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IN THE HIGH COURT OF KARNATAKA AT BENGALURU

DATED THIS THE 12TH DAY OF JANUARY, 2026

BEFORE

THE HON'BLE MR. JUSTICE M.NAGAPRASANNA

R

CRIMINAL PETITION NO. 17142 OF 2025

BETWEEN:

SRI BINOJ P J
S/O. SRI.JOSE.P.V
AGED ABOUT 38 YEARS,
R/AT PUDUSSERY HOUSE,
CHOTTUPARA KILLANNUR,
THRISSUR DISTRICT,
KERALA STATE-680581

...PETITIONER

(BY SRI. DEENABANDHU RAI N., ADVOCATE)

AND:

1. STATE BY KARNATAKA
COMMERCIAL STREET POLICE STATION
BENGALURU
NOW REP. BY STATE PUBLIC PROSECUTOR
HIGH COURT OF KARNATAKA AT BENGALURU
HIGH COURT COMPLEX
BANGALORE - 560 001
2. SRI.AMBARAYA.M.KAMANAMI,
AGED 48 YEARS
POLICE INSPECTOR /
STATION HOUSE OFFICER,
COMMERCIAL STREET POLICE STATION,

SHIVAJI NAGAR,





BENGALURU - 560 001

...RESPONDENTS

(BY SRI. VINAY MAHADEVAIAH, HCGP FOR R1)

THIS CRL.P. IS FILED U/S 482 CR.P.C (U/S 528 BNSS) BY THE ADVOCATE FOR THE PETITIONER PRAYING THAT THIS HONOURABLE COURT MAY BE PLEASED TO QUASH THE ENTIRE PROCEEDINGS IN SPL.C.NO.2119/2025, FOR THE OFFENCE P/U/S 67(b) OF I.T. ACT, U/S 15 OF POCSO ACT, PENDING ON THE FILE OF ADDL. CITY CIVIL AND SESSIONS JUDGE, FTSC-1, AT BENGALURU AGAINST THE ACCUSED/PETITIONER.

THIS PETITION, COMING ON FOR ADMISSION, THIS DAY, ORDER WAS MADE THEREIN AS UNDER:

CORAM: **HON'BLE MR. JUSTICE M.NAGAPRASANNA**

ORAL ORDER

The petitioner is before this Court calling in question the charge sheet in Special Case No.2119 of 2025 registered for the offences punishable under Section 67B of the Information Technology Act, 2000 ('the IT Act' for short) and Section 15 of Protection of Children from Sexual Offences Act, 2012 ('the POCSO Act' for short).

2. Heard Sri. Deenabandhu Rai N., learned counsel appearing for the petitioner and Sri. Vinay Mahadevaiah,



learned High Court Government Pleader appearing for respondent No.1.

3. Facts, in brief, germane are as follows:-

The petitioner is the sole accused in the subject crime. In a strange circumstance, the petitioner is caught in the web of proceedings. A crime comes to be registered in Crime No.1 of 2025 for several offences against several accused. The petitioner is one of the accused in the said crime. The mobile phone of the petitioner is seized and sent for forensic examination. While the forensic examination was being conducted, the forensic experts found a plethora of pictures and videos of child pornography. Therefore, a complaint comes to be registered against the petitioner for the offences punishable under Section 67B of the IT Act and Section 15 of the POCSO Act.

4. The learned counsel appearing for the petitioner submits that the petitioner was only holding those photos and videos in his phone and had not circulated them. Therefore, the act of the petitioner would not amount to the offences punishable under Section 67B of the IT Act and Section 15 of



the POCSO Act. The learned counsel further submits that charges have already been framed in the case at hand.

5. I have given my anxious consideration to the submissions made by the respective learned counsel and have perused the material on record. The issue is, whether the petitioner can be charged of the offence punishable under Section 15 of the POCSO Act and Section 67B of the IT Act.

6. The facts lie in a narrow compass. The petitioner becomes the sole accused in Special Case No.2119 of 2025 not directly, but on ingredients of crime being found out of serendipity. A crime comes to be registered in Crime No.1/2025 in a different circumstance against several accused. The petitioner is one of the accused in it. The mobile phone of the petitioner was seized and sent for forensic examination. The forensic experts found that the mobile phone was filled with child pornography containing both pictures and videos. The submission of the learned counsel for the petitioner is that merely keeping videos and pictures of child pornography would not be an offence under the aforesaid sections. The said



submission is unacceptable and is in violation of the law laid down by the Apex Court.

7. The Apex Court in the case of **JUST RIGHTS FOR CHILDREN ALLIANCE v. S. HARISH¹**, while considering the entire spectrum of the law and interpretation of Section 67B of the IT Act and Section 15 of the POCSO Act, punishes storing, publishing or transmitting of material depicting children in sexually explicit acts. The Apex Court observes as follows:

" "

ii. Scope of Section 15 of the POCSO and Section 67B of the IT Act.

