

IN THE COURT OF THE FAST TRACK SPECIAL JUDGE, HARIPAD

Present:- Smt. Saleena V.G. Nair, Special Judge

Saturday, the 6<sup>th</sup> day of February, 2021

Sessions Case No.186/2017

(Filed on: 20/04/2017)

(Crime No.462/15 of Nooranad Police Station)

Complainant : State of Kerala – rep. by Inspector  
of Police, Mavelikara.  
  
*(by Adv.Sri.S. Reghu, Special Public  
Prosecutor)*

Accused : 1. Sinosh Kumar @ Harinarayanan  
Namboothiri.  
  
2. Radha Devi.  
  
*(by Advs.Sri. Ajeesh P. Nair & Sri.M.S.  
Karunakaran)*

Charge : U/Ss.376(2)(n) r/w S.34, 376(2)(f) r/w  
S.34, 376(2)(i) r/w S.34, 376(2)(k) r/w  
S.34, 377, 370 r/w S.34, 370(1) &  
370(4), 506(2) of IPC and Sec.5(n) r/w  
S.6 r/w S.16, 5(l) r/w S.6 r/w 16, 5(i) r/w  
S.6 r/w 16, 5(h) r/w S.6 r/w 16, 19 r/w  
S.21 of POCSO Act and S.75 of the  
Juvenile Justice (Care and Protection of  
Children) Act, 2015.

Plea of the accused : Not guilty.

Finding of the Judge : A1 is found guilty U/Ss.376(2)(f) (l),k &  
(n), 377, 506(1) of IPC, S.5(h) & (l) r/w 6  
of the PoCSO Act and 75 of the JJ Act.

Sentence or Order : (a) *the first convict (A1) is  
sentenced to undergo rigorous imprisonment for life  
(which shall mean imprisonment for the remainder of his  
natural life) for each of the offences punishable under Ss.  
376 (2) (f), (i), (k) and (n) of the IPC, and to pay a fine of*

₹ 20,000/- (rupees twenty thousand) each, and in default of payment of fines, to undergo Rigorous Imprisonment for a further period of six (6) months each;

(b) the first convict (A1) is further sentenced to undergo rigorous imprisonment for ten (10) years each for the offences U/Ss. 377 of the IPC and 5(h) and (i) r/w 6 of the PoCSO Act, and to pay a fine of ₹ 10,000/- (rupees ten thousand) each, and in default of payment of fine, to undergo Rigorous Imprisonment for a further period of three (3) months each;

(c) the first convict (A1) is further sentenced to undergo rigorous imprisonment for two (2) years each for the offences U/Ss. 506(1) IPC and 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015;

(d) it is ordered that the first convict shall first undergo the other term of sentences before the commencement of his life sentence;

(e) the first convict is allowed to set off, U/s. 428 of Cr.PC, the period of detention already undergone by him as an under trial prisoner, from 16.05.2015 to 21.08.2015 and from 19.03.2016 to 28.03.2016, against the substantive sentence of imprisonment, if his life imprisonment is commuted or remitted by the government by virtue of section 432 or 433 Cr.P.C, subject to the statutory restriction u/s.433A Cr.P.C.

(f) the second convict (A2) is sentenced to undergo simple imprisonment for 41 days for the offence punishable by U/s.19 r/w 21(1) of the PoCSO Act. She is allowed to set off U/s. 428 of Cr.PC, the period of detention already undergone by her as an under trial prisoner from 02.04.2016 to 12.05.2016. As she has already suffered the sentence imposed, she is ordered to be set at liberty forthwith;

(g) M.O.1 series, M.O.2 series and M.O.3 shall be destroyed after the period of appeal, or any appeal filed after its disposal;

(h) the District Legal Services Authority, Alappuzha is recommended for providing compensation to PW1 under

*the Victim Compensation Scheme. Office is directed to send a copy of the judgment to DLSA, forthwith;*

*(I) since the convict is sentenced to imprisonment for life, all the sentences shall run concurrently. If the fine amount is realised, it shall be released to PW.1, the victim as compensation.*

**DESCRIPTION OF THE ACCUSED**

Sl.No.	Name	Father's name	Religion	Occupation	Residence	Age
1	Sinosh Kumar @ Harinarayanan Namboothiri S/o Aravindakshan, residing on rent at Harisree Veedu, Cherumukha Muri, Nooranad Village from Panickal Njaliyil Veedu, East of Thrikkariyoor Mahadeva Temple, Thrikkariyoor Kara & Village, Kothamangalam Taluk, Ernakulam District.					35/15
2	Radha Devi W/o Shnosh Kumar @ Harinarayanan Namboothiri, residing near Vasudevapuram Durga Temple, Cherumukha Muri, Nooranad Village from Valappally Illam, Cheruvally Muri, Chirakkadavu Village, Ponkunnam Taluk, Kottayam District.					-

**Date of:**

Offence	Report	Apprehension	Release on bail	Committal
20/08/14	13/03/17	16/05/15 (A1) 19/03/16 (A1) 02/04/16 (A2)	21/08/15 28/03/16 12/05/16	-
Commence ment of trial	Close of trial	Sentence/order	Explanation for delay	
20/10/20 20	04/02/20 21	06/02/2021	-	

This Sessions case coming on for hearing before me, upon perusing the records of evidence and proceeding and upon duly considering the same after hearing the Special Public Prosecutor and Counsel for the accused on 04/02/2021, I do adjudge and deliver the following:

J U D G M E N T

**'Silence encourages the tormentor, never the tormented'**

This case portrays and unfolds the alleged repeated rape of a 13 year old girl by her stepfather, a temple priest, for more than a year and the attempt of her mother to entomb his mad libido. The quest for justice is set in motion on the disclosure of the victim about the nightmare, while she was residing with him and her mother in the three residential buildings taken on rent by him at three different locations, wherein he was working as a priest and conducting poojas, during the alleged period of occurrence i.e. during 2014-2015.

2. Now, coming to the facts in detail, the case of the prosecution is that the first accused, who is the stepfather of PW1 victim (the name and address are not mentioned as part of maintaining the anonymity of the victim), had, in the days after her school was closed for vacation in the year 2014, repeatedly committed rape on her, while she was residing with him and her mother, the

second accused, in a rented house in Karumkottuva muri in Shasthamkotta village, thereafter, while they were residing in a house that situated in the Elamkulam village of Kanjirappally Taluk, and also from 20.08.2014 onwards, in the rented house in the Nooranad Grama Panchayat, and lastly on 25.04.2015 at 9:30 p.m, in the same rented building. PW1 had informed the last instance of sexual assault by the first accused to the second accused, and the second accused concealed the criminal acts of the first accused and thereby she failed to report the matter to the police, and thus she abetted the first accused for the commission of the sexual acts and she also hushed up the torments of the first accused and directed PW1 not to reveal the same to any person. The final report has been laid under section 376(2), (f), (i) and (n) of the Indian Penal Code and Sections 5(n), and (l) read with 6 and 9(h) and (l) read with 10 of the Protection of Children from Sexual Offences Act, 2012 (hereinafter called the 'PoCSO Act') as against the first accused and under Sections 5(n) and (l) read with 6 and 9(h)

and (l) read with 10 r/w 16 read with 17 of the PoCSO Act, as against the second accused. It is thereby contended that the accused have committed the aforesaid offences.

3. The case originated when PW1 along with PW9, her aunt, and PW12 who is a relative of PW9, went to the Nooranad police station on 12.05.2014 and launched Ext.P1 First information statement, revealing the sexual abuse inflicted on her by the first accused. This statement was recorded by PW11 on the instruction of PW16, the then Sub Inspector of Nooranad Police Station. Thereafter, Ext P9 FIR was registered by PW16. On the instruction of PW16, PW11 had taken PW1 for medical examination before PW13 in the presence of PW9. PW13 conducted a medical examination and issued an exhibit P6 medical examination report. PW13 had collected nail clippings, vaginal swab and vaginal smear for chemical examination and it was forwarded by PW16 through court. Thereafter PW11 had taken PW1, as instructed by PW16 before the Judicial First Class Magistrate, Kayamkulam for recording her statement

U/s.164 CrPC. Accordingly, CW16, the Magistrate, recorded the 164 statement of PW1. PW17 took over the investigation. He recorded the statement of witnesses, prepared scene mahazar in respect the residential building of PW4 wherein the last incident of sexual assault had allegedly taken place on 20/8/2014. The dress allegedly worn by PW1 during the last incident of sexual abuse was also seized as per Ext P4 recovery mahazar. Thereafter, PW16 arrested the accused and subjected him for his potency examination before PW15. After examination, PW 15 issued an exhibit P8 potency test report. Thereafter, the 1<sup>st</sup> accused was produced before Court and he was remanded in judicial custody. Thereafter, PW17 obtained police custody of the 1<sup>st</sup> accused and along with him went to the residential building at Nediavila and Ponkunnam and prepared Ext.P3 and P4 mahazars with respect to those buildings. Thereafter, along with the first accused PW17 had gone to the residential building of PW4 and seized the dress worn by the first accused on the alleged last incident

of sexual abuse. The second accused surrendered before the Court on 20.04.2016 and she was also remanded in judicial custody. Thereafter, she obtained bail from the Principal Court of Session, Alappuzha on 30.04.2016 and the 1<sup>st</sup> accused from the Hon'ble High Court of Kerala. The dress worn by the first accused and PW1 during the last alleged incident of sexual abuse was send for forensic examination with a forwarding note after production of the same in Court. On completing the investigation, pending the FSL report, the final report was filed before the Court by PW18.

4. The Principal Sessions Court, Alappuzha, after taking cognizance of the aforesaid offences, had taken the case on file in the above number. On the appearance of the accused before that Court, they were served with all relevant prosecution records u/s.207 Cr.P.C. They were permitted to continue on the same bail bonds. On the establishment of the Special Court, this case has been transferred to this Court as per Order No.SS1-4046(1)/2020 dtd.27.07.2020 of the Principal Sessions Judge, Alappuzha in



accordance with the direction of the Hon'ble High Court of Kerala as per O.M.D7A(1)-56450/2018 dated 24.02.2020.

5. The accused persons appeared before the Court pursuant to the summons. They were permitted to continue on the same bail bonds. Thereafter, the learned Special Public Prosecutor opened the prosecution case u/S.226 Cr.P.C.

6. Upon consideration of the records of the case and the documents submitted therein, and after hearing the submission of the learned Special Public Prosecutor and the counsel for the accused in this regard, the charge was framed against the first accused for the offences punishable U/S.376(2)(f), (i), (k) and (n), 377, 370(1) r/w 370(4) and 506(2) of IPC and Secs.5(h),(i),(l) and (n) r/w S.6 of PoCSO Act and S.75 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and against the 2nd accused U/Ss.376(2), (f), (i),(k) and (n) r/w 34, 370(1) r/w 370(4) of IPC and Secs.5(h), (i), (l) and (n) r/w S.6 r/w 16 and 19 r/w S.21 of POCSO Act and S.75 of the Juvenile Justice (Care and

Protection of Children) Act, 2015, read over and explained to both the accused the accused, to which they pleaded not guilty and claimed to be tried.

7. Thereupon the prosecution has examined PW1 to 18, marked Exts.P1 to P18 and identified MO1 to 4.

8. On the closure of the prosecution evidence, both the accused were examined u/s.313(1)(b) Cr.PC. They denied all the incriminating evidence and circumstances brought out against them by the prosecution. The 1<sup>st</sup> accused has stated in his 233(2) statement that he and the second accused got married on 07.07.2014. PW9, the sister of the second accused, due to various reasons, was in inimical terms with both the accused. She was of the impression that if the second accused received share in the family property, it would be managed and enjoyed by the 1<sup>st</sup> accused. PW9, with the assistance of her relative PW12, a policeman who is the victim's sister's husband and the Panchayat member, influenced PW1 and lodged a false and fabricated case in the Konni and Nooranad Police Stations.

The other children of the 2<sup>nd</sup> accused are inmates of a care home and because of the fact that PW1 has mental disorder, she was sent back from the institution. She has undergone treatment for the same while she was residing with him in Edappal. She was inimical with him because of his marriage with her mother, and by inducing and influencing her with the offer of buying new clothes and an opportunity to stay with the sisters at their institution, she had made her a tool to lodge the complaint. Her intention is to separate the second accused from him as he belongs to the washerman community. She induced PW1 to give evidence against him, and on the basis of legal opinion, she has arrayed her sister also as an accused.

