IN THE FAST TRACK SPECIAL COURT(POCSO)
THIRUVANANTHAPURAM.

Present:- Smt. REKHA.R, SPECIAL JUDGE.

Tuesday, 31st October, 2023 (9th Karthika, 1945)

SESSIONS CASE No.1073/2013
(Crime No.41/2013 of Poojappura Police Station)

Complainant : State - represented by the Inspector of Police, Museum Circle Thiruvananthapuram.

(By Special Public Prosecutor, Sri.Vijay Mohan.R.S)

Accused 1 : Gopinathan Nair, S/o.Narayana Pillai
Kunnu Bunglow, TC.19/452
Mudavanmughal Ward, Thirumala Village.
(KRRA 242, MLA Road, Thamalam.(No more)

2. Prabhathkumar @ Prabhan, aged 54/13
S/o.Ramakrishnan Nair, Pottayil Veedu
TC.19/1054 (3), Thamlam Therivila Lane
Mudavanmughal Ward, Thirumala Village.

(By Advs.Sri.Bert S.L, Sri.Subhash.B and Sri.Sen.A.G)

Charge **:** Under sections 376(2)(l), 377 of Indian Penal Code, sections 4 read with 3(a), sections 4 read with 3(c), sections 4 read with 3(d) sections 6 read with 5(k), sections 8 read with 7 and sections 10 read with 9(k) of Protection of Children from Sexual Offences Act.

Plea : Not guilty

Finding : Guilty under section 377 of Indian Penal Code, sections 4 read with 3(a), sections 6 read with 5(k) and sections 8 read with 7 and sections 10 read with 9(k) of Protection of Children from Sexual Offences Act and not guilty under section 376(2)(l) of Indian Penal Code, sections 4 read with 3(c) and sections 4 read with 3(d) of Protection of Children from Sexual Offences Act.

Sentence/
order : Accused is sentenced to undergo rigorous imprisonment for a period of **35 years** and to pay a fine of **Rs.50,000/-** (Rupees Fifthy thousand) and in default of payment of fine to undergo rigorous imprisonment for a further period of **6 months** for the offence punishable under section 6 read with section 5(k) of Protection of Children from Sexual Offences Act, 2012 and to undergo rigorous imprisonment for **7 years and to pay a fine of Rs.25,000/-** (Rupees Twenty five thousand) and in default of payment of fine to undergo rigorous imprisonment for a further period of **3 months** for the offence

punishable under section 10 read with section 9(k) of the Protection of Children from Sexual Offences Act and to undergo rigorous imprisonment for **10 years and to pay a fine of Rs.50,000/- (**Rupees Fifty Thousand) and in default of payment of fine to undergo rigorous imprisonment for **6 months** for the offence punishable under section 377 of Indian Penal Code. Substantive sentences shall run concurrently.

The fine amount if remitted by the accused or if realized from the accused shall be paid to PW1 as compensation under section 357(1) (b) of Criminal Procedure Code.

Accused was in judicial custody for the period from 23/04/2013 to 23/05/2013. Accused is entitled to get set off for one month against the substantive term of imprisonment.

Invoking the power under section 357- A of the Code of Criminal Procedure Code, 1973 and section 33(8) of Protection of Children from sexual Offences Act, this court hereby makes recommendation to the District Legal Services Authority, Thiruvananthapuram for adequate compensation to PW1.

Description of the accused

Sl. No.	Name of accused	Father's name	Religion /Caste	Occupation	Age	Residence
1	Prabhathkumar	Ramakrishnan Nair	Hindu	Coolie	62	Thamalam

Date of

Occurrence	Complaint	Apprehension	released on bail	Committal	Commencement of trial	Close of trial	Sentence/ order
10/01/13	24/07/13	23/04/13	23/05/13	Nil	15/02/18 13/01/23	27/10/23	31/10/23

This case having been finally heard on 27/10/2023 in presence of the above counsel and the court on 31/10/2023 delivered the following :

JUDGMENT

Accused No.2 faced trial for charges under sections 376(2)(l), 377 of Indian Penal Code, sections 4 read with 3(a), sections 4 read with 3(c), sections 4 read with 3(d), sections 6 read with 5(k) sections 8 read 7 and sections 10 read with 9(k) of Protection of Children from Sexual Offences Act.

2.Prosecution case as emerged from the final report and from the prosecution evidence in brief are as follows :- On 10/01/2013 in the evening accused No.2 committed rape and penetrative sexual assault on child victim by inserting his penis into her mouth and ejaculating in her

mouth at her residence. Accused No.2 committed rape and penetrative sexual assault on child victim taking advantage of her mental disability. Accused No.2committed carnal intercourse with child victim against the order of the nature by inserting his penis into the mouth of child victim and ejaculating in her mouth. Accused No.2 touched vagina of child victim, sucked her breast and kissed her with sexual intent by taking advantage of her mental disability. Accused No.2 had thus committed the above mentioned offences.

3. Station House Officer, Poojappura Police Station registered first information report number 41/2013 on the basis of first information statement given by child victim and conducted investigation. Circle Inspector of Police, Museum Police Station completed investigation and laid final report before the Principal Sessions Court, Thiruvananthapuram. Cognizance was taken for the offences punishable under sections 376, 377 of Indian Penal Code and sections 3(a) and 4 of Protection of Children from Sexual Offences Act, 2012. Accused 1 and 2 were released on bail. Accused 1 and 2 were served with copy of the prosecution records. Thereafter the case was transferred to the 1st Additional District and Sessions Court and thereafter to Additional District and Sessions Court (For the trial of cases relating to Atrocities and Sexual Violence against Women and Children),

Thiruvananthapuram. After appearance of accused no.1 and 2, the learned Special Public Prosecutor opened the case of the prosecution. Accused and prosecution were heard under section 227 of Criminal Procedure Code. After finding that there is no scope for discharge under section 227 Criminal Procedure Code, charges under 376 of Indian Penal Code and section 377 of Indian Penal Code and section 3 read with 4 of Protection of Child from Sexual Offences Act were framed in English, read over and explained to accused No.1 in Malayalam to which he pleaded not guilty and charge under section 377 of Indian Penal Code was framed in English, read over and explained to accused No.2 in Malayalam to which he pleaded not guilty. Accused No.1 is no more. Charge against accused No.1 was ordered as abated on 18/12/2018. The case was thereafter made over to this court for trial and disposal.

4.Prosecution examined PW1in part and got marked Ext.P1, MO1 to MO4 on 11/1/2023. Thereafter charge was altered and charge under sections 376(2)(l), 377 of Indian Penal Code, section 3(a) read with section 4, section 3(c) read with section 4, section 3(d) read with section 4, section 5(k) read with section 6, section 7 read with section 8 and section 9(k) read with section 10 of Protection of Children from Sexual Offences Act were framed in English, read over and explained to accused No.2 in

Malayalam to which he pleaded not guilty. Thereafter prosecution examined PW2 to PW19 and got marked Exts.P2 to P24 and MO1 to MO7. CW4 and CW15 were given up by prosecution. Prosecution evidence was closed. Accused No.2 was questioned under section 313 of Criminal Procedure Code. Accused No.2 filed additional statement under section 313(5) of Criminal Procedure Code. Defence version as seen from the 313 statement of accused No.2 and additional statement filed by him is that that he is a cancer patient, he can not eat much and did not go anywhere in the neighbourhood. PW12 who is mother of PW1 (child victim) borrowed some money from Viswambharan and accused No.2 demanded that amount during the marriage of his daughter and hence this case was filed. According to accused No.2 he has been residing in a rented house and did not commit the offences alleged in this case and is innocent and was falsely implicated in this case. Prosecution and accused No.2 were heard under section 232 of Criminal Procedure Code. Accused No.2 was found not entitled to be acquitted under section 232 of Criminal Procedure Code. Thereafter accused No.2 was called upon to enter on his defence. Ext.D1 contradiction and Ext.D2 document were marked on the side of accused No.2 The case was then posted for hearing. Defence part was seen heard. Prosecution filed CMP.218/2023 for reopening the evidence

when the case stood posted for hearing the prosecution. As per the order dated 02/06/2023 in CMP.218/2023 prosecution evidence was reopened. As per the order in CMP.223/2023, CMP.241/2023 and CMP.355/2023, prosecution examined PW20 and PW21 and got marked Exts.P25, P25(a), P26 and P26(a). Prosecution evidence was closed. Accused No.2 was further questioned under section 313 of Criminal Procedure Code. Accused No.2 again submitted that he was innocent. Thereafter accused No.2 was again called upon to enter on his defence. On 03/10/2023 accused No.2 submitted that he had no further defence evidence. Accordingly evidence was closed. Both sides were heard.

5.The points which arise for consideration are :-

1. Did accused No.2 commit rape on PW1, a mentally disabled child by inserting his penis into her mouth and ejaculating in her mouth on 10/01/2013 in the evening at her residence and thereby commit the offence punishable under section 376 (2)(l) of Indian Penal Code?

2. Did accused No.2 commit carnal intercourse against the order of the nature with PW1 by inserting his penis into her mouth and ejaculating in her mouth on 10/01/2013 in the evening at her residence and thereby commit the offence punishable under section 377 of Indian Penal Code?

3.Did accused No.2 commit penetrative sexual assault on PW1 by penetrating his penis into her mouth and ejaculating in her mouth on 10/01/2013 in the evening at her residence and thereby commit the offence punishable under sections 4 read with 3(a) of Protection of Children from Sexual Offences Act?

4. Did accused No.2 commit penetrative sexual assault on PW1 by manipulating her body so as to cause penetration into her vagina on 10/01/2013 in the evening at her residence and thereby commit the offence punishable under sections 4 read with 3(c) of Protection of Children from Sexual Offences Act?

5. Did accused No.2 commit penetrative sexual assault on PW1 by making PW1 apply her mouth to penis of accused on 10/01/2013 in the evening at her residence and thereby commit the offence punishable under sections 4 read with 3(d) of Protection of Children from Sexual Offences Act?

6. Did accused No.2 commit penetrative sexual assault on PW1 by penetrating his penis into her mouth and ejaculating in her mouth taking advantage of her mental disability on 10/01/2013 in the evening at her residence and thereby commit the offence punishable under sections 6 read with 5(k) of Protection of Children from Sexual Offences Act?

7. Did accused No.2 commit sexual assault on PW1 by touching her vagina, sucking her breast and kissing her with sexual intent on 10/01/2013 in the evening at her residence and thereby commit the offence punishable under sections 8 read with 7 of Protection of Children from Sexual Offences Act?

8.Did accused No.2 commit aggravated sexual assault on PW1 by touching her vagina, sucking her breast and kissing her with sexual intent taking advantage of her mental disability on 10/01/2013 in the evening at her residence and thereby commit the offence punishable under section 10 read with 9(k) of Protection of Children from Sexual Offences Act?

9. In the event of conviction, what is the proper sentence to be imposed on accused No.2?

6.Points 1 to 6 :- Since the evidence to be discussed in points No.1 to 6 are interconnected, these points are considered together. Prosecution allegation is that accused No.2 committed rape, carnal intercourse against the order of nature, aggravated penetrative sexual assault and aggravated sexual assault on PW1 taking advantage of her mental disability on 10/01/2013 in the evening at the residence of PW1.

7.PW1, PW2, PW12 and PW13 were examined by the prosecution to prove the incident. PW3 is an attestor to Ext.P2 scene mahazar. PW4 is the teacher of the school in which PW1 was studying. PW5 is a Special Educator in whose presence statement of PW1 was recorded by police. PW6 who is the Headmistress of the school in which PW1 was studying produced Ext.P3 extract of admission register of PW1. PW6 recorded Ext.P1(a) body note of PW1. PW8 is an attestor to Ext.P4 mahazar prepared for seizing dresses of accused No.1 and identified MO5 to MO7 dresses of accused No.1. PW9 was the Village Officer who prepared Ext.P5 scene plan. PW10 is the doctor who examined PW1 on 12/01/2013 and issued Ext.P6 medical certificate. PW11 conducted potency examination of accused No.1 and issued Ext.P7 potency certificate. PW14 is the doctor who conducted potency

examination of accused No.2 on 23/04/2013 and issued Ext.P8 potency certificate. PW15 who is the Headmaster of the school where PW1 was first admitted in the school, produced Ext.P9 abstract of admission register of PW1 and Exts.P10 to P13 extract of same admission register. PW16 is the doctor who examined PW1 and signed Ext.P14 disability certificate of PW1. PW20 is the Secretary, Pareeska Bhavan who produced Ext.P25 Secondary School Leaving Certificate of PW1 and Ext.P25(a) section 65B certificate. PW21 who is the Sub Registrar of Birth and Death, Thiruvananthapuram Corporation produced Ext.P26 extract of the birth register and Ext.P26(a) section 65 B certificate. PW18 recorded Ext.P1 first information statement of PW1 and registered Ext.P16 first information report and conducted investigation. PW17 also conducted investigation. PW19 completed investigation and laid final report.

