



2024:KER:28420

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

FRIDAY, THE 5TH DAY OF APRIL 2024 / 16TH CHAITHRA, 1946

CRL.MC NO. 1736 OF 2021

CRIME NO.351/2020 OF Hosdurg Police Station, Kasargod
AGAINST THE FINAL REPORT IN SC NO.519 OF 2020 OF ADDITIONAL
DISTRICT & SESSIONS COURT - I, KASARAGOD

PETITIONER/ACCUSED:

PARTHASARATHI M
AGED 33 YEARS
S/O. VENUGOPAL, SWAPNAM HOUSE, NEAR AMRUTHA
NURSARY, ANANTHAMPALLAM, KANHANGAD VILLAGE,
HOSDURG , KASARGOD, KERALA-671 315.
BY ADVS.
MAHESH V RAMAKRISHNAN
SMT.MARY LIYA SABU

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA,
ERNAKULAM-682 031.

BY P.P.SMT.M.K.PUSHPALATHA
SRI.N.R.SANGEETH RAJ
SMT.C.SEENA
SRI.G.SUDHEER

AMICI CURIAE SRI.RENJITH B MARAR & SRI.JOHN S
RALPH

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD ALONG
WITH CRL.R.P.NO.70/2023 AND CONNECTED CASES ON 05.04.2024,
THE COURT ON THE SAME DAY PASSED THE FOLLOWING:



2024:KER:28420

Crl.M.C.Nos.1736 of 2021, 2231 of 2023 and
Crl.R.P.Nos.70, 221 & 281 of 2023

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

FRIDAY, THE 5TH DAY OF APRIL 2024 / 16TH CHAITHRA, 1946

CRL.MC NO. 2231 OF 2023

CRIME NO.503/2020 OF Infopark Police Station, Ernakulam
AGAINST THE FINAL REPORT IN SC NO.971/2021 AND ORDER DATED
1.11.2022 IN CMP.NO.468 OF 2022 OF ADDL. DISTRICT AND
SESSIONS COURT, ERNAKULAM (FOR THE TRIAL OF CASES RELATING
TO ATROCITIES & SEXUAL VIOLENCE AGAINST WOMEN AND CHILDREN)

PETITIONER/ACCUSED:

AHAMED MUBASHIR, AGED 26 YEARS
S/O MOIDEEN, ORMAKUDIL HOUSE,
UDAMA P.O, KASARGOD, PIN - 671319.

BY ADVS.SARUN
C.C.ANOOP
R.ANAS MUHAMMED SHAMNAD
ARCHANA HARIDAS K.

RESPONDENTS/STATE & COMPLAINANT :

- 1 THE STATE OF KERALA
THROUGH THE LEARNED PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, PIN - 682031.
- 2 THE STATION HOUSE OFFICER
INFO PARK POLICE STATION, INFO PARK CAMPUS, KAKKANAD
ERNAKULAM DISTRICT., PIN - 682030
BY P.P.SMT.M.K.PUSHPALATHA, SRI.N.R.SANGEETH RAJ,
SMT.C.SEENA & SRI.G.SUDHEER
AMICI CURIAE SRI.RENJITH B MARAR & SRI.JOHN S RALPH

THIS CRIMINAL MISC. CASE HAVING BEEN FINALLY HEARD
ALONG WITH CRL.R.P.NO.70/2023 AND CONNECTED CASES ON
05.04.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:



2024:KER:28420

Crl.M.C.Nos.1736 of 2021, 2231 of 2023 and
Crl.R.P.Nos.70, 221 & 281 of 2023

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

FRIDAY, THE 5TH DAY OF APRIL 2024 / 16TH CHAITHRA, 1946

CRL.REV.PET NO. 70 OF 2023

CRIME NO.1190/2020 OF Viyyur Police Station, Thrissur
AGAINST THE ORDER DATED 17.01.2023 IN SC NO.289 OF 2022 OF
FAST TRACK SPECIAL COURT, THRISSUR

REVISION PETITIONER/ACCUSED:

BASIL ELDOSE, AGED 27 YEARS
NEDUNGOTTIL HOUSE, PULLAMKANDAM DESOM,
KATILAPPOVAM, MADAKKATHARA VILLAGE, THRISSUR,
KERALA, 680028, PIN - 680028.
BY ADV SARATH BABU KOTTAKKAL

RESPONDENT/COMPLAINANT:

STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, PIN - 682031.
BY P.P.SMT.M.K.PUSHPALATHA
SRI.N.R.SANGEETH RAJ
SMT.C.SEENA
SRI.G.SUDHEER

AMICI CURIAE SRI.RENJITH B MARAR & SRI.JOHN S
RALPH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY
HEARD ALONG WITH CRL.R.P.NO.221/2023 AND CONNECTED CASES
05.04.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:



2024:KER:28420

Crl.M.C.Nos.1736 of 2021, 2231 of 2023 and
Crl.R.P.Nos.70, 221 & 281 of 2023

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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

FRIDAY, THE 5TH DAY OF APRIL 2024 / 16TH CHAITHRA, 1946

CRL.REV.PET NO. 221 OF 2023

CRIME NO.2880/2020 OF Kottarakkara Police Station, Kollam
AGAINST THE ORDER DATED 27.1.2023 IN CRL.M.P.06/2022 IN SC
NO.809 OF 2020 OF FAST TRACK SPECIAL COURT, KOTTARAKKARA

REVISION PETITIONER/ACCUSED:

AKHIL ABRAHAM, AGED 28 YEARS
S/O KURUVILA MATHEW, ANJILIL VELIL VEEDU,
NETAJI NAGAR, KIZHAKKEKARA MURI,
KOTTARAKARA, KOLLAM, PIN - 691506.

BY ADVS.S.RAJEEV

V.VINAY

M.S.ANEER

PRERITH PHILIP JOSEPH

SARATH K.P.

ANILKUMAR C.R.

RESPONDENT/STATE:

STATE OF KERALA

REP. BY PUBLIC PROSECUTOR, HIGH COURT OF KERALA,
ERNAKULAM-682031 (CRIME NO 2880/2020 OF
KOTTARAKARA POLICE STATION, KOLLAM)

BY P.P.SMT.M.K.PUSHPALATHA , SRI.N.R.SANGEETH RAJ
SMT.C.SEENA, SRI.G.SUDHEER

AMICI CURIAE SRI.RENJITH B MARAR & SRI.JOHN S
RALPH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY
HEARD ALONG WITH Crl.Rev.Pet.70/2023 AND CONNECTED CASES ON
05.04.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:



IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR.JUSTICE K. BABU

FRIDAY, THE 5TH DAY OF APRIL 2024 / 16TH CHAITHRA, 1946

CRL.REV.PET NO. 281 OF 2023

CRIME NO.1499/2020 OF Kannur Town POLICE STATION, Kannur
AGAINST THE ORDER DATED 17.1.2023 IN CMP.NO.48/22 IN SC
NO.20 OF 2021 OF FAST TRACK SPECIAL COURT, KANNUR

REVISION PETITIONER/ACCUSED:

SUJITH. P.M, AGED 59 YEARS
S/O VASUDEVAN, MEGNA HOUSE, THULICHERY.P.O,
CIVIL STATION, KANNUR, PIN - 670004.

BY ADVS.

M.K.SUMOD

VIDYA M.K.

THUSHARA.K

RESPONDENT/STATE:

THE STATE OF KERALA
REPRESENTED BY THE PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, PIN - 682031
BY P.P.SMT.M.K.PUSHPALATHA
SRI.N.R.SANGEETH RAJ
SMT.C.SEENA
SRI.G.SUDHEER
AMICI CURIAE SRI.RENJITH B MARAR & SRI.JOHN S
RALPH

THIS CRIMINAL REVISION PETITION HAVING BEEN FINALLY
HEARD ALONG WITH CrI.Rev.Pet.70/2023 AND CONNECTED CASES, ON
5.4.2024, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:



ORDER

Is strict proof of the age of the victim required in all cases of child pornography ? Should the prosecution prove the identity of the victim in child pornography cases ? These are essentially the questions raised in all these petitions. Therefore, I prefer to dispose of all these cases analogously.

2. In Crl.M.C.No.2231 of 2023, the petitioner challenges the final report and the order dated 1.11.2022 in CMP.No.468 of 2022, an application seeking discharge, passed by the Court of Additional District and Sessions Judge, Ernakulam (for the trial of cases relating to Atrocities & Sexual Violence against Women and Children). In Crl.M.C.No.1736 of 2021, the petitioner challenges the final report in S.C.No.519/2020 on the file of the Additional District and Sessions Court-I, Kasaragod.

3. In all the Criminal Revision Petitions, the petitioners challenge the orders rejecting their applications seeking discharge under Section 227 Cr.P.C..



Crl.M.C.No.1736 of 2021

4. The prosecution case is that on 27.6.2020 at 8 a.m., the Police found naked videos and photos of minor girls in the mobile phone of the accused. After completing the investigation the Police submitted final report alleging offences punishable under Sections 15(1) & 15(2) of the Protection of Children from Sexual Offences Act, 2012 (for short "the POCSO Act") and Section 67-B(b) of the Information Technology Act, 2000 (for short "the I.T. Act").