9. The 2<sup>nd</sup> accused has in her 233(2) statement, maintained her innocence contending that all the allegations made by PW1 are false. She has four children in her first marriage and that when her husband passed away, she had to undergo immense hardships to bring up the four girls. There was no one to support her and she had sent her

daughters to the care homes. She also started service in one such institution. Whiles, the 1<sup>st</sup> accused who had high rank and position in the sangh parivar, so as to protect her, married her on 07.07.2014. Since the 1<sup>st</sup> accused hailed from a lower community and cast, and since she had remarried, her sisters and father were in enmity with her. They induced PW1 to be antagonistic towards her. PW1 was undergoing treatment for mental disorders and she was sent back for this purpose by the Institution. She lost her father in early childhood and thereafter there were behavioural changes in her behaviour. She was in the habit of making problems for everyone. PW9 pressured her to transfer the property, which she obtained from her forefathers, to her children. The second accused has also reiterated some of the other contentions of the 1<sup>st</sup> accused.

10. After the examination of the accused, both sides were heard U/s.232 of Cr.PC. Since it is not a case in which there is no evidence against the accused warranting their acquittal under this provision, they were called upon to

enter on their defence and to adduce evidence, if any. On their side, DW1 to 3 were examined and Ext.D1 was marked in support of the defence.

11. The learned Special Public Prosecutor and the counsel for the accused were heard.

12. **The points that arise for determination are as follows:**

1. *What was the age of PW1 at the time of the alleged occurrence?*
2. *Is there any delay in registering the case and if so, is it justifiable?*
3. *Are accused 1 and 2 relatives or guardians of PW1 and in a position of trust and authority towards her?*
4. *Are the first and second accused in a position of control and dominance over PW1?*
5. *Whether the first accused committed repeated rape on PW1?*
6. *Whether the first accused voluntarily had carnal intercourse against the order of nature with PW1?*
7. *Whether the first accused trafficked PW1 to different residential locations for the purpose of sexual exploitation?*
8. *Whether the first accused criminally intimidated PW1 to cause death or grievous hurt to her with an intention to cause alarm to her or not*

*to divulge the sexual assault and rape committed on her?*

9. *Whether the accused had a domestic relationship with PW1 and were living in the same household during the alleged occurrence?*
10. *Whether the first accused committed aggravated penetrative sexual assault more than once or repeatedly on PW1?*
11. *Whether the first accused, while committing penetrative sexual assault, caused bodily harm and injury on PW1?*
12. *Whether the first accused used deadly weapon to commit penetrative sexual assault on PW1?*
13. *Did accused 1, in furtherance of the common intention shared with accused 2, subject PW1 to rape?*
14. *Whether the first and second accused, having actual charge and control over PW1, assaulted or abused, or wilfully neglected her in a manner likely to cause her unnecessary mental or physical suffering?*
15. *Whether the second accused procured PW1 to be assaulted, abused and exposed in a manner likely to cause her unnecessary mental or physical suffering?*
16. *Whether the second accused abetted the 1st accused in committing the offence of aggravated penetrative sexual assault on PW1?*
17. *Whether the 2<sup>nd</sup> accused had knowledge that an offence has been committed on PW1 by the first accused under the PoCSO Act and, if so, she failed to report the commission of such offence to the Special Juvenile Police Unit or local police?*

18. *Whether the victim is suffering from conduct misbehavior which renders her evidence not believable, as contended by the accused?*
19. *Whether the accused committed the offences with which they are charged?*
20. *If the accused are found guilty, what should be the proper sentence?*

13. **Point No.1:-** Most of the offences in the charge are attracted only if the victim was below the age of 16 years and also if below 18 years, in some other offences, at the time of the alleged incident. In the said circumstances, the age of PW1, the victim, during 2014 - 2015 is relevant. The offences are alleged to have taken place as per the prosecution case in the year 2014 - 2015 while, PW1 was studying in the 7th standard and was 13 years of age.

14. Out of the witnesses examined, on the side of the prosecution, PW1 is the victim, PW2 is the priest of Elamkulam Sree Dharma Shastra Temple wherein the 1<sup>st</sup> accused has also worked as a priest and has resided in the temple out house during the relevant period. PW3 is the Vice President of the Elamkulam Sree Dharma Shastra. PW4 is the house owner of the building wherein the accused and family

had resided and which is one of the locations of the alleged occurrence. PW5 is the secretary of the temple committee of the Gurunathan Ardhanarishvara Temple wherein the accused had worked as a priest during the relevant period. PW6 is an attestor to Ext.P2 scene mahazar prepared by the investigating officer with respect to the residential building in Elamkulam wherein the accused had resided with family. PW7 is a witness in the seizure mahazar prepared in respect of the dresses owned by the victim at the time of the occurrence. PW8 is the witness in Ext.P4 seizure mahazar in respect of the dress worn by the accused at the time of the last incident of the alleged occurrence. PW9 is the aunt of the victim and sister of the second accused, in whose presence FIS was allegedly given by PW1. PW10 is the village officer of Nooranad village who prepared Ext.P5 scene plan with respect to the house wherein the last alleged incident has taken place. PW11 is the Police officer who recorded Ext.P1 F.I. Statement of the victim. PW12 is the relative of PW9 (aunt of the victim) who was present when the victim revealed the incidents to



PW9. PW13 is the doctor who examined the victim and issued Ext.P6 certificate, PW14 is the Headmistress of the school wherein the victim had studied in the seventh class during the period 2014-2015 and through whom Ext.P7 extract of School Admission Register was marked, PW15 is the doctor of the Mavelikara District Hospital who examined the accused and issued Ext.P8 potency certificate, PW16 is the SHO of Nooranad Police Station who registered Ext.P9 First Information Report and initiated the initial investigation, PW17 is the investigation officer who had taken over the investigation from PW16 and PW18 is the Circle Inspector of Mavelikara, who verified the investigation and submitted the final report before the Principal Sessions Court, Alappuzha.

15. The defence adduced oral and documentary evidence through DW1 to DW3. DW1 is the husband of PW9. DW2 is the sister of the second accused. DW3 is the Psychiatrist of NSS Medical Mission Pandalam, who issued Ext.D1 medical certificate dtd.12/5/2015 with respect to the examination of the victim on 22/9/2014.

16. Age of the victim on the first date of the alleged occurrence:

PW1, the victim, would say that she was studying in 7<sup>th</sup> standard during the period when she was sexually assaulted and harassed by the accused. She was aged 13 years at the time of the alleged incident. The last episode of sexual harassment had taken place on 25.04.2015 at 9:30 p.m. She also stated that she was being sexually assaulted and harassed for more than a year. The first information statement was given and the first information report was registered on 12.05.2015 at 6:00 p.m. The last incident alleged is on 25.04.2015. The main challenge by the defence is with respect to the admissibility and reliability of Ext P7 certificate which is the extract of the admission register marked through PW14.

17. As per section 2(d) of the PoCSO Act, 'child' means any person below the age of 18 years. As per Sec. 34(2) of the POCSO Act, if any question arises in any

proceeding before the Special Court whether a person is a child or not, such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination. However, there is no provision under the PCSO Act as to how the age has to be determined . So, the relevant provisions in the Juvenile Justice (Care and Protection of Children) Act are made applicable in POCSO Act cases also.

In this respect, in **Jarnail Singh v. State of Haryana** (AIR 2013 SC 3467), the Hon'ble Supreme Court held that -

*even though the Juvenile Justice (Care and Protection of Children) Rules, 2007, framed under Section 68(1) of the Juvenile Justice (Care and Protection of Children) Act, 2000 applies strictly only for determination of the age of a child in conflict with law, the statutory provisions in Rule 12 therein can certainly be the basis for determining the age of even a child who is a victim of crime, for there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law and a*

*child who is a victim of a crime.*

In the matter of age determination, the same principle is followed by our Hon'ble High Court in **Abhilash Vs State of Kerala** (2019 (3) KHC 1002). The question to be decided here is the standard of proof and the mode in which the age of the victim can be ascertained and proved before a court of law.

18. In S.94 of the Juvenile Justice (Care and Protection of Children) Act, 2015, there is a specific provision regarding determination of the age. As per this provision, for determining the standard of proof, the first preference is given to the date of birth certificate issued from the school or the matriculation or equivalent certificate from the Examination Board, and in the absence of these documents, the extract of the birth certificate issued by the local authority is to be relied on to prove the age of the victim, and so on.

19. Here, in the case on hand, the prosecution produced Exhibit P7 extract of the school

Admission Register. PW14 is the Headmistress of the school, wherein the victim pursued her 7<sup>th</sup> standard. She deposed that Ext.P7 is the extract of the original school Admission Register, in which the details regarding PW1 are entered. As per school records, the date of birth of the victim is 23/3/2002. The victim was admitted to the 7<sup>th</sup> standard on 01/10/2014. The date of transfer certificate from the previous school is recorded as 1/10/2014.

20. The main challenges against the Admission Register, from which exhibit P7 extract was taken It is contended it was not maintained as per section 154 of the Manual of Office Procedure, and that it is not prepared by PW14 and that she is not the custodian of the admission register and since, it is not prepared as enjoined by law, section 35 of the Indian Evidence Act is not applicable.

21. PW14 has deposed that she had issued Ext. P4 to the Mavelikara Police Inspector on their request. She vouchsafed the correctness of its contents and the

authorship of the signature therein and the fact that she is the head of the institution and the custodian of the school admission register. So, there is no merit in the contention that the register was not produced from proper custody. The names of the victim, her father and her house are seen entered in the register and tallies with the name and details in the final report. The register is still in use. It is an ante litem mortem document. The documents made ante litem motam can be relied upon safely (see **Murugan alias Settu v. State of Tamil Nadu** (AIR 2011 SC 1691))

22. There is no challenge to the fact that the victim was born on 23.03.2002. Ext. P7 reveals the fact that as on 11.10.2014 she had taken admission in the 7th standard. The second accused (victim's mother) in her 313 CrPC questioning (question number 133), admitted the veracity and correctness of the contents in Ext. P7.

23. Thus, the prosecution has proved, beyond a doubt, that the date of birth of PW1 is 23/03/2002. Thus, as on 23.03.2014, the victim completed

12 years of age. The alleged incident had taken place from the month of June, 2014. So, the prosecution evidence shows that the victim had just crossed 12 years on the date of the first incident alleged, and as such, the victim was a 'child' as defined under the PoCSO Act. Accordingly, point number 1 is found in favour of the prosecution.

24. **Point numbers 2 to 18:-** These points are taken up together for convenience in the discussion as the facts, sequence of events and evidence are closely intermingled, interwoven and interconnected with each other.

Prosecution case revolves around the evidence adduced by PW1 the victim, PW 9 her aunty and PW12, the relative of PW9.—The prosecution relies on the evidence of PWs 9 and 12 to corroborate that of PW1, as provided U/s 157 of the Indian Evidence Act. PW1 testifies that after her birth, she was residing with her parents and three sisters. Her father passed away when she was two and a half years

old due to cancer. After her father's death, her mother had shifted all her three sisters and herself into an institution named Jyothirmayi at Karukachal and thereafter she and her sister were shifted to Sabari Balika Sadanam. Her elder sister, after her plus two, joined Nursing studies at a hospital in Thrissur. The other sisters were also shifted to Balika Sadan by her mother. It was thereafter, the second accused married the first accused. Later, as decided by both the accused, her eldest sister was brought from Thrissur to a lodge in Ernakulam, wherein the accused were residing. The first accused made a demand for his marriage with the eldest sister, but her mother was not ready for the same. Subsequently, her sister eloped with a person with whom she was in love. Thereafter, the accused moved to a rented building in a place called Nediyaavila at Ernakulam. PW1 was also taken to that house. After sometime, the 2<sup>nd</sup> accused forced her mother to bring the other two sisters to the house and she did it. That house had only one room. Her step father and mother slept on the one side of the



room and the sisters and herself slept on the other side. During the nights, her stepfather used to approach and attempt to sexually harass her sisters. PW1 also narrated specific incidents of attempts of sexual harassment on her sisters.