60. In the case at hand, we are concerned with the interpretation of Section 15 of the POCSO and Section 67B of the IT Act, more particularly the scope of these two provisions and what would constitute an offence under each of them. In other words, what exactly has been made punishable under Section(s) 15 of the POCSO and 67B of the IT Act respectively and what are the necessary ingredients or elements to establish or make out an offence under it.

a. Contradictory Views of different High Courts on the subject.

61. Before proceeding with the analysis of the aforesaid two provisions, it would be appropriate to refer to the decisions of various High Courts and the cleavage of opinion that have been expressed as regards the scope of Section 15 of the POCSO and Section 67B of the IT Act.

.... "

¹ 2024 SCC OnLine SC 2611



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72. Thus, it appears from the aforesaid that there are divergent views expressed by different High Courts of the country as regards the ingredients necessary to constitute an offence under Section 15 of the POCSO and Section 67B of the IT Act. The Kerala High Court has taken the view that mere possession or viewing of pornographic material involving a child will not fall within the ambit of Section 15 of the POCSO, rather what the provision criminalizes is the actual act of transmission or sharing of the said material. It has held that where the allegations are confined only to the possession of pornographic material and there is nothing to indicate the actual transmission of the same, the criminal proceedings shall be liable to be quashed. Whereas, the Bombay High Court appears to have taken the view that under Section 15(1) of the POCSO, what is penalized is the storage of child pornography and resultant failure to delete or report the same while under Section 15(2), it is the storage and consequent transmission of child pornography. Similarly, with respect to Section 67B, both the Karnataka High Court and the Kerala High Court have held that what is criminalized is the intentional browsing or transmission of child pornography, and not the mere possession of such material.

b. Three distinct offences punishable under Section 15 of the POCSO.

....
76. A bare perusal of the aforesaid provision makes it abundantly clear that Section 15 of the POCSO is in three parts. The legislature by virtue of the 2019 Amendment Act has now made three different forms of storage or possession of child pornography a punishable offence under the said provision, unlike the erstwhile provision, which had criminalized only one form of storage of child pornography.

77. Section 15 sub-section (1) of the POCSO now provides that any person who either stores or possesses any pornographic material involving a child and fails to either delete, destroy or report the same with the intention to share or transmit such



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material, shall be liable to fine of not less than rupees five thousand for the first offence, and a fine of not less than rupees ten thousand for any subsequent offence.

78. On the other hand, Section 15 sub-section (2) of the POCSO provides that any person who either stores or possesses any pornographic material involving a child for transmitting, displaying, propagating, or distributing the same in any manner except for either reporting it or for using it as evidence shall be punishable with either imprisonment extending upto three-years or with fine or both.

79. Whereas, Section 15 sub-section (3) of the POCSO stipulates that any person who either stores or possesses any pornographic material involving a child for commercial purpose shall be punishable with imprisonment of not less than three-years, which may extend upto five-years, or with fine, or both for the first offence, and for any subsequent offence, he shall be punishable with imprisonment not less than five-years, that may extend upto seven-years and along with fine.

I. Concept of an Inchoate Crime - The 'Actus Reus' and 'Mens Rea' required under Section 15.

80. Before proceeding further to discuss the scope of Section 15 of the POCSO and the ingredients necessary to constitute an offence thereunder, it would be apposite to first understand the true purpose and the nature of the said penal provision.

81. A plain reading of Section 15 of the POCSO and the marginal note appended thereto would reveal that the common theme permeating across subsection(s) (1), (2) and (3) respectively is that there is no requirement whatsoever for an actual transmission of any child pornographic material in order to fall within the ambit of the said provision. What is sought to be penalized under Section 15 of the POCSO is the storage or possession of any child pornographic material when done with a particular



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intention or purpose as stipulated in sub-section(s) (1), (2) or (3), as the case may be. Thus, the bare textual reading of the said provision makes it clear that it is the intention which is being punished and not the commission of any criminal act in the traditional sense. This in the criminal jurisprudence is known as an 'Inchoate Crime' or 'Inchoate Offence'.

82. Inchoate crimes are defined as criminal acts that are committed in preparation for a further offence. The term "inchoate" itself means "undeveloped" or "incomplete."

83. The Doctrine of Inchoate Crimes is a cornerstone of criminal jurisprudence. It is aimed at addressing the legal culpability of those who engage in a conduct that is preparatory to the commission of any substantive offence. **Inchoate crimes, are often referred to and described as an incomplete or preliminary offence, that capture the essence of criminal intent and the preparatory actions that precede the commission of a criminal act. It underscores the principle that the law does not merely respond to offences already committed but also intervenes when a crime is in the process of being committed, thus thereby protecting public order and safety.** Inchoate crimes represent a critical aspect of criminal law, embodying the legal system's proactive and deterrent approach to crime itself.

