

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MRS. JUSTICE M.R.ANITHA

THURSDAY, THE 30TH DAY OF SEPTEMBER 2021 / 8TH ASWINA, 1943

CRL.MC NO. 4188 OF 2021

(AGAINST THE ORDER IN CRL.M.P. NO.172/2021 IN S.C.171/2020 ON THE
FILE OF FAST TRACK SPECIAL JUDGE, KOTTAYAM)

PETITIONER/ACCUSED:

MAHESH THAMPI
AGED 39 YEARS
S/O. THAMPI,
UMBUKKAD VEEDU, N.S.S.
KARAYOGAM BHAGOM, S.H.MOUNT P.O.,
KOTTAYAM.

BY ADVS.
C.S.MANILAL
S.NIDHEESH

RESPONDENT/STATE:

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

ADV.C.SEENA - PUBLIC PROSECUTOR

THIS CRIMINAL MISC. CASE HAVING COME UP FOR ADMISSION ON
30.09.2021, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

ORDER

Dated this the 30th day of September 2021

Petitioner is the accused in S.C No.171/2020 pending before the Fast Track Special Court, Kottayam, which arose out of Crime No.155/2020 of Kumarakom Police station. This Crl. M.C. has been filed aggrieved by Annexure -A6 order in Crl. M.P. No.171/2021 in the said case. Copy of the petition has been produced as Annexure-A4.

2. According to the petitioner the allegation against him is that he had shown the victim obscene pictures in his mobile phone. His mobile phone has been seized by the investigating officer and sent for examination to the Forensic Science Laboratory. The CD has been forwarded along with the report to the trial court. So petitioner seeks to allow the counsel for the petitioner/accused to inspect the CD with the aid of an expert in the presence of the petitioner in the court premises/office or

Court Hall.

3. By the impugned order, the Special court dismissed the petition. Aggrieved by the same the petitioner came up before this Court. Notice was issued to the respondent. The respondent appeared through the learned Public Prosecutor.

4. Heard both sides. The main contention of the learned counsel for the petitioner is that prosecution allegation is that alleged obscene pictures were deleted and the request of the Police was to retrieve the same and to find out the traces from the mobile based on the forensic examination. As per the expert advice received to the petitioner, the date of deletion can be ascertained by the examination of the CD with the aid of expert. Hence this Crl.M.P. No.171/2021 was filed by him. The learned counsel relies on the dictum laid down by the Honourable Supreme Court in **P. Gopalakrishnan alias Dileep vs. State of Kerala and another [AIR 2020 SC 29]**, paragraph No.43 of the said judgment was highlighted by the

learned counsel, which reads thus:

43. If the accused or his lawyer himself, additionally, intends to inspect the contents of the memory card/pen-drive in question, he can request the magistrate to provide him inspection in Court, if necessary, even for more than once along with his lawyer and I.T. expert to enable him to effectively defend himself during the trial. If such an application is filed, the Magistrate must consider the same appropriately and exercise judicious discretion with objectivity while ensuring that it is not an attempt by the accused to protract the trial, While allowing the accused and his lawyer or authorised I.T. expert, all care must be taken that they do not carry any devices much less electronic devices, including mobile phone which may have the capability of copying or transferring the electronic record thereof or mutating the contents of the memory card/pen-drive in any manner. Such multipronged approach may subserve the ends of justice and also effectuate the right of accused to a fair trial guaranteed under Article 21 of the Constitution.

5. According to the learned counsel, the prosecution is relying on the contents of the CD and hence he should be

permitted to inspect the contents of the CD in order to ascertain the date of deletion. In the impugned order the findings of the Special Judge is that as per the report there is only a single folder in the CD produced along with the report. That single folder contains the retrieved pictures only and there is no scope to find out the date of deletion of pictures from the mobile phone by inspection of the CD.

6. It is not clear from the impugned order as to how the learned Special Court arrived at that conclusion. Contention of the petitioner is that he got expert advice in that regard. In **Gopalakrishnan @ Dileep (supra)** referred above the Apex Court laid down the position of law regarding the rights of the accused to examine the CD with aid of an experts for the purpose of defending his case. So in order to ensure fair trial which is a constitutional mandate, I am of the view that an opportunity should be given to the counsel for the petitioner to inspect the CD with the aid of an expert in the presence of the petitioner, to secure the ends of justice.

Hence, the impugned order passed by the learned Sessions Judge is set aside and the petitioner is given an option to inspect the CD with the aid of an expert in the presence of the Judge concerned or anybody authorised by him, prosecutor and also the counsel for the petitioner and petitioner. The Special Judge is also directed to give suitable directions as provided under paragraph No.43 of the decision cited and extracted above.

Hence, Crl.M.C allowed as above.

Sd/-

M.R. ANITHA
JUDGE

SMF

APPENDIX OF CRL.MC 4188/2021

PETITIONER'S ANNEXURE

Annexure A1 TRUE COY OF THE F.I.R IN CRIME 155/2020 OF KUMARAKOM POLICE STATION.

Annexure A2 TRUE COPY OF THE FSL REPORT DATED NIL.

Annexure A3 TRUE COPY OF THE JUDGMENT REPORTED IN AIR 2020 SC 1.

Annexure A4 TRUE COPY OF THE PETITION IN CRL.M.P.172/2021 IN S.C.171/2020 ON THE FILE OF FAST TRACT SPECIAL COURT (POCSO), KOTTAYAM.

Annexure A5 TRUE COPY OF THE OBJECTION IN CRL.M.P.172/2021 IN S.C.171/2020 ON THE FILE OF FAST TRACT SPECIAL COURT (POCSO), KOTTAYAM.

Annexure A6 CERTIFIED COPY OF THE ORDER IN CRL.M.P. 172/2021 IN S.C.171/2020 ON THE FILE OF FAST TRACT SPECIAL COURT (POCSO), KOTTAYAM.

//TRUE COPY//

PA TO JUDGE