

**IN THE COURT OF THE FAST TRACK SPECIAL JUDGE
(PoCSO), THIRUVANANTHAPURAM.**

Present : R.Jayakrishnan, Special Judge.

Monday, 17th January, 2022 (27th Pousha, 1943)

SESSIONS CASE 869/2021

- Accused*** : Vijayakumar, aged 53/20, S/o.Gopalakrishnan
Keezhkkadi Veedu, Near South KaladyVolibal
Ground, Kalady Ward, Manacaud Village.
Now residing at Shamna Manzil, TC.100/4253
Near Mukkolackal Rice Mill, Pallithura Ward
Attipra Village.
- Charge*** : U/s.511 of 377 IPC and Sec.9(m) r/w 10 of the
Protection of Children from Sexual Offences Act.
- Plea*** : Not guilty
- Finding*** : Not guilty u/s.511 of 377 IPC.
Guilty u/s.9(m) r/w 10 of the Protection of Children
from Sexual Offences Act, 2012.
- Sentence/
Order*** : For the offence under S.9(m) r/w 10 of the Protection of
Children from Sexual Offences Act. 2012 the accused is
sentenced to undergo Rigorous Imprisonment for 5 years
and fine of Rs.25,000/- (Twenty five thousand only) with
default sentence for 6 months Rigorous Imprisonment.

The accused is entitled to set off for the period from 27/11/2020 till date against the substantive sentence. If the fine amount is remitted or recovered, the same shall be given to PW1 as compensation u/s 357(1)(b) of the Criminal Procedure Code.

Name of Police Station and : Thumpa
Crime No. : 834/2020

Prosecution conducted by : Special Public Prosecutor
 Sri.Vijay Mohan R.S

Accused defended by : Sri.Shahul Hameed

**Date of which copy of judgment
 was given to the accused** : 17/01/2022

JUDGMENT IN SC 869/2021

A minor boy was sexually assaulted and attempted to commit carnal intercourse against the nature by the accused.

2. Prosecution unfolded this case in the following way :-

PW1 is the victim boy having aged 9 years. He was residing along with his family. The accused was a servant of the owner of the house where the PW1 and his family resided on rent. One day morning while PW1 was in the veranda of the house the accused came there and squeezed the penis of PW1. At that time the house owner came to there and the accused released him. Thereafter the accused went to the back side of the kitchen and the accused called the PW1 near to him through the door of the kitchen. Immediately the PW1 told the incident to his mother, but she did not take it as seriously. But she saw that the accused called PW1 to the back side of the kitchen. PW1 told his mother that the accused assaulted him and he showed her how the accused squeezed his penis. He also told her that he had pain when the accused squeezed his penis. Then she asked PW1 to tell the same to his father. PW1 told the incident to his father. They went to the police station. PW1 gave Ext.P1 statement to PW8. On the basis of Ext.P1 statement PW9 registered a case. PW4 is the mother of PW1.

3. PW2 and PW3 are the doctors who examined PW1 and the accused and issued Ext.P3 Medical Certificate and Ext.P4 Potency Certificate of the accused. PW5 is the owner of the house where PW1 and his family were resided. PW6 is an attester in the scene mahazar and PW7 is the Village Officer who prepared the scene plan. PW9 and PW10 were conducted investigation in this case. PW10 completed the investigation and charge sheet was filed by him.

4. The investigation in this case revealed that the accused with his sexual intent squeezed the penis of PW1, a minor boy aged 9 years and caused pain to him at the sit out of TC.100/770(1) Santhi Nagar Menamkulam and also called PW1 to the back side of the residence and thus committed the aforesaid offences. After completing the investigation PW10 filed charge sheet in this case against the accused before the learned Additional Sessions Court (PoCSO), Thiruvananthapuram on 13/04/2021. The accused is in custody.

5. On issuance of summons, the accused was produced before the Special Court. Copies of the prosecution records were furnished to the accused.

6. As per order No.B457/21 dated 09/08/21 of the Hon'ble Sessions Judge, Thiruvananthapuram, the case was transferred to this court for trial and disposal.