25. Her sisters informed their grandfather about the sexual harassment by the stepfather. Their grandfather, in turn, conveyed it to their aunt (PW9). She asked the entire family to reach her residence. The accused and all the 3 girls and the grandfather went to PW9's residence. Thereafter, her sisters refused to return back with the accused and they decided to go back to the Sabari Bala Sadanam. She found her mother crying in the auto when all the three daughters refused to accompany her. Seeing this, she had joined her mother and went along with her and the stepfather. After about two days, the stepfather started sexually harassing her by catching hold of her breast. When she told him that she would inform her mother, he threatened her that he would finish her off and also that he would inform the police that

she in fact caught his private parts, and in that event, the police would arrest her. Accordingly, he managed to continue the sexual harassment on several occasions. One day, when her mother had gone to purchase ration articles, her stepfather approached her and told her that he had to throw out something. When she refused to accompany him, he forced her stating that it had to be done before her mother reached back. He forcefully took her and directed her to take his penis into her mouth. When she expressed displeasure and refused to do so, he stated that these are the acts which she has to practise and it will come to use when she is married.

26. PW1 further testifies that during her mother's menstrual days, her stepfather used to approach her and repeated such acts. He inserts his penis into her vagina and when she tries to cry, he used to gag her and ask her not to give out any sound. He used to apply oil in her vagina and made penetrations. One day, when she had gone to her grandfather's place, she brought a plastic stick so as to make a needle for paper earrings. While she was watching the TV, her stepfather approached her, pulled up her

skirt, removed her panties and took this plastic stick and asked her to insert it into her vagina. She told him that it is painful and refused, and then he inserted the said plastic stick into her vagina about half of its portion. She further deposed that when her mother was not around, on several days at several occasions, her stepfather used to insert his penis into her vagina. He used to insert his penis into her mouth and when she could not tolerate such repeated sexual harassments and sexual assaults she informed her torments to her mother. Her mother told her not to reveal it to anyone and that he is her father and that it's okay. On several earlier occasions, she told her stepfather that she would divulge the harassment inflicted on her, to her mother, and he told her that her mother would also be arrested by the police. Her stepfather had, on several occasions, sexually harassed and assaulted her in the rental houses in Nediavila then at Edappon in Pandalam and at Ponkunnam.

27. PW1 also gives evidence that her sisters' birth certificates and Aadhaar cards were in the possession of

her mother. Her aunt (PW9) who was their local guardian requested for the same, to produce before the institution wherein her sisters were staying . Though her Aunt called her mother, she refused to hand over the same. Hence, her aunt filed a complaint before the Konni police station for getting the Aadhaar cards. The police summoned her stepfather. The police had directed her stepfather to bring her also to the station. At the station, she had revealed about the sexual abuses met by her from her stepfather and refused to go back with them. Her aunt informed the Sub Inspector and he asked her about the torments. She narrated about the sexual abuse to the police officer . She went along with her aunt to Nooranad Police Station and gave the FIS. She also gave a statement to PW17, the C.I. of Mavelikkara. PW9 was with her when she gave these statements. She was later taken to CW16, the Judicial First Class Magistrate, Mavelikara. She had narrated all the incidents and the Magistrate had written the same and read it over to her and she signed the statement.

She had shown all the places to PW16 & 17, wherein she was sexually abused by the 1st accused. She had also handed over the clothes to PW16 that she had worn during the last alleged incident. She identified the clothes as MO1 to MO3 and she stated that MO 4 is the dress worn by the first accused during the last incident of sexual abuse.

28. PW1 admitted the suggestion in cross-examination that she did not like or support her mothers decision to remarry and did not appreciate her mother marrying anyone and not because it was A1 or because he is of a lower caste. She stated that she is not aware of his caste. She denied the defence suggestion that the complaint in Konni police station was regarding the dispute to give her mothers share in the property to her mothers children. She admitted that a POCSO case was given against one Mathews Unninni on 2/12/2014 and that case was lodged as he had caught her breasts and tried to make her catch his lower waist region and at that juncture, she had not revealed the sexual assaults of her step father. In her cross examination she

admitted that her sisters had told their mother about the attempts made on them by A1 and her mother reacted by crying and hitting him and enfolded the girls in her arms and cried. During the last incident she admitted that her mother was around in the house somewhere but not in the hall room where she was assaulted and though she cried it was not loudly. About the threatening, she stated that his threats were not in anger or in gentle words, but he was cool and threatening with an attitude that he is not going to lose anything. She denied the defence suggestion that a false fabricated case is lodged. She denied the suggestion that a false case is lodged due to property dispute and stated that no one has influenced her and she has only stated the real experiences she went through. She admitted the presence of PW9, DW1 and her grandfather at the Konni police station but denied the presence of her grandmother and DW2 at the station. She clarified with reasonable explanations the contradictions and omissions put across to her by the defence counsel with reasonable explanations. She said that in her 164 statement, the Judicial First Class Magistrate asked from where she got the plastic stick and she had

clarified that she bought that from her grandfather's house. She denied vehemently to the suggestion that she was instrumental in lodging a false case in connivance with PW9, PW12 and others. She stated that she has only expressed the pain and suffering she has undergone.

29. PW9 testifies that PW1 is the fourth daughter of her sister who is the second accused. After the death of PW1's father, all the four children were entrusted in the Balikasadanam institution. Her sister was working in another Balikasadanam. Whiles, she met the first accused and it was later she learned that they got married. The eldest daughter of the 2nd accused was then studying for nursing. The first accused started to sexually molest the eldest daughter who was brought home and therefore she eloped and married a boy she was in love with. The other three girls were in the Konni Balika Sadanam. During the vacations and other intermittent periods, the children used to visit and stay with the accused. When the first accused began to make attempts of sexual harassment they informed their grandfather who in turn

informed her. PW9 further testifies that the three children informed her that their stepfather was making attempts to sexually harass them and they pleaded to be taken away and protected. PW9 further testifies that one day the three children and both the accused came to her house. The older girls refused to go back with them. The youngest (PW1) accompanied her mother. When she found PW1 crying in the auto, she thought PW1 did not actually want to go with them.

30. PW9 also stated that she was the local guardian of the other two girls who were in Balikasadanam. In furtherance of their studies, the institution demanded their Aadhaar cards. She requested her sister to hand over the same. However, the 2<sup>nd</sup> accused refused to give the same questioning her authority in supporting the children in Balikasadanam and she also threatened her. Hence, she preferred a complaint before the Konni Police Station against the accused to get the Aadhaar card. The Accused were summoned to the Station and the Aadhaar Cards were handed over to her at the Station. Afterwards, when they were



about to return, PW1 ran to her and told her that she did not want to go with her stepfather and mother and she wanted to accompany her. When she enquired the reason, PW1 told her about the sexual assaults and harassments inflicted on her by her stepfather. Since it was dusk, she could not take the child who was complaining of sexual abuse directly home. And so she informed the Sub Inspector.

31. PW9 further deposed that PW1 told her at the Konni station that she was sexually assaulted at Nediyaavila, Ponkunnam and Pandalam wherein they had stayed in rented buildings. PW1 told her the following facts. The child informed her that her stepfather used to catch hold of her breast and insert his penis into her urinating organ. When her mother had gone to Kottayam, her stepfather told her that he had to throw out something and she was forced to take his penis into her mouth and thereafter a white liquid fell on her legs and she placed a paper so that it could fall on the paper. When the child complained of pain he used to pour oil into those portions and one

day while she was watching T.V, he removed her panties and inserted his penis. When the child informed him that she would tell her mother, he used to threaten her that her mother would also go to the jail. He used to force her to take his penis into her mouth. He told her that it is a practice for performance after her marriage. He used to insert his fingers into her vagina. When the child informed her mother about the matter she was told not to worry and that he is her father and hence not to reveal it to anyone. When her mother was not there, he inserted a stick into her vagina. PW1 also told her that she was lastly assaulted sexually at a place called Cherumukham in Pandalam.

32. Therefore the Police at Konni Station directed her to file a complaint before the Nooranad Police Station. PW9 took the child to Nooranad station on the next day. She accompanied the child when she had given statements to the police and the Magistrate. She also accompanied PW1 when PW1 was taken for medical examination. The child was studying in the 7th standard and was aged 13 years during this period. She also

stated that the matter was reported to the Konni Police on 11.05.2015 and the statement of the victim was given to Nooranad Police on 12.05.2015. PW12, her relative was also present at Konni Police station along with her on 11.05.2015. In her cross examination she denied the presence of DW2 her sister but admitted the presence of her father, her husband and PW12. She stated that her father came to support the accused and questioned as to why a complaint was lodged for aadhar cards. She admitted that her father taught poojas and rituals to A1. She stated that in her complaint for adhaar card she had stated that the children were not safe and secure in the house of the accused and therefore she had to take responsibility for the children. She denied the existence of any property dispute and stated that there was never such talks and that her father does not have large properties and he was in huge debts and only now he has purchased little land and is living there. She denied the defence suggestion that she has vengeance against A1. She denied the existence of any case lodged by her father against her and stated a case was lodged by her father against his sons at Manimala

station. She stated when omissions of the types of sexual offence was pointed out that PW1 had conveyed various physical and mental assaults and she does not remember as to which of these were repeated by her in her previous statements. She denied the defence suggestion that a false and fabricated case was foisted in connivance with PW12 and PW1 to wreak vengeance against A1 because he is of a lower caste.

33. PW12 testifies that she had accompanied PW9 to the police station . PW1 narrated to PW9 and her about the incidents of sexual abuse inflicted by her stepfather. She had taken PW9 to the station in her car. PW12 stated that PW1 told her that PW1's stepfather had compelled her to do oral sex with him, inserted his penis into her vagina and that when she felt pain, he used to apply coconut oil in her private parts. PW1 was 13 years when the sexual assault was inflicted on her and she was studying in class VII. The child also told her that she had informed her mother

about the incident, but she was advised by her mother not to bother about it and not to divulge it to others. She had taken the victim along with PW9 to the Nooranad Police Station, the next day. In her cross examination she stated that PW9 is her brother's mother in law. She has seen both the accused for the first time during the upanayanam of PW9s son. She stated she doesn't know details like caste and community of A1. She denied that she tutored PW1 and stated that she has no business to do such things. She stated that she does not know any property details of the family of the accused and there are other family members who belong to other castes in her family and therefore she has no such vengeance against anyone.

34. PW13, the doctor who examined the victim on 13.05.2015, proved the Medical Examination Report as Ext. P6. PW13 and deposed that PW1 was brought to her by WCPO 5300 (PW11) and her mother's

sister (PW9). PW1 had narrated the history of sexual assault by her stepfather. on the basis of which a crime was registered as Cr.No. 462/2015 by Nooranad Police. PW1 had narrated that she was residing with her mother and stepfather for the last one year. During this period, her step-father had subjected her to sexual assaults, about two to three times a week. That is, attempted penetration with penis and history of fingering the vagina. The acts were done under threat to life and hence without resistance. The last episode was two weeks earlier. On examination of the victim, she found that the hymen admits one finger loose and it is torn at 4 O'clock and 8 o'clock position. No abnormalities were detected but there was mild tenderness inside. She also stated that samples were collected and sent for chemical examination and she opined that her findings are consistent with the alleged history. her cross examination she stated that she cant say 100 percent that there was sexual assault without

seeing chemical examination report but only in rare occasions there will be any variance in the findings. She answered to the suggestion that normally people during masturbation, while doing sports activities like cycling and person who fall on sharp objects will tear their hymen, that it can happen in rare occasions and that is why she said 100 percent she cant give an opinion and that in this case victim has not given any prior history of masturbation, sports activities or fall. The defence objected to the marking of Exhibit P6 medical examination report stating that it does not bear the seal of the hospital. PW13 stated that it bears her signature, name and designation and there are connected records in the hospital. It is the original taken from the accident cum wound certificate register of the medical college. It has serial number 931 and its duplicate is maintained in the register.

35. The prosecution also relies on the

evidence of PW15, the doctor who examined the accused on 16.05.2015 and issued the Ext.P8 potency certificate to prove that the accused is capable of performing sexual acts. PW15 would say that he examined the accused personally and found his sensorium neurological functions normal and opined in exhibit P8 that there is no evidence to suggest that the person is incapable of normal sexual intercourse.