8.As per the prosecution case and court charge, the incident alleged in this case occurred on 10/01/2013. PW1 deposed that the incident occurred while she was studying in 7th standard. PW1 gave an answer as ‘Oh’ when the Special Prosecutor had put a question that the incident occurred on 10/01/2013. On scrutinizing the deposition of PW1 it is evident that the deposition of PW1 that the incident occurred while she was studying in 7th standard was spoken by her without any

prompting, prodding or suggestion on the part of the Special Public Prosecutor. Nothing has been forthcoming from the cross examination of PW1 to discredit the period of incident stated by her. So this court accepted the evidence of PW1 that the incident occurred while she was studying in 7th standard. PW4 is a teacher in the school where PW1 was studying from 5th standard. PW4 categorically deposed that PW1 was in 7th standard during 2012 - 2013. The above said evidence of PW4 remained unchallenged. So it can be concluded from the deposition of PW4 that PW1 was in 7th standard during 2012 – 2013. On a combined analysis of the deposition of PW1 and PW4, it can be concluded that the incident in this case happened while PW1 was in 7th standard during 2012 – 2013.

9.It is necessary to consider whether prosecution succeeded in proving that PW1 was a minor during 2012 – 2013. Prosecution examined PW6, PW15, PW20 and PW21 and produced Exts.P3, P9, P25 and P26 to prove the age of PW1. Prosecution cited PW6 in the final report and produced Ext.P3 along with final report to prove the age of PW1. PW15, PW20 and PW21 were examined as additional witnesses and Exts.P9, P25 and P26 were marked by the prosecution as per the order in CMP.67/23, CMP.218/23, CMP.223/23 and CMP.355/23.

10. PW6 is the Headmistress of the school in which PW1 was studying. PW6 identified Ext.P3 as the admission register of the school. According to PW6 the child mentioned in Ext.P3 studied in that school and her date of birth was 15/10/1998 as per Ext.P3. According to PW6 that child got admitted in that school in 5th class. On scrutinizing Ext.P3 it is evident that extract of the admission register of PW1 was entered in a stamp paper. The learned defence counsel disputed Ext.P3 on the ground that the stamp paper in which the extract of the admission register was entered was not purchased in the name mother and hence it can not not be relied upon. As per the deposition of PW6 stamp paper on which extract was entered was purchased and supplied by mother of the child. On scrutinizing Ext.P3 it is seen that the stamp paper was issued in the name of PW1. The main probe in this case is whether Ext.P3 can be accepted or not. As per the decision in **P. Yuvaprakash v State** represented by Inspector of Police in Criminal Appeal No. (S).1898 of 2023 and section 94 of the J.J Act, date of birth certificate from the school is an admissible document to prove the age of victim. Ext.P3 is a document showing the date of birth of PW1 from the school. Nothing has been forthcoming from the cross examination of PW6 to doubt the entries in Ext.P3. The mere reason that stamp paper on which Ext.P3 document was prepared was not purchased in the name of PW12

who is mother of PW1 is no ground to doubt Ext.P3. On evaluating the deposition of PW6 and Ext.P3 this court find no reason to reject the evidence of PW6 and Ext.P3 in respect of the date of birth of PW1.

11.PW15 is the Headmistress of the school where PW1 was admitted in the first standard. As per the deposition of PW15, she produced extract of the admission register relating to child in admission No.3476 and date of birth of that child is 15/10/1998. Deposition of PW15 shows that original admission register was produced at the time of examination and extract of the admission register relating to child in admission No.3476 was compared with original and marked as Ext.P9 and original admission register was returned. On scrutinizing Ext.P9 it is evident that admission No.3476 relates to PW1 in this case. As per Ext.P9 the date of birth of PW1 in admission No.3476 is 15/10/1998. The learned defence counsel challenged Ext.P9 on the ground that it was prepared falsely for the purpose of this case. The learned defence counsel rested his contention on the basis of some corrections admitted by PW15 in Ext.P9. PW15 admitted that column No.7 in admission number 3476 pertaining to date of birth was seen entered on a paper cut and pasted on column No.7. According to PW15 the said entry was initialed by then headmistress. It was noted by my predecessor in office in the deposition paper of PW15 that original register regarding Ext.P9

was perused and date of birth as 15/10/1998 with initials of headmistress was seen entered in another paper and pasted in column No.7. The learned defence counsel vehemently argued on the basis of the entry regarding date of birth on paper cut pasted in column No.7 to substantiate his contention that admission details of PW1 was subsequently entered in it. PW15 stated that she did not make any new entries in it and produced the register as such before the court and the paper cut entry in Ext.P9 was initialed by then headmistress. According to PW15 entries in paper cuts are being pasted if there is correction and the same will be initialed by H.M. During re-examination PW15 stated that entries in paper cut were seen pasted in the column for date of birth in respect of child in admission No.3445 with initials of H.M in page No.2 of admission register. My learned predecessor in office noted in the deposition paper of PW16 after perusing the original register that there was an entry on a paper cut regarding date of birth and pasted in column No.7 relating to date of birth of child in admission No.3445 similar to that in Ext.P9. The said relevant page ie page no.2 of original register was marked as Ext.P10. PW15 further stated that corrections were made in column No.7 of admission No.3512 and column No.2 of admission No.3513 in page No.11 of admission register with whitener and the said corrections were countersigned by H.M. Copy of page

No.11 of admission register was seen marked as Ext.P13. On evaluating the deposition of PW15 and the subsequent entries alleged to have been made in a paper cut pasted in the date of birth column of PW1 in Ext.P9 in the light of deposition of PW15 and observation of my learned predecessor in office in the deposition paper of PW15 regarding the very same entry in the original of Ext.P10 relating to the date of birth of child in admission No.3445 strengthened the evidence of PW15 that corrections were made in the register in the manner deposed by her and not falsely. Moreover as per the deposition of PW15 corrections were made with whitener and initials of H.M in column No.7 of admission No.3512 and column No.2 of admission No.3513. Considering the similar entry on paper cut in admission No.3445 relating to the date of birth of the child and corrections with whitener in admission Nos.3512 and 3513 , it can only be assumed that corrections were made in the date of birth of PW1 in column No.7 of Ext.P9 with initials of H.M in a routine manner and not for creating false evidence regarding date of birth of PW1 in this case.

12. Another challenge to Ext.P9 by the learned defence counsel was that the reason for leaving was not stated in the admission details of PW1. PW15 admitted that reason for leaving was not stated in column No.15 in admission No.3476 . On scrutinizing Ext.P9 it is seen that

reason for leaving was not stated in that column in the admission details of PW1. It is evident from the deposition of PW15 that reason for leaving was not stated in the admission details of child in admission No.3452 in Ext.P11 and of the child in admission No.3513 in Ext.P12. So it is evident that the omission to supply the reason for leaving in the admission register occurred not only in the admission details of PW1 but also in other admission details. As per Ext.P9 PW1 studied up to standard 4 in that school and the date of leaving was 28/04/2010 and TC was issued on 28/04/2010. As per Ext.P3 PW1 got admitted in the new school on 31/05/2010. Deposition of PW4 also proved that PW1 got admitted in the new school in 5th standard in 2010. In Ext.P3, the name of the previously attended school was the same school in the seal of Headmaster in Ext.P9. On a cumulative analysis of deposition of PW4, PW15 and Exts.P3 and P9 it can be concluded that PW1 was first admitted in the school in Ext.P9 and studied up to 4th standard in that school and left that school on 28/04/2010 with TC and got admitted in 5th standard in the school in Ext.P3 on 31/05/2010. So it cannot be concluded from the omission to supply the reason for leaving in Ext.P9 that PW1 did not study in that school.

13.The learned defence counsel disputed Ext.P9 on the ground that the letter ‘M’ after the name of mother of PW1 in Ext.P9 was not

shown in brackets but in other entries the letters ‘M’ and ‘F’ were shown in brackets after the name of parents. PW15 stated that the letter ‘M’ after the name of mother of PW1 in Ext.P9 might be her initial and ‘M’ and ‘F’ shown in brackets in the register actually denote mother and father. The mere fact that a letter ‘M’ after the name of mother of PW1 in Ext.P9 was not shown in bracket cannot be considered as a major flow affecting the genuineness of Ext.P9. So the said contention of the defence counsel is liable to be rejected. On evaluating the grounds of challenge to Ext.P9 by accused No.2 it can be summed up that the grounds of attack to Ext.P9 were not tenable to affect the credibility and genuineness of that document. Ext.P9 is also a document showing the date of birth of PW1 from school and can be accepted.

14.PW20 was also examined as additional witness to prove the date of birth of PW1. PW20 is Secretary, Pareeksha Bhavan, Thiruvananthapuram. PW20 produced Ext.P25 copy of Secondary School Leaving Certificate of PW1 taken from digilocker. That document was accepted as per the order in CMP.241/2023. Since Ext.P25 is a copy taken from digilocker, the certificate under section 65B of Indian Evidence Act was also produced. The same was marked as Ext.P25(a). As per the deposition of PW20 the details of the students who had appeared for Secondary School Leaving examination were

stored by Pareeksha Bhavan in digilocker and he produced Ext.P25 copy taken from digilocker. The learned counsel for the accused objected to the marking of Ext.P25 on the ground that a forged document was previously produced and new document was produced only to get over that document. Accordingly document was marked as the objection did not relate to the admissibility of the document and it was ordered to consider the acceptability of Ext.P25 later on the basis of the contentions of the learned defence counsel. It is important to note that the forged document alleged to have been produced was not marked in evidence. Even then PW15 explained how a document was produced from the very same office earlier in this case. During examination PW15 stated that a document was produced earlier from the database of Pareeksha Bhavan on the basis of the application submitted by Poojappura Police Station and he handed over the application for that document to BC 2 section and the staff in that section took the copy using his login and after that the letter from the police station was handed over to Tapal section and file number was generated and letter reached BC 1 section. Since the copy was taken by staff in BC 2 section file number was corrected and BC 1 section was entered in order to avoid difficulty for future reference. As per the deposition of PW20 that document was produced earlier and there was no change in

the datas. PW20 explained clearly how a document was produced from the very same office on a previous occasion. PW20 deposed that the date of birth of the child in the document produced from his office earlier and in Ext.P25 was 15/10/1998. There was nothing in the deposition of PW20 to conclude that previous document produced from his office was a forged one. Nothing has been forthcoming from the cross examination of PW20 to conclude that Ext.P25 was falsely fabricated. So Ext.P25 cannot be discarded from consideration merely on the ground of some other document which was alleged to be forged as per the contentions of the defence counsel was produced from very same office.

15. PW20 was subjected to lengthy cross examination by the learned defence counsel by putting questions regarding the minute details in Ext.P25. The learned defence counsel put a question to PW20 that there must be 15 details in an Secondary School Leaving Certificate. PW15 answered that there were 14 details in Ext.P25 and he needed to verify whether 15 details should mandatorily be entered in Secondary School Leaving Certificate. Accused No.2 did not produce any document to prove that there should be 15 details in Secondary School Leaving Certificate and any Secondary School Leaving Certificate devoid of even one entry short of 15 details cannot be

accepted. So the contention of the learned defence counsel is liable to be rejected.