Crl.M.C.No.2231 of 2023

5. The prosecution case is that on 4.10.2020, pursuant to the information received from the Cyber Cell, Kochi City, the Inspector of Police, Info Park Police Station found child pornographic videos and pictures in the message application installed in the mobile phone of the accused. After completing the investigation the Police submitted final report alleging offences punishable under Sections 67 & 67-B of the I.T. Act and Section 15 of the POCSO Act.

Crl.R.P.No.70 of 2023

6. The prosecution alleges that on 4.10.2020, the Police found obscene videos containing child pornography in the laptop in the possession of the accused. The Police submitted final report alleging



offences punishable under Section 15(1) of the POCSO Act and Section 67-B(b) of the I.T. Act. The petitioner/accused filed an application seeking discharge under Section 227 Cr.P.C. as Crl.M.P.No.575/2022. The Court below dismissed the application. This order is under challenge in the Crl.R.P.

Crl.R.P.No.221 of 2023

7. The prosecution alleges that the Police found pornographic photos and videos downloaded in the mobile phone in the possession of the accused. The Police submitted final report alleging offences punishable under Section 15 of the POCSO Act and Section 67-B(b) of the I.T. Act. The petitioner/accused filed an application seeking discharge under Section 227 Cr.P.C. as Crl.M.P.No.06/2022. The Court below dismissed the application. This order is under challenge in the Crl.R.P.

Crl.R.P.No.281 of 2023

8. The prosecution case is that on 4.10.2020, the Police found obscene videos and photos containing child pornography in the mobile phone in the possession of the accused. The Police submitted final report alleging offences punishable under Section 15(1) of the POCSO Act and Section 67-B(b) of the I.T. Act. The petitioner/accused



filed an application seeking discharge under Section 227 Cr.P.C. as C.M.P.No.48/2022. The Court below dismissed the application. This order is under challenge in the revision petition.

9. I have heard the learned counsel for the petitioners, the learned Amici Curiae Sri.Renjith B Marar and Sri.John S Ralph and the learned Public Prosecutor Smt.Pushpalatha.

10. Sri.Sarath Babu Kottakkal, the learned counsel appearing for the petitioner in Crl.R.P.No.70/2023 submitted the following:

The offences under the POCSO Act are attracted only if the victim is a child. The term 'child' is defined as any person below the age of eighteen years. If the age is not established, no prosecution under the POCSO Act will lie. For any offence under the POCSO Act proof of age of the victim is necessary. There shall be some legally admissible material to establish the age of the victim. It is not safe to assess the age of someone from a photograph or video from the perception of the viewer.

11. Sri.Mahesh V.Ramakrishnan, the learned counsel appearing for the petitioner in Crl.M.C.No.1736/2021 supported the contention raised by Sri.Sarath Babu Kottakkal. Sri.Sarun, the



learned counsel for the petitioner in Crl.M.C.No.2231/2023 submitted that the report of the forensic science laboratory makes it clear that the petitioner has not downloaded any pornographic material.

12. Sri.M.K.Sumod, the learned counsel for the revision petitioner in Crl.R.P.No.281/2023 relying on **Manuel Benny v. State of Kerala and Another (2022 KHC 3437)** submitted that since there is no material to show that the petitioner downloaded child pornographic material the offences alleged are not attracted.

13. Sri.S.Rajeev, the learned counsel appearing for the petitioner in Crl.R.P.No.221 of 2023 submitted that the prosecution needs to adduce positive evidence to prove the age of the victim. The prosecution has to prove that the victim is aged below 18 years. It is further submitted that the prosecution failed to prima facie prove that the petitioner voluntarily downloaded any pornographic material.

14. The learned Amicus Curiae Sri.Renjith B Marar submitted the following:

(1) The offence of child pornography is not against the individual model alone but against the entire society. It therefore



emphasizes the viewpoint of the audience which is the society at large.

(2) Strict proof of the age of the model is not necessary. There doesn't need to be any actual abuse of the child for the depiction of the sexual activity to constitute child pornography. Therefore, the age of the child which is the subject matter of the visual depiction need not be brought to light by strict proof. What is necessary is that the subject model needs to appear to depict the child. In the case of digital image there cannot be any proof as to the age, as the image is not born at all but only depicts a child. There could also be instances wherein the child pornographic materials may be stored or transmitted by the accused and the subject matter may not be within the jurisdiction of the respective courts or the investigating agency may find it difficult to ascertain the real age of the person whose image is portrayed. Therefore, all that is necessary to constitute child pornography is that to a prudent man's wisdom, the person portrayed in the pornographic materials appears to be a child. There could also be the assistance of expert testimony in cases where there are doubts in the mind of the Court as to the age of the model used in the pornographic material.



(3) The Court can rely on its own experience to decipher whether the model used is a child. A case-to-case basis approach is required.