36. Then the prosecution also relied on the evidence of the police officers (PW11 to PW18) including the investigation officers (PW16 & 17) to corroborate the substantial evidence of PW1. PW11 deposed that on the direction of the S.I., she had recorded the statement of PW1 on 12-05-2015 at 6.00 pm. She admitted her signature in Ext.P1 FI statement. She stated that the statement was given in the presence of PW9. In exbt. P1 FIS, PW1 had stated the various incidents of penetrative sexual assaults and



sexual harassments in tune with her statements before Court. The statement was taken in a counselling room adjoining to the station.

37. PW16 was the SHO, Nooranad police station during the relevant period. He stated that on 12.05.2015, on his direction PW11 had taken the statement of PW1, and on its basis, he registered Ext.P9 FIR U/s.376 IPC and Ss.5(n) r/w 6 and 16 r/w 17 of the PoCSO Act. Thereafter, he directed PW11 to take PW1 for medical examination in the Alappuzha Medical College Hospital. Thereafter he requested permission of Alappuzha Chief Judicial Magistrate to take the statement of PW1 U/s.164 CrPC. Thereafter, since the case falls within the category of grave crime, PW17 took over the investigation. As he went on leave for 2 days, he directed PW16 to investigate and on 16.05.2015, he arrested the accused, prepared Exts. P10 arrest memo, P11 inspection Memo, P12 legal aid

notice, and P13 intimation notice informing the factum of his arrest to the relatives. Thereafter, the accused was taken for potency examination and he obtained Ext.P8 certificate, and produced it before Court.

38. PW17 stated that he took over the investigation from PW16 and recorded the statements of witnesses. Thereafter he prepared Ext.P3 scene mahazar with respect to the building wherein both the accused and PW1 resided from 2014 August 20 onwards. This building is in the ownership of PW4 and Ext.P3 was prepared in the presence of attesters. He also seized the dress worn by PW1 at the time of the occurrence. He prepared Exts.P2 and P14 scene mahasars. He seized the dhoti that was worn by the accused at the time of the occurrence as per Ext. P4 mahaser. He prepared Ext.P15 property list and identified MOs 1 to 4 as the articles seized by him. He stated that the second accused surrendered on

02.04.2016. He obtained Ext.P7 birth certificate of PW1 from Pandalam NSS GHSS, and also obtained Ext.P5 scene plan from PW10, Village officer. PW18 deposed that during the relevant period he was the Circle Inspector of Mavelikara Police Station and he had verified the investigation conducted in this case and submitted the final report against both the accused.

39. To establish that the accused had resided with PW1 in the aforesaid rented buildings, PW2 to PW6 were examined. PW2 has deposed that he is the priest of Sri Dharma Sastha Temple. The first accused had joined the temple as the junior priest and he had introduced himself as Hari Nambudiri. First accused used to reside in the Shanthi Madam on the north of the temple with his family. They were there for almost 2 months. When Thantri visited the temple, he identified that the first accused is not a brahmin. He informed this fact to the devaswom and the devaswom asked

him to leave. He stated that he has seen the wife and the daughter of the first accused in the temple. In the cross examination he admitted that Devaswom Board now recognizes even non-brahmins as priests in temples but some tantris and private temples have not recognized. There was no challenge to the other facts stated in his chief examination.

40. PW3 stated that he is the Vice President of Elamkulam Dharma Sastha temple. The first accused had worked in the temple for almost 2 months. He had conveyed his name as Hari Namboodiri. They were residing in the outhouse of the temple known as Shanthi Madam. He got the said job misrepresenting that he is a brahmin and that he was dismissed when it was revealed that he is not a brahmin. In his cross examination he has stated that santhi madom has a room meant for tantris and when they are not there it is locked and inside there is one

hall and two rooms and the rooms have no doors. The other facts were not challenged.

41. PW4 deposed that the 1st accused and his wife & daughter used to reside in his house on rental basis. He had entrusted his house to the temple committee of Gurunathan kaavu, that house is given by the temple committee to the priest of the temple. The first accused had informed his name as Hari Narayan Namboodiri. The first accused had told him that he is the natural father of PW1. The 1st accused and his family had resided there for almost 46 months. He goes to his shop at 9.30 and returns at 8.45 - 9.00 pm. In his cross examination he stated that PW1 has anger issues and that there was an incident , when he came back from shop , PW1s parents were standing outside and the child was inside and the parents informed him that PW1 is stubborn and for flimsy reasons she throws things at them and that she has not revealed any

incidents of sexual assaults to them. His house is just 2 metres away from this house and if there is noise it will be heard in their house.

42. PW5 deposed that he is the secretary of Gurunathan Kavu Ardhanareeswara temple. The first accused has worked in the temple. The temple committee had rented out a house for their stay. He left the place after the registration of this case. PW6 deposed that he is a resident of Elamkulam and the police had come with the accused and examined the house and property wherein the first accused and family stayed and police prepared Ext.P2 Mahazer. He is an attester to Ext.P2. He showed the house in which the 1st accused and family had resided earlier. He said the police came with Harinarayan Namboothiri. He and family were residing in the Shanthi madom. In his cross examination he stated that in his temple even non brahmins can conduct poojas.

43. The prosecution rests its case on the above discussed evidence. The learned Prosecutor has submitted that the prosecution has proved the foundational facts of the case beyond a reasonable doubt and hence the presumption under section 29 of the PoCSO Act has arisen, and that the accused has failed to rebut the presumption.

44. According to the learned defence counsel, there are four motives for PW1, in connivance with PW9 and PW12, in foisting a false case against both the accused which are stated hereunder;

1. The second accused belongs to a Namboothiri family, whereas the first accused belongs to another caste. The entire family has never accepted the first accused as a member of the family. The family wanted one way or the other to separate the first accused from the second accused.

2. The second accused was given 10 cents of property by her father and PW9 wanted this property to be given to the children of the second accused for which both the accused were not ready.

3. When both the accused were not amenable to the property settlement, PW9 in connivance with PW12 and the Policeman, who is a friend of PW1's elder sister's husband had conspired and using PW1, they lodged a false and fabricated complaint before the Nooranad Police.

4. PW1 is a girl who has been treated for conduct misbehaviour and therefore medically unfit and hence her evidence cannot be relied on.

45. The learned defence counsel argues that the defence was able to establish that the above motives have led to the lodging of this false and fabricated case. Moreover, PW1 had several prior



occasions to reveal the alleged sexual acts inflicted on her by her step-father. Therefore, prosecution has failed to establish the foundational facts beyond reasonable doubt. So, the presumption under Section 29 of the PoCSO Act has not arisen and hence the accused are entitled for an acquittal.

46. It is noted here that if the foundational facts are established and presumption has arisen, the accused are able to rebut the presumption by adducing the defence evidence and bringing out the circumstances which would be sufficient to prove that the defence version is probable and the accused are falsely implicated.

47. Here, the accused are charged with substantive offences punishable both under IPC and PoCSO Act. On analysis of various provisions of these penal statutes, it shows that identical or similar acts are punishable in both the Acts. The definition of the

offence of rape as per Sec. 375 IPC is the offence of penetrative sexual assault as defined in Sec. 2(f) r/w Sec.3 of the PoCSO Act. Sec. 42 of the PoCSO Act provides alternate punishment which is greater in degree. The PoCSO Act being a special legislation specifically dealing with the sexual offences against the children, it is better to consider firstly whether the prosecution has succeeded in proving any of these offences under this Act. The question whether or not PW1 was a child within the meaning of Sec. 2(d) of the PoCSO Act, when the offences were allegedly committed by the accused, shall be discussed and decided towards the later part of the analysis of the entire evidence, to avoid repetition of facts and evidence.

48. Unlike in Penal Code, the PoCSO Act provides a special provision for presumption as to certain offences. Section 29 provides that -

*where a person is prosecuted for committing abetting or attempting to commit any offence under section 3, 5,7 and section 9 of this Act, the Special Court shall presume that such person has committed or abetted or attempted to commit the offence as the case may be unless the contrary is proved.*

Sexual offences are usually being committed secretly, that too, on children, there may not be any eyewitnesses in all such cases. So, this provision aiding the prosecution in establishing its case by invoking this statutory presumption. However, it does not mean that the prosecution version has to be accepted as gospel truth in all cases. Regarding the application of this presumption, it is worthwhile to read the decision of our Hon'ble High Court in **Abhishek K.A. vs. State of Kerala (MANU/KE/2427/2020)**. Therein it was held that –

the questions to be considered in a case arising under the POCSO Act is as to whether the prosecution has adduced evidence to

prove the foundational facts constituting the guilt of the accused and if so, whether the accused has proved his innocence on the principle of preponderance of probability.

49. So, the questions to be considered is whether the prosecution has adduced evidence to prove, beyond a reasonable doubt, the foundational facts constituting the guilt of the accused for the offence under Sec.3 and 5 of PoCSO Act, and if so, whether the accused has proved his innocence on the principle of preponderance of probability.

### 3. Penetrative sexual assault-

A person is said to commit "penetrative sexual assault" if-

*a. he penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a child or makes the child to do so with him or any other person; or*

- b. he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or*
- c. he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or*
- d. he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.*

The essential fundamental/basic facts to be established by the prosecution are the proof of the overt acts alleged against the accused, which constitute the offences under the PoCSO Act and charged against the accused.

50. PW1's substantive evidence on the facts that the first accused is her stepfather and the 2nd accused is her mother and they were in a position

of trust and authority towards her is unchallenged. The fact that the accused are close relatives and guardians of the victim is an admitted case. The prosecution case that PW1 was residing with the accused during the alleged period is also unchallenged. The 2nd accused has answered to question No.15 & 18 in the examination U/s. 313 CrPC that both accused were married to each other on 07.072014, and from that day onwards, PW1 is residing with them. The evidence of PW2 to PW7 corroborates that of pw1 that she resided in this place along with the A1 and A2, wherein the accused subjected to sexual abuse. The 1st accused has also admitted in answers to question No.68, 70, 71, 75, 77, 79, 83 and 86 that he along with the 2nd accused and PW1 has resided in the rented buildings in the three places as alleged by the prosecution. The 2nd accused also admitted these aspects in her examination U/s. 313. It is the settled law that the answers given by the accused in their examination

under section 313(1) (b) Cr.PC can be used for lending credence to the prosecution evidence. It shows that the evidence adduced by the prosecution regarding the above facts are supported by the said answers given by the accused. Therefore, the fact that PW1 and the accused lived in shared households and were having domestic relationships is proved.

51. In her evidence PW1 specifically stated that her step-father, almost for a year, subjected her to penetrative sexual assaults, including aggravated penetrative assaults. She was subjected to unnatural sexual acts and carnal intercourse against the order of nature. PW1 has stated in her cross examination that she was transported from one place to another by her stepfather accompanied by her mother and was sexually assaulted and raped at all these places. She has narrated specific incidents and the crux of her statement is consistent that the 1st

accused had inserted his penis into her vagina and her mouth. He inserted a rod-like plastic object into her vagina. He also applied his mouth to her vagina. Though she was subjected to a thorough cross-examination, absolutely there is nothing brought out to discredit her veracity. She is a reliable and trustworthy witness so as to accept her testimony.

52. It is settled law that if the evidence of the victim is of a sterling quality, there is no requirement of corroboration. Corroboration is not the rule of law but only a rule of prudence. How evidence of the prosecutrix in a sexual offence is to be approached is a question considered by the Hon'ble Supreme Court repeatedly and in **State of Punjab vs. Gurmit Singh** (1996) 2 SCC 384) it was held that –

"Corroborative evidence is not an imperative component of judicial credence in every case of rape. Corroboration as a condition for



judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a women or a girl subjected to sexual assault is not an accomplice to the crime but is a victim of another person's lust and it is improper and undesirable to test her evidence with a certain amount of suspicion, treating her as if she were an accomplice. Inferences have to be drawn from a given set of facts and circumstances with realistic diversity and not dead uniformity lest that type of rigidity in the shape of rule of law is introduced through a new form of testimonial tyranny making justice a casualty. Courts cannot cling to a fossil formula and insist upon corroboration even if, taken as a whole, the case spoken of by the victim of sex crime strikes the judicial mind as probable.”