16. The learned defence counsel put several questions to PW20 regarding some numbers which are present in the original Secondary School Leaving Certificate. PW20 sufficiently explained that hard copy of the Secondary School Leaving Certificate were actually printed on a paper with some numbers already printed on it for security purposes. The learned defence counsel cross examined PW20 thoroughly regarding each entry in Ext.P25. The learned defence counsel put question to PW20 such as it was not specifically stated in Ext.P25 as name of the candidate, the space after the register number, month and year were blank, range of grade were not stated below 'Information Technology' in Ext.P25. PW20 answered that the word 'name' was written in Ext.P25 and there was no mandate for writing the entry as 'name of the candidate' itself and there are some changes in the form of Secondary School Leaving Certificate for security purposes. PW20 admitted that there was blank space after register number, month and year in Ext.P25 and there were one more sentence in that space in the hard copy issued to candidate. According to PW20 range of grades were written in the hard copy issued to candidate. PW20 admitted that Ext.P25 is not the exact replica of Secondary School Leaving Certificate

issued to PW1. On evaluating the deposition of PW20 it is crystal clear that PW20 deposed that Ext.P25 is not the exact replica of hard copy of the Secondary School Leaving Certificate due to the absence of some entries which were entered in the hard copy for security purposes while printing the hard copy.

17.PW20 categorically deposed that all the datas regarding the candidate were same in the hard copy issued to the candidate and in the details kept in the digilocker. The questions put to PW20 by the learned defence counsel to challenge Ext.P25 were not sufficient to doubt the genuineness of Ext.P25 and the datas regarding PW1. Defence side has no case that there were any correction or change in the date of birth of PW1 in Ext.P25 and in the actual hard copy issued to candidate. PW20 clearly explained the procedure for effecting corrections in the Secondary School Leaving Certificate. According to PW20 application should be submitted with supporting document and payment of required fees through teacher for correcting Secondary School Leaving Certificate and in that case entries excluding entries regarding caste and admission number can be corrected through appropriate proceedings. So it is evident that datas in the Secondary School Leaving Certificate can not be corrected so easily as contended by the learned defence counsel to create a false Secondary School

Leaving Certificate. On evaluating the deposition of PW20 and questions put to PW20 by learned defence counsel, it is evident that all the datas regarding the child in the hard copy of Secondary School Leaving Certificate issued to students were stored in digilocker and there were no variation in those datas in the hard copy of the Secondary School Leaving Certificate and in Ext.P25. It is important to note that photo of student was also affixed in Ext.P25. Ext.P14 is the disability certificate of PW1 with photo. The photo in Ext.P25 is similar to the photo in Ext.P14. The name of PW1 and of her mother PW2 was stated in Ext.P25. Nothing has been forthcoming from Ext.P25 to doubt the genuineness of said document. Defence side failed to bring forth any evidence in the cross examination of PW20 to conclude that Ext.P25 was subsequently fabricated for the purpose of this case. As per the prosecution case, PW1 and her mother PW12 suffers from mental disability. It is evident from the deposition of PW1 that she is residing with PW12 and her grandmother PW13. PW13 is aged 90 years as per her age recorded in her deposition paper. Prosecution filed CMP. 218/2023 to examine PW20 on the ground that PW1 and PW12 could not say the details of Secondary School Leaving examination due to their disabilities. Considering the disabilities of PW1 and PW12 and the age of PW13 with whom they were residing, this court is of the opinion

that deposition of PW20 and Ext.P25 can be accepted as proof of Secondary School Leaving Certificate of PW1. So it can be concluded from the deposition of PW20 and Ext.P25 that Ext.25 is the copy of the Secondary School Leaving Certificate of PW1 taken from digilocker. Hence Ext.P25 can be accepted as the secondary evidence of the School Leaving Certificate of PW1 taken from digilocker.

18.PW21 produced Ext.P26 extract of birth register of PW1 along with Ext.P26(a) certificate under section 65 B of Indian Evidence Act. PW21 was also subjected to intense cross examination by the learned defence counsel regarding the minute details in Ext.P26. On scrutinizing the deposition of PW21 and ext.P26(a) it can be concluded that all the relevant details to identify Ext.P26 as the extract of the birth register of PW1 were there in Ext.P26. Although questions were put to each and every entry in Ext.P26 to PW21, nothing can be elicited to discredit Ext.P26. As per Ext.P26 the age of PW1 is 15/10/1998. So Ext.P26 can be accepted as the extract of the birth register of PW1 from Corporation, Thiruvananthapuram.

19.On evaluating the whole evidence adduced by prosecution regarding the age of PW1 it can be concluded that prosecution succeeded in producing four acceptable documents ie.Ext.P3 extract of admission register from the school in which PW1 was studying, Ext.P9

extract of the admission register from the school where PW1 got admitted first, Ext.P25 copy of Secondary School Leaving Certificate kept in digilocker from Pareeksha Bhavan and Ext.P26 extract of the birth register from the corporation. As per Exts.P3, P9, P25 and P26, the date of birth of PW1 is 15/10/1998.

20. It is highly necessary to consider which of the documents produced by the prosecution can be acted upon by this court as proof of age of PW1. In **Jarnail Singh v State of Haryana reported in 2013 KHC 4455 the** Hon'ble Supreme Court held that even though the Rules framed under the Juvenile Justice (Care and Protection of Children) Act 2000 apply strictly only for determination of the age of a child in conflict with law, the statutory provisions therein can certainly be the basis for determining the age of even a child who is a victim of crime. In Rajan K.C v State of Kerala reported in 2021 KHC 375 the Hon'ble High Court held that since the Hon'ble Supreme Court has specifically referred to Rules of 2007 and imported the same procedure in case of minor victim the said rigor has to be applied in cases where determination of age of a minor victim arises. Recently the Hon'ble Supreme Court in **P. Yuvaprakash v State represented by Inspector of Police in Criminal Appeal No.(S).1898 of 2023** held that it is evident from the conjoint reading of the above provisions (section 34(1)

of Protection of Children from Sexual Offences Act and section 94 of the Juvenile Justice Act 2015) that whenever the dispute with respect to the age of a person arises in the context of her or him being a victim under the Protection of Children from Sexual Offences Act, the courts have to take recourse to the steps indicated in section 94 of the Juvenile Justice Act. The three documents in order of which the Juvenile Justice Act requires consideration is that the concerned court has to determine the age by considering the following documents.

'(i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if available; and in the absence thereof;

(ii) the birth certificate given by a corporation or a municipal authority or a Panchayat;

(iii) and only in the absence of n(i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board''.

21. Exts.P3, P9, P25 and Ext.P26 are the documents which answer the description of the documents mentioned in section 94 of The Juvenile Justice (Care and Protection of Children) Act), 2015(J.J Act).

As per the decision in **P. Yuvaprakash v State represented by Inspector of Police mentioned supra and section 94 of the J.J Ac**t, Ext.P25 is to be given precedence over other three documents produced by the prosecution. As per Ext.P25 the date of birth of PW1 is 15/10/1998. Hence it can be concluded from Ext.P25 that date of birth of PW1 is 15/10/1998. The incident in this case happened while PW1 was in 7th standard during 2012 - 2013. PW1 was aged 15 years during the time of incident in this case. So it can be safely concluded that prosecution succeeded in proving that PW1 was a minor at the time of incident.

22.The definite case of the prosecution is that PW1 suffers from mental disability. In order to evaluate the deposition of PW1 in proper perspective, it is highly necessary to consider at first before appreciating the evidence of PW1 that prosecution succeeded in proving that PW1 suffers from any mental disability. Evidence of prosecution on that aspect consist of the deposition of PW5, PW10, PW16 and Ext.P14 disability certificate. It is vital to note that as per the deposition paper PW1 was allowed to give evidence only after conducting voire dire test by this court. PW5 is the Special Educator, Rotary Institute, Vazhuthacaud. PW5 took Diploma in Special Education (Mental Retardation). According to PW5, Ext.P1 first information statement of

PW1 was recorded in her presence. As per the deposition of PW5 she spent about 2 hours with PW1 at the time of recording Ext.P1 first information statement. Deposition of PW5 shows that she found on interaction with PW1 that PW1 was a child with mental retardation. Nothing has been forthcoming from the cross examination of PW5 to discredit her evidence that PW1 was a mentally retarded child.

23.PW10 is the doctor who examined PW1 at 9.20 pm on 12/01/2013 at Government Women and Children Hospital, Thycaud. As per the deposition of PW10, on examination mild mental retardation was present in PW1. According to PW10, PW1 told her that she did not know how to read and write and that she could not put her signature and PW1 was unable to give consent. Accordingly PW10 found that PW1 was a mentally retarded child. During cross examination PW10 answered that she wrote mild from the three options ie. excited, depression and calm. According to PW10 being a doctor she could understand and know that child has mental retardation. A question was put to PW10 by the learned defence counsel during the cross examination with permission of the court that why the doctor did not refer PW1 to a psychiatrist. PW10 answered that mental retardation was a permanent state and there was no need for emergency treatment. On evaluating the deposition of PW10 it is evident that PW1 was found

to be a mentally retarded child on examination by PW10. Nothing has been forthcoming from the cross examination of PW10 to discredit the above said finding of PW10.

24.PW16 is the doctor who examined PW1 for the purpose of issuing Ext.P14 disability certificate. Ext.P14 disability certificate was challenged by the learned defence counsel on the ground that it was not produced along with the final report. As per the deposition of PW13 she produced disability certificate. But Ext.P14 was not marked through PW13. Ext.P14 was actually marked through PW16. It is true that Ext.P14 disability certificate was not produced along with final report. Ext.P14 was seen produced before the court during trial as per a memo filed by Special Public Prosecutor. It is a well settled proposition that if some mistake is made by Investigating Officer by not producing some documents of relevance at the time of submitting the final report, it is always open to produce the same with the permission of the court. **(CBI v. R.S.Pai and another 2002 KHC 403 and Sundaran v. State of Kerala 2023 (3) KHC 125).** In view of the above settled proposition accused cannot contend that Ext.P14 cannot be accepted as it was not filed along with final report.

25.PW16 stated that he was a member in the Medical Board constituted for assessing the disability of PW1. As per the deposition of

PW16 he was consultant psychiatrist, General Hospital, Thiruvananthapuram in the year 2014 and was psychiatrist member in the Medical Board which assessed the disability of PW1. PW16 clearly deposed that he was also present while examining PW1 and she has 70% disability moderate as per Ext.P14. PW16 identified his signature in column No.5 which deals with the details of the psychiatrist in the medical board. Ext.P14 was the disability certificate dated 21/11/2014 with photo of PW1 affixed on it. As per Ext.P14 medical board certifies that PW1 has mental retardation and disability is 70%. PW16 also deposed that Ext.P14 was issued for mental retardation of PW1. PW16 further stated that thumb impression of PW1 was affixed in Ext.P14. PW16 categorically deposed that photo of PW1 was affixed on it and signature and seal over that photo belongs to him. The name of PW1 and of her mother are also written in Ext.P14.

26.The learned defence counsel disputed Ext.P14 mainly on three grounds : Firstly there was no identification mark of PW1 in Ext.P14, secondly there was correction in the seal of PW16 in Ext.P14 and thirdly the purpose for which medical board was constituted was not stated in it. As regards the corrections in the seal of PW16 over the photo in Ext.P14, PW16 deposed that it was not a correction and he wrote ‘Tvm’ as the seal was not clear. PW16 was further cross examined

as to the same corrections in his seal in column number 5 of Ext.P14 and to that question also PW16 replied in the same way. On scrutinizing Ext.P14 it is evident that the place of the hospital was not clear in the seal of PW16 above the photo in Ext.P14 and in the seal of PW16 in column number 5 of Ext.P14 and Tvm was written after General Hospital in the seal in both places. Name and designation of PW16 was written in that seal. This court find no reason to conclude that Ext.P14 was falsely created for the purpose of this case merely on the ground that the word Tvm was written after General Hospital in the seal. PW16 sufficiently explained why the word Tvm was written after General Hospital in his seal above the photo of PW1 and in column number 5 of Ext.P14. Since there was sufficient explanation from PW16 regarding that aspect and nothing was found in Ext.P14 to doubt its genuineness simply for the reason of having written the word Tvm after the seal of PW16 in it, Ext.P14 cannot be eschewed from consideration on the above contention of the learned defence counsel.

