

Crl.Rev.Pet.No. 1769 of 2006



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IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE DR. JUSTICE KAUSER EDAPPAGATH

FRIDAY, THE 8TH DAY OF AUGUST 2025 / 17TH SRAVANA, 1947

CRL.REV.PET NO. 1769 OF 2006

AGAINST THE JUDGMENT DATED 20.03.2006 IN Cr1.A NO.312
OF 2005 OF COURT OF SESSIONS, KOTTAYAM DIVISION ARISING OUT
OF THE JUDGMENT DATED 22/4/2005 IN ST NO.259 OF 1999 OF
JUDICIAL MAGISTRATE OF FIRST CLASS-I, KOTTAYAM

REVISION PETITIONER/APPELLANT/ACCUSED:

HARIKUMAR, S/O GOPALAN NAIR,
KUNNAKATTU VEEDU, KOOROPPADA VILLAGE.

BY ADV SRI.M.P.MADHAVANKUTTY

RESPONDENT/RESPONDENT/STATE & COMPLAINANT:

THE STATE OF KERALA
REPRESENTED BY PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

SRI.SANGEETHA RAJ.N.R-PP

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR
ADMISSION ON 08.08.2025, THE COURT ON THE SAME DAY DELIVERED
THE FOLLOWING:

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"C.R."

ORDER

The revision petitioner is the sole accused in C.C.No.259/1999 on the files of the Judicial Magistrate of First Class-I, Kottayam (for short, the trial court). He faced trial for the offence punishable under Section 292(2)(a), (c) and (d) of the IPC.

2. The prosecution case, in short, is that on 13.12.1997 at 3 p.m., the accused was found in possession for sale/hire, ten obscene video cassettes at his video shop, namely 'Omega Videos and Communications' situated at House No.4 in Ward No.II of Kuroppada Panchayat.

3. Before the trial court, PW1 to PW7 were examined and Exts.P1 to P6 were marked. MOI series, MOII and MOIII were identified. After trial, the trial court found that the petitioner had committed the offence punishable under Section 292 (2) (a), (c) and (d) of the IPC, and he was convicted for the said offence. He was sentenced to undergo

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simple imprisonment for two years and to pay a fine of ₹2,000/-, in default to suffer simple imprisonment for three months. The petitioner challenged the conviction and sentence of the trial court before the Sessions Court, Kottayam (for short, the appellate court) in Crl.A.No.312/2005. The appellate court confirmed the conviction but reduced the sentence to simple imprisonment for one year and a fine of ₹1,000/-, in default to suffer simple imprisonment for one month. This revision petition has been filed challenging the judgments of the trial court as well as the appellate court.

4. I have heard Sri. M.P. Madhavankutty, the learned counsel for the petitioner and Sri. Sangeetha Raj N.R., the learned Public Prosecutor.

5. The learned counsel for the petitioner submitted that while judging the question of obscenity, the learned Magistrate himself ought to have viewed the video cassettes in question and satisfied himself that those cassettes contained obscene motion pictures and in the absence of the

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same, the conviction based on the oral evidence of PW1, PW2, PW4, PW6 and PW7 is not sustainable. Reliance was placed on **Abdul Rasheed v. State of Kerala** (2008 (2) KHC 677). On the other hand, the learned Public Prosecutor supported the findings and verdict handed down by the trial court as well as the appellate court and argued that the prosecution had succeeded in proving the case beyond a reasonable doubt.

6. PW7 is the detecting officer. He, along with PW1 and PW2, visited the shop allegedly owned by the petitioner on 13.12.1997 at 3 p.m. and seized ten video cassettes (MO1 series) exhibited therein for the purpose of lending to the customers. PW7, along with PW1 and PW2, viewed the cassettes by playing them in a television and VCR kept in the shop and satisfied themselves that they contained several obscene scenes. Then PW7 arrested the petitioner, and registered Ext.P5 FIR. During the investigation, the investigating officer gave a direction to PW4, Tahsildar, to view MO1 series video cassettes. Accordingly, PW4 viewed all

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ten cassettes and filed Ext.P2 report. PW6 Sub Inspector of Police, Pampady, also viewed the video cassettes along with PW4. Ext.P2 report coupled with the evidence of PW4 would show that all the cassettes contained obscene scenes.