In **Alamelu vs. State (AIR 2011 SC 715)** it was held that

*“Undoubtedly, the testimony of victim of*

*sexual assault stands at par with testimony of an injured witness, and is entitled to great weight. Therefore, corroboration for the testimony of the victim would not be insisted upon provided the evidence does not suffer from any basic infirmities and the probability factors do not render it unworthy of credence. A conviction can be recorded on the sole, uncorroborated testimony of a victim provided it does not suffer from any basic infirmities or improbabilities which render it unworthy of credence."*

In **Kunjumon @ Unni vs. State of Kerala** (2013 AIAR (Cri.) 211) it was held that -

"In the present case, we are not dealing with the evidence of an ordinary witness - we are dealing with a victim of a crime, someone who was directly at the receiving end of the appellant and who came face to face with the threat and intimidation by the appellant. The evidence of such a victim of a crime must be placed, in our opinion, on a somewhat higher pedestal,

in terms of the credibility attached to it, than the evidence of any other witness”.

The Hon'ble Supreme Court again in the **State of Himachal Pradesh vs. Asha Ram** (2006 CrI. L.J 139 (SC)) held that

“Conviction for rape can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for seeking corroboration. The evidence of a prosecutrix is more reliable than that of an injured witness. The testimony of the victim of sexual assault is vital unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty in acting on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Corroboration as a condition for judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence

under given circumstances. The evidence of the prosecutrix is more reliable than that of an injured witness. Even minor contradictions or insignificant discrepancies in the statement of the prosecutrix should not be a ground for throwing out an otherwise reliable prosecution case.”

In *Rajinder @ Raju vs. State of Himachal Pradesh* (**2009 AIR SCW 4858**), the principle laid down in ***Gurmit Singh's case*** (supra) was followed.

53. In the light of the above stated legal principles, evidence of PW1 has to be considered. On a sieving of her evidence, it is seen that the precise allegations and material facts that form the basis of this case are devoid of any embellishments, improvements or contradictions. She is a wholly reliable witness. Hence, her solitary evidence is sufficient which inspires confidence of the Court as it is absolutely trustworthy, unblemished and of sterling quality.

Moreover, the prosecution has let in ample evidence to corroborate her substantive evidence.

54. In exhibit P1, PW1 narrated the very same sexual assaults that she narrated before Court. She has deposed in tune with the various incidents of sexual assaults, the nature and manner in which the first accused had subjected her to penetrative sexual assaults. Exhibit P1 corroborates her evidence. She was subjected to a medical examination by PW13 doctor who prepared exhibit P6 medical certificate in which the history of the alleged incident corroborates the version given by PW1 before the Court. The doctor found that her hymen was torn and vagina was loose. The doctor also opined that her findings on examination of the victim was consistent with the history of penetrative sexual assault. So, the medical evidence and the

statement given by the victim to the doctor narrating the history of the incident fully corroborate the testimony of PW1 and also the prosecution case.

55. PW1 is consistent with her version before the police in her First Information Statement and the Court regarding the overt acts alleged against the accused. It is also proved that PW1 conveyed the alleged acts of the first accused to PWs 9 and 12. They have given evidence that they got the information about the sexual acts of the first accused from PW1. The evidence of PW1 regarding the acts of the accused is corroborated by her previous statements to the doctor, her relatives and before the police, in her FIS, as provided under section 157 of the Indian Evidence Act. This section provides that in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about

the time when the fact took place or before any authority legally competent to investigate the fact, may be proved. True, PW1 informed the matter to PW9 after about 18 days of the last incident. In the facts and circumstances of the case as unfolded by PW1, that she reported at the first instance that she got before police authorities satisfies the 'at or about' condition, since she was proved to be under the constant threat of her step father and her complaint against him to her mother was in vain.

In this context, the dictum laid down by the Honorable Supreme Court in **State of Tamil Nadu v. Suresh** (AIR 1998 SC 1044) is relevant, in which it was held;

*"28. We think that the expression 'at or about the time when the fact took place' in S.157 of the Evidence Act should be understood in the context according to the facts and circumstance of each case. The mere fact*

*that there was an intervening period of a few days, in a given case, may not be sufficient to exclude the statement from the use envisaged in S.157 of the Act. The test to be adopted, therefore, is this : Did the witness have the opportunity to concoct or to have been tutored? In this context the observation of Vivian Bose, J. in Rameshwar v. State of Rajasthan, (AIR 1952 SC 54 : 1952 CriLJ 547) is apposite : 'There can be no hard and fast rule about the 'at or about' condition in S.157. The main test is whether the statement was made as early as can reasonably be expected in the circumstances of the case and before there was opportunity for tutoring or concoction."*

56. Here, in this case, it can be safely concluded that there was no chance of any concoction or tutoring prior to the matter being informed to PWs 9 and 12 and also to the Police and doctor and hence the delay is immaterial and the testimony of PWs 9, 12 and 13 can be used for corroborating the evidence of PW1.



The evidence of the police officer who recorded her FI statement also supported her testimony. The evidence of PW1 is creditworthy. There is no reason to disbelieve her and there is no need of any corroboration. The peculiar circumstances of the victim and the possible inference of a believable version that flows from those circumstances inevitably leads to the conclusion that the statement of the prosecutrix is believable. However, the evidence of PW9, PW12 and PW13, the doctor corroborates the statement of PW1 regarding the sexual assaults and sexual harassments undergone by her.

57. From the evidence of these witnesses and the documentary evidence proved by them, in my opinion, the prosecution has succeeded in establishing the foundational facts, beyond a reasonable doubt, and hence the presumption under section 29 of the PoCSO Act has arisen.

58. When the prosecution is successful in establishing the foundational facts and the presumption is raised against the accused, the accused can rebut the same either by discrediting the prosecution witnesses through cross-examination or by adducing his own evidence to demonstrate that the prosecution case is improbable, based on the principle of preponderance of probability. The accused need not adduce evidence to rebut the presumption. He can rely upon circumstantial evidence and, if the circumstances so relied upon are compelling, the burden may likewise shift to the prosecution.

59. In this case, the accused adduced evidence, both oral and documentary. Let me examine whether the accused has succeeded in establishing that the prosecution case is improbable

or the evidence adduced by the defence is sufficient to disprove the prosecution case.

60. While examining PW1, the accused brought on record the following omissions. PW1 had not narrated the sexual harassment met by her three sisters from the first accused. When confronted with the omissions she gave a satisfactory explanation that since there was only attempt of sexual assault and harassment on her sisters and since they took the decision to leave the house, they were not subjected to rape and penetrative sexual assault. In the 313 questioning regarding these facts, the 1st accused has not denied it, but pleaded ignorance. The defence argues that the sisters were not arrayed as witnesses and hence these omissions are very relevant. Here, for the determination of the points

raised in this case, the sisters of PW1 have no role in the sequence of events narrated by the prosecution and hence omissions pointed out by the accused are not material as per the explanation to section 162 CrPC. It does not appear to be significant or otherwise relevant having regard to the context in which such an omission has occurred and therefore the omission pointed out does not amount to contradiction. Moreover, the alleged sexual acts against the sisters of the victim are not the fact in issue involved in this case.

61. Likewise, no material contradiction or omission has been proved to impeach the credit of the supporting material witnesses under section 155(3) of the Evidence Act. The other minor omissions pointed out by the defence are facts prodded and brought out during cross-examination of the material witnesses. The defence cannot take advantage of such facts as

material omissions and cannot draw them in their favour as proved contradictions and on this basis the reliability of the testimony of the witnesses cannot be assessed.

62. The first motives stated by the defence to establish their case that a false and fabricated case has been lodged can now be taken up for consideration. The defence has raised a contention that the 1st accused is not a Namboodiri and therefore the whole family has not accepted him and therefore PW1, PW9 and PW12 connived and lodged this false case. The defence has brought out evidence that the father of the 2nd accused has taught the first accused mantras and vedas which the Namboodiris ought to know and has procured the job of a priest in various temples. From Ext..P7 birth certificate, it is seen that the 1st husband of the 2nd accused, who is the father of the victim, is also of a different community. DW1 and

DW2 are close relatives of the 2nd accused and they have adduced evidence in favour of the accused.(What is evidence adduced by DWs 1 and 2 and whether their evidence is believable which has to be discussed here) The independent prosecution witnesses have stated that the first accused is known as Hari Namboothiri. He has introduced himself as Hari Namboothiri in the temples he has worked. The defence explanation regarding this misrepresentation is that a non Brahmin can be a priest by learning the mantras and other Vedic rituals and can be a priest in most of the temples.

63. In the questioning U/s. 313 Cr.PC, to question number 77, the first accused answered that he was given the name Hari in his upanayana. PW1 in her evidence has stated that the first accused is the reason for the destruction of her family. The learned defence counsel highlighted this statement to

substantiate her alleged ill-motive. PW1 has not stated that her dislike is on the basis of caste or community. On an objective analysis of the evidence, it is evident that PW1 or any of her relatives has any enmity towards the first accused because of his community. PW12 has nothing to do with the accused and family and her motive to implicate the accused in a PoCSO case is bereft of any reasonableness. The 2nd accused has stated in her statement U/s 313 Cr.PC, to question No.125, that she has seen PW12 for the first time at the upanayana of PW9's son. PW12 has deposed that she knows nothing about such issues in the family of the accused. Considering all these aspects, it appears that there is no truth in the case of the defence in this regard—and is found to have been raised only as an experimental basis.

64. The next contention is about the long standing property dispute in the family. It is noted

here that the defence themselves could not explain with clarity as to what is the property dispute that existed between the accused and PW9. The vague contention is that 10 cents of property was transferred by the father Namboodiri to the 2nd accused, and PW9 wanted her to transfer the same in favour of PW1 and her sisters. In 313 questioning, both the accused have stated that this ten cents property has been surrendered back to the father. However, no documentary evidence has been adduced to establish such a fact. PW1 expressed her ignorance about any such transactions. DW2 stated that the dispute is related to a case filed by the father Namboodiri against his sons. Though the best person to throw light on the existence of dispute, if any, regarding any such property is the father of the 2nd accused, he is not examined to substantiate the contention of the accused. Nothing was brought out in evidence of any witnesses regarding any property dispute which can



possibly be a motive for concocting a false case against the accused, as alleged.

65. The defence strongly argued that the complaint in the Konni Police station was in respect of a settlement talk about the share in the property. However, the accused or DW1 and DW2 could not explain as to why the discussion of property had to take place in Konni Police Station, when the property is within the jurisdiction of Cheruthoni police station in Kottayam, wherein the grandfather of PW1 is residing. The 1st accused, in his 313 questioning, has answered question number 42 that they were summoned to the police station for the purpose of handing over the adhaar card and he had taken it along with him to the police station and had handed over the same to them. The 2nd accused also repeated the same answer that she was called to the police station on the adhaar issue. Here, it is noted that the version of PW1 and

PW9 is that, thereafter PW1 had told PW9 that she wants to accompany her and unfolded the sexual abuse she has suffered.

66. At this juncture, PW9's version that at the Konni Police Station, a complaint was lodged for the purpose of Aadhar card for the children who stayed in an institution within the Konni Police Station limit is believable and reliable. If a false case of sexual assault has to be preferred against the accused, it need not have been in the Konni Police Station as the accused were residing within the Mavelikara police station and if it was property issue, it ought to have been in a Police Station in Kottayam as the property is situated within Kottayam jurisdiction. The evidence of the prosecution in this respect is supported by the answers given by the accused in their 313 statements. In this backdrop of facts, it is proved that the case filed before the Konni Police Station was regarding adhaar card of

the children and the alleged motive of property dispute set by the defence is not a believable story.

67. The defence also raised a case that PW1 has mental disorders and utilising her mental abnormality, PW9 influenced her to lodge a false complaint. The entire case of mental disorder is based on Exhibit B1, a medical certificate issued by the DW3. In this respect, PW1, in her cross-examination, has stated that while she was in her seventh class, she had informed her class teacher about the sexual assault inflicted on her. She added that her teacher had informed the matter to her grandfather and that her grandfather had told the teachers that she has anger issues and therefore not to believe her. She deposed that her mother, step father and grandfather feared that the issue would get out of hand and immediately took her away from the school and she was thereafter admitted in a school in Pandalam. She stated that her

grandfather said that if the incident became public, everyone would be put to shame, so she was taken to a rental house in Pandalam and admitted in the school at Pandalam.(witness also stated the name of the school). In Pandalam school, she tried to convey the sexual assault and told her friend, who in turn informed it to her teacher. Her teachers had been informed by her parents that she had mental disorder issues.