27.For addressing the other two challenges of the learned defence counsel to Ext.P14 it is highly necessary to mention the law and rules governing the issue of disability certificate. At present the law relating to disability certificate was mentioned in section 56 to 59 of the Rights of Persons with Disabilities Act, 2016 and rule 17 to 20 of Rights

of Persons with Disabilities Rules, 2017. As already stated Ext.P14 was issued on 21/11/2014. The law and rule governing issue of disability certificate at the time of issuing Ext.P14 was section 2 (i) of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act 1996 and Rules 3 to 6 of The Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Rules, 1996. As per rule 4 of The Rules of 1996 Disability Certificate shall be issued in Form II, Form III, Form IV as applicable. On perusing Rules of 1996 the Forms of Disability Certificate applicable to mental retardation was Form IV of the Rules. In the light of Form IV of 1996 Rules the other two challenges to Ext.P14 disability certificate can be appreciated. PW16 admitted that identification mark of PW1 was not therein Ext.P14. PW16 further stated that Ext.P14 was a printed form and identification mark had to be stated in it. On comparing Form No.IV of Rules of 1996 with Ext.P14 it is clear that Ext.P14 contain almost all the relevant entries in Form IV of 1996 Rules. There was no entry in Form IV of 1996 Rules to write the identification marks of the person with disability and the reason for issuing the same. Hence the learned defence counsel cannot challenge Ext.P14 on the ground that identification marks of PW1 and reason for issuing the same were not stated in it. From the deposition of PW16

and Ext.P14 it is crystal clear that PW1 is a mentally retarded child of 70% of disability and the mental retardation was a disability by birth and Ext.P14 was issued to PW1.

28.On evaluating the deposition of PW5, PW10, PW16 and Ext.P14 disability certificate it can be concluded that prosecution succeeded in proving that PW1 is a mentally retarded person of 70% of disability.

29.The next important aspect to be considered is whether prosecution succeeded in proving the offences alleged in this case through the deposition of PW1. On scrutinizing the deposition of PW1 it is evident that the special prosecutor started the examination of PW1 pertaining to the incident by putting a prompting question that anybody caused any hurt to her while she was studying in school. Then PW1 answered in negative. Later PW1 deposed that she filed case against one auto uncle and another uncle. PW1 stated that she knew accused No.2 standing in the dock. According to PW1 accused no.2 also touched her. PW1 pointed to her vagina and stated that accused No.2 touched that part. As per the deposition of PW1, accused No.2 drank her milk and inserted his penis into her mouth and thereafter a milk like substance came in her mouth. PW1 continued and deposed that accused No.2 attempted to place his penis into her vagina but he could not place it and

accused No.2 kissed her. PW1 identified her signature in Exhibit P1 first information statement. According to PW1 the incident occurred while she was studying in 7th standard. PW1 identified MO1 to MO4 as the dresses worn by her at the time of the incident.

30. The learned defence counsel vehemently argued that the above mentioned deposition of PW1 was obtained by the special prosecutor by putting leading questions. Hence it is liable to be eschewed from consideration. The learned defence counsel further argued that PW1 deposed in chief examination itself that nobody caused any hurt to her while she was studying in school. On that ground also the learned defence counsel argued for rejecting the above mentioned deposition of PW1. On perusing the deposition of PW1 recorded by this court, it can be understood that the above mentioned deposition of PW1 that that accused No.2 touched her vagina, drank her milk, inserted his penis into her mouth and a milk like substance came in her mouth thereafter and accused No.2 attempted to insert his penis into her vagina but he could not succeed and accused No.2 kissed her were deposed by PW1 without any leading question from Special Prosecutor. Hence the contention of the learned defence counsel that the deposition of PW1 pertaining to the penetrative sexual assault and sexual assault on PW1 was obtained by special prosecutor by putting

leading question is liable to be rejected. It is true that at the beginning of the deposition of PW1, PW1 answered in negative to a question put by special prosecutor that anybody caused any hurt to her while she was studying in school. But there after she identified accused No.2 and stated clearly the penetrative sexual assault and sexual assault on the part of accused No.2. Hence on the basis of that answer of PW1 to a question put by special prosecutor in the beginning of the deposition, evidence adduced by PW1 in the later part of chief examination regarding the penetrative sexual assault and sexual assault by accused No.2 cannot be rejected in view of the disability of PW1.

31.The learned defence counsel further argued that the answers given by PW1 in cross examination to his questions actually crumbled the entire case put forward by the prosecution in the chief examination of PW1. The learned defence counsel put a suggestion to PW1 that on 10-1-2013 she was assaulted by auto uncle and PW1 answered as 'Oh'. PW1 answered again as 'Oh' when the learned defence counsel had put another suggestion that she gave a statement to the police as per the instruction of her grandmother. PW1 answered as 'Oh' when the court had put a question that the incident in this case actually happened. Thereafter PW1 again answered as 'Oh' when the defence counsel put a question that all these were done by auto uncle.

PW1 answered that accused No.2 had come to her house when the defence counsel had put to PW1 that accused No.2 did not come to her house. Thereafter as per the deposition paper PW1 stared at the presiding officer and stood in blank when the learned defence counsel had put a suggestion to her that accused No.2 did not assault her. The learned defence counsel put another suggestion thereafter that PW1 did not remember what was happened in 2013. PW1 then answered that she did not remember. PW1 answered in negative when the learned defence counsel put a question that his grandmother and mother owed some money to accused. PW1 answered as 'Oh' when the learned defence counsel suggested that this case was filed falsely as money was due to accused. As per the deposition paper, PW1 remained without any response when the learned defence counsel had put a suggestion that MO1 to MO4 had no connection with this case. Thereafter PW1 started howling and requesting that she wanted to go home. But my predecessor in office pacified her to remain in the court for few more minutes as per the deposition paper. There after the learned defence counsel put a question that accused number 2 did not come in her neighbourhood for work and did not see her. Then PW1 stated that he did not come. PW1 did not respond to another question of the learned defence counsel that this case was filed as per the instructions of mother and grandmother.

Then PW1 started crying. PW 1 started howling when the defence counsel had put a question that accused no.2 did not come to her house. There after during re- examination PW1 stated that he did not see accused No.2 when the special prosecutor asked her whether she had seen the uncle in the dock. My predecessor in office wrote in the deposition paper thereafter that PW1 was not able to understand and she was crying and requesting to go home and accordingly learned special prosecutor requested time for re examination and witness was bound over for re-examination. On further re examination on another day PW1 clearly identified accused No.2 standing in the dock as the person who assaulted her.PW1 further stated that apart from this uncle, one Gopi maman also assaulted her . Special prosecutor asked PW1 during re examination as to why she deposed last time that accused No.2 did not assault her while advocate uncle had put a question to her. PW1 answered that she deposed so under fear.

32.Based on the deposition of PW1 in cross examination mentioned in paragraph 31, the learned defence counsel argued that the version of PW1 in cross examination was in favour of the prosecution and in favour of the accused No.2 and the version of PW1 in favour of the accused No.2 should be accepted and benefit of that version should be given to accused No.2. In order to decide whether

accused No.2 is entitled to get the benefit of the version of PW1 in favour of the accused in cross examination, a thorough analysis of the deposition of PW1 and the circumstances under which PW1 adduced such an evidence is highly necessary in view of her mental retardation. It is true that PW1 answered as 'Oh' in affirmation when the learned defence counsel put a question that on 10 -1 -2013 she was assaulted by auto uncle and she gave statement to the police as per the instructions of her grandmother. It is important to note that as per the deposition of PW1, two persons assaulted her sexually. PW1 who suffers from mental retardation might not be able to realise whether on 10-1-2013 she was assaulted by accused number 2 or accused number 1 whom she mentioned as auto uncle when such an indirect suggestion was put to her. PW1 specifically stated in chief examination that she was assaulted by accused number 2 while she was studying in 7th standard. There was no contradictory answer of PW1 in cross examination to that evidence of PW1. Moreover she stated to the court question that the incident in this case actually happened. Subsequent to that court question, the learned defence counsel put a question that all these were done by auto uncle and PW1 answered as 'Oh' in affirmation. On evaluating the deposition of PW1 in the light of her mental disability, as there was sexual assault by two accused clubbed in this case, PW1 might not be

able to distinguish between two incidents when such a tricky question was put to her by the learned defence counsel. The above answers of PW1 cannot be considered as negating her evidence regarding the sexual assault of PW1 in chief examination since there was no direct mention of the act done by accused No.2 on PW1 in the questions and suggestions put forward by the learned defence counsel. Moreover the statement of PW1 that she gave statement to police as per the instructions of her grandmother also cannot be considered as affecting adversely her evidence in chief examination as she might not be able to understand the ramifications of such an answer. PW1 simply deposed that she gave statement to the police as per her grandmother's instruction. Such an answer also cannot be considered as affecting the evidence of PW1 regarding the sexual assault on the part of accused No.2 in view of her mental disability.

33.It is important to note that PW1 clearly answered when defence counsel had put questions specifically with regard to accused number 2. PW1 answered that that accused number No.2 had come to her house when the learned defence counsel had put a suggestion that accused no.2 did not come to her house. PW1 stared at the presiding officer and stood blank and was not responding when the learned defence counsel had put a suggestion that accused No.2 did not assault

her. In view of the mental retardation of PW1, attitude of PW1 staring at the presiding officer and standing blank and not responding to the suggestion of the learned defence counsel cannot be interpreted to understand that accused number no.2 did not assault her. Moreover the answer of PW 1 that she could not remember the incidents in 2013 to the tricky and general suggestion of learned defence also cannot be interpreted to assume that clear and the cogent evidence given by PW1 regarding the sexual assault of PW1 in chief examination is not correct in view of her disability.

34.It is vital to note that PW1 denied the suggestion of learned defence counsel regarding the financial transaction among accused, her grandmother and mother. PW1 answered as 'Oh' in affirmation when the learned defence council had put a suggestion that this case was filed falsely as some money was due to accused. There after PW1 cried as per the deposition paper. It is important to note that a reasonably intelligent person capable of rational thinking might not give such a self destructive answer. Moreover PW1 cried also after giving such an answer. So it could only be understood that defence counsel was able to obtain such an answer regarding the false filing of this case taking advantages of the mental disability of PW1 especially when she had denied the financial transaction among accused, her mother and

grandmother when the learned defence counsel had put a direct question regarding that. The above mentioned evidence of PW1 cannot be allowed to be taken advantage of by accused in view of her disability.

35. It is true that PW1 answered crying that accused No.2 did not come when the learned counsel defence had suggested that accused number 2 did not come to her neighbourhood for work and she did not see him. There after PW1 did not respond and started crying when the learned defence counsel had put to her again that this false case was filed due to the instruction of grandmother and mother. PW1 started howling when the learned defence counsel had put another suggestion that accused No.2 did not come to his house at the time of incident. It is important to note that the above said evidence was elicited from PW1 by the learned defence counsel after PW1 was pacified to remain in the court for few more minutes by the then presiding officer when PW1 had started howling and stated to go home. PW 1 gave such an answer crying also. So it could only be understood that accused PW1 gave such an answer that accused did not come in a hurry to go home. So the above evidence of PW1 that accused did not come was not taken as having given by her understanding the true meaning of such a question. It is interesting to note that in that hurry she even stated that she did not

see the uncle standing in the dock when special prosecutor had put such a question during re examination on the same day. But on further re examination on another day she clearly identified accused and stated that under fear she stated on previous occasion that accused No.2 did not assault her. Considering the sequence of events that transpired during cross examination of PW1 as evident from the deposition paper it is crystal clear that the evidence of PW1 discussed in this paragraph was given by her during cross examination and re-examination in a hurry to go home and under fear. Accused cannot be allowed to take advantage of such an evidence elicited from PW1 who suffers from mental disability .

36. On evaluating the entire deposition of PW1 particularly in cross examination, it is true that the learned defence counsel succeeded in eliciting some evidence from PW1 in favour of accused. In view of the discussion in the forgoing paragraphs, this court hold that such an evidence was able to be obtained from PW1 by the learned defence counsel taking advantage of her disability. As already stated the defence counsel was not able to succeed in shaking the evidence of PW1 in chief examination regarding the exact acts of sexual assault and penetrative sexual assault meted out to her by accused number No.2 This court is mindful of the mental disability of PW1 and also the plea

innocence of accused while appreciating the evidence of PW1. This court is fully aware of its duty to extend its help to victims like PW1. Answers to the tricky questions and suggestions of the learned defence counsel to a witness like PW1 cannot be taken as one to give the benefit of that version to accused. So this court hold that accused is not entitled to get the benefit of evidence of PW1 elicited by the learned defence counsel in favour of the accused due to her mental disability.