7. Even though the petitioner has taken up a contention that he was neither the owner nor in any way connected with the video cassette shop in question and that the person arrested by PW7 was one Mr.Jacob Cherian, the trial court as well as the appellate court negatived the said contention. The learned counsel for the petitioner did not canvass any argument on the said point.

8. To attract sub-section (2) of Section 292, the prosecution has to prove that a person sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation or has in his possession for the purpose of sale, hire, distribution, public exhibition or circulation any obscene representation or object. The word 'obscene' is not defined under IPC, IT Act or POCSO Act. Black's Law Dictionary

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defines the word 'obscene' as "extremely offensive under contemporary community standards of morality and decency; grossly repugnant to the generally accepted notions of what is appropriate". The word 'obscenity' has been explained in it as "the character or state of being morally abhorrent or socially taboo, esp. as a result of referring to or depicting sexual or excretory functions". The Supreme Court has time and again dealt with the issue of obscenity and laid down the broad principles to judge obscenity. The Constitution Bench of the Supreme Court in **Ranjit D. Udeshi v. State of Maharashtra** [(1965) 1 SCR 65] highlighted the delicate task to be discharged by the Courts in judging whether the word, picture, painting, etc., would pass the test of obscenity under Section 292 of IPC. The Court took a rather restrictive view of what would pass muster as not being obscene. The Court followed the 'Hicklin test' laid down in the old English judgment in **Hicklin's** case (R v. Hicklin (1868) LR 3 QB 360). The test is 'whether the tendency of the matter charged as obscene is to deprave and corrupt those whose

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minds are open to such immoral influences and into whose hands a publication of this sort may fall'. In **Aveek Sarkar and Another v. State of West Bengal and Others** [(2014) 4 SCC 257], the Supreme Court, while considering the issue of obscenity and indecent representation, moved away from the 'Hicklin test' and applied the 'contemporary community standards test' which postulated that 'obscenity' should be gauged with respect to contemporary community standards that reflect the sensibilities as well as the tolerance levels of an average reasonable person. In **Director General, Directorate General of Doordarshan and Others v. Anand Patwardhan and Another** [(2006) 8 SCC 433] it was held that a material may be regarded as obscene if the average person applying contemporary community standards would find that the subject matter taken as a whole appeals to the prurient interest and that taken as a whole it otherwise lacks serious literary, artistic, political, educational or scientific value. In **S. Khushboo v. Kanniammal and Another** [(2010) 5 SCC 600] again, it

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was held that obscenity has to be decided in accordance with community standards reflecting the tolerance and sensibilities of the average reasonable person. In **Devidas Ramachandra Tuljapurkar v. State of Maharashtra and Others** [(2015) 6 SCC 1], the Supreme Court reiterated that it is the community standard test which has to be looked into for deciding the question of obscenity

9. A bare reading of sub-section (1) of S.292, makes it clear that a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object shall be deemed to be obscene (i) if it is lascivious; (ii) it appeals to the prurient interest, and (iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene. The word 'any other object' would include the video cassette as well. Once the matter is found to be obscene, the question may arise as to whether the impugned matter falls within any of the exceptions contained in the Section. Thus, to attract the offence under Section 292 of the IPC, the following ingredients must be proved namely:

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(i) the book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object is lascivious, (ii) it appeals to the prurient interest, (iii) it tends to deprive and corrupt persons who are likely to read/see/hear the matter (iv) the matter does not fall within the exceptions provided in the section and (v) the obscenity is judged from the point of view of an average person, by applying contemporary community standards.