68. She admitted in cross examination that she was taken to a doctor, one Narayana Pisharody by her mother for consultation. It was her mother who spoke to the doctor and thereafter she was examined by the doctor and the doctor asked whether she has anger issues and was given medicine.

69. According to PW1, she was taken before the doctor only for the purpose of getting a certificate so as to give it to the school and this was done by her stepfather and her mother. DW3 has

deposed that he has issued exhibit D1, a certified copy of a certificate obtained from the Court in Pathanamthitta. DW3 would say that he had seen the child on 22.09.2014, that she had conduct disorder, which according to him, is a disorder, including anger, throwing and destroying things, refusing to go to school and uttering abuses to the parents. In the cross examination, he stated the following facts: that, he could not state anything about the details of the treatment without seeing the records and case sheet of the patient. He could not recollect as to how many times he had seen the patient and as to what medicines were given. Children are affected with such conduct disorder upto the age of 15. He also stated that the history about the disorder of the child was given by her mother. Her mother had told that she used to destroy things in the house. The child has not stated any symptoms or history. He stated that the mother reported that she did not study properly and did not do

any house-work. After the issuance of the said certificate, the child was never brought before him. On seeing the patient, he did not have any prima facie opinion that she has any conduct disorder. He learned from her parents that she was good at studies but she was adamant and stubborn. He also stated that on seeing a patient, the doctor could not conclude as to whether the patient had any conduct misbehaviour or not. He has answered to the Court question that persons who are subjected to sexual abuse, due to anxiety and depression, may exhibit behavioral disorders.

70. DW3 also stated that the certificate was issued on the request of the parents of the patient. At this juncture it is to be noted that PW1 has a case that such a certificate was obtained so as to convince the school authority that she had mental disorders. It is also to be noted here that her parents

could not explain as to why such a certificate was obtained. On a combined analysis of the evidence, PW1's version that the act of taking her to a doctor and briefing him about her alleged conduct disorder and obtaining a certificate for the purpose of convincing the School authorities, cannot be discarded. Here, the conduct of the accused falsely procuring a certificate showing that PW1 is suffering from some mental issues. It is a relevant fact under Section 8 of the Indian Evidence Act, which provides that any fact is relevant which shows or constitutes a motive or preparation for any fact in issue or relevant fact. Illustration (e) says "A is accused of a crime. The facts that, either before or at the time of, or after the alleged crime, A provided evidence which would tend to give to the facts of the case an appearance, favourable to himself, or that he destroyed or concealed evidence, or prevented, the presence or procured the absence of persons who might have been witnesses, or suborned

persons to give false evidence respecting it are relevant.” It is proved from the above conduct of the accused that the medical evidence falsely created at the instance of the accused is with the intention to make it appear that PW1 has some mental disorders, in order to use the same in the criminal case, if any, against the accused or to convince the teachers and others that what she is saying is false and she cannot be believed at all.

71. It is also pertinent to note that such a certificate was obtained soon after she was got admitted in a new school where she had reported the instance of sexual assault met by her from her stepfather.

72. The defence also relied on the evidence of PW4 to substantiate their contention that PW1 has some kind of mental disorder. PW4 was the next door neighbour and owner of the house while they



were staying in his house. He stated that PW1 had anger issues and became violent towards her parents and threw articles at them. PW1 was asked about the same in her cross examination and she stated that while she was residing in the said house, she was physically beaten up by the first accused and locked up in a room. When she had come out of the house, PW4 had enquired about what had taken place and she had only stated that her step father is not a nice person. PW4 has also stated that on his return from his shop in the night, he found the accused outside the house and they told him that PW1 had behaved violently towards them and thrown things around. So, from this evidence, the accused are not able to prove that PW1 had any mental disorder. As submitted by the prosecutor, the first accused was recreating a story to suppress his sexual abuses on the victim. Moreover, if at all the victim had such a conduct disorder, in fact, it also strengthens the case of the prosecution. It is likely to

be the fallout of the sexual abuses met by her at the hands of the first accused and also due to the absence of any kind of support from her own mother.

73. Our Hon'ble High Court in ***Abhishek K.A. Vs State of Kerala***\_(MANU/KE/2427/2020) has considered the "rape traum syndormome" of the victims of child abuses case and for rejecting the contention of the accused that the victim had some phychiatric disorder, it was also considered a passage from the Diagnostic and Statistical Manual of Mental Disorders, 4th Edition Text Revision (DSM-IV-TR) of the American Psychiatric Association that;

"The following associated constellation of symptoms may occur and are more commonly seen in association with an interpersonal stressor (e.g., childhood sexual or physical abuse, or domestic battering): impaired affect modulation; self destructive and impulsive behavior; dissociative symptoms; somatic complaints; feelings of ineffectiveness, shame, despair, or hopelessness; feeling permanently damaged; a

loss of previously sustained beliefs; hostility; social withdrawal; feeling constantly threatened; impaired relationships with others; or a change from the individual's previous personality characteristics.

74. In this respect, DW3 has also opined that the victims of sexual abuse, due to anxiety and depression, may exhibit such behavioral disorders. So, here also PW1 being a victim of continuous sexual abuses from her own stepfather, if at all showed any impulsive behavior or hostility can not be considered as psychiatric or mental illness and thereby doubting her testimony.

75. Another contention of the accused is that PW1, PW9 and PW12 had connived together to file a false and fabricated case against the accused while they all assembled for the upanayana of PW9's son. DW1, the husband of PW9 and DW2, the sister of the second accused were examined to prove his contention. DW1 has admitted that there are litigations and domestic violence cases

pending between him and PW9 . He stated thereafter that they had gone to the Konni Police Station in a property dispute. However, he could not give any details of the said property dispute. He added that his wife and a Policeman who assisted her had decided to file a false case. He admitted that the property is situated at Cheruvally in Kottayam District. He has no knowledge about any property disputes between PW9 and the accused. His evidence will not support the defence of false implication. The identity of the policeman is not stated. Even on repeatedly prodding, this witness did not admit the presence of any policeman at the Upanayana day.

76. DW2 is a person whose name has not been mentioned in any of the incidents narrated in this case. There is not even a suggestion to PW1 regarding her involvement. PW1, and PW9 was asked about her presence in the Konni Police station. Both of them denied her presence though at the time they were examined they naturally would not have any idea

that she would enter the box as a defence witness. According to her, she was also present in the police station in connection with the property dispute. If that be so, what is her claim in the property and the details of the property are not stated. It is to be noted here that DW2 has no case that she was ever involved or associated with the affairs of the four children of the second accused. She stated the presence of a policeman at the upanayana who later assisted in foisting a false and fabricated case. She has not stated anything about his identity.

77. Both the first and second accused have stated in their 313 Cr.PC (question No.42) questioning that in the Konni police station they were summoned regarding adhaar issue and the adhaar cards were handed over. In the circumstance, DW1s and DW2s evidence cannot be believed. Moreover, it has already been found that the petition matter with

the Konni police was not with respect to any property dispute, but in connection with the Aadhar cards of the sisters of PW1.

78. Therefore, on an unwinding of the entire evidence on record, I find no merit in the contention that PW1 is a tutored witness. Her demeanor was noted during her examination. She was totally broken and depressed. When a suggestion was put to her that the accused did not do anything as she deposed, the Court noted that she emphatically replied in the negative and stated that he sexually assaulted her several times. Her evidence that she was afraid of the accused is cogent and convincing. She is a wholly reliable witness and even without any corroboration, her evidence regarding the commission of the offences by the accused can safely be acted upon by the Court.

79. Delay in lodging First Information Statement - whether justifiable?

The crime was registered on 12.05.2015 at 6:00 p.m. on the allegation that PW1, the victim, was raped by her stepfather the first accused while she was residing with the first accused and her mother, the second accused, for almost a year and that the last alleged incident of rape took place on 25.04.2015 at 9:30 p.m. Ext.P1 is the first information statement dated 12.05.2015. The defence counsel argues that the allegations of sexual harassment and sexual assault lasted almost a year, and as such, there is practically a delay of one year from the first alleged incident to the lodging of the FIS, and that PW1 has not given any satisfactory explanation for such a long delay. He also submits that the delay in lodging FIR will, without doubt, result in embellishments as a result of after thought.

80. PW1 testifies that she had been living with the first and second accused for more than a

year. She was under their control and custody. The accused are none other than her stepfather and mother. Her evidence shows that she was under constant intimidation by the first accused, and therefore, she was not in a position and mental frame to reveal the sexual assaults inflicted on her to any person. The last incident alleged by her is on 25.04.2015 at 9.30 PM. Her evidence further shows that on the above date, her step father had compelled her to insert a stick into her vagina and he forcefully did the same and it hurt her, and she had informed this incident to her mother. Her mother advised her not to reveal it to any person and to tolerate it as the assault was inflicted by her father. Thereafter, she happened to accompany the accused who were summoned to the Konni Police station on a complaint lodged by PW9 her Aunt, against the accused seeking the help of the police to hand over the Aadhar cards of her elder sisters who were the inmates of Shabari Balika



Sadanam at Konni at that time. At the Police station, she had revealed the sexual assaults met by her from her stepfather to PW9 and hence she was reluctant to go back with her parents. Accordingly, PW9 reported the matter to the SI of police. Thereafter, she too briefed him about the matter. Since she was residing with both the accused within the limit of Nooranad Police station, they were directed to that police station and she lodged FIS therein, based on which the Ext P9 FIR was registered.

81. It is evident from the sequence of the events narrated by PW1 that she was under the dominance, control and custody of the accused during the alleged 1 year period. On an analysis of the prosecution evidence it is seen that, the situation and circumstance of the victim was such that, at the age of two and half years PW1 lost her father and thereafter she and her three elder sisters were shifted to care

homes and her mother also joined another institution. This indicates that there was no one in the family to give them Asylum, care or protection. The 2nd accused herself has stated in her 233(2) statement that she had to bear immense hardships after her husband's death and that her father and sisters neither protected nor supported them. According to PW1, her mother remarried the first accused and on his direction, the daughters were brought to the house wherein the accused were residing, The older sisters complained attempt of sexual harassment from the 1st accused and went back to the care homes. PW9 stated that PW1, the youngest, due to her affection towards her mother, had decided to remain with the mother. PW1 also stated so. After her sisters left her, the stepfather started inflicting sexual assaults on her.

82. The facts and circumstances brought out by the prosecution indicates that the victim was

totally dependent on the accused and under their dominance and custody. They were the only guardians she had. Her sisters were in care homes. She stated, while in the witness box, that she had not complained about her torments to any person due to fear and intimidation caused by the first accused.

83. PW1 has in her cross examination stated that she had made attempts to inform the school authorities, but the accused had managed to convince them that she was a mentally disturbed person. It is only normal in such a circumstance that she was not in a position to reach the police. It is also to be noted that she was aged 13 yrs only. Her step father and mother are the alleged tormentors and the perpetrators of the alleged incidents and tortures. It has been settled through various decisions of the Supreme Court and High Courts that the effect of delay in lodging complaints has to be considered in the light

of the peculiar facts and circumstances of each case.

In **State of Himachal Pradesh vs. Prem Singh** (2009 CrI. L.J 786 (SC)) it was held, “So as far as the delay in lodging the FIR in question is concerned, the delay in a case of sexual assault, cannot be equated with the case involving other offences. There are several factors which weigh in the mind of the prosecutrix and her family members before coming to the police station to lodge a complaint. In a tradition bound society prevalent in India, more particularly, rural areas, it would be quite unsafe to throw out the prosecution case merely on the ground that there is some delay in lodging the FIR.”

84. “Normal rule regarding duty of prosecution is to explain delay in lodging FIR and lack of prejudice/or prejudice caused because of such delayed lodging of FIR does not per se apply to cases of rape.” (**State of U.P vs. Manoj Kumar Pandey**

(2009) 1 SCC 72) “Rape itself brings enormous shame to victim and it is after much persuasion that a rape victim goes to police station to lodge a report and if some delay is occasioned that cannot in any way detract from other credible evidence.” (**Srivalla Srinivasa Rao vs. State of AP** (2011) 8 SCC 113)

85. It may be noted that in this case as per the prosecution version the crime was registered after PW1 was subjected to several instances of sexual assaults. The circumstances stated by PW1 is such that she was not able to reveal and divulge the torments she was undergoing, though the incidents had occurred repeatedly for a long period of time. The victim girl's assertion is that she had been threatened by her stepfather with whom she was living. Victim was a very young girl at the time, the incident of rape had occurred.