....
86. The POCSO as outlined in its Statement of Object and Reasons was specifically designed to provide commensurate penalties to serve as a deterrent against the sexual abuse and exploitation of children. Additionally, the Statement of Objects and Reasons accompanying the 2019 Amendment Act which *inter-alia* amended Section 15 of the Act to provide for three distinct offences punishable under it, explicitly emphasizes that the said amendments had been introduced in order to implement stringent measures aimed at addressing and deterring the alarming increase in child sexual abuse. **The plain reading of sub-section(s) (1), (2) and (3) respectively of Section 15 of the POCSO along with the marginal note appended to it which reads "Punishment for storage of pornographic material involving child" indicates, that the said provision punishes only the storage of pornographic**



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material involving a child when done with a specific intent prescribed thereunder and that there is no requirement for any actual transmission. It is trite to say that, in the absence of any inherent conflict or contradiction between the marginal note and the substantive parts of a particular provision, the marginal note may be used to aid in the interpretation of the provision. Thus, the aforesaid leaves no manner of doubt in the mind of this Court, that the provision of Section 15 of the POCSO 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 stored with a specific intent prescribed thereunder, without requiring any actual transmission, dissemination etc.

87. Under Section 15 sub-section (1), where a person either stores or possesses any child pornography and does not delete or report the same, in order to share or transmit the same, he will be liable under the said provision. The use of the words "*with an intention to share or transmit child pornography*" in the said provision makes it clear that no actual sharing or transmission is required to occur, rather what is required is only the intention to share or transmit because of which the said material was neither deleted, destroyed, or reported. In other words, the *actus reus* that is penalized under Section 15 sub-section (1) is the failure to delete, destroy or report any child pornography that was stored or in possession of any person with an intention to share or transmit the same. Had the intent of the legislature been otherwise, it would have clearly used the words "*transmits*" or "*shares*" instead.

88. Similarly, Section 15 sub-section (2) penalizes the storage or possession of any child pornographic material when done for the purpose of either transmitting, propagating, displaying or distributing the same in any manner. The use of the words "*for transmitting or propagating or displaying or distributing in any manner at any time*" clearly suggests that again no actual act of transmission, propagation, display or distribution is required to take place. Had the intent of the legislature been otherwise, it would have explicitly stated "*any person,*



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who stores or possesses pornographic material in any form involving a child and transmits or propagates or displays or distributes in any manner at any time". The use of the words "*for transmitting or propagating or displaying or distributing in any manner*" in Section 15 sub-section (2) makes it crystal clear that the said provision deals with two kinds of *actus reus* being (I) *first*, the storage or possession of a pornographic material involving a child when done with an intention to either transmit it or to propagate it or to display or distribute it though no actual transmission, propagation, display or distribution might have occurred OR (II) *secondly*, the storage or possession of a pornographic material involving a child which was actually transmitted, propagated, displayed or distributed in any form or manner. In other words, the *actus reus* that is required under Section 15 sub-section (2) is that a pornographic material involving a child must be found to have been stored or in possession with an intention to either transmit it or to propagate it or to display or distribute it or the same must have been transmitted, propagated, displayed or distributed in any form or manner.

89. The underlying difference in the *actus reus* under Section 15 sub-section(s) (1) and (2) is that in the former the storage or possession of any such material is due to the omission to delete, destroy or report the same whereas in the latter, the storage or possession of any such material is in order to facilitate the transmission, propagation, display or distribution of the same. To further put the distinction into perspective, the *actus reus* under sub-section (1) must be such that indicates that the child pornographic material found in storage or possession was only due to an omission to delete or destroy. Whereas under sub-section (2) it must be shown that such material had been stored or in possession for a reason more than just mere omission i.e., for the reason of transmitting, propagating, displaying or distributing the same. The use of the words "*any manner*" in sub-section (2) makes it clear that apart from the storage or possession of such pornographic material, there must be something more to show 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



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preparation or setup done that would enable that person to transmit it or to display it. Thus, Section 15 sub-section (2) of the POCSO would cover both the actual transmission, propagation, display or distribution of any child pornography as-well as the facilitation of any of the abovementioned acts.

90. On the other hand, the *mens rea* which is required to constitute an offence under Section 15(1) is the intent to share or transmit a pornographic material involving a child, and the said intention is to be gathered or gauged from the *actus reus* itself i.e., by culling out the manner in which there was an omission to delete, destroy or report such a material or the reason behind the same. This is evinced from the construction of the expression "*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*" which makes it clear that the scope of discerning the intent to share or transmit has been both limited AND tied to only the omission to delete, destroy or report i.e., the *actus reus*. The expression "*with an intention to share or transmit*" cannot be singled out and construed devoid of its context. Thus, it is the manner in which along with the attending circumstances attributable to the failure to delete, destroy or report that must sufficiently be indicative of the intent to share or transmit any material.

91. In Section 15 sub-section (1) of the POCSO the legislature by qualifying and linking the expression "*intent to share or transmit*" to the omission to delete, destroy or report, has in its wisdom made the intention or *mens rea* under the said provision a matter of inference, to be ascertained from the *actus reus* itself. The degree of probability for inferring such intention would largely depend upon the manner in which the *actus reus* i.e., how the omission took place. It is for the courts to ascertain whether the manner in which the material was found in storage or possession, the attending circumstances to the omission and the conduct of the person accused sufficiently refutes or displaces the inference of an intention to share or transmit or not.