7. Notices were issued to the learned Special Prosecutor as well as the learned counsel for the accused. The Special Prosecutor as well as the accused was produced before this court. After hearing the prosecution and the accused and on perusing the prosecution records, a charge u/s.511 r/w 377 IPC and Sec.9(m) r/w 10 of the Protection of Children from Sexual Offences Act. was framed against the accused. The charge was read over and explained to the accused. He pleaded not guilty and claimed to be tried.

8. On behalf of the prosecution, PW1 to PW10 were examined and Exhibits P1 to P13 and MO1 were marked.

9. When the accused was examined u/s 313 Cr.PC, the accused denied the incriminating circumstances. He reiterated his innocence. He further stated that he is innocent. He was cheated. He did not commit any offence. He has nobody. Thereafter both the accused and the prosecution were heard on the point u/s.232 Cr.PC. Since the acquittal of the accused was not felt warranted under that provision, the accused was called upon to enter on his defence. No witnesses were examined from the side of the accused and no documents were marked.

10. Both sides were heard.

11. The following points arise for determination :-

1. Whether the victim in this case was a minor?
2. Whether the accused committed aggravated sexual assault on PW1?
3. Whether the accused attempted to commit carnal intercourse against the nature of the order on PW1?
4. What are the offence, if any, committed by the accused?
5. What is the sentence to be imposed?

12. **Point No.1** :- PW1 is the victim and PW4 is the mother of PW1. PW1 testified that in 2020 his age was 9 years. He did not remember his date of birth. Ext.P1 is the FI statement given before the police and he signed in it. He further stated the incident happened on 2020 November 26 at the veranda of his house. PW4, the mother of PW1 testified that the victim, PW1 is her son and his date of birth is 07/12/2011. Ext.P13 is the Certified Extract of Birth Certificate of PW1. As per section 35 of the Evidence Act 1872 “An entry in any public or other official book, register or record, stating a fact in issue or relevant fact and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or

(record or electronic record) is kept, is itself a relevant fact”. In **Anagha Prasad v. M. C. Abu and Another, 2014 (3) KHC 837**, Hon’ble High Court held that *“The birth certificate is issued in consonance with a register kept by the officer concerned as per the prescription of a Statute. Therefore, in the absence of any reason to find that the date of birth of the petitioner shown in the birth register is wrong, it gets precedence over the entry in the school register. Certified copy of the entry in the birth register mentioned by an official in discharge of his official duty is admissible under S.35 of the Evidence Act and it is not necessary to examine the official”*. The incident was on 26/11/2020. As per Ext.P13 the date of birth of PW1 was on 07/12/2011. So it can be seen that on the date of incident PW1 was aged 9 years and he was a minor. Here the accused did not raise any serious dispute about the age of the victim. It is found that at the time of incident the victim, PW1 in this case was a minor. Point is found accordingly.

13. **Point Nos.2 and 3** :- PW1 testified that the incident was on 26/11/2020 morning at the veranda of the residence of PW1, which was a rented house. The accused came there and he caught the penis of PW1, the victim and squeezed it. He had suffered pain. At that time the house owner came to there and he released him and called him back side of the house. Immediately he went inside the house and told the incident to PW4, his mother. At first PW4 did not believe the words of PW1. Thereafter he showed her how the accused squeezed his penis and made believe to PW4. PW4, the mother asked him to say about the same to his father. Hence he told the incident to his father. He insisted his parents to complained about the incident to the police. The evidence of PW4, the mother of PW1 would show that she also testified in court in tune with PW1. PW5 is the owner of the house also testified that the accused was a servant of him and he was resided in his residence one month. On the date of incident the accused came to the residence of PW1. The evidence of PW1, PW4 and PW5 would show that the accused is the servant of PW5 and he came to the residence of PW1 one or two times for garden work. PW1

properly identified the accused and explained the atrocities committed by the accused against him.