37. The learned defence counsel contended that prosecution failed to prove the place of incident in this case. PW1 clearly deposed that the incident of sexual assault by accused number 2 took place in her house. It is true that PW1 did not say the name of the house and the place where the house was situated etc. PW1 cannot be expected to give minute details of the of the house in which she was residing due to her mental disability. It is evident from the deposition of PW1 that accused number 2 assaulted her at her house. In the cross examination of PW1, nothing was elicited to doubt that evidence. So it can be concluded from the deposition of PW1 that accused number 2 assaulted her at her house. The contention of the learned defence counsel that prosecution failed to prove the place of incident is liable to be discarded.

38.Some confusion emerged from the deposition of PW1 regarding the actual time of the incident. As per the prosecution case

and the court charge, accused number 2 assaulted PW1 at 4:00 p.m and in the evening. But PW1 has different version regarding the time of incident. During chief examination PW1 stated that the incident occurred at about 7:00 p.m. while the current had gone. PW1 denied the question of special prosecutor that incident occurred at 4:00 p.m. but it has come out from the deposition of PW1 that accused number 2 assaulted her while she was studying in 7th standard. During cross examination PW1 stated that the incident occurred at 4:00 pm. PW1 answered as 'Oh' in affirmation when the learned defence counsel had put a suggestion that PW1 deposed the time of the incident as 7:00 p.m. in chief examination as such an incident did not take place at 4:00 pm. On evaluating the deposition of PW1 it is clear that PW1 could not say precisely the time of incident. Considering the disability of PW1, PW1 cannot be expected to give correct time of incident. So this court does not take in to consideration the time of incident deposed by PW1 as 7:00 p.m. in chief examination and as 4:00 p.m. in cross examination. But it is clear from the deposition of PW1 that the incident occurred while she was studying in the 7th standard. The pivotal question to be considered whether accused number 2 assaulted PW1 during minority. It was already found that the incident of sexual assault on PW1 by accused number No.2 took place while PW1 was a minor. So this court

does not take in to consideration the contradiction in the deposition of PW1 regarding the exact time of the incident as a serious flaw in the prosecution case in view of her disability.

39. The learned defence counsel argued that PW1 deposed that incident took place while she was watching TV. But there was no TV in the house of PW1 as per the deposition of PW9, the village officer who prepared Ext.P5 scene plan. PW1 answered as 'Oh' when the learned defence counsel had put a suggestion that she was watching TV while accused had assaulted her at 7 pm. The learned defence counsel relying upon the deposition of PW 9 contended that PW1 is not a reliable witness. PW 9 deposed that he did not mark TV in Exhibit P5 plan and he would have marked it if TV was there. Defence counsel relied upon the above said deposition of PW 9 to contend that there was no TV in the house of PW1 and the deposition of PW1 that sexual assault of accused number 2 took place while she was watching TV cannot be accepted. It is pertinent note that PW9 had no case that he did not see any TV in the house of PW 9. Instead PW9 deposed that he would have noted it if TV was there. Such a deposition of PW9 cannot be acted upon to conclude that there was no TV in the house of PW1. It is pertinent note that there was TV in the house of PW 1 or not is not a crucial aspect. The actual probe in this case is that accused assaulted

PW1 sexually. PW1 clearly stated the exact acts of accused number 2 during chief examination. So the contention of the learned defence counsel that there was no TV noted by PW9 in the house of PW1 in Exhibit P5 scene plan is no ground to reject the prosecution case.

40. The learned defence counsel argued that there was contradiction in the deposition of PW1 regarding the death of her father in her evidence before the court and in her statement to the police and hence PW1 is not a truthful witness. PW1 deposed before the court that she did not state to the police that her father died. PW18 who recorded exhibit P1 first information statement of PW1 stated that PW1 gave such a statement to the police. It is important to note that the alleged contradiction was not marked in evidence. The contradiction canvassed by the learned defence counsel was with respect to the death of father of PW1. That contradiction cannot be considered as a relevant one having a bearing on the credibility of the evidence adduced by PW1 regarding the sexual assault of accused number 2. The contention of the learned defence counsel that PW2 is a reliable witness on the basis of that contradiction is not tenable.

41. At this juncture it is highly necessary to consider whether the evidence adduced by PW1 in chief examination which remained unshaken in cross examination that accused No.2 touched her vagina,

put his penis into her mouth and a milk substance came in her mouth and accused No.2 drank her milk and kissed her is believable and can be accepted. The learned defence counsel argued that PW1 was taught to give such an evidence to evade from the payment of money due to accused. PW1 denied any financial transaction with accused. It is important to consider a witness like PW1 could be taught to give such an evidence. The deposition of PW16 who examined PW14 for issuing Exhibit P14 disability certificate assumes significance. During cross examination of PW16, a question was put to him by the learned defence counsel that mentally retarded persons can have wild imagination. PW16 denied the same. PW16 further clarified in re -examination that a mentally retarded person was not possible to have wild imagination or be in imagination mould as their brain has no development. According to PW16, for abstract thinking ,dreaming and imagination there should be brain development. PW16 further stated that such persons could not lie. PW16 is a psychiatric doctor and an expert who examined PW1. So this court can accept the opinion of PW16 that mentally retarded person cannot have wild imagination, dreaming and abstract thinking and cannot lie. Nothing has been forthcoming from the cross examination of PW1 to conclude that the exacts acts done by accused No.2 as deposed by PW1 were false and given by her under the tutoring of

anybody. So it can be safely concluded from the deposition of PW1 and the PW16 that the unblemished testimony of PW1 that accused No.2 touched her vagina, drank her milk, put his penis into her mouth and a milk like substance came in her mouth and accused kissed her is believable and can be accepted as true.

42. Defence side challenged the identification of accused No.2 by PW1 in the court on 2 grounds. Defence side contended that there was no identification of accused No.2 by PW1 before the police and no test identification parade was conducted during investigation. So dock identification of accused by PW1 is liable to be discarded. Accused number 2 was not named in Exhibit P16 FIR registered on 12-11-2013. Accused number 2 was stated in Exhibit P16 as an identifiable person. PW19 who arrested accused number 2 deposed that he got a secret information that accused No.2 was standing near a 'mandapam' in Poojapura junction and accused No.2 was brought to police station after identifying him there and thereafter he was arrested and Exhibits 21 and 22 arrest memo and inspection memo were prepared in connection with his arrest. There after PW19 filed Exhibit P23 report stating the name and address of accused number 2. The learned defence counsel argued that there was no material against accused No.2 till 24-8-2013 and this was a pointer to the false implication of accused no.2 in this

case. The learned defence counsel pointed to the date of commission of offence mentioned as on 23-4-2013 in Exhibit P21 arrest memo also to substantiate the same . Exhibit P 23 report stating the name and address of accused number 2 was seen filed before the court on 23-4-2013. It is true that date of commission in exhibit P21 arrest memo was stated as 23-4-2013 and date and time of arrest was stated as 8.00 hours on 23-4 -2013. PW19 stated that 23/4/ 2013 stated in exhibit P21 was actually the date of arrest . So the date of commission mentioned in exhibit P21 as 23/4/2013 can be considered as a mistake. The above mistake in exhibit P21 cannot be considered as a serious flow indicating false implication of accused number 2 in this case.

43. PW19 explained that there was sufficient indication in the statement of PW1 leading to accused number 2 and hence he was arrested. As per section 41(ba) of Cr.PC, a police officer can arrest any person against whom a credible information has been received that he has committed a cognizable offence punishable with imprisonment for a term exceeding 7 years. The real probe before the court at present is whether prosecution succeeded in proving that accused No.2 committed sexual assault on PW1. There is no need for probing at present into whether PW 19 received any credible information that accused number No.2 has committed the offence alleged in this case at

the time of his arrest. Even then the deposition of PW19 clearly proved that there was sufficient clue in the statement of PW1 to the police leading to accused number 2 and accused number 2 was arrested after getting him identified by PW1 and PW 13. The learned defence counsel argued that there was no material to prove that accused number 2 was identified by PW1 and PW13 in the police station before arresting him. It is pertinent to note that the identification of accused by witnesses before the police is hit by section 162 Cr.PC. The Honourable Supreme Court recently in **Mohd.Rijwan v.State of Haryana** in Criminal Appeal NO.2350 Of 2011 held that such a procedure is not known to law. So this court need not inquire into such an inadmissible evidence.

44.The actual question to be decided is whether identification of accused no 2 by PW1 in the court can be accepted. As per the evidence of PW 1 he had seen accused coming to the neighbourhood for work before the actual commission of the offence. PW2 was also examined by the prosecution to prove that accused number 2 had worked in the neighbourhood of PW1. PW2 deposed that during 2012 - 2013 accused came as worker for construction of his new house and PW1 was residing adjacent to his house. During cross examination PW2 deposed that he constructed that house using the money in his hand and taken by loan. PW2 stated that he did not produce the loan

documents before the police as they did not ask for it. The learned defence counsel disputed the evidence of PW2 on the ground that no loan documents regarding the construction of the house was produced before the court. Nothing has been forthcoming from the deposition of PW2 to discredit his version that accused number 2 had come as a worker for constructing his new house. Cross examination of PW2 did not elicit anything to prove that there existed any necessity for PW2 to give such an evidence falsely against accused number 2. The mere fact that loan documents of the housing loan of PW2 was not produced is no ground to reject the evidence of PW2. Another contention of the learned defence counsel was that as per the evidence of PW2, accused did not invite him for his daughter's wedding and if there was such a relationship between PW2 and accused number 2,he would have invited PW3 for his daughter's wedding and hence the evidence of PW 2 is not believable. It is true that PW2 deposed that accused did not invite him for his daughter's wedding. On that ground alone the evidence of PW2 cannot be rejected in the absence of any other circumstances doubting his evidence in cross examination. Moreover PW12 who is mother of PW1 also deposed that accused No.2 had come to work in the house of PW2. So this court has no hesitation to accept the evidence of PW2 that accused came as a worker for constructing his new house adjacent to the

house of PW1. This evidence of PW2 and PW12 actually corroborated the version of PW1 that she saw accused number 2 while he had come to work in the neighbourhood. So it can be safely concluded from the deposition of PW1 that she had previous acquaintance with the accused number 2. Moreover deposition of PW1 clearly proved the exact acts done by accused on her. Considering the acts done by accused on PW1 as per the deposition of PW1, it can be understood that she got sufficient opportunity to see accused No.2 also at the time of incident. In these circumstances this court find no reason to discard the dock identification of accused number 2 by PW1.

45.The Honourable Apex Court has clearly laid down that test identification parade is not a must in all cases to accept the dock identification. In **Malkhansigh & Ors.v. State of M.P. (2003) 5 SCC 746**, the Hon'ble Supreme Court held that failure to hold a test identification parade would not make inadmissible the evidence of identification in court. The weight to be attached to such identification should be a matter for the courts of fact. In appropriate cases it may accept the evidence of identification even without insisting on corroboration. It was held in paragraph 10 of Malkhansingh's judgment that it is no doubt true that much evidentiary value cannot be attached to the identification of the accused in court where identifying witness is a

total stranger who had just a fleeting glimpse of person identify or who had no particulars reason to remember the person concerned, if identification is made for the first time in the court. In **Rajesh v State of Haryana (2021) 1 SCC 118** the Hon'ble Supreme Court held that the identification in the course of a TIP is intended to lent assurance to the identity of the accused. In **Munshi Sigh Gautam (D) & Others v. State of M.P., (2005) 9 SCC 631**. the Hon'ble Supreme Court held that identification tests are primarily meant for the purpose of helping the investigating agency with an assurance that their progress with the investigation into the offence is proceeding on the right lines. The identification can only be used as corroborative as statement in court. The necessity for holding an identification parade can arise only when the accused are not previously known to the witnesses. In **Faisal v. State of Kerala** reported in 2016 (2) KHC 578, a similar contention regarding absence of proper identification was raised that the police should have conducted a test identification parade to prove the identity of the accused. Since the witnesses got sufficient time to see the accused and to have his face and physical features imprinted in their mind and that the said case was not a case where everybody had only glimpse of the accused and that all witnesses had sufficient time to see and identify the accused, the Hon'ble High Court held that it is of little consequence

that test identification parade was not conducted during investigation and evidence of the witnesses cannot be rejected on the ground that a test identification parade was not conducted during investigation. It is evident from the above cited decisions that if accused is known to witnesses and witnesses got sufficient opportunity to see accused at the time of incident, dock identification of accused cannot be rejected due to want of test identification parade. In the present case also it was proved by the prosecution that accused No.2 had been known to PW1 and PW1 got sufficient opportunity to see accused number 2 at the time of incident. Hence identification of accused number 2 by PW1 in the court is not at all doubtful and can be accepted .