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92. The underlying reason behind tying the inference of intention to the omission alone is because the legislature was alive to the practical difficulty that exists in establishing an intention to share or transmit any child pornographic material from just the mere possession of such material. In offences pertaining to or involving the possession of any contraband, it is too uphill a task for the courts to peer through and look into the mind of the person accused and then cull out the intention of that person behind possessing or storing such material. Thus, in such cases instead of directly establishing the intention from the mental state of the person accused, it is established indirectly by inferring it from the manner in which the contraband was found to have been stored or in possession. Here again due to the infeasibility or difficulty in cogently establishing an inference of intention often due to the lack of any material and the very private and clandestine nature of the offence, the courts instead try to look for some material or circumstances that might displace the inference of such an intention, and wherever there is nothing to show the same, the courts may without hesitation proceed to infer the existence of such an intention.

93. Whereas, under Section 15 sub-section (2) 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 would be indicative of any facilitation or actual transmission, propagation, display or distribution of such material. Thus, wherever in addition to the storage or possession of any child pornographic material, there exists any material or attending circumstances that would either show or indicate the facilitation or actual commission of any of the acts enumerated in Section 15 sub-section (2) of the POCSO, the said provision would get attracted in place of Section 15 sub-section (1). We say so because, the presence of such additional material may demonstrate that the intention of the person accused has gone beyond the contours of Section 15 sub-section (1). It evinces a more significant



manifestation of the intention of the person accused, which moved from what is required in sub-section (1) to a much higher degree of intention that is required under sub-section (2). In other words, the existence of such additional material strengthens the inference of that intention which is required and made punishable under Section 15 sub-section (2).

94. Section 15 sub-section (3) penalizes the storage or possession of any child pornographic material when done for any commercial purpose. The term 'commercial purpose' refers to and encompasses any activity or transaction that is carried out or undertaken as a means of any commercial enterprise i.e., with the object or intention of any gain, irrespective of whether it was in monetary terms or not. Thus, to constitute an offence under this provision, the requirement is that the storage or possession of any child pornography must be in lieu of any monetary gain or for receiving any other valuable consideration. Again, the words "*any commercial purpose*" indicate that the storage or possession must be with an intention to generate or acquire any monetary gain or any other form of valuable consideration, irrespective and regardless of whether such monetary gain or valuable consideration is actually generated or acquired. Thus, it is immaterial whether any monetary gain or any other benefit was actually realized or not. 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 of any form of gain or benefit. As soon as there is any material to indicate that the storage or possession of any child pornographic material was done in lieu or in expectation of some form of gain or benefit, it would constitute an offence under Section 15 sub-section (3) of the POCSO notwithstanding whether such gain was actually realized.

95. Thus, while Section 15 sub-section (1) requires the existence of the requisite *mens rea* or intention due to which the child pornographic material was not deleted, destroyed or reported, Section 15 sub-section (2) requires the existence of the requisite *mens rea* or intention which propelled



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or led the person accused to not only store or possess the said material but also to take some additional steps towards either the actual transmission, propagation, display or distribution or the facilitation of the same. In contrast, Section 15 sub-section (3) requires the existence of the requisite *mens rea* or intention due to which the person accused not only stored or possessed the child pornographic material but also compelled him to take some additional steps either for any gain or benefit or in lieu or expectation of some form of gain or benefit.

96. For the sake of clarity, it would be apposite to give few illustrations as a guiding example to further demonstrate the fine but pertinent distinction that exists between sub-section (1), (2) and (3) of Section 15 of the POCSO.

97. For illustration; say certain child pornographic material was found stored in the personal mobile phone of 'A' and the same was neither deleted, destroyed nor reported. Here though there is possession or storage of child pornographic material but since there is nothing to show any facilitation of transmission, propagation, display or distribution of the said material, this would attract the provision of Section 15(1). At the same time, since the material in question was found in the personal mobile of 'A' the same is indicative that the omission to either delete, destroy or report in all likelihood was due to the intent to share or transmit. Here the manner in which the omission has occurred is sufficiently indicative of the intent to share or transmit, as there is nothing apart to show that the omission was attributable to any other reason but the intent to share or transmit, and thus it would constitute an offence under Section 15(1) of the POCSO.

98. Conversely, say for example certain child pornographic material was found stored in a broken mobile phone of 'A' and the said material had never been deleted, destroyed or reported. Now again, there is nothing to show that there was either any actual transmission, propagation, display or



distribution nor anything to show that something apart from and in addition to the storage or possession had been done by 'A' for facilitation of the transmission, propagation, display or distribution of such material. This would again attract the provision of Section 15(1) instead of 15(2) of the POCSO. However, since the material was found in a broken phone, it is likely that the failure to delete, destroy or report the same was attributable to the inability of 'A' to operate the broken mobile rather than the intent to share or transmit, thus, no offence would be made out under Section 15(1) of the POCSO. This is because, the manner in which the omission has occurred is not sufficiently indicative of the intent to share or transmit. Thus, no offence could be said to have been constituted under Section 15 sub-section (1) of the POCSO.