14. Ext.P1 is the statement given by PW1 before the police. As per Ext.P1 the incident was on 26/11/2020 at 10 am. Ext.P1 would show that the statement was recorded by PW8, the Vanitha Sub Inspector of Police, Medical College Police Station at the residence of PW1 at 3.00 pm. PW9 who registered the case as per Ext.P7 FIR testified that as per his direction PW8 recorded Ext.P1 statement of PW1. Ext.P7 FIR would show that on the basis of Ext.P1 statement the case was registered on 26/11/2020 at 13.50 pm. So it can be seen that immediately after the incident the father of PW1 informed the incident to the police and PW8 came to the residence of PW1 and recorded his statement as per the direction of PW9, the investigating officer in this case. In ***Mottammal Shaji @ Kakka Shaji and Others v. State of Kerala, 2017 KHC 155***, Hon'ble High Court held that "*Effect of delay in lodging FIR. The Court cannot reject the prosecution version as given in the FIR and substantiated by the evidence, merely on the ground of delay, unless there are indications of fabrication. Suspicion about the credibility of FIR normally arises only when the delay remains unexplained*". Here it can be seen that there is only natural delay and there is no exorbitant delay in registering the case.

15. The specific arguments advanced by the counsel for the accused is that due to enmity between the accused and the parents of PW1, the parents of PW1 used PW1 to file a false case against the accused. It is important to note that though such suggestion was put by the counsel for the accused at the time of examination of PW9 no such suggestion was raised at the time of examination of PW4 and PW5. Another contention raised by the counsel for the accused is that the owner of the building where the victim and his family were resided is not examined. The investigating officer clarified that the building belongs to the daughter of PW5 and now she is not in station. The rent is collected by PW5. It is important to note that at the time of examination PW1, PW4 and PW5, the counsel for the accused did not

raise any such contention and he did not ask any such question to PW5 at the time of the cross examination. The counsel for the accused also raised a contention that PW6 who put her signature in Ext.P5 scene mahazar is a native of Alappuzha and in order to help the prosecution she gave a false version before the court. But she admitted that her native place was at Alappuzha and last 2½ years she is residing in the locality.

16. It is true that PW1 and PW4 testified that at the time of incident father of PW1, PW4, brother of PW1 and the housemaid were in the house. PW1 testified that they never saw the incident. It is true that at the time of cross examination of investigating officer the counsel for the accused raised some new allegations which were not confronted with the witnesses in this case. Such allegations were not asked to the witnesses while at the time of their examination. So it is not admissible in evidence. More over Ext.P1 is the statement given by PW1 before the police and Ext.P2 is the 164 statement given by PW1 before the Magistrate. PW1 testified before the court in tune with Exts.P1 and P2. Further no omission or contradiction was brought out in the cross examination of PW1. There is no reason to disbelieve the version of PW1, PW4 and PW5. It is settled proposition of law that the accused need not entered into the witness box and prove his innocence. This is not an offence comes under the IPC. This is the offence comes under the POCSO Act. The Act is designed in such a way that once the prosecution proved the offence and the Court drawn the presumption under section 29 of the POCSO Act. It is for the accused to rebut the presumption. Here the accused raised a number of suggestions at the time of examination of the witnesses. But no evidence was adduced to show that he has not committed any offence. From the evidence it can be seen the presence of the accused at the place of occurrence is proved. In the circumstances mentioned above, only irresistible conclusion that the accused is the perpetrator of the crime. At the same time I found that there is no evidence to show that the accused has committed any attempt for carnal intercourse against the nature

of the order on PW1. Considering the totality of the evidence and the circumstances which I narrated above, I hold that the accused committed aggravated sexual assault on PW1. At the same time I found that the accused did not commit any offence of attempting to commit unnatural offence of carnal intercourse against the victim. Points are found accordingly.

17. **Point No.4 :-** In view of my findings on earlier points, the accused is found not guilty of the offence u/s.511 r/w 377 IPC and found guilty u/s. 9(m) r/w 10 of the Protection of Children from Sexual Offences Act. I acquit the accused for the offence u/s.511 r/w 377 IPC and convict him for the offence u/s.9(m) r/w 10 of the POCSO Act.

Dictated to the Confidential Assistant transcribed and typed by her, corrected by me and pronounced in open court on this the 17th day of January, 2022.

**R.JAYAKRISHNAN
SPECIAL JUDGE.**

18. **Point No.5:-** I heard the accused regarding the sentence to be imposed. But he has nothing to say except that he is innocent. He prayed for mercy. I have also heard the learned Special Prosecutor as well as learned counsel for the accused. The accused is a prudent man, well acquainted with the pros and cons of his misdeeds. His attitude shows his scant respect and honour for the legal system and morality. So he is not entitled to get the benevolent provisions of the Probation of Offenders Act, 1958.