46.PW12 and PW13 are mother and grandmother of PW1 respectively. As per the deposition paper before examination of PW12 voire dire test was conducted by then presiding officer as prosecution and defence submitted that PW12 is also mentally ill to a limited extend. PW12 and PW13 have a no direct knowledge regarding the sexual assault of accused number 2. Hence deposition of PW12 and PW13 cannot be accepted as corroborating the evidence of PW1 regarding the sexual assault of accused number 2.

47. Defence side contended that PW1 did not know how to sign and hence lodging of Exhibit P1 first information statement by

PW11 is very doubtful. On the basis of the above said contention, the learned defence counsel argued that prosecution case was falsely created. During chief exclamation PW1 identified and admitted her signature in exhibit P1 first information statement when first information statement was put to her. During cross examination PW1 stated that she does not sign. PW1 did not deny her signature in exhibit P1 first information statement during cross examination. The deposition of PW1 that she doesn't sign can only be considered as conveying the meaning that she doesn't sign usually. It is true that there is deposition of PW 10 that she assessed the mental retardation of PW1 from the fact that that PW1 can't put signature and she could put only thumb impression. But there is clear admission from PW1 that she signed in exhibit P1 first information statement. PW16 clearly deposed that persons of mental retardation cannot lie. There is nothing in the deposition of PW1 to discredit her version that she signed in Ext.P1. Moreover PW 5 who was the special educator deposed that exhibit P1 first information statement was recorded in her presence. The learned defence counsel argued that there was nothing in the deposition of PW5 as to when first information statement was recorded. PW5 was not asked in chief examination or cross examination about the date on which first information statement was recorded. Hence on the basis of

absence of that date in the deposition of PW5, her evidence can not be rejected. PW18 also deposed that exhibit P1 first information statement was recorded with the assistance of PW5. Nothing was established in the deposition of PW5 and PW18 to doubt the recording of exhibit P1 first information statement. So the contention of the learned defence counsel that the lodging of Ext.P1 first information statement is doubtful cannot be accepted.

48. Prosecution examined PW4 to prove how this incident was brought to light. PW4 was the teacher of PW1. PW4 stated that friends of PW1 told her that PW1 had pain in her cheeks and neck and accordingly she asked PW1 and that anybody assaulted her and then PW1 stated that she suffered assault and at that time PW4 was the class teacher of PW1. According to PW4, the incident happened in 2013 and she informed school manager and school manager loaded complaint. PW18 who registered exhibit P16 first information register also deposed that he received information from the school of PW1. The learned defence counsel relied upon exhibit D1 contradiction marked through PW4 to contend that PW4 is a reliable witness. As per the deposition of PW4 she informed the manager about PW1. But she did not know the proceedings thereafter. On scrutinizing exhibit D1 contradiction, it is seen that it didn't contradict with any of the statement

of PW4 before the court. PW19 admitted that PW4 gave exhibit D1 statement to him. Since there was no contradiction in the deposition of PW1 with exhibit D1, Ext.D1 cannot be acted upon to conclude that the PW4 is not a reliable witness. On evaluating the entire deposition of PW4 and PW18 it can be concluded that the incident was brought to light when PW1 informed PW4 that somebody had assaulted her. There is nothing in the prosecution evidence to discredit the said evidence adduced by PW4 and PW18.

49. PW7 deposed that she was civil police officer in Poojapura police station and examined the body of PW1 on that day for the purposes of preparing exhibit P1(a) body note. As per the deposition of PW7, she found swelling on the cheeks and neck of PW1 on examination. The learned defence counsel argued that there was no corresponding swelling noted by PW10 who examined PW 1 on the very same day. PW1 had no case that any swelling on the neck and cheeks were caused due to the act of accused No.2 in the course of committing sexual assault on her. PW10 examined PW1 at 9:20 p.m. on 12-1-2023. PW10 stated that there was no signs of myalgia. No swelling was noted on the body of PW1 by PW10. The learned defence counsel argued that noting swelling falsely by PW7 is an indication of the creation of this false case. PW 18 deposed hat PW7 prepared body

note of PW1 after recording exhibit P1 first information statement. Exhibit P1 first information statement was seen record at 6:00 pm. So it can be assumed that PW17 might have noted the swelling after 6:00 p.m if it was true. If there was swelling on the cheeks and neck of PW1, it would have been noted by PW 10 at 9 p.m. on that day. There was no swelling on the cheeks and neck of PW1 noted by PW 17 at 9:20 p.m. on the very same day. Therefore the deposition of PW7 that she found swelling on the neck and cheeks of PW1 while examining her body after recording exhibit P1 first information statement cannot be accepted as true. It was already found that the testimony of PW1 that accused committed penetrative sexual assault and sexual assault on her is believable and acceptable. Hence the finding of this court on the deposition of PW7 regarding the swelling of PW1 cannot be considered as having an detrimental effect on the deposition of PW1.

50. The learned defence counsel argued that there was no medical evidence to substantiate the case of PW13 that she gave medical attendance to PW1. According to PW13, accused number 2 came to her house during night on a day and she took knife for chopping him and at that time PW1 told her that accused No.2 came yesterday and assaulted her by threatening her. According to PW13, she took PW1 to hospital on the next day as PW1 told pain on cheeks and

neck. PW13 stated during cross examination that she did not know the name of the hospital to which she took PW1 but she gave medicine to PW1 after visiting hospital. PW19 deposed that he did not investigate regarding the hospital deposed by PW13 as there was no such statement made by PW13 to him. As per the deposition of PW13, PW1 told her about the incident on the next day of incident and she took her to the hospital on the very next day. PW10 who examined PW1 on 12-1-2013 stated that there was no signs of myalgia on 12-1-2013. PW10 had no case that she administered any medicine to her. The deposition of PW13 that she took PW1 to the hospital on the next day after PW1 had told her was not supported by any corresponding medical evidence. Hence evidence of PW13 regarding the hospital visit cannot be accepted as true. **As** already found there is unshaken testimony of PW1 regarding the acts done by accused number 2. So finding of this court regarding the testimony of PW13 pertaining to the hospital visit on the next day of the incident cannot be said to have an adverse effect on the testimony of PW1 regarding the sexual assault of accused No.2.

51. As per the deposition of PW1, accused No.2 attempted to place his penis into her vagina. Evidence of PW1 is not clear as to whether any partial or slightest penetration was done in the above said

act of the accused No.2 So it cannot be concluded from the deposition of PW1 that accused No.2 penetrated his penis into the vagina of PW1.

52. Defence side contended that there was no injuries noted on the private parts of PW1 and accused No.2 by the doctors who examined them. So the deposition of PW1 that accused committed penetrative sexual assault on her is not believable. PW10 deposed that there was no genital injury to PW1. PW14 who examined accused number 2 for potency examination testified that there was no abrasion or injury on the penis of accused number 2. The learned defence counsel argued on the basis of the absence of genital injury to PW1 and accused number 2 to contend that the incident stated by PW1 did not happen. PW1 had a no case that any injury was inflicted on her by accused No.2 in the course of committing sexual assault. Moreover as per the deposition of PW1 accused actually penetrated his penis into mouth of PW1. Absence of abrasion on the penis of accused number 2 cannot be interpreted as negating the evidence of PW1 regarding the sexual assault of accused number 2 by penetrating his penis into her mouth. As per the prosecution case the incident happened on 10-1-2013. Accused number 2 was examined by PW14 only on 23-4 -2013. Even for the sake of argument the contention of learned defence counsel was accepted as true, such an injury or abrasion cannot be expected to be

present for 4 months till 23/4 2013. Hence the absence of injury on the penis of accused number No.2 cannot in anyway be interpreted to mean that the case advanced by PW1 is false. Moreover as per the deposition of PW1 accused attempted to place his penis to her vagina but he could not succeed. As already stated evidence of PW1 is not clear as to whether there was any penetration even in partial or slightest way. In that case also the contention of defence counsel that there must be injuries on her genital if there was penetration having done by accused number 2 is not acceptable. From the above discussion it can be only be concluded that absence of injury on the genital area of PW1 and of accused number 2 cannot be interpreted to mean that the acts of penetrative sexual assault of accused number 2 on PW1 deposed by her is false.

53. The absence of FSL report to prove the presence of semen in the dresses of PW1 was also argued upon by learned defence counsel as a serious flaw to doubt the prosecution case. MO1 to MO4 were produced as the dresses worn by PW1 at the time of incident. PW1 identified the same also. PW19 deposed that he submitted exhibit P24 forwarding note for examination of dresses of PW1 in FSL. But no FSL report was seen filed in this case. It is highly necessary to consider whether FSL report has any significance in this case. As per the

deposition of PW1, penetration was actually done by accused into her mouth and a milk like substance came in her mouth thereafter. PW1 had a no case that her dresses were smeared with that milk like substance. As already stated, there was no evidence to prove that there was vaginal penetration done by accused number 2 to PW1. This court is of the view that in view of the mode of penetration done by accused number 2 to PW1, FSL report does not assume any significance in this case. Failure of the prosecution to prove the presence of semen in the dresses of PW1 cannot be taken as fatal to the prosecution case.

54. The defence side contended that PW12 and PW13 borrowed Rs.50,000/- from accused No.2 through one Viswambaran and accused No.2 requested that amount at the time of marriage of her daughter and this case was foisted falsely to evade from the payment of that debt. Exhibit D2 marriage certificate of daughter of accused number 2 was produced to substantiate that contention. As per Ext.D2, marriage of daughter of accused No.2 took place on 12-7-2013. Exhibit P16 FIR was registered on 12-1-2013. The mere production of exhibit D2 by defence side did not in anyway prove the money transaction alleged by him. It is necessary to consider whether accused No.2 succeeded in proving the money transaction alleged by him. PW1 denied the money transaction alleged by accused No.2 when such a suggestion was made

to her by learned defence counsel during cross examination. As per the deposition of PW1, PW12 and Gopi uncle did dirty things and that uncle assaulted her after giving money to PW12. There was nothing in the deposition of PW1 regarding the acceptance of any money from Viswambaran by PW12. PW12 also deposed that Gopi gave her money after having sexual intercourse with PW1 and her. PW12 also did not adduce any evidence in favour of the money transaction alleged by accused number 2. PW13 also denied that she borrowed RS.50,000/- from Viswambaram. Nothing has been forthcoming from the cross examination of PW1, PW12 and PW 13 and from the evidence of other prosecution witnesses to prove that a money transaction took place as alleged by accused No.2. Accused No.2 also did not adduce any evidence to prove the money transaction alleged by him. So it can be safely concluded that accused number 2 failed to prove the money transaction alleged by him with PW12 and PW13. The contention of the defence side that this case was foisted falsely due to the money transaction pending with PW12 and PW13 is liable to be rejected.

55. The learned defence counsel argued that the investigation in this case was faulty and hence the prosecution case is liable to be thrown overboard. Defence side projected absence of 164 statement of PW1 and lack of independent witness in Ext.P3 scene plan as serious

flaws affecting the credibility of the prosecution case. Section 25 of the POCSO Act dealt with the mode of recording of statement of child under section 164 of the Criminal Procedure Code . There is no mandate in the POCSO Act that 164 statement shall be recorded invariably in all cases to accept the evidence of victim before the court. Section 164(5-A)of Cr.PC which was introduced by Amendment with effect from 03/02/2013 provides that judicial Magistrate shall record the statement of the person against whom the offence under section 376 has been committed. That section also did not provide that in the absence of such a 164 statement, prosecution case cannot be accepted. So on basis of want of 164 statement of the PW1, it cannot be contended by the defence side that evidence of PW1 before the court is not acceptable.