(4) Given the anonymity of the internet, the identity of the children depicted and their whereabouts are frequently unknown.

15. The learned Amicus Curiae Sri.Renjith B Marar relied on the following decisions:-

- (i) Regina v. Michael Land **[1998] 1 All ER 403**
- (ii) John Lead better v. Her Majesty's Advocate **[2020] HCJAC 51.**
- (iii) United States v. Katz **178 F.3rd 368 (1999).**
- (iv) K.A.Abbas v. Union of India **[(1970) 2 SCC 780]**
- (v) Aweek Sarkar & Anr. v. State of West Bengal and others **[(2014) 4 SCC 257]**
- (vi) Common Wealth v. Robert, **The Superior Court of Pennsylvania 829 A.2d.1207.**

16. The learned Amicus Curiae Sri.John S Ralph made the following submissions:-

1. If the prosecution allegation is that a minor child (human being) is used in the images, the prosecution has to prove the age except in cases where the court can take judicial notice as in the case of an infant or toddler.
2. If the image is that of a virtual child, age cannot be proved since the image has no date of birth.



3. In such a case the objective test is to be applied to see whether the intention of the accused was to store/possess etc. of child porn.

17. The petitioners are alleged to have committed offences punishable under Section 15 of the POCSO Act and Section 67-B of the I.T. Act. The relevant penal sections are extracted below:

18. Section 15 of the POCSO Act reads thus:-

“15. Punishment for storage of pornographic material involving child.-- (1) Any person, who stores or possesses pornographic material in any form involving a child, but fails to delete or destroy or report the same to the designated authority, as may be prescribed, with an intention to share or transmit child pornography, shall be liable to fine not less than five thousand rupees and in the event of second or subsequent offence, with fine which shall not be less than ten thousand rupees.

(2) 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.

(3) Any person, who stores or possesses pornographic material in any form involving a child for commercial purpose shall be punished on the first conviction with imprisonment of either description which shall not be less than three years which may extend to five years, or with fine, or with both and in the event of second or subsequent conviction, with imprisonment of either description which shall not be less than five years which may extend to seven years and shall also be liable to fine.

19. Section 67-B of the Information Technology Act reads thus:

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:

xx xx xx

Explanation—For the purposes of this section, —children means a person who has not completed the age of 18 years.”

20. Sub-section (1) of Section 15 of the POCSO Act makes the act of storing or possessing pornographic material in any form involving a child with an intention to share or transmit child pornography. Sub-section (2) makes any act of storing or possessing pornographic material in any form involving a child for transmitting or



propagating or displaying or distributing in any manner. Sub-section (3) deals with the same overt acts committed for commercial purposes.

21. Child pornography is defined in Section 2(da) of the POCSO Act as follows:-

“2(da) “child pornography” means any visual depiction of sexually explicit conduct involving a child which includes photograph, video, digital or computer generated image indistinguishable from an actual child, and image created, adapted, or modified, but appear to depict a child.”

22. Section 2(da) takes in the following ingredients:

- i. visual depiction of sexually explicit conduct
- ii. involving a child
- iii. image indistinguishable from an actual child
- iv. appear to depict a child.

23. Sub-sections (a) and (b) of Section 67-B of the I.T. Act make the acts referred to therein depicting children punishable.

24. A close reading of the relevant sections in the POCSO Act and the I.T. Act makes it clear that depiction can only be through artificial intelligence or through a work created to depict the image of a child.

25. The intention of the legislation is to prohibit digital child pornography. The legislature perceived the offence of child pornography



not against the individual model alone but against the entire society.

26. The offence of child pornography is treated as an offence against the entire society emphasizing the viewpoint of the audience, the society at large. In child pornography always there need not be any actual abuse of the child.

27. In **Regina v. Michael Land** (supra), while dealing with the offence under Section 1(1)(c) of the Protection of Children Act 1978 which makes possession of indecent photographs or pseudo photographs of children with a view to their being distributed or shown, the Royal Courts of Justice (The Strand, London WC2) considered the nature of evidence to prove the age of the child involved. The Court, while considering the question of whether the model involved did or might depict a person under 16 observed that there is obvious difficulty in making any positive identification of an unknown person depicted in a photograph, hence his/her age, and therefore, underlines that the question of whether such a person was a child for the purpose of the 1978 Act is one of fact based on inference without any need for formal proof. The Court further held that there was no basis for concluding that in the absence of pediatric or other expert evidence, the jury is prevented from concluding that the indecent photograph depicts a boy



or a girl under the age of 16. In the jury trial, the Judge directed the jury that in deciding whether it was proved that the photographs were of a child the jury can do no more than use his/her own experience in the judgment and his/her critical faculties in deciding the issue. The Judge observed that it is simply an issue of fact for the jury to decide what they have seen with their own eyes.