19. In ***State of Punjab v. Bawa Singh, 2015 KHC 4036***, Hon'ble Supreme Court held that "*This Court reiterated the settled proposition of law that one of the prime objectives of criminal law is the imposition of adequate, just, proportionate punishment which commensurate with gravity, nature of crime and the manner in which the offence is committed. One should keep in mind the social*

interest and conscience of the society while considering the determinative factor of sentence with gravity of crime. The punishment should not be lenient that it shocks the conscience of the society. It is, therefore solemn duty of the Court to strike a proper balance while awarding the sentence as awarding lesser sentence encourages any criminal and, as a result of the same, the society suffers.”

20. Here the victim is a minor boy having age of 9 years. The accused is aged 53 years. The accused made atrocities to an innocent minor boy very cruelly. He made atrocities to a minor boy who is old enough to have a grand son of the accused. The accused does not deserve any leniency for sentence. This court has a duty to consider and credit the trauma faced by PW1 and his family members. I have to keep in mind the guide-lines of the Hon’ble Supreme Court in the aforesaid decision while determining proper sentence to be imposed on the accused. On considering the facts and circumstances of this case, the accused is sentenced to undergo Rigorous Imprisonment for 5 years and to fine of Rs.25,000/-(Twenty five thousand only) with default sentence for 6 months Rigorous Imprisonment u/s 9(m) r/w 10 of the Protection of Children from Sexual Offences Act, 2012, will meet the ends of justice. Point is answered accordingly.

In the result, the accused is acquitted u/s.235(2) Cr.PC for the offence u/s.511 r/w 377 IPC and he is convicted under Section 235(2) Cr.PC and the following sentence is awarded:

For the offence u/s 9(m) r/w 10 of the the Protection of Children from Sexual Offences Act, Rigorous Imprisonment for 5 years and to fine of Rs.25,000/-(Twenty five thousand only) with default sentence for 6 months Rigorous Imprisonment.

The accused is entitled to set off for the period from 27/11/2020 till date against the substantive sentence. If the fine amount is remitted or recovered, the same shall be given to PW1 as compensation u/s 357(1)(b) of the Criminal Procedure Code.

The victim in this case is entitled to get the compensation under the Victim Compensation Scheme. Send a copy of this Judgment to the District Legal Services Authority, Thiruvananthapuram under section 357-A(3) Cr. PC.

The convicted accused will be sent to the Central Prison, Thiruvananthapuram to serve out the sentence. MO1 shall be returned to the accused after the expiry of appeal period.

Dictated to the Confidential Assistant transcribed and typed by her, corrected by me and pronounced in open court on this the 17th day of January, 2022.

**R.JAYAKRISHNAN
SPECIAL JUDGE.**

Appendix

Prosecution Witnesses:

- PW1. Victim
- PW2. Dr.Aiswarya Lekshmi.R.V
- PW3. Dr.Mohamed Shiji.A
- PW4. Smitha Dileep
- PW5. Shamsudeen
- PW6. Sabitha
- PW7. Madhu.K
- PW8. Priya P.M
- PW9. Shaji.S
- PW10. Ashok Kumar.N

Exhibits for Prosecution :

- P1. FI statement
- P2. 164 statement
- P3. Medical Certificate of the victim
- P4. Potency Certificate of the accused
- P5. Scene mahazar
- P6. Scene plan
- P7. FIR
- P8. Inspection memo
- P9. KPF 151 A Form
- P10. Remand application

- P11. Address report
P12. Ownership Certificate
P13. Certified Extract of Birth Certificate of the victim

Defence Witness : Nil

Exhibits : Nil

Material Object :

MO1 – Samsung Mobile Phone

Description of the Accused

Name of accused	Father's name	Occupation	Religion/Caste	Residence	Age
Vijayakumar	Gopalakrishnan	Coolie	Hindu	South Kalady	55

Date of

Offence	Complaint	Apprehension	Released on bail	Commencement of trial	Close of trial	Sentence/order	Explanation of delay
26/11/20	26/11/20	27/11/20	Custody	04/10/21	12/01/22	17/01/22	No delay

**R.JAYAKRISHNAN
SPECIAL JUDGE.**

//True Copy//

**R.JAYAKRISHNAN
SPECIAL JUDGE.**