56. PW3 is an attestor to exhibit P3 scene plan. There is nothing in the deposition of PW 3 to prove that he is relative of PW1. Hence it cannot be concluded that PW3 is not an independent witness. Moreover absence of independent witness in scene mahazer contended by the learned defence counsel even if accepted as true can not be taken as having an adverse effect on the evidence adduced by PW1 before the court. So the contention of the learned defence counsel for rejecting the prosecution case for want of 164 statement and of independent witness in exhibit P3 scene plan did not stand.

57. The learned defence counsel relied upon the failure of PW18 to register first Information report on the basis of the information received from the school of PW1 prior to exhibit P1 and simultaneous timing of exhibit P1 and exhibit P16 to canvass that prosecution cases is not at all genuine. PW18 admitted that he received information from the school and did not register first Information report on that basis as he needed to verify the veracity of that information due to its grave nature and accordingly statement of PW1 was recorded and then exhibit P16 first Information report was registered on that basis. It is highly necessary to consider whether such a course adopted by PW18 is proper. As per section 154 of Cr.PC, officer in charge of the police station is bound to register first Information report the moment he receives information regarding the commission of a cognizable offence. The Honourable Supreme Court in **Lalitha Kumary v. Govt of UP and Others** reported in 2013(4) KHC 552 held that registration of FIR is mandatory under section 154 of the Criminal Procedure Code and if the information discloses the commission of cognizable offence, no preliminary enquiry is permissible in such a situation and that a preliminary enquiry maybe conducted only to ascertain whether cognizable offence is disclosed or not and that the scope of preliminary enquiry is not to verify the veracity or otherwise of the information

received but only to ascertain whether information reveals a cognizable offence. The case at hand is not one of the categories mentioned by the Honourable Supreme Court in above stated decision to conduct preliminary enquiry. In the present case instead of conducting a preliminary enquiry as to whether a cognizable offence is made out in the information given by the school of PW1, PW18 proceeded to conduct a preliminary enquiry regarding the veracity of such information by recording the statement of PW1 without registering first information report on the basis of the earlier information. The course adopted by the investigating officer in this case is not the one recognized by the Honourable Supreme Court in above referred case. The next aspect to be considered is whether the inaction and the omission of PW18 in not registering first Information report on the basis of information first received from school have an adverse effect on the evidence of PW1 before the court. No prejudice was proved to have been happened to accused No.2 by not registering first Information report on the basis of information received from school. Besides the case of false simplification alleged by the accused No.2 was proved to be false. Evidence of PW1 before the court is found to be acceptable and reliable. In **Karnel Singh v. State of MP** (1995 KHC 482) it was held that in cases of defective instigation the court has to be circumspect

in evaluating the evidence but it would not be right in acquitting an accused person solely on account of the defect and to do so would tantamount to playing into the hands of the investigating officer if the investigation is designedly defective. In **Paras Yadav and others v. State of Bihar** (1998 KHC 938) it was held while commenting upon certain omissions of the investigating agency that it may be that such lapse is committed designedly or because of negligence and hence the prosecution case is required to be examined dehors such omissions to find out the said evidence is reliable or not. Similar view was taken in **Ram Bihari Yadav v. State of Bihar** (1999 KHC 968). In **Amar Sigh v. Balwinder Singh and others (2003 KHC 858)** it was held that when the prosecution case is fully established by the direct testimony of the eye witnesses, which is corroborated by the medical evidence, any failure or omission of the investigating officer cannot render the prosecution case doubtful or unworthy of belief. The Honourable Supreme Court in **State of UP v. Jagdeo and Others** (2003 KHC 762) held that assuming the investigation was faulty, for that reason alone accused persons cannot let off or acquitted. For the fault of the prosecution, the perpetrators of such a ghastly crime cannot be allowed to go scot free. In **Suresh Babu v. State of Kerala** (2023 (3) KLT SN 27 (Case No.13) the Hon'ble High Court of Kerala held that defects in

investigation cannot be a ground to reject the prosecution case. It is evident from the above cited decisions that omissions of the investigating agency is not a ground for acquittal if there is reliable evidence to prove the commission of the offences. As already noted sexual assault of accused No.2 to PW1 was proved by the evidence of PW1. In view of the dictum in the above cited decisions and of the credible evidence of PW1 before this court, failure of PW18 to register first Information report on the basis of the information furnished by school authorities cannot be taken as having a detrimental effect on the evidence of PW1 before the court.

58. It is correct that time of exhibit P1 first information statement and exhibit P2 first information report was recorded as 6:00 p.m. PW18 admitted such a mistake and deposed that exhibit P16 FIR was registered at 6:30 p.m. after recording the statement of PW1. It is a mistake on the part of the investigating officer. Similarly the offences under the POCSO Act was not included in first information report by PW18. It is also an omission on the part of PW18. As the evidence of PW1 was found to be reliable and acceptable, the case of the PW1 cannot be allowed to fall to the ground on the basis of the mistake committed by PW18 in noting the time of first information statement and first information report simultaneously and omitting to include the

offences under POCSO Act in Ext.P16 first information report in view of the the decisions in **Karnel Singh v. State of MP, Paras Yadav and others v. State of Bihar, Ram Bihari Yadav v. State of Bihar, Amar Sigh v. Balwinder Singh and others State of UP v. Jagdeo and Others** and **Suresh Babu v. State of Kerala** mentioned supra.

59.Defence side argued that there was Government Circular to file an express report by Sub Inspectors to Superior Officers immediately after registration of cases involving grave offences. PW17 admitted the existence of such a circular of DGP to that effect. The learned defence counsel vehemently argued that violation of such a circular was also a serious flaw affecting the prosecution case. The circular of DGP cannot be understood to have the force of law. Hence the violation of such a circular cannot be taken as a serious flaw affecting the credibility of the prosecution case.

60. Prosecution succeeded in proving through the deposition of PW1 that accused No.2 penetrated his penis into her mouth and a milk like substance came thereafter. It can only be understood as accused No.2 ejaculated in the mouth of PW1. The next aspect to be considered is in which of the penal provisions of in the Indian Penal Code and in the Protection of Children from sexual Offences Act the above offending act of the accused No.2 fall. Penetrating penis into the

mouth of child who was aged 15 years is penetrative sexual assault under section 3(a) of Protection of Children from Sexual Offences Act which is punishable under section 4 (2) of the Protection of Children from Sexual Offences Act.

61. Penetrating penis into the mouth was brought within the definition of rape in section 375 of Indian Penal Code by Amendment with effect from 03/02/2013. In Vinod Thankarajan and Another v State of Keraka and others (2020 (1) KHC 852) it was held that a reading of section 375 as per the amended process would make it clear that forcible acts of oral sex are said to have been committed by a male accused on female victim would come within the ambit of section 375 of IPC with effect from 03/02/2013. Therefore, where the alleged acts of oral sex are said to have been committed by a male accused on a female victim if allegedly done one or after 03/02/2013, it would come within the ambit of 375 of IPC and not within section 377 of IPC. In Santhosh v State of Kerala (2021 (4) KHC 527) it was held while discussing 2003 Amendment to section 375 of Indian Penal Code that one of the consequences of such Amendment is that several penetrative sexual assault which would otherwise be triable under section 377, now come within the operative field of section 375. However section 377 would still be attracted in cases of penetrative sexual assaults against the order

of the nature, which are not falling under section 375. As per the prosecution case the incident in this case occurred on 10/01/2013. As per the deposition of PW1 and PW4 the incident occurred while she was studying in 7th standard during 2012 – 2013. Since Ext.P1 first information statement and Ext.P16 first information report was registered on 12/01/2013 it can be concluded that the incident in this case occurred before the Amendment to 375 of Indian Penal Code was brought into effect on 03/02/2013. Penetrating penis into the mouth of PW1 and ejaculating in the mouth is carnal intercourse against the order of the nature is punishable under section 377 of Indian Penal Code as the incident occurred before 03/02/2013. So it can be concluded that accused No.2 committed the offence under section 4(2) of POCSO Act read with section 3(a) of that Act and section 377 of Indian Penal Code.

62.Prosecution succeeded in proving that accused No.2 penetrated his penis into the mouth of PW1 and ejaculated in the mouth taking advantage of her mental disability. The above act of accused No.2 is punishable under section 6 read with 5 (k) of POCSO Act. So it can be concluded that prosecution succeeded in proving that accused No.2 committed the offences punishable under section 6 read with 5(k) of POCSO Act.

63. Charge was framed for the offences under section 376(1)(l) of IPC. Section 376(1)(l) of IPC was brought to the statute book by Amendment with effect from 03/02/2013. It was already found that the incident occurred before the Amendment on 03/02/2013. Hence charge under section 376(1)(l) of IPC would not lie against accused No.2. It can only be concluded that prosecution failed to prove that accused No.2 committed the offences punishable under section 376(1)(l) of IPC.

64.Charge was framed under section 4 read with 3(c) of POCSO Act for the allegation that accused No.2 committed penetrative sexual assault on PW1 by manipulating her body so as to cause penetration into her vagina. PW1 did not depose anything to the effect that accused No.2 manipulated any part of her body so as to cause penetration into her vagina. Prosecution did not adduce any evidence to prove the charge under section 4 read with 3(c) of POCSO Act. It can be concluded that prosecution failed to prove that accused No.2 committed the offence under section 4 read with 3(c) of POCSO Act.

65.Charge was also framed for the offence under section 4 read with 3(d) of POCSO Act on the allegation that accused No.2 made PW1 to apply her mouth to the penis of PW1. It was proved by the prosecution that accused No.2 penetrated his penis into the mouth of PW1. No evidence was adduced by PW1 to the effect that accused No.2

made her to apply her mouth to his penis. So it can be concluded that prosecution failed to prove the charge under section 4 read with 3(d) of POCSO Act.

66. On evaluating the entire evidence it can be concluded that prosecution succeeded in proving that accused No.2 committed the offences punishable under section 4 (2) read with section 3(a) of POCSO Act, section 6 read with 5(k) of POCSO Act and 377 of Indian Penal Code. Prosecution failed to prove that accused No.2 committed the offences punishable under section 4 read with section 3(c) of POCSO Act and section 4 read with section 3(d) of POCSO Act and section 376(1)(l) of Indian Penal Code. Point Nos.2, 3 and 6 found in favour of the prosecution. Point Nos.1, 4 and 5 found against the prosecution.

67. Point Nos.7 and 8 : Prosecution alleged that accused No.2. committed aggravated sexual assault on PW1 by touching her vagina, sucking her breast and kissing her in the course of committing penetrative sexual assault on her. It was proved from the deposition of PW1 and PW4 that the incident occurred while PW1 was studying in the 7th standard during 2012 – 2013. It was already found under the discussions in point Nos.1 to 8 that PW1 was a minor during the above period and PW1 suffers from mental disability.

68. As per the deposition of PW1 accused touched her vagina, drank her milk and kissed her in the course of committing penetrative sexual assault on her. The statement of PW1 before the court that accused drank her milk can only be understood as accused sucked her breast as the said act was done by accused No.2 in the course of committing penetrative sexual assault on PW1. Since the above said act of accused No.2 that is touching her vagina, sucking her breast and kissing her was committed by accused No.2 in the same transaction of committing penetrative sexual assault on her, it can only be held that accused No.2 touched the vagina of PW1, sucked her breast and kissed her with sexual intent. As per section 30 of the Protection of Children from Sexual Offences Act, 2012 in any prosecution for any offence under the Protection of Children from Sexual Offences Act, 2012 which requires a culpable mental state on the part of the accused the special court shall presume the existence of such mental state. When such a presumption can be presumed has been laid down by Judicial pronouncements in **Justin @ Renjith and Another v Union of India and others** reported in 2020 (6) KHC 546 and **David v. State of Kerala reported in 2020(4) KHC 717**. It is evident from the judicial pronouncements in the above mentioned two cases that if the foundational facts that victim is a child, that the alleged incident had

taken place and that accused has committed the offence are proved by the prosecution, the presumption under section 30 of the Protection of Children from Sexual Offences Act, 2012 will come into play and the court can presume culpable mental state of the accused in doing the said act. In the present case also the prosecution succeeded in proving that PW1 was a minor during the time of the incident and accused No.2 touched her vagina, sucked her breast and kissed her in the course of committing penetrative sexual assault on her. It was already found that very acts of accused deposed by PW1 that is touching her vagina, sucking her breast and kissing her can only be assumed as having committed by accused No.2 with sexual intent. The nature of the assault on the part of accused No.2 to PW1 and section 30 of the POCSO Act enable this court to presume that accused No.2 touched vagina of PW1, sucked her breast and kissed her with sexual intent. Accused failed to adduce any evidence to rebut the presumption drawn by this court. It can be concluded from the evidence adduced by the prosecution that accused No.2 committed sexual assault on PW1 and thereby committed the offence punishable under sections 8 read with 7 of POCSO Act. It was already found that PW1 was a person of mental retardation. Hence it can only be concluded that accused No.2 committed sexual assault on PW1 taking advantage of the mental

disability of PW1. Prosecution succeeded in proving that accused No.2 committed the offence under sections 10 read with 9(k) of POCSO Act. Point Nos.7 and 8 found in favour of the prosecution.