28. While constructing the term 'obscenity' as provided in Section 292 of the Indian Penal Code the Supreme Court in **Aveek Sarkar & Anr. v. State of West Bengal and others [(2014)4 SCC 257]** applied the 'community standard test' holding that Hicklin test (**R. v. Hicklin [(1868) LR 3 QB 360]**) which postulated that a publication has to be judged for obscenity based on isolated passages of a work considered out of context and judged by their apparent influence on most susceptible readers, such as children or weak-minded adults, is not a correct test to be applied to determine what is obscenity. The Supreme Court observed that obscenity has to be judged from the point of view of an average person, by applying contemporary community standards. This view was reiterated by the Supreme Court in **Apoorva Arora v. State (Govt. of NCT of Delhi) [2024 KHC OnLine 6153]**.



29. In **John Lead Better v. Her Majesty's Advocate (2020 HCJAC 51)**, the Court, concerning the question of who is competent to give evidence about whether an indecent photograph depicts a child, held that proof that the subject of an indecent image was of a person under the age of 16 did not require an expert witness. A wide range of types of evidence might be available. It was necessary to demonstrate that a skilled witness did have relevant knowledge and experience to give evidence of fact, which was not based on personal observation or of opinion. Where that was demonstrated, the witness could draw on the general body of knowledge and understanding, the Court observed following **Griffiths v. Hart (2005 JC 313)** and **Kennedy v. Concordia Services [2016 SC (UKSC) 6 at paras (42) and (50)]**.

30. In **Procurator Fiscal, perth v. Neil Macdonald Hart (2005 SCCR 392)**, the Court, while dealing with the charge of contravention of Section 52A(1) of the Civic Government (Scotland) Act 1982, considered the nature of evidence required for proving the age of a child in a visual. The Court disagreed with the view in **Regina v. Michael Land** and held as follows:-

"We must respectfully disagree with that view. In our opinion, while there may be cases in which proof of the



essential facts in question may be achieved without reference to an expert witness or witnesses, in other kinds of cases, where the subject of the image may be approaching the age of 16, there may be very considerable difficulty for the fact-finding tribunal in that regard. In such cases, the evidence of one or more expert witnesses may well be necessary in practice to enable the Crown to prove that the subject of an image is under 16 years of age."

31. In **United States v. Katz** (supra) on the question of whether the age of a model in a child pornography can be determined by a lay jury without the assistance of expert testimony, the Court held thus:-

"20. Implicit in the district court's ruling is the finding that the age of the models had to be determined by expert testimony. The ruling was no doubt influenced by the government's position embracing the need for, and advocating the admissibility of, expert testimony on this issue. On appeal, the government changes its position and argues that a lay jury could determine the age of the post-puberty models without any assistance from its own expert, citing *United States v. Lamb*, 945 F.Supp.441 (N.D.N.Y.1996) (declining to require the government to prove the age of the persons depicted by expert testimony); *United States v. Gallo*, 846 F.2d 74, 1988 WL 46293, at 4 (4th Cir.1988) (table), ("expert testimony as to age, while perhaps helpful in some cases, is certainly not required as a matter of course."); *United States v. Villard*, 700 F.Supp.803, 814 (D.N.J.1988) (noting that "the jury can examine the photographs in question and determine for itself whether the individual is under eighteen years of age.")

21. The threshold question – whether the age of a model in a child pornography prosecution can be determined by a lay jury without the assistance of expert testimony -must be determined on a case by case basis. As the government correctly points out, it is sometimes possible for the fact finder to decide the issue of age in a child pornography case



without hearing any expert testimony. See *United States v. O'Malley*, 854 F.2d 1085 (8th Cir.1988) (defendant's letters describing the models in the pictures as a "twelve-year-old girl" and "younger than nine]," combined with the pictures themselves, sufficient to sustain a child pornography conviction). However, in other cases, the parties have been allowed to present conflicting expert testimony. See *United States v. Anderton*, 136 F.3d 747, 750 (11th Cir.1998) (Government's expert, a medical doctor with expertise in adolescent growth and development, testified that the models were between eleven and fifteen and a half. Defendant's expert, a clinical psychologist and sex therapist, testified that the ages of the models could not be determined.) In yet other cases, one party presents expert testimony, while the other does not. See *United States v. Broyles*, 37 F.3d 1314, 1316 (8th Cir.1994) (Government presented the expert testimony of a pediatric endocrinologist and Broyles presented no evidence). A case by case analysis will encounter some images in which the models are prepubescent children who are so obviously less than 18 years old that expert testimony is not necessary or helpful to the fact finder. On the other hand, some cases will be based on images of models of sufficient maturity that there is no need for expert testimony. However, in this case, in which the government must prove that a model, who is post-puberty but appears quite young, is less than eighteen years old, expert testimony may well be necessary to "assist the trier of fact to understand the evidence or to determine a fact in issue." Fed.R.Evid. 702."