99. Take for instance, certain child pornographic material was found stored in the mobile phone of 'A' but this time, the said material had found its way in the device due to an automatic download of media of which 'A' had no knowledge whatsoever. Here although there is possession or storage of such material, yet the omission to delete, destroy or report is clearly shown and established by 'A' that it was due to lack of knowledge about the existence of such material on his parts. Here the manner in which the omission has occurred is not sufficiently indicative of the intent to share or transmit, thus no offence could be said to have been made out under Section 15(1) of the POCSO.

100. Take a case where certain child pornographic material was found stored in the mobile phone of 'A' but this time in addition to the aforesaid material few chats were also recovered wherein 'A' told his friend 'B' that he had some child pornographic material which he could share with him. Here, since there is additional material to show that 'A' had taken some overt steps in order to propagate the said material, he would be liable under Section 15(2) of the POCSO.

101. For another illustration, say for example, again certain child pornographic material was found stored in the



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mobile phone of 'A' but this time 'A' creates a chat group consisting of several of his friends, and sends a message therein stating that he has some child pornographic material which he would forward on the group. Here, since there is additional material to show that 'A' had taken some overt steps in order to distribute the said material, he would be liable under Section 15(2) of the POCSO.

102. Conversely, say 'A' who has certain child pornographic material in his phone, again creates a group consisting of several of his friends, but this time he sends a message stating that he has some child pornographic material which he would send in exchange of some amount of money. Here, since there is additional material to show that 'A' had taken some overt steps in respect of the said material for some monetary gain, he would now be liable under Section 15(3) of the POCSO instead.

103. We may at the cost of repetition clarify that there may be situations where the possession or storage of the pornographic material is found to be in a such a manner that the same by itself would be indicative of an intention to either transmit, display, propagate or distribute such material or that it was done in lieu or expectation of any gain. In such cases the storage or possession of child pornographic material itself would sufficiently be indicative of the requisite intention either under Section 15 sub-section(s) (2) or (3) as the case may be, and there would be no requirement to adduce any additional material as long as the manner of storage or possession of such material or the attending circumstances itself is sufficiently indicative of such intention.

....
106. The aforesaid illustrations have been provided only as a guiding example to highlight the distinction between sub-section(s) (1), (2) and (3) of Section 15 of the POCSO. These illustrations should not be mechanically applied or construed by any court in any proceeding while dealing with any matter involving Section 15 of the POCSO devoid of the context in which these illustrations have been given and without applying its mind as to whether the necessary ingredients have been established or not in the individual facts and circumstances of the matter. Any



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matter involving Section 15 sub-section (1), (2) or (3) of the POCSO, must be dealt with independent of the illustrations narrated above and *stricto-sensu* in accordance with only the ratio of this decision.

107. Lastly, we must also caution the police and the courts to be mindful of the fact that wherever in a given case a particular sub-section of Section 15 is found to be applicable, the other two remaining sub-sections of the said provision will cease to be applicable. Section 15 sub-section(s) (1), (2) and (3) respectively of the POCSO are 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 that they cannot survive without each other. This is because, the underlying distinction between Section 15 sub-section(s) (1), (2) and (3) respectively lies in the different degree of culpable *mens rea* that is required under each of the three provisions. The inception of the requisite culpable *mens rea* begins and takes shape from the intention specified under sub-section (1), then gradually continues to transform into the intention stipulated under sub-section (2) and finally culminates into the intention prescribed under sub-section (3). Under Section 15 sub-section (1) of the POCSO, the requisite intention therein is still *in fieri* i.e., in process of developing and culminating into either the intention under sub-section(s) (2) or (3). Whenever, the said intention ultimately crystalizes into the intention either under sub-section(s) (2) or (3), the other provisions would automatically become inapplicable.

108. Yet one another important aspect, that the police and the courts should be mindful of is that while examining any matter involving the storage or possession of any child pornography, it finds that particular sub-section of Section 15 is not attracted, it must not jump to the conclusion that no offence at all is made out under Section 15 of the POCSO. The police at the time of investigation and the courts at the time of taking cognizance, should keep this aforesaid aspect in mind. In other words, both should try to ascertain that if offence is not made out in one particular sub-section, whether the same is made out in the other two sub-sections or not.



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II. Concept of 'Possession', 'Constructive Possession' and 'Immediate Control' under Section 15 of the POCSO.

....
111. One another subtle but significant change that was made to all three subsections of Section 15 was the inclusion of the word "possession" in addition to storage, which was earlier not there in the erstwhile provision of Section 15 of the POCSO.

112. Thus, while the word "*possession*" was originally absent in the unamended Section 15 of the POCSO, the legislature in its wisdom, specifically added the said word in the amended Section 15, whereby now both the storage or the possession of any child pornographic material would be liable to be punished when done with any of the specified intention thereunder.

....
114. An important aspect of the jurisprudence on possession as an inchoate crime is the doctrine of constructive possession. Constructive possession extends the concept of possession beyond physical control to situations where an individual has the power and intention to control the contraband, even if it is not in their immediate physical possession. This doctrine is particularly relevant in cases where contraband is found in a location that is not directly under the physical control of the accused, but where the accused has access to and control over the area where the contraband is found.