69 <u>Point No. 9.</u> : In view of the finding on point Nos.1, 4 and 5 accused No.2 is found not guilty of the offences punishable under sections 376(1)(l) of Indian Penal Code and sections 4 read with 3(c) and sections 4 read with 3(d) of Protection of Children from Sexual Offences Act. Accused No.1 is no more. Hence charge against accused No.1 abated and accused No.2 is acquitted under section 235(1) Cr.PC for the offences punishable under sections 376(1)(l) of Indian Penal Code, sections 4 read with 3(c) and sectins 4 read with 3(d) of Protection of Children from Sexual Offences Act.

70. In view of the finding on point Nos.2, 3 and 6, 7 and 8 accused No.2 is found guilty of the offences punishable under sections 377 of Indian Penal Code, sections 4 read with 3(a), sections 6 read with 5 (k), sections 8 read with 7 and sections 10 read with 9(k) of Protection of Children from Sexual Offences Act. Hence accused No.2 is convicted under section 235(2) Criminal Procedure Code for the offences punishable under section 377 of Indian Penal Code, sections 4 read with 3(a), sections 6 read with 5(k), sections 8 read with 7 and

sections 10 read with 9(k) of Protection of Children from Sexual Offences Act.

71. Considering the gravity of the offences committed by accused on PW1 who was minor, this court is satisfied that it is not expedient in the interest of justice to invoke the benevolent provision of Probation of Offenders Act.

72. Accused will be heard on the question of sentence.

Dictated to the Confidential Assistant transcribed and typed by her, corrected by me and pronounced in the Open Court on the **31st day of October, 2023.**

REKHA.R
SPECIAL JUDGE.

73. Accused No.2 was heard on the question of sentence. Accused submits that he is aged 62 years and a cancer patient and his wife is alone at house. According to accused No.2 his only daughter was married off. Accused No.2 submits that he was diagnosed with cancer in the year 2016. Accused No.2 submits that he has been undergoing treatment in RCC. The learned Special Public Prosecutor prayed for imposing maximum sentence on accused. The sentence should deter

the criminal from achieving the avowed object to break the law and the endeavour should be to impose an appropriate sentence (Ahmed Hussein Vali Mohammed Saiyed v. State of Gujarat 2009 KHC 4705). Law should adopt the corrective machinery or deterrence based on factual matrix. By deft modulation, sentencing process be stern where it should be and tempered with mercy where it warrants to be (Jameel v. State of UP 2010 KHC 7354). It is the duty of the court to see that appropriate sentence is imposed regard being had to the commission of the crime and its impact on the social order and that sentencing includes adequate punishment (Guru Basavaraj v. State of Karnataka 2012 KHC 4468). Punishment is designed to protect society by deterring potential offenders as also by preventing the guilty party from repeating the offence (B.C. Goswami v. Delhi administration 1974 KHC 519). The acts of the accused No.2 that is penetrating his penis into the mouth of PW1 and ejaculating in her mouth and touching her vagina, sucking her breast and kissing her with sexual intent proved by the prosecution is abject and diabolic. It is proved from the evidence adduced by the prosecution that accused committed aggravated penetrative sexual assault and aggravated sexual assault on PW1 who was residing with her mentally disabled mother and aged grandmother taking advantages of her mental disability and deplorable living

conditions. Accused No.2 did not produce any medical records to prove his disease. Accused No.2 appears to be physically fit at present. Considering the diabolic act of accused No.2 on PW1, the disease of accused No.2 even if true is not a ground to get mild punishment. On the basis of the disease of accused No.2, he cannot be let off with meagre punishment. Moreover accused No.2 can be provided adequate medical aid through appropriate direction to Jail authorities. Submissions of accused during the hearing on sentence cannot be considered as mitigating factors while imposing sentence. Considering the gravity of the offence committed by accused No.2 on PW1, this court is of the definite view that severe punishment should be imposed on accused No.2 in order to sent a strong message to the society to prevent recurrence of similar offences and to deter potential offenders from committing similar offences. Age of the accused No.2 will be considered while imposing sentences.

74. The offending act for which accused was convicted under sections 8 read with 7 of Protection of Children from Sexual Offences Act was part of the acts for which accused was convicted under sections 10 read with 9(k) of Protection of Children from Sexual Offences Act. Therefore accused is liable to be sentenced only for the offences under section 10 read with 9(k) of Protection of Children from Sexual

Offences Act in view of section 71 of Indian Penal Code. Similarly accused No.2 is liable to be sentenced only for the offence under section 6 read with section 5(k) the Protection of Children from Sexual Offences Act in view of section 71 of IPC since the offending acts for which accused was convicted under section 4 read section 3(a) of POCSO Act is part of the acts for which accused was convicted under section 6 read with section 5(k) of POCSO Act.

75.In the result,

Accused is sentenced to undergo rigorous imprisonment for a period of 35 years and to pay a fine of Rs.50,000/- (Rupees Fifthy thousand) and in default of payment of fine to undergo rigorous imprisonment for a further period of 6 months for the offence punishable under section 6 read with section 5(k) of Protection of Children from Sexual Offences Act, 2012 and to undergo rigorous imprisonment for 7 years and to pay a fine of Rs.25,000/- (Rupees Twenty five thousand) and in default of payment of fine to undergo rigorous imprisonment for a further period of 3 months for the offence punishable under section 10 read with section 9(k) of the Protection of Children from Sexual Offences Act and to undergo rigorous imprisonment for 10 years and to pay a fine of Rs.50,000/- (Rupees

Fifty Thousand) and in default of payment of fine to undergo rigorous imprisonment for 6 months for the offence punishable under section 377 of Indian Penal Code.Substantive sentences shall run concurrently.

76. The fine amount if remitted by the accused or if realized from the accused shall be paid to PW1 as compensation under section 357(1) (b) of Criminal Procedure Code.

77.Accused was in judicial custody for the period from 23/04/2013 to 23/05/2013. Accused is entitled to get set off for one month against the substantive term of imprisonment.

78.MO1 to MO7 being old clothes and valueless shall be destroyed after the appeal or after the disposal of appeal if appeal is filed.

79. Invoking the power under section 357- A of the Code of Criminal Procedure Code, 1973 and section 33(8) of Protection of Children from sexual Offences Act, this court hereby makes recommendation to the District Legal Services Authority, Thiruvananthapuram for adequate compensation to PW1.

80. The Superintendent, Central Prison, Thiruvananthapuram is directed to provide immediate medial aid to accused No.2 and thereafter as and when required.

(Dictated to the Confidential Assistant, transcribed and typed by her, corrected by me and pronounced in the Open Court on this the **31st day of October, 2023.**

REKHA.R
SPECIAL JUDGE.

Appendix

Prosecution witnesses

PW1.	11/01/023	Victim, Occurrence witness
PW2.	17/01/2023	Unnikrishnan, Occurrence witness
PW3.	19/01/2023	Aravind, mahazer witness
PW4.	19/01/2023	Lekshmi.N.R, Teacher, Chinnamma Memorial Girls Higher Secondary School Poojappura.
PW5.	19/01/2023	Geena.G.R, Special Educator, Rotary Institute, Vazhuthacaud.
PW6.	19/01/2023	Santhi.G.S, Headmistress of Chinnamma Memorial Girls Higher Secondary School Poojappura.
PW7.	25/01/2023	Kusuma Kumari,S, Police witness
PW8.	25/01/2023	Saju.V.S, Police witness
PW9.	14/02/2023	Victor.N, Village Officer, Thirumala.

PW10.	17/02/2023	Dr.L.T. Sanal Kuamr, Medical witness
PW11	17/02/2023	Dr. Geetha.R, Medical witness
PW12.	21/02/2023	Mother of child victim
PW13.	21/02/2023	Grandmother of child victim
PW14.	21/02/2023	Dr.Ambili.A, Medical witness.
PW15.	03/03/2023	Joseph Eappan, Headmaster, MSC LP School, Thrivikramangalam, Poojappura.
PW16.	09/03/2023	Dr.Selvam.O.S, Medical witness
PW17.	21/03/2023	Santhosh.M.S, Police witness
PW18.	04/04/2023	Vinod Kumar.P.B, Police witness
PW19.	11/04/2023	Jayachandran.V, Police witness
PW20.	17/06/2023	Santhosh Kumar.S, Official witness
PW21.	08/09/2023	Shine.N.S, Official witness

Exhibits for prosecution:

P1.	12/01/2013	First Information Statement proved by PW1 on 11/01/2023.
P1(a)	12/01/2013	Body note of PW1 proved by PW7 on 25/01/2023.
P2.	13/01/2013	Scene mahazar proved by PW3 on 19/01/2023.
P3.	19/04/2013	Extract of Admission register of child victim proved by PW6 on 19/01/2023.
P4.	13/01/2013	Mahazar (dress of accused 1) proved by PW8 25/01/2023.
P5.	24/07/2023	Scene plan proved by PW9 on 14/02/2023.
P6.	12/01/2013	Medical examination report of child victim proved by PW10 on 17/02/2023.
P7.	14/01/2013	Potency certificate of accused No.1 proved by PW11 on 17/02/2023.
P8.	23/04/2013	Potency certificate of accused No.2 proved by PW14 on 21/02/2023.
P9.	03/03/2023	Copy of School admission register proved by PW15 on 03/03/2023.

P10.	03/03/2023	Copy of School admission register proved by PW15 on 03/03/2023.
P11.	03/03/2023	Copy of School admission register proved PW15 on 03/03/2023.
P12.	03/03/2023	Copy of School admission register proved by PW15 on 03/03/2023.
P13.	03/03/2023	Copy of School admission register proved by PW15 on 03/03/2023.
P14.	21/11/2014	Disability certificate of PW1 proved by PW16 on 09/03/2023.
P15.	12/12/2013	Section added report proved by PW17 on 21/03/2023.
P16.	12/01/2013	First Information Report proved by PW18 on 04/04/2023.
P17.	13/01/2013	Arrest memo of accused No.1 proved by PW18 on 04/04/2023.
P18.	13/01/2013	Inspection memo proved by PW18 on 04/04/2023.
P19.	Nil	Address report of accused No.1 proved by PW18 on 04/04/2023.
P20.	Nil	Section added report proved by PW18 on 04/04/2023.
P21.	23/04/2013	Arrest memo of accused No.2 proved by PW19 on 11/04/2023.
P22.	23/04/2023	Inspection memo proved by PW19 on 11/04/2023.
P23.	23/04/2013	Address report of accused No.2 proved by PW19 on 11/04/2023.
P24.	22/01/2013	Forwarding Note proved by PW19 on 11/04/2023.
P25.	16/06/2023	Copy of SSLC certificate of PW1 proved by PW20 on 27/06/2023.

P25(a) 16/06/2023	Certificate u/s.65B of Indian Evidence Act proved by PW20 on 17/06/2023.
P26. 18/08/2023	Extract of Birth certificate of PW1 proved by PW21 on 08/09/2023.
P26(a) 18/08/2023	Certificate u/s.65B of Evidence Act proved by PW21 on 08/09/2023.

Defence witnesses: **Nil**

Defence Exhibits:-

D1.	Portion of 161 statement of PW4 marked on 19/01/2023.
D2.	Marriage certificate of daughter of accused marked on 08/05/2023.

Material Objects :-

MO1	blue coloured pants
MO2	White coloured top
MO3	Brown coloured shimmy
MO4	Black coloured bracier
MO5	Shirt of accused No.1
MO6	Mundu of accused No.1
MO7	Underwear of accused No.1

REKHA.R
SPECIAL JUDGE.

Judgment in SC.1073/2013
Dated: 31/10/2023