32. In **United States of America v. T.Glenn Anderton** (supra) the Court relied on expert testimony as evidence. In **United States v. Broyles**, (37F 3d 1314, 1316 (8th Dir 1994)) the Court relied on the testimony of a pediatric endocrinologist to determine the age of the child in a video. The Court also relied on the expert testimony to find the age of the child.

33. In **Commonwealth v. Robert** (829 A.2d.127), the Superior Court of Pennsylvania observed that proof of age, like proof of



any material fact, can be accomplished by the use of either direct or circumstantial evidence, or both. The proof necessary to satisfy the element of age in a dissemination or possession of child pornography case is not limited to expert opinion testimony.

34. The learned Amicus Curiae Sri.Renjith B. Marar submitted that given the anonymity of the internet, the identity of the children depicted and their whereabouts were frequently unknown. Thus conventional means of proving age such as birth certificates or testimony of a relative are usually unavailable. The learned Amicus Curiae contended that requiring law enforcement officials to track down and identify the children depicted to successfully prosecute a child pornography case would defeat the very intention of the child pornography statute and destroy its efficacy as a preventive measure in the sexual exploitation of children.

35. The learned Amicus Curiae submitted that in determining the age of the children the Courts can invoke Section 45 of the Indian Evidence Act to form an opinion upon the age of the model in a given case.

36. The learned Amicus Curiae Sri.John S Ralph however, contended that the witness who says that the image is that of a child



will not satisfy the definition of an `expert' within the meaning of the Indian Evidence Act and therefore, his opinion cannot substitute proof regarding the age of the child.

37. Section 45 of the Indian Evidence Act reads thus:-

“45. Opinions of experts

When the court has to form an opinion upon a point of foreign law, or of science or art; or as to identity of handwriting or finger impressions, the opinions upon that point of persons specially skilled in such foreign law, science or art, or in questions as to identity of handwriting or finger-impressions are relevant facts.

Such persons are called experts.”

38. Section 45 of the Indian Evidence Act is an exception to the rule as regards the exclusion of opinion evidence. An expert within the meaning of Section 45 is one who has devoted time and study to a special branch of learning. He is specially skilled in those points on which he is asked to state his opinion. The Opinion of the expert is only an opinion on evidence.

39. It is a general rule that the opinion of witnesses possessing peculiar skill is admissible, whenever the subject matter of enquiry is such that inexperienced persons are unlikely to form a correct judgment upon it without such assistance. In other words, this is so when it so far partakes of the character of a science or art as to require a course of previous habit or study to obtain a competent



knowledge of its nature.

40. An expert to be competent as a witness need not have acquired his knowledge professionally. It is sufficient so far as the admissibility of the evidence goes if he has acquired special experience therein. The only thing is that the expert must show that he is skilled and has adequate knowledge and experience on the subject.

41. Both under Sections 45 and 47 of the Indian Evidence Act, the evidence is of an opinion, in the former by a scientific comparison and in the latter based on familiarity resulting from frequent observations and experience.

42. In either case the Court must satisfy itself by such means as are open that the opinion may be acted upon.

43. **Phipson on Evidence (Sixteenth Edn at 33-09**

page 971) states as follows:-

“Even at common law the opinions of skilled witnesses were admissible wherever the subject is one upon which competency to form an opinion can only be acquired by a course of special study or experience.”

44. **Phipson (Eighteenth Edn at 33-62 page 1189)**

further states thus:-

“Though the expert must be “skilled”, by special study or experience, the fact that he has not acquired his knowledge professionally goes merely to weight and not to



admissibility.... Equally, one can acquire expert knowledge in a particular sphere through repeated contact with it in the course of one's work, notwithstanding that the expertise is derived from experience and not from formal training."

45. In **State v. S.J. Choudhary [(1996) 2 SCC 428]**, overruling **Hanumant Govind Nargundkar v. State of M.P. [(1952) 2 SCC 71 : AIR 1952 SC 343]** the Supreme Court held that the opinion of an expert in regard to 'typed script' would fall within the ambit of Section 45 of the Evidence Act. The court held that opinion of a person specifically skilled in the use of typewriters and having scientific knowledge of typewriters would be an expert in the science and his opinion about the identity for the purpose of identifying the particular typewriter on which the writing is typed is a relevant fact under Section 45 of the Evidence Act. Viewed on the touchstone of the principles discussed above, I hold that giving an opinion on the age of a model in a visual by a pediatrician is 'science' occurring in Section 45 of the Act.