....
117. Thus, for establishing constructive possession both the power to control the material in question and the knowledge of exercise of such control are required. The doctrine of constructive possession, is a crucial development in the criminal jurisprudence, especially pertaining to inchoate crimes where possession is sought to be punished, as it ensures that no person can evade liability by simply distancing themselves from the physical possession of contraband while retaining the ability to control it.

118. We are of the considered view, that wherever a person indulges in any activity such as



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viewing, distributing or displaying etc. pertaining to any child pornographic material without actually possessing or storing it in any device or in any form or manner, such act would still tantamount to 'possession' in terms of Section 15 of the POCSO, if he exercised an invariable degree of control over such material, applying the aforesaid doctrine of constructive possession.

....
122. Thus, we are of the considered view that any form of intangible or constructive possession of any child pornographic material will also amount to "possession" under Section 15 of the POCSO in terms of the Doctrine of Constructive Possession. There is no requirement of a physical or tangible "storage" or "possession" of such material in Section 15 of the POCSO. We may clarify with a view to obviate any confusion that, where any child pornographic material is in the constructive possession of an accused, there the failure or omission to report the same would constitute the requisite *actus-reus* for the purposes of Section 15 sub-section (1) of POCSO.

....
124. At this juncture we may also address ourselves on another pertinent aspect for constituting an offence under Section 15 of the POCSO. The term 'storage' and 'possession' that has been used in the said provision does not require that such 'storage' or 'possession' must continue to be there at the time of registration of an FIR or any criminal proceeding. The provision of Section 15 is not fixated any particularly time-frame. What is *simpliciter* required to constitute an offence under Section 15 of the POCSO is the establishment of 'storage' or 'possession' of any child pornographic material with the specified intention under sub-section(s) (1), (2) or (3), at any relevant point of time. Even, if the said 'storage' or 'possession' no longer exists at the time of registration of the FIR, nonetheless an offence can be made out under Section 15 if it is established that the person accused had 'stored' or 'possessed' of any child pornographic material with the specified intention at any particular point of time even if it is anterior in time. We say so because, any other view aside from the above, in our



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opinion would lead to a chilling effect with drastic consequences, whereby the provisions of the POCSO may be defeated by a devious person. If for instance, a person immediately after storing and watching child pornography in his mobile phone deletes the same before an FIR could be registered, could it be said that the said person is not liable under Section 15, because at the time of registration of the FIR, such material no longer existed on the device of the person accused? The answer to the aforesaid, must be an emphatic "no". Thus, we clarify that there is no requirement under Section 15 of the POCSO that 'storage' or 'possession' must continue to exist at the time of initiation of the criminal proceeding, and no such requirement can be read into the said provision. An offence can be made out under Section 15 if it is established that the person accused had 'stored' or 'possessed' of any child pornographic material with the specified intention at any particular point of time even if it was before such initiation or registration of criminal proceedings.

c. Pornographic Material must *prima facie* appear to involve a Child.

125. At this stage, we may explain one another crucial aspect concerning Section 15 of the POCSO, more particularly the criteria for determining whether the material in question involves or depicts a 'child', or in other words whether such material can be considered a 'child pornography' or not. The determination of whether the individual involved is a 'child' or not, in terms of the POCSO is a crucial foundational element for constituting various offences under the Act.

....
129. A plain reading of the above would indicate that the term "child pornography" means any visual depiction of a child involved in any sexually explicit conduct. It further explains that the expression 'visual depiction' means and includes the following:—

i. A photograph or video, which may be either in actual or any electronic form.



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ii. An image generated digitally or by a computer which is indistinguishable from an actual child i.e., any self-generated image which appears to depict a lifelike child indistinguishable from an actual child, and will not include any artistic or cartoon based depiction.

iii. Any other image (including any video-based imagery) that has been created, adapted or modified.

The above list of material mentioned is inclusive in nature i.e., the different types, form and manner of visual depiction that has been enumerated therein is not exhaustive in any manner. In the last, the said provision, more particularly the words "*but appear to depict a child*" lays down the test or criteria for ascertaining, whether any of the above mentioned visual depiction is a 'child pornography' or not, by prescribing a *prima facie* subjective satisfaction that the material appears to depict a child.

130. The use of the comma before the words "*but appear to depict a child*" is significant. The legislature has used the aforesaid comma both as a disjunctive and a conjunctive to the words preceding it. It has been used as a disjunctive to stress, that the subjective criteria that the material in question appears to depict a child is not inextricably linked or limited to just one category of visual depictions i.e., the last category being "*image created, adapted, or modified*". At the same time, it has been used as a conjunctive in relation to all types of visual depictions that have been illustrated in the said provision, to clearly indicate, that this subjective criterion applies to the entire provision i.e., to all types of visual depictions mentioned therein or in other words to 'child pornography'.

131. Thus, 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' for the purposes of the POCSO.



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Therefore, for any offence under the POCSO that relates to child pornographic material, such as Section 15, the courts would only be required to form a *prima facie* subjective satisfaction that the material appears to depict a child from the perspective of any ordinary prudent person. Such satisfaction may be arrived at from any authoritative and definitive opinion such as through a forensic science laboratory (FSL) report of such material or from any expert opinion on the material in question, or by the assessment of such material by the courts themselves, depending on the peculiar facts and circumstances of each case.