In the case of **Ramdas & Ors. Vs. State of**

**Maharashtra**, reported in 2007 (2) SCC 170 = AIR 2007 SC 155, the Apex Court has held that in the case of sexual offences, there is another consideration which may weigh in the mind of the Court regarding delay in lodging the FIR, i.e., the initial hesitation of the victim to report the matter to the police which may affect her family life and family' s reputation.

86. PW1 has deposed that the incident had occurred over a period of 1 year. The unchallenged evidence portrays that she was residing with both the accused during the 2014-2015 period. Both the accused have admitted this fact in their 313 statement. She was very affectionate towards her mother and remained with her through her elder sisters. Her mothers well being would have been a priority and concern for the young girl aged 13. There is no reason to disbelieve this version. It is proved that she has been physically, mentally and emotionally intimidated or

rather blackmailed by the accused.

87. From the evidence on record, it is clear that the sudden and unexpected disclosure of the incidents to the police by PW1 was not the result of any instigation of the relatives of her mother, as alleged by the accused, but it was the spontaneous outcome of the unbearable torture meted out by her from the first accused when she happened to reach the police station and got an opportunity and courage to disclose it. So, there is absolutely no chance of any deliberation, concoction and implication of the accused in a false case at the instigation of others. Hence, the delay is quite natural on the facts and evidence of the case, and it does not in any way prejudicially affect the interest of the accused. Applying the principle laid down by the Honorable Supreme Court and High Court in the decisions referred to, above and also relying on the the sterling evidence adduced by PW1, it can well

be concluded that the delay in lodging exhibit P1 cannot have the effect of discarding the evidence of PW1 and the prosecution case, as there is nothing suspicious in the delay. I am satisfied that there are sufficient and reasonable explanations for the delay caused in lodging the FIS and registering the FIR, and hence the delay caused is not fatal to the case of the prosecution.

88. On an objective analysis of the entire material on record, it can be held that the accused have not succeeded in rebutting the statutory presumption even under the yardstick of preponderance of probabilities. They failed to disprove that the facts proved by the prosecution either do not exist or non-existence of the facts are so probable that a prudent man ought, under the circumstances of this case, to act upon the supposition that the facts do not exist. Moreover, since the evidence of PW1 is fully



reliable, even without the application of the statutory presumption, it can be seen that the prosecution has succeeded in proving its case against the first accused, beyond a reasonable doubt. So, from the above discussions, I come to a definite conclusion that the prosecution has succeeded in proving that the 1st accused committed aggravated penetrative sexual assaults and unnatural sex against the order of the nature on PW1.

89. As far as the 2<sup>nd</sup> accused is concerned, the prosecution has failed to prove that she had any knowledge regarding the offences committed by the first accused until the last incident. The prosecution or PW1 has also no case that she had intentionally aided or assisted the first accused in the commission of penetrative sexual assaults or by any act or illegal omission, the doing of that offence. Since the second accused failed to report the matter to the

police when the last incident was reported to her she is liable only for the same.

90. Now, when coming to the charge of the offence of rape against the 1st accused, S.375 IPC defines rape as follows;

*A man is said to commit "rape" if he-*

*(a) penetrates his penis, to any extent, into the vagina, mouth, urethra or anus of a woman or makes her to do so with him or any other person; or*

*(b) inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of a woman or makes her to do so with him or any other person; or*

*(c) manipulates any part of the body of a woman so as to cause penetration into the vagina, urethra, anus or any part of body of such woman or makes her to do so with him or any other person; or*

*(d) applies his mouth to the vagina, anus, urethra of a woman or makes her to do so with him or any other person.*

91. So far as the offences under the Indian Penal Code in the charge are concerned, the evidentiary burden is on the prosecution to prove the offences, beyond a reasonable doubt. On analysing the entire evidence on record which is discussed in the foregoing paragraphs, I can hold that the prosecution has proved beyond a reasonable doubt that the first accused committed the offences under IPC as well.

92. It has been proved by cogent evidence that the 1st accused has penetrated his penis into the mouth and vagina of PW1, he has also inserted a stick into her vagina and also made her do so with the same. He also applied his mouth to the vagina of PW1. As such he committed the offence of rape as defined under section 375(a), (b) and (d) IPC. Sections 376 (2) (i) IPC provides for the offence of rape on a woman when she is under sixteen years of age,

93. Prosecution has proved that the first

accused committed rape on PW1 who was under 16 years of age. As such he has committed the offence u/s 376(2)(i) IPC. S.376(2)(n) provides for committing rape repeatedly on the same woman. Here, the prosecution has proved that the first accused has repeatedly committed rape on PW1, and as such, he has committed the offence u/s.376(2)(n)IPC. Sec.376(2)(f) provides punishment when the accused being a relative, guardian or teacher of, or a person in position of trust or authority towards the woman, commits rape on such woman. The first accused being a relative and guardian of PW1 and was a person in authority towards her has committed rape on her. Hence, this offence is also clearly established.

94. To attract Sec. 376(2)(k), the accused must be in a position of control or dominance over a woman and commits rape on such woman. Here, the first accused was in control over PW1 at the

time when he committed rape on her and hence this offence is also made out against him. The offences under these subsections shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life which shall mean imprisonment for the remainder of that person's natural life, and shall also be liable to fine:

S. 377 provides for punishment for unnatural offences, which says that;

*Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with [imprisonment for life], or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.*

**Explanation.-** Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section. 95. Here, the act of the

accused in inserting his penis to the mouth of the victim and also applying his mouth to her sexual organ amounts to carnal intercourse against the order of nature punishable under this section.

S.370 provides for Trafficking of person, and the relevant portion of which says;

*(1) Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by-.....*

Here, the ingredients of this section are not proved by the prosecution and it only proved that PW1 was residing with the accused as their daughter. So this offence is not attracted against both the accused.

96. Next is the offence of criminal intimidation which is defined in section 503 IPC that whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is

interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

97. Section Sec.506 IPC provides punishment for criminal intimidation, which says that whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

If the threat be to cause death or grievous hurt, etc.

98. Here, from the evidence of PW1, it is proved that the first accused had threatened her that if she divulged his sexual torments to her mother, he will tell that it was she who touched his private parts and

caused fear in her that her mother will also be arrested and put in jail. Such a threat amounts to injury to her reputation and thus attracts the offence of criminal intimidation punishable under the first part of Sec.506. In order to attract the second part of this section the threat must of causing death or grivous hurt. Here such an ingredient is not attracted. Hence the prosecution failed to prove the offence punishable U/s. 506(2) IPC.

99. As far as the second accused is concerned, it is alleged that she is also liable for the criminal acts of the first accused under the principles of vicarious liability as per Sec. 34 IPC. This section provides that

*Acts done by several persons in furtherance of common intention.—When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone.*



100. Here, there is absolutely no evidence of such sharing of common intention by both the accused in committing any of these offences. Thus, the second accused is not at all constructively liable for the offences committed by the first accused as per this provision because the evidence shows that the first accused committed the offences on PW1 not in furtherance of the common intention shared with the second accused.

101. When coming to the offences under PoCSO Act, Section 3 defines penetrative sexual assault exactly in *pari materia* with the definition of rape U/s. 375 IPC.

So here the acts of the accused also come under section 3(a), (b) and (d) of the PoCSO Act. S.5 of PoCSO Act deals with aggravated penetrative sexual assault ;

*its relevant parts are as follows*

5. *Aggravated penetrative sexual assault.—*

(a).....

(h) *whoever commits penetrative sexual assault on a child using deadly weapons, fire, heated substance or corrosive substance; or*

(i) *whoever commits penetrative sexual assault causing grievous hurt or causing bodily harm and injury or injury to the sexual organs of the child, or*

.....

(l) *whoever commits penetrative sexual assault on the child more than once or repeatedly; or (m) whoever commits penetrative sexual assault on a child below twelve years; or (n) whoever being a relative of the child through blood or adoption or marriage or guardianship or in foster care or having a domestic relationship with a parent of the child or*

*who is living in the same or shared household with the child, commits penetrative sexual assault on such child; or*

.....

*is said to commit aggravated penetrative sexual assault.*

The offence under this section is punishable U/s.6 which says “whoever, commits aggravated penetrative sexual assault, shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extent to imprisonment for life and shall also be liable to fine.”

102. Here, the prosecution has proved that the first accused has committed penetrative sexual assault more than once and repeatedly by inserting his penis into the vagina and mouth of PW1, a child, and also by inserting a plastic rod to her vagina

when she was residing with him in the shared house holds as relative. Use of plastic rod for penetration to the vagina no doubt amounts to use of a deadly weapon as provided in clause 'h'. Here, PW1 has also specifically given evidence that she suffered bodily pain in doing so. The term hurt is not defined under this Act and hence by virtue of Sec. 2(2) the meaning as per the definition of IPC can be assigned. As per Sec.319 IPC whoever causes bodily pain, disease or infirmity to any person is said to cause hurt. So, here the act of the 1st accused no doubt also attracted the offence under clause 'i'. Therefore, the prosecution has succeeded in proving that the first accused committed the offences as defined under clauses (h), (i), (l) and (n) of this section and are punishable U/s.6.

103. According to the prosecution, the second accused failed to report the commission of the offences by the first accused on her daughter even

though she was informed about the same by the victim herself and hence is liable for the offence U/s.19 of the PoCSO Act. This section provides for mandatory reporting of offences that *notwithstanding anything contained in the Code of Criminal Procedure, 1973, any person (including the child), who has apprehension that an offence under this Act is likely to be committed or has knowledge that such an offence has been committed, he shall provide such information to, --*

- (a) *the Special Juvenile Police Unit, or*
- (b) *the local police.*

104. Here the prosecution has succeeded in proving that the second accused was informed by PW1 about the last incident of sexual assault by the 1st accused, but she failed to report the same to the police and thereby committed the offence under this section which is punishable U/s. 21. Now with respect to S. 75

of Juvenile Justice (Care and Protection of Children) Act it is contended that by abusing and assaulting the victim the accused also committed this offence. This section says that -

*Whoever, having the actual charge of, or control over, a child, assaults, abandons, abuses, exposes or wilfully neglects the child or causes or procures the child to be assaulted, abandoned, abused, exposed or neglected in a manner likely to cause such child unnecessary mental or physical suffering, shall be punishable with imprisonment for a term which may extend to three years or with fine of one lakh rupees or with both:*

*Provided that in case it is found that such abandonment of the child by the biological parents is due to circumstances beyond their control, it shall be presumed that such abandonment is not wilful and the penal provisions of this section shall not apply in such cases:*

105. By proving that the first accused who had actual control over PW1 had assaulted and abused her, he is liable for the commission of this offence. However, the prosecution has failed to prove

that the 2nd accused has wilfully neglected or abandoned the victim. Accordingly, points 2 to 7, 8 to 12, 14, 17 and 18 are answered in favour and points 7, 13, 15 and 16 are found against the prosecution.

106. **Point number 19:-** As per my finding in points 1 to 18, the first accused is found guilty of the offences punishable under sections 376 (2) (f) , 376 (2) (i), 376 (2) (k) and Sec.376(2) (n), 377, and 506(1) of IPC and 5 (n) read with 6 , 5 (l) read with 6 , 5 (i) read with 6 , 5 (h) read with 6 of PoCSO Act and S.75 of the Juvenile Justice (Care and Protection) Act, and he is convicted thereunder. However, he is not found guilty of the offences punishable U/s 370(1) r/w 370(4) and Sec.506(2) of the IPC and is acquitted of these offences under section 235(1) CrPC. The second accused is found guilty of the offence punishable under section 19 read with 21 of the PoCSO Act and she is convicted thereunder. She is

found not guilty of the offences punishable U/Ss.376(2), (f), (i), (k) and (n) r/w 34, 370(1) r/w 370(4) of IPC and Secs.5(h),(i),(l) and (n) r/w S.6 r/w 16 and S.75 of the Juvenile Justice (Care and Protection of Children) Act, 2015 and is acquitted of these offences U/s.235 (1) CrPC.