10. The evidence of PWs 1, 2, 4, 6 and Ext.P2 would prove that MO1 series of video cassettes were seized from the shop occupied by the petitioner, and those cassettes contained obscene materials. However, the crucial question is whether that evidence is sufficient to convict the petitioner under Section 292(2)(a), (c) and (d) of the IPC in the absence of the satisfaction of the learned Magistrate himself that the video cassettes in question contained obscene scenes after viewing them.

11. The Indian Evidence Act, 1872, defines 'evidence'

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in Section 3 to mean oral and documentary evidence, which includes electronic records for the inspection of the Court. The Information Technology Act, 2000, defines 'electronic record' in Section 2(1)(t). It covers a wide range of formats in which data can be stored. No doubt, the video cassette is one among them. Thus, MO1 series are documents/electronic records as defined under the Indian Evidence Act. The obscene scenes contained in MO1 series video cassettes are the contents of the document/electronic record.

12. Section 59 of the Indian Evidence Act lays down how a fact can be proved. It says that all facts, except the contents of documents or electronic records, may be proved by oral evidence. Section 61 of the Indian Evidence Act lays down that the contents of documents may be proved either by primary or by secondary evidence. As per Section 62, primary evidence means the document itself produced for inspection of the Court. Section 65A of the Indian Evidence Act provides that the contents of electronic records may be proved in accordance with the provisions of Section 65B.

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Section 65B provides for the admissibility of electronic records, without the need to provide the original, if the electronic record (being the document) is supported with a certificate under Section 65B (4) of the Indian Evidence Act. However, the Supreme Court in **Anvar P.V. v. P.K.Basheer and Others** [AIR 2015 SC 180] and in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal** [2017 SCC OnLine SC 1983], has held that when original of the electric record is produced before the court, it has to be treated as a primary evidence and the requisite certificate is unnecessary if the original document itself is produced.

13. No doubt, MO1 series is primary evidence. The very purpose of producing the primary evidence is to facilitate the court to see, examine and analyse it directly. When a video cassette which allegedly contains obscene scenes is produced in a prosecution under Section 292 of IPC, the Court must view and examine the said cassette to convince itself that it contains obscene scenes which is lascivious or appeals to the prurient, lewd, lecherous, lustful or satyric instincts of the

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viewer. In other words, unless the Court/Judge personally views the video cassette and convince itself the obscenity in the content, it cannot be said that there is substantive evidence before the Court to render a finding that offence under Section 292 is attracted. If such an exercise is made, of course the evidence given by other persons who viewed the cassette can be used for corroboration. [See **Abdul Rasheed** (supra)].

14. In this case, the only issue is whether the document/the video cassettes in question contain obscene scenes. Therefore, the direct examination of the contents of the video cassettes by the Court was necessary to prove that the video cassettes contained obscene materials. Unless and until the Court views the video cassette produced by the prosecution for its inspection as contemplated under Section 61 of the Indian Evidence Act, it cannot be said that there is substantive evidence to prove that the contents in the video cassette are obscene in nature.

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15. It is true that this Court is not supposed to re-appreciate the evidence in a revision petition. But this is not a case of re-appreciation of evidence. It is a case where the trial court as well as the appellate court, relied on the evidence which is inadmissible without substantive evidence. The powers vested with this Court under Section 397 r/w 401 of Cr.P.C. are inherent in nature to correct the judgments of the trial court or the appellate court which suffers from gross illegality. The findings in the impugned judgments of the trial court as well as the appellate court have been arrived at by ignoring the principles that govern reappreciation of evidence. The entire approach of the trial court as well as the appellate court in dealing with the evidence and law on the point was wrong.

For these reasons, I hold that this is a fit case where the discretionary power vested with this Court under Section 397 r/w 401 of Cr.P.C. could be exercised. Accordingly, the criminal revision petition is allowed. The conviction and sentence are hereby set aside. The petitioner is found not

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guilty for the offence under Section 292(2)(a), (c) and (d) of IPC, and he is accordingly acquitted of the said offence.

Sd/-
DR. KAUSER EDAPPAGATH
JUDGE

kp/APA