....
142. If the courts while dealing with any matter involving child pornography, continue to refer and rely on Section 2(1)(d) of the POCSO, then the same will frustrate the intention behind Section 2(1)(da) more particularly the words "*but appear to depict a child*" in the statute book, thereby render that portion of the aforesaid provision otiose and nugatory.

143. The true purport of Section 2(1)(da) of the POCSO, is to ensure that for offences pertaining to child pornography, it is Section 2(1)(da) that is given due regard and not Section 2(1)(d). **Thus, in any offence pertaining to child pornography the definition of 'child' in Section 2(1)(d) would pale in comparison to the definition of 'child pornography' under Section 2(1)(da) of the POCSO. As such, the court while dealing with an offence under Section 15 of the POCSO, must be mindful of the fact, that it is Section 2(1)(da) of the POCSO, which has to be referred to and relied upon and not Section 2(1)(d). In other words, it is the definition of 'child pornography' which is of relevance while considering whether Section 15 of the POCSO can be invoked or not.**

d. Scope of Section 67B of the IT Act.

144. The IT Act was originally enacted with the object of providing a legal framework for *inter-alia* recognizing electronic records & digital signatures, facilitating electronic commerce, and providing a legal sanctity to e-contracts. While the IT



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Act did include certain provisions to penalize cybercrimes, they were rudimentary and did not comprehensively address issues like creation and facilitation of sexual abuse of children, the online publication, transmission and distribution of child pornography or the sexual inducement, enticement and exploitation of children over the internet.

....

148. From the aforesaid, it can be seen that the Standing Committee whilst making its recommendation, underscored that no useful purpose would be served if the publication or transmission of any child pornography is punished all the same as any other pornographic material. It highlighted, that while the IT Act had originally been enacted keeping in mind the requirements that existed then, yet now with the march of the age of internet, it has become imperative to undertake a fresh approach to the provisions of the IT Act particularly those relating to cyber-crime in light of the new emerging forms of misuse of the internet. It opined that, merely criminalizing the publication or transmission of child pornography will not be sufficient, and that other various forms of online sexual abuse and exploitation also need to be recognized and adequately punished, on par with the laws prevailing in various other countries.

149. It was in the aforesaid backdrop that the legislature by virtue of the Information Technology (Amendment) Act, 2008 *inter-alia* amended Section 67 of the IT Act and introduced Section 67A along with Section 67B. This was for the first time, that a specific provision had been made, to recognize and protect the vulnerable and tender age of children by criminalizing various forms of online sexual degradation, abuse and exploitation with enhanced punishment. At the cost of repetition, Section 67B of the IT Act is being reproduced below:—

....

150. A conjoint reading of Section(s) 67 and 67A *viz-a-viz* 67B would reveal that unlike the former which penalizes only the publication or transmission of any obscene material or pornographic material, **the scope and ambit of Section 67B is much wider inasmuch as it**



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recognizes and penalizes five different forms/categories of *actus reus*, being:—

(i) Section 67B sub-section (a):—

a. Section 67B sub-section (a) of the IT Act pertains to the dissemination of child pornography and penalizes the publication or transmission of any material involving a child in any sexually explicit act or conduct, and the direct or indirect involvement in aiding or facilitating the dissemination of such material.

b. In order, to constitute an offence under this provision, there must be an actual publication or transmission of any child pornographic material, though the said publication or transmission may be done either by the accused himself or be caused through someone else at the instance or behest of the accused. In other, words Section 67B subsection (a) punishes any person who is involved in a process, in any manner that leads to the publication or transmission of any child pornographic material.

c. Thus, twin-conditions as prescribed under Section 67B(a) of the IT Act, need to be satisfied in order to constitute an offence : - (I) the actual publication or transmission of any child pornographic material AND (II) the involvement of the accused in such publication or transmission process in any manner.

(ii) Section 67B sub-section (b):—

a. It penalizes the creation of any text or image-based content in any electronic form, that depict children in any obscene or indecent or sexually explicit manner. It further penalizes the collection, solicitation, browsing i.e., online viewing, or downloading of such material. Thus, even the mere viewing of any child pornographic material that is stored in a mobile phone would tantamount to 'browsing' of such material in electronic form. Lastly, it also penalizes the advertising, promotion, exchange or distribution of any such material. Here



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again, what is punishable is only the actual commission of any of the above-mentioned acts.

b. The scope of Section 67B sub-section (b), is more expansive than the preceding sub-section because, (i) *first*, the term 'material' here includes any electronic content depicting children in sexually explicit acts as well as in obscene or indecent contexts, and (ii) *secondly*, the *actus reus* encompasses not just the act of disseminating but also the acts of creating, propagating, or engaging with or using such material.

c. In other words, Section 67B sub-section (b) penalizes the actual commission of any of the following:—

i. the act of producing or creating any text or digital image based electronic material (incl. videos) that depict children in any obscene, indecent or sexually explicit manner;

ii. the act of engaging or using such material by way of collecting, browsing, accessing, downloading, saving, seeking, actively searching such material from any computer resource, and;

iii. the act of facilitating or propagating the circulation or dissemination of such material by advertising, promoting, exchanging or sharing, distributing or offering for sale such material from any computer resource on the internet.