46. Conclusions

(1) The provisions dealing with the offence of child pornography punishable under Section 15 of the POCSO Act and the offence of publishing or transmitting material in electronic form depicting children engaged in sexually explicit acts or conduct punishable under Section



67-B of the Information Technology Act are to be constructed emphasizing the viewpoint of the audience, the society at large.

(2) There need not be any strict proof as regards the age of the model in every case of child pornography. What is relevant is whether the model appears to be a child.

(3) If the image is that of an infant or toddler, the court can take judicial notice of the fact that the image is that of a child and proceed by framing charge.

(4) The question of whether the age of a model used in a child pornography prosecution is below 18 years is to be answered on a case-by-case analysis. In some cases, there need not be any strict proof as regards the age where the appearance of the model is explicitly that of a child aged below 18 years. In such cases, the fact finder can decide the issue of age without the assistance of an expert testimony.

(5) In some cases, the model involved might depict a person close to the age of 18. The fact finder will find it difficult to arrive at a conclusion as to the age. In such cases, the fact finder may rely on the opinion of a pediatrician or an expert in the field. In the case where the model depicts a boy or girl under the age of 16, the fact finder may



decide based on the experience, using his/her critical faculties in deciding the issue. However, the conclusions are always open to challenge by the defence and the burden of proof shifts in accordance with Chapter VII of the Indian Evidence Act.

(6) In cases of marginal nature the opinion of the experts, including pediatrician and forensic experts, is necessary for arriving at conclusions on the age.

(7) In cases where special circumstances are pleaded as to the age of the model, it is the burden of the party who pleads it to prove the existence of such special circumstances or exceptions, as the case may be.

(8) Prosecution need not always establish the identity of the model as it is practically impossible and insistence on identification of the child and proof of the age as in the case of other offences under the POCSO Act will defeat the intention of the statute. The fact-finding on the age, being an integral part of the offence, the prosecution has to place the material before framing of charge.

Crl.M.C.No.2231 of 2023

47. The petitioner is alleged to have committed the offences punishable under Sections 67 & 67-B of the I.T. Act and Section 15 of



the POCSO Act. The report of the Forensic Science Laboratory (Annexure-A4) prepared after examining the mobile phone and the memory card reads thus:-

“14. Results of Examination:

1. Child pornographic image files were retrieved from the questioned mobile phone marked **Q1**. The soft copy UFED report containing details of image files and other data retrieved from the questioned mobile phone marked **Q1** are enclosed in a folder `Recovered from Q1' in Annexure-1 DVD.
2. Video/picture files depicting child pornography were not detected amongst the data retrieved from the questioned memory card marked.”

In view of the finding of the expert that videos/picture files depicting child pornography were not detected amongst the data retrieved from the memory card, the continuation of the prosecution against the petitioner in S.C.No.971/2021 on the file of the Additional District & Sessions Court, Ernakulam is an abuse of process of law as the prosecution failed to prima facie establish the ingredients of the offences alleged against the petitioner. The case comes under category (3) as enumerated in **State of Haryana and Others v. Bhajan Lal and Others [(1992) SCC (Cri.) 426]** case. Therefore, the FIR, final report and all further proceedings in S.C.No.971/2021 stand quashed.



Crl.R.P.Nos.70, 221 and 281 of 2023

48. In these criminal revisions challenge is to the orders rejecting the applications seeking discharge under Section 227 Cr.P.C. In these cases, the trial Courts have not considered the question of whether the image used is that of the child in the backdrop of the conclusions arrived at above. Therefore, the orders dismissing Crl.MP.Nos.575/2022, 6/2022 and CMP.No.48/2022 stand set aside and the trial Courts are directed to reconsider the applications in accordance with law.

Crl.M.C. No.1736 of 2021

49. The petitioner in this case is alleged to have committed the offences punishable under Sections 15(1) & 15(2) of the POCSO Act and Section 67-B(b) of the I.T. Act. The case of the prosecution is that the mobile phone of the accused therein contained naked videos and photos of minor girls. The prosecution has specifically alleged that the petitioner intentionally stored child pornographic content. It is submitted that the prosecution has failed to establish the age of the model used to attract the offences



alleged. This Court is of the view that it is not a case where this Court can quash further proceedings at this stage. However, the petitioner is to be allowed to seek discharge before the trial Court. Therefore, the Crl.M.C. is closed giving liberty to the petitioner to file an application under Section 227 Cr.P.C. before the trial Court.

50. All the Crl.M.Cs and Crl.R.Ps are disposed of as above. I make it clear that I have not gone into the merits of the allegations contained in the cases considered.

Before parting with these cases, this Court places on record its appreciation to the learned Counsel Sri.Renjith B Marar and Sri.John S Ralph, for their valuable assistance as Amici Curiae.