*(Dictated to the C.A., corrected and pronounced by me in open court on this the 6<sup>th</sup> day of February, 2021)*

Special Judge.

Considering the facts and circumstances of the case, including the nature of the offences and punishment provided therein I am of the view that it is not a fit case to invoke the benevolent provisions of Probation of Offenders Act. Hence, both the accused were heard on the question of sentence under S.235(2) Cr.P.C. The first convict (A1) submitted that he is totally innocent, that his wife is dependent on him and that he is diabetic and also suffering from hypertension. The



second convict (A2) also prayed for leniency stating that she is the mother of four daughters, and that only one of them is married, that there is no one to take care of them and that she is also suffering from high blood pressure and sugar. The learned defence counsel submitted that this Court should imbibe the spirit of reformatory system of punishment. The sentencing should be to reform the accused. The first accused is 40 years age only and has ailments. As far as the second accused is concerned, he submits that the hardships she has undergone with four daughters when her husband passed away must be considered. There was no one to give them protection and asylum. Only a sentence of fine may be imposed as she has no one to even bail her out. The learned Public Prosecutor prays for maximum sentence. He submits that both. the accused have snatched away the childhood of four girls. First accused is not entitled for any leniency as he has committed a crime which pierces the soul of the

society. The sentencing should be such that it sends a message to the perpetrators of crime and a solace to the tormented.

The sordid episode of the convict stepfather, whose sacred duty was to ensure the protection and welfare of his own daughter like victim, subjected her to gratify his lust in a most cruel and barbaric manner, makes the crime of rape proved even more heinous. Keeping in view the poor and pathetic family background of the victim, it is obvious that a most heinous and perverted type of barbaric act of rape was committed on a helpless and defenceless school going girl of 13 years old by her guardian. If the guardians of wards behave in this manner, who will guard the wards? The faith of the society by such a barbaric act of the stepfather gets totally shaken and its cry for justice becomes loud and clear. The sexual offence committed was not only inhuman and barbaric, but it was a totally ruthless crime of rape and an affront to

the human dignity of the society. The savage nature of the crime has shocked my judicial conscience. There are no extenuating or mitigating circumstances, whatsoever, in the case, and I see aggravating circumstances alone on the facts, circumstances and evidence of the case. The incestuous and perverted acts of the convict on an innocent and defenceless young girl of 13 years certainly calls for the extreme punishment, and hence accordingly, I have decided to impose the extreme sentence on him.

So far as the second convict mother is concerned, the situation is totally different. It has come out in evidence that her husband died unexpectedly, leaving behind her family consisting of four girl children as well, and the youngest of the children, the victim, was just two and a half years at the time of his death. She had no other option but to entrust the children to care homes and she herself started working in one of the care homes. In these

circumstances, the accused, who was working in the institution wherein she had joined, started intimacy with her, which resulted in their marriage. Her family accepted him, trusted him and her father accepted him as his student and taught him vedas and rituals and even conducted his upanayana. Albeit she came to know the sexual acts of the accused from the victim, she tried to hide the same, and she failed in her legal duty to inform it to the police forthwith. She might have her own excuses for not doing so. The consequences which she would have to suffer from the accused had she exercised the legal duty and also that of a mother, might have withdrawn her from taking such a course of action. Anyhow, in my considered opinion, the mitigating circumstances in her case outweigh the aggravating circumstances, and hence she deserves leniency in the matter of punishment. So, awarding punishment limiting the sentence to the

period already undergone by her appears to be sufficient to meet the ends of Justice.

The first accused is found guilty of the offences punishable under IPC as well as under the PoCSO Act for the same criminal acts. Sec.42 of the PoCSO Act provides for alternative punishment which indicates that, if an accused is found guilty of the offence punishable under this Act and also under IPC, the offender shall be liable to punishment only under such law or this Act which provides for greater punishment. Section 26 of the General Clause of the Act also states that, “where an act or omission constitutes an offence under two or more enactments, then the offender shall be liable to be prosecuted and punished under either or any of those enactments, but shall not be liable to be punished twice for the same offence”.

There are no corresponding provisions in the PoCSO Act for Sec.376 (2) (i) and (k) and 377 of IPC and

in IPC it corresponds to Sec.5(h) and (i) r/w 6 of PoCSO Act. Sec.376 (2) (n) corresponds to Sec.6 r/w.5 (l ) of the PoCSO Act. Likewise Sec.5 (n) of PoCSO Act corresponds to Sec.376(2)(f) of IPC.

Here the law applicable to the punishment for the offence of rape was the Amended Act of 13 of 2013 of IPC which provides the punishment for the offences u/s. 376 (2) (i) (k) and (n) of IPC is rigorous imprisonment for a term which shall not be less than 10 years, but, which may extend to imprisonment for life which shall mean imprisonment for the remainder of that person's natural life and shall also be liable to fine. During the above said period, Sec.6 of the PoCSO Act provides punishment of rigorous imprisonment for a term which shall not be less than 10 years, but, which may extend to imprisonment for life and also be liable to fine.

A comparison of Sec.6 of PoCSO Act with Sec.376 (2) (i) (k) of IPC shows that the punishment is

greater in the IPC than the former. So, I am of the view that the alternative punishment provided u/s.376 (2) (f) and 376 (2) (n) of IPC can be resorted to.

It is already proved that PW.1, the victim lost her father in her childhood. Thereafter, she was in care homes apart from the alleged period of torment in this case, she has three sisters who were also brought up in care homes. The convict is a close relative of the victim. He was a father figure for the victim. He exploited his control, authority and dominance over the victim. He exploited his domestic relationship and used the victim to satisfy his lust. Hence he deserves no leniency in the matter of punishment. Therefore, the maximum sentence of imprisonment provided by the statutes and fine with default sentence will meet the ends of justice.

Regarding the multiple sentences for imprisonment for life, Hon'ble Supreme Court in its Constitution Bench decision in **Muthuramalingam**

**and others Vs State Rep by Inspector of Police**

**(AIR 2016 SC 3340)** issued some guidelines and in para 31 of the judgment it was held that;

*31. In conclusion our answer to the question is in the negative. We hold that while multiple sentences for imprisonment for life can be awarded for multiple murders or other offences punishable with imprisonment for life, the life sentences so awarded cannot be directed to run consecutively. Such sentences would, however, be superimposed over each other so that any remission or commutation granted by the competent authority in one does not ipso facto result in remission of the sentence awarded to the prisoner for the other.*

The Hon'ble Court also decided the question as to whether the Court can direct life sentence and term sentences to run consecutively and held;



*“the power of the Court to direct the order in which sentences will run is unquestionable in view of the language employed in S.31 of the CrPC. The Court can, therefore, legitimately direct that the prisoner shall first undergo the term sentence before the commencement of his life sentence. Such a direction shall be perfectly legitimate and in tune with S.31.”*

Considering the nature of the case, in view of the power u/s.33(8) of the POCSO Act coupled with R.7 of PoCSO Rules 2012 and Sec.357A Cr.PC, I hereby recommend the District Legal Services Authority, Alappuzha to pay compensation to the victim under the Kerala Victim's Compensation Scheme. The office is directed to send a copy of the judgment to the Secretary, District Legal Services Authority, Alappuzha.

In the result;

**(a) the first convict (A1) is sentenced to undergo rigorous imprisonment for life (which**

***shall mean imprisonment for the remainder of his natural life) for each of the offences punishable under Ss. 376 (2) (f), (i), (k) and (n) of the IPC, and to pay a fine of ₹ 20,000/- (rupees twenty thousand) each, and in default of payment of fines, to undergo Rigorous Imprisonment for a further period of six (6) months each;***

***(b) the first convict (A1) is further sentenced to undergo rigorous imprisonment for ten (10) years each for the offences U/Ss. 377 of the IPC and 5(h) and (i) r/w 6 of the PoCSO Act, and to pay a fine of ₹ 10,000/- (rupees ten thousand) each, and in default of payment of fine, to undergo Rigorous Imprisonment for a further period of three (3) months each;***

***(c) the first convict (A1) is further sentenced to undergo rigorous imprisonment for two (2) years each for the offences U/Ss. 506(1) IPC and 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015 ;***

***(d) it is ordered that the first convict shall first undergo the other term of sentences before the commencement of his life sentence;***

***(e) the first convict is allowed to set off, U/s. 428 of Cr.PC, the period of detention***

***already undergone by him as an under trial prisoner, from 16.05.2015 to 21.08.2015 and from 19.03.2016 to 28.03.2016, against the substantive sentence of imprisonment, if his life imprisonment is commuted or remitted by the government by virtue of section 432 or 433 Cr.P.C, subject to the statutory restriction u/s.433A Cr.P.C.***

***(f) the second convict (A2) is sentenced to undergo simple imprisonment for 41 days for the offence punishable by U/s.19 r/w 21(1) of the PoCSO Act. She is allowed to set off U/s. 428 of Cr.PC, the period of detention already undergone by her as an under trial prisoner from 02.04.2016 to.12.05.2016. As she has already suffered the sentence imposed, she is ordered to be set at liberty forthwith;***

***(g) M.O.1 series, M.O.2 series and M.O.3 shall be destroyed after the period of appeal, or any appeal filed after its disposal;***

***(h) the District Legal Services Authority, Alappuzha is recommended for providing compensation to PW1 under the Victim Compensation Scheme. Office is directed to send a copy of the judgment to DLSA, forthwith;***

- (i) since the convict is sentenced to multiple sentences of imprisonment, for life or the life sentences shall run concurrently;**
- (j) if the fine amount is realised, it shall be released to PW1, the victim as compensation u/S.357(1)(b) of Cr.PC.**

*(Dictated to the C.A., data entered by him, corrected and pronounced in open court on this the 6<sup>th</sup> day of February, 2021)*

Special Judge,  
Fast Tract Special Court, Haripad.

A P P E N D I X

Witnesses examined for prosecution:-

PW1-Victim of the offence.

PW2-Anil Namboothiri.

PW3-Santhosh Kumar.

PW4-Harikumar.

PW5-Prakash.

PW6-Muraleedharan Nair.

PW7-Gokul.

PW8-Kaladharan.

PW9-Sandhya Devi.

PW10-Sujatha Devi, Village Officer, Nooranad.

PW11-Jaseela, WCPO 5419, Nooranad PS.

PW12-Gayathri V. Naboothiri.

PW13-Dr. Sapna, Asst. Professor in OBG, MCH, Vandanam.

PW14-Sreelatha S., HM, NSS Girls HS, Pandalam.

PW15-Dr. Nibin Nahas, RMO, District Hospital, Mavelikara.

PW16-Dwijesh S, S.I. of Police, Nooranad.

PW17-Jose Mathew, Inspector of Police, Mavelikara.

PW18-P. Sreekumar, Inspector of Police, Mavelikara.

Exhibits for prosecution:-

(marked through)

P1-First Information Statement dtd.12/05/14.	PW1
P2-Scene mahazar dtd.27/05/15.	PW6
P3-Scene mahazar dtd.14/05/15.	PW7
P4-Recovery mahazar dtd.28/05/15.	PW8
P5-Scene plan dtd.01/03/16.	PW10
P6-Medical examination report of victim.	PW13
P7-Extract of admission register.	PW14
P8-Potency certificate dtd.16/05/15.	PW15
P9-First Information Report dtd.12/05/15.	PW16
P10-Arrest Memo of A1 dtd.16/05/15.	"
P11-Inspection memo of A1 dtd.16/05/15.	"
P12-Arrest notice to legal aid dtd.16/05/15.	"
P13-Arrest notice dtd.16/05/15.	"
P14-Mahazar dtd.27/05/15 dtd.27/05/15.	"
P15-Property list dtd.11/06/15.	"
P16-Address report of accused dtd.14/05/15.	PW17
P17-Forwarding note dtd.18/08/15.	"
P18-FLS report dtd.17/06/2020.	"

Witnesses examined for defence:-

DW1-Sajikumar.

DW2-Minikumari Antharjanam.

DW3-Dr. Unnikrishna Pisharadi, Psychiatrist, NSS Medical Mission Hospital, Pandalam.

Exhibits for defence:-

D1-Certified copy of medical certificate dtd.12/05/15. (DW3)

Material object:-

MO1-Skirt.

MO2-Shirt.

MO3-Shuddy.

MO4-Dhothi.

Special Judge,  
Fast Track Special Court, Haripad.

pk/-