(iii) Section 67B sub-section (c):—

a. Section 67B sub-section (c) of the IT Act penalizes the act of any person to induce or entice a child to participate or indulge in any sexually explicit act or any other act that would offend any adult of reasonable mind, using any computer resource.

b. In order to constitute an offence under the said provision, what is required is only the actual commission of an act of inducement or enticement in any manner by the accused alone, and there is no



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requirement that such enticement or inducement must have resulted in the child indulging in any sexually explicit or any other offensive act.

c. Thus, even where the accused merely attempts to entice a child to indulge in any such act, through a computer resource, he would be liable under this provision, irrespective of whether the child also indulges in such act or not. Furthermore, such enticement or inducement may be for having the child either indulge in any sexually or offensive act with the accused himself or with any other person at the instance or persuasion of the accused.

d. In other words, what is penalized under Section 67B sub-section (c) is the act of enticing or inducing a child to indulge in any sexually explicit offensive act or behaviour.

(iv) Section 67B sub-section (d):—

a. Section 67B sub-section (d) penalizes any form or manner of facilitation of abuse of children, online i.e., it penalizes any form of degradation, exploitation, or abuse of children on any online platform. The *actus reus* punishable under the said provision is the doing, aiding or abetting of any act, either directly or indirectly that would facilitate or enable the abuse of children online in any indecent, lascivious or prurient manner.

b. It is pertinent to note, that under Section 67B sub-section (d) there is no requirement that the act in question must have been done only with an intention to facilitate the abuse of children online. What is rather required to constitute an offence under the said provision is that the act must be such which likely would facilitate the abuse of children online.

c. In other words, what is penalized is any act that has the propensity or likelihood to aid, enable or support the online abuse of children in any obscene, indecent, or lewd fashion.



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(v) Section 67B sub-section (e):—

a. Section 67B sub-section (e) of the IT Act penalizes the act of recording through video or any other electronic means, the participation of any sexually explicit act with or in the presence of any child. The *actus reus* required is the use of any video or any other electronic means to record any sexually explicit act being done either by the accused himself or by anyone else in the presence of a child.

b. It must be borne in mind, that the sexually explicit act itself need not be done in the actual presence of the child, rather what is required is that the child was made privy to such sexually explicit act, and the same was recorded by the accused in any electronic form. Say for instance, that in the presence of a child, a pornographic video is played, and the same is then recorded by the accused. Here since, the recording includes a child being subjected to a sexually explicit act in the form a pornographic video, an offence would be constituted under the said provision, even though no such act was done in the actual presence of the child.

c. In other words, what is penalized under Section 67B sub-section (e) is the act of exposing or subjecting a child to any sexually explicit act by anyone, and recording the same in any electronic form.

151. From the aforesaid, it is clear that 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.

152. This Court
in *SharatBabuDigumarti v. Govt.* of NCT of



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Delhi, (2017) 2 SCC 18 held that Chapter XI of the IT Act, more particularly Section(s) 67 through 67B are a complete code in itself when it comes to offences relating to electronic forms of obscene and pornographic material. The relevant observations read as under:—

"31. Having noted the provisions, it has to be recapitulated that Section 67 clearly stipulates punishment for publishing, transmitting obscene materials in electronic form. The said provision read with Sections 67-A and 67-B is a complete code relating to the offences that are covered under the IT Act. [...]"

(Emphasis supplied)

153. Thus, Section(s) 67, 67A and 67B 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."

(Emphasis supplied)

The Apex Court in the aforesaid judgment in unambiguous terms holds that possession or storage of pornographic material involving a child would attract the rigours of Section 67B of the IT Act and Section 15 of the POCSO Act. The Apex Court further holds that Section 15 of the POCSO Act is in the nature and form of an inchoate offence, which also penalizes the mere storage or possession of child pornographic material when done with the specific intent to share or transmit, without requiring



any actual transmission or dissemination, since the intention 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.

7. Therefore, the contention of the learned counsel that mere storage of child pornography would not amount to an offence and only if it is transmitted, it becomes an offence, does not hold ground in light of the judgment of the Apex Court in the aforesaid case which clearly observes that it is not transmission alone, but even storage of child pornographic content which has the capacity of being transmitted, which would become an offence under Section 15 of the POCSO Act.

8. The petitioner has admittedly stored sexually explicit pictures and videos of children, which would amount to storage of child pornography under Section 15 of the POCSO Act. Merely because the petitioner has not transmitted anything from his phone would not mean that he would not be liable for the ingredients of the said offence.



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9. In light of the aforesaid circumstance, there is no warrant of interference in the case at hand at this stage, particularly, after charges have been framed against the petitioner for the aforesaid offences and when the proceedings are at the stage of evidence. It is for the petitioner to come out clean in a full-blown trial. The petition lacking in merit, stands ***rejected.***

**Sd/-
(M.NAGAPRASANNA)
JUDGE**

JY
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