed only by accused 2 and 3 from the residence of the 1st accused. There is no allegation that the film was produced by any of the petitioners for purposes of distribution or circulation also. So, the acts alleged in the charge do not constitute an offence under sub-s. (2)(a) of S.292 IPC. If the prosecution had succeeded in finding the source of the film, possibly, the producer or in case it was sold or distributed, such person who



sold, distributed or put the film on circulation could have been prosecuted. That is not the case here. There is no scope for prosecuting the petitioners for the above said offence. The charge is liable to be quashed.”

8. Similarly in **Abdul Rasheed v. State of Kerala** [2008 (2) KHC 677], this Court considered a similar question. It will be better to extract the relevant portion of the above judgment:

“13. It may be true that mere possession of an obscene cassette by itself amount to an offence punishable under S.292(2) IPC. But it all depends upon the circumstances under which a person is found to be in possession of such obscene material. In Moidu's Case, 1989 KHC 526 : 1989 (2) KLT 809 all that was proved was that a person was found standing in a public place with two cassettes in a bag and those cassettes were after his apprehension by the police, found to contain obscene scenes. If from the facts and circumstances of a given case it is revealed that a person is in possession of obscene material meant for satisfying his fugitive passion for sex, and the circumstances do not suggest that he had any mercenary interest in possessing such obscene material, it could then be legitimately concluded that such material is not obscene so as to expose the



person to punishment. But here in the case on hand, the accused was found managing a video shop wherein MO 1 obscene cassette containing a blue film evidently kept for hire to the potential customers, was found. In such circumstances, it cannot be said that the possession of the cassette was without the requisite mens rea or that it and does not attract the ingredients of the offence punishable under S.292 IPC.”

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 Section 292 IPC is made out against the petitioner. Therefore, this Crl.M.C. is to be allowed.

9. But before parting with this case, I must remind the parents of minor children in our country. Watching pornography may not be an offence. But if minor children start to watch porn videos, which are now accessible in all mobile phones, there will be far reaching consequences. The innocent parents will give



mobile phones to their minor children to make them happy. Instead of delicious food made by the mother and a cake cutting ceremony on birthdays of children, parents are giving mobile phones with internet access to their minor children as a gift on such occasions to make them happy. The parents should be aware of the danger behind it. Let the children watch informative news and videos from the mobile phones of their parents in their presence. Parents should never hand over mobile phones to minor children to make them happy and thereafter complete their daily routine works in their house allowing unsupervised use of mobile phones by children. Let the children play cricket or football or other games they like during their leisure time. That is necessary for a healthy young generation who are to become the beacons of hope of our nation in the future. Instead of purchasing food from restaurants through 'swiggy' and 'zomato', let the



children taste the delicious food made by their mother and let the children play at play grounds at that time and come back home to the mesmerizing smell of mother's food. I leave it there to the wisdom of the parents of minor children of this society.

In the facts and circumstances of this case, I am of the considered opinion that no offence is made by the petitioner in this case. Hence, this Crl.M.C. is allowed. All further proceedings in C.C.No.1248/2016 of the Judicial First Class Magistrate Court-I, Aluva arising from Crime No.2550/2016 of Aluva Police Station are quashed.

Sd/-

**P.V.KUNHIKRISHNAN
JUDGE**



2023/KER/53584

Crl.M.C.No.7421 of 2023

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APPENDIX OF CRL.MC 7421/2022

PETITIONER ANNEXURES

ANNEXURE1 CERTIFIED COPY OF FIR IN CRIME NO.
2550/2016 OF ALUVA POLICE
STATION,ERNAKULAM DISTRICT .

ANNEXURE2 CERTIFIED COPY OF THE CHARGE SHEET
IN C.C. NO. 1248/2016 OF JUDICIAL
FIRST CLASS MAGISTRATE COURT-I,
ALUVA.

RESPONDENTS EXHIBITS :NIL

//TRUE COPY// PA TO JUDGE