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## SUPREME COURT OF INDIA

**JUST RIGHTS FOR CHILDREN ALLIANCE & ANR. ...APPELLANT(S)**
**VERSUS**
**S. HARISH & ORS. ...RESPONDENT(S)**

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# Mere watching or storage of pornography involving children is an offence under POCSO Act: Supreme Court

CRIMINAL APPEAL NOS. 2161-2162 OF 2024 (ARISING OUT OF SPECIAL LEAVE PETITION (CRL) NOS. 3665-3666 OF 2024)

Date of Judgement: 23/09/2024

**Click here to Read the Complete Judgement**

## Facts of the Case:

This case pertains to a respondent accused of possessing and viewing child pornography. The National Crimes Record Bureau (NCRB) reported that the respondent was actively consuming pornography and had downloaded child pornographic material. Based on this report, an FIR was registered against the respondent under the IT Act and POCSO Act **as Crime No. 03 of 2020 at the All-Women's Police Station Ambattur, Chennai, Tamil Nadu.**

During the investigation, the respondent's mobile phone was seized and analyzed, revealing two child pornographic videos and over a hundred other pornographic videos. Subsequently, a chargesheet was filed against the respondent for the offenses of possessing and viewing child pornography under the IT Act and POCSO Act. Aggrieved by the chargesheet and subsequent proceedings, the respondent filed a quashing petition in the Madras High Court to challenge the validity of these actions.

The Hon'ble High Court quashed the criminal proceedings on the ground that no offence could be said to have been made out against the respondent no. 1 either under Section 14(1) of the POCSO Act or Section 67B of the IT Act.

The appellants herein were not a party to the proceedings before the High Court. However, having regard to the serious issue of public importance involved in the matter they challenged the impugned judgment of the High Court through the present appeal before Hon'ble Supreme Court.

The respondent nos. 2 & 3 are the State of Tamil Naidu and the Inspector of Police, All-Women's Police Station Ambattur, Chennai, respectively.

## Issues Advanced:

I. What is the scope of Section 15 of the POCSO Act? In other words, what is the underlying distinction between sub-section(s) (1), (2) and (3) respectively of the POCSO Act?

II. Whether, mere viewing, possessing or storing of any child pornographic material is punishable under the POCSO Act?

III. What is the true scope of Section 67B of the IT Act?

IV. What is the scope of Section 30 of the POCSO Act? In, other words, what are the foundational facts necessary for invoking the statutory presumption of culpable mental state in respect of Section 15 of the POCSO Act?

V. Whether, the statutory presumption contained in Section 30 of the POCSO Act can be invoked only at the stage of trial by the Special Court alone established under the POCSO Act?

In other words, whether it is permissible for the High Court in a quashing petition filed under Section 482 of the Cr.P.C. to resort to the statutory presumption of culpable mental state contained in Section 30 of the POCSO Act?

## Judgement:

The Supreme Court, in this case, provided clarity on the applicability of Section 15 of the POCSO Act, distinguishing between three distinct offences it penalizes: (1) failure to delete/report child pornography, (2) propagation or transmission of such material, and (3) storage for commercial purposes. It further clarified the presumption of culpable mental state under Section 30 of the POCSO Act, emphasizing that the mere possession of child pornography, combined with certain attendant circumstances, can imply intent. The court set aside the High Court's judgment and restored the criminal proceedings against the accused.

The Hon'ble Supreme Court summarized its conclusion in this matter as follows:

(I)Section 15 of the POCSO Act provides for three distinct offences that penalize either the storage or the possession of any child pornographic material when done with any particular intention specified under subsection(s) (1), (2) or (3) respectively. It is in the nature and form of an inchoate offence which penalizes the mere storage or possession of any pornographic material involving a child when done with a specific intent prescribed thereunder, without requiring any actual transmission, dissemination etc.

(II)**Sub-section (1) of Section 15 penalizes the failure to delete, destroy or report any child pornographic material that has been found to be stored or in possession of any person with an intention to share or transmit the same. The mens-rea or the intention required under this provision is to be gathered from the actus reus itself i.e., it must be determined from the manner in which such material is stored or possessed and the circumstances in which the same was not deleted, destroyed or reported.** To constitute an offence under this provision the circumstances must sufficiently indicate the intention on the part of the accused to share or transmit such material.