Sd/-
K.BABU
Judge

TKS



APPENDIX OF CRL.MC 1736/2021

PETITIONER ANNEXURES

- ANNEXURE-A1** CERTIFIED COPY OF THE FIR NO.0351/21020
DATED 27.06.2020 OF THE HOSDURG POLICE
STATION
- ANNEXURE-A2** CERTIFIED COPY OF THE FINAL REPORT DATED
31.10.2020 IN SC NO.519/2020 ON THE FILE
OF THE ADDL.DISTRICT AND SESSIONS COURT,
KASARAGO



APPENDIX OF CRL.MC 2231/2023

PETITIONER ANNEXURES

Annexure-A1	THE TRUE COPY OF THE SEARCH LIST DATED 04.10.2020 PREPARED BY THE 2ND RESPONDENT
Annexure-A2	CERTIFIED COPY OF THE F.I.R NO. 0503/2020 OF INFO PARK POLICE STATION REGISTERED ON 04.10.2020
Annexure-A3	CERTIFIED COPY OF THE CHARGE SHEET FILED BY THE 2ND RESPONDENT IN CRIME NO.0503/2020
Annexure-A4	TRUE COPY OF THE EXAMINATION REPORT OF REGIONAL FORENSIC LABORATORY, KOCHI
Annexure-A5	CERTIFIED COPY OF THE ORDER DATED 01.11.2022 IN CMP NO.468/2022 IN S.C.971/2021 ON THE FILE OF ADDL. DISTRICT AND SESSIONS JUDGE, ERNAKULAM (FOR THE TRIAL OF CASES RELATING TO ATROCITIES & SEXUAL VIOLENCE AGAINST WOMEN AND CHILDREN)



APPENDIX OF CRL.REV.PET 70/2023

PETITIONER ANNEXURES

- Annexure A1** 3. THE CERTIFIED COPY OF THE FIR IN CRIME NO 1170/2020 DATED 04/10/2020 OF THE VIYYUR POLICE STATION, THRISSUR
- Annexure A2** 4. THE CERTIFIED COPY OF THE FINAL REPORT IN CRIME NO 1170/2020 DATED 30/12/2021 OF THE VIYYUR POLICE STATION, THRISSUR
- Annexure A3** 5. THE CERTIFIED COPY OF THE S.161 STATEMENTS OF THE WITNESSES IN CRIME NO 1170/2020 DATED 05/10/2020 TO 05/07/2021 OF THE VIYYUR POLICE STATION, THRISSUR
- Annexure A4** 6. THE CERTIFIED COPY OF THE CYBER-FORENSIC REPORT IN CRIME NO 1170/2020 DATED 29/12/2021 OF THE VIYYUR POLICE STATION, THRISSUR
- Annexure A5** 7. THE CERTIFIED COPY OF THE IT CERTIFICATE IN CRIME NO 1170/2020 DATED 17/08/2021 OF THE VIYYUR POLICE STATION, THRISSUR
- Annexure A6** 8. THE CERTIFIED COPY OF THE COURT CHARGE FRAMED AGAINST THE ACCUSED IN SC 289/2022 DATED 17/01/2023 OF THE (FAST TRACK) SPECIAL JUDGE, THRISSUR



APPENDIX OF CRL.REV.PET 221/2023

PETITIONER ANNEXURES

Annexure-I A TRUE COPY OF THE FIR IN CRIME NO
2880/2020 KOTTARAKARA POLICE STATION,
KOLLAM DISTRICT

Annexure-II A TRUE COPY OF THE FINAL REPORT IN CRIME
NO. 2880/2020 KOTTARAKARA POLICE STATION,
KOLLAM DISTRICT



APPENDIX OF CRL.REV.PET 281/2023

PETITIONER'S ANNEXURES

- Annexure A1** CERTIFIED COPY OF THE FIR IN CRIME NO. 1499/2020 OF THE KANNUR TOWN POLICE STATION DATED 4.10.2020.
- Annexure A2** CERTIFIED COPY OF THE MEMO OF EVIDENCE IN CRIME NO 1499/20 OF KANNUR TOWN POLICE STATION
- Annexure A3** CERTIFIED COPY OF THE "CYBER FORENSIC ANALYSIS REPORT" DATED: 02/12/2020
- Annexure A4** CERTIFIED COPY OF THE FINAL REPORT DATED: 17/12/2020 IN THE CRIME NUMBER 1499/2020 OF KANNUR TOWN POLICE STATION.
- Annexure A5** CERTIFIED COPY OF THE ORDER DATED: 17/01/2023 IN CMP 48/2022 IN SC 20/21 OF THE FAST TRACK SPECIAL JUDGE (FTSC), KANNUR.