(III) **Section 15 sub-section (2) penalizes both the actual transmission, propagation, display or distribution of any child pornography as-well as the facilitation of any of the abovementioned acts**. To constitute an offence under Section 15 sub-section (2) apart from the storage or possession of such pornographic material, there must be something more to show i.e., either (I) the actual transmission, propagation, display or distribution of such material OR (II) the facilitation of any transmission, propagation, display or distribution of such material, such as any form of preparation or setup done that would enable that person to transmit it or to display it. **The mens rea is to be gathered from the manner in which the pornographic material was found to be stored or in possession and any other material apart from such possession or storage that is indicative of any facilitation or actual transmission, propagation, display or distribution of such material.**

(IV)**Section 15 sub-section (3) penalizes the storage or possession of any child pornographic material when done for any commercial purpose.** To establish an offence under Section 15 sub-section (3), **besides the storage or possession of the pornographic material involving a child, there must be some additional material or attending circumstances that may sufficiently indicate that the said storage or possession was done with the intent to derive any gain or benefit. To constitute an offence under sub-section (3) there is no requirement to establish that such gain or benefit had been actually realized.**

(V)Sub-section(s) (1), (2) and (3) respectively of Section 15 constitute independent and distinct offences. The three offences cannot coexist simultaneously in the same set of facts. They are distinct from each other and are not intertwined. This is because, the underlying distinction between the three sub-sections of Section 15 lies in the varying degree of culpable mens rea that is required under each of the three provisions.

**(VI)The police as well as the courts while examining any matter involving the storage or possession of any child pornography, finds that a particular sub-section of Section 15 is not attracted, then it must not jump to the conclusion that no offence at all is made out under Section 15 of the POCSO Act. If the offence does not fall within one particular subsection of Section 15, then it must try to ascertain whether the same falls within the other sub-sections or not.**

**(VII)Any act of viewing, distributing or displaying etc., of any child pornographic material by a person over the internet without any actual or physical possession or storage of such material in any device or in any form or manner would also amount to 'possession' in terms of Section 15 of the POCSO Act, provided the said person exercised an invariable degree of control over such material, by virtue of the doctrine of constructive possession.**

(VIII)Any visual depiction of a sexually explicit act which any ordinary person of a prudent mind would reasonably believe to prima facie depict a child or appear to involve a child, would be deemed as 'child pornography' and the courts are only required to form a prima facie opinion to arrive at the subjective satisfaction that the material appears to depict a child from the perspective of any ordinary prudent person for any offence under the POCSO Act that relates to child pornographic material, such as Section 15. Such satisfaction may be arrived at from any authoritative opinion like a forensic science laboratory (FSL) report of such material or opinion of any expert on the material in question, or by the assessment of such material by the courts themselves.

(IX) **Section 67B of the IT Act is a comprehensive provision designed to address and penalize the various electronic forms of exploitation and abuse of children online. It not only punishes the electronic dissemination of child pornographic material, but also the creation,**

**possession, propagation and consumption of such material as-well as the different types of direct and indirect acts of online sexual denigration and exploitation of the vulnerable age of children.** Section(s) 67, 67A and 67B respectively of the IT Act being a complete code, ought to be interpreted in a purposive manner that suppresses the mischief and advances the remedy and ensures that the legislative intent of penalizing the various forms of cyber-offences relating to children and the use of obscene / pornographic material through electronic means is not defeated by a narrow construction of these provisions.

(X) **The statutory presumption of culpable mental state on the part of the accused as envisaged under Section 30 of the POCSO Act can be made applicable provided the prosecution is able to establish the foundational facts necessary to constitute a particular offence under the POCSO Act that may have been alleged against the accused.** Such presumption can be rebutted by the accused either by discrediting the prosecution's case or by leading evidence to prove the contrary, beyond a reasonable doubt.

(XI) **The foundational facts necessary for the purpose of invoking the statutory presumption of culpable mental state for an offence under Section 15 of POCSO Act are as follows: -**

**a) For the purpose of sub-section (1), the necessary foundational facts that the prosecution may have to first establish is the storage or possession of any child pornographic material and that the person accused had failed to delete, destroy or report the same.**

**b) In order to invoke the statutory presumption of culpable mental state for an offence under sub-section (2) the prosecution would be required to first establish the storage or possession of any child pornographic material, and also any other fact to indicate either the actual transmission, propagation, display or distribution of any such material or any form of an overt act such as preparation or setup done for the facilitation of the transmission, propagation, display or distribution of such material, whereafter it shall be presumed by the court that the said act was done with the intent of transmitting, displaying, propagating or distributing such material and that the said act(s) had not been done for the purpose of either reporting or for use as evidence.**

**c) For the purpose of sub-section (3) the prosecution must establish the storage or possession of such material and further prove any fact that might indicate that the same had been done to derive some form of gain or benefit or the expectation of some gain or benefit.**

(XII)The statutory presumption of culpable mental under Section 30 of POCSO Act can be made applicable in a quashing proceeding pertaining to any offence under the POCSO Act.