

IN THE FAST TRACK SPECIAL COURT(POCSO)  
THIRUVANANTHAPURAM.

Present :- Smt. REKHA R, SPECIAL JUDGE.

Saturday, 31<sup>st</sup> August, 2024 (9<sup>th</sup> Bhadra, 1946)

**SESSIONS CASE No.443/2020**

(Crime No.2390/2019 of Peroorkada Police Station)

Complainant : State - represented by the Inspector  
of Police, Peroorkada Police Station  
Thiruvananthapuram District.

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

Accused : Ratheesh Kumar @ Lathi Ratheesh  
aged 37/19, S/o. Velukutty  
TC.19/2812, Kudappanakunnu Harvipuram  
1<sup>st</sup> Lane, Kudappanakunnu Ward,  
Kudappakunnu Village.

(By Adv.Sri. Prathap Ashish Nair)

Charge : Under sections 376AB, 363, 506(i) of Indian  
Penal Code, sections 4 read with 3(a), 6 read  
with 5(l), 6 read with 5(m), 8 read with 7, 10  
read with 9(l), 10 read with 9(m), 12 read with  
11 (iii) and 12 read with 11(iv) of Protection of  
Children from Sexual Offences Act.

Plea : Not guilty

Finding : Guilty under sections 4 read 3( a), 6 read with 5(l), 6 read with 5( m), 8 read with 7, 10 read with 5(l),10 read with 5( m) of Protection of Children from Sexual Offences act and sections 363 and 506 of Indian Penal Code.

Not guilty under sections 376 AB of Indian Penal Code and section 12 read with 11(ii) and (iv) of Protection of Children from Sexual of Offences Act.

Sentence/  
order : Accused is acquitted under section 235(1) of Criminal Procedure Code for the offences punishable under section 376AB of Indian Penal Code and sections 12 read with section 11(iii) and 11( iv) of Protection of Children from Sexual offences Act and

Accused is convicted under section 235(1) Criminal Procedure Code for the offences punishable under sections 4 read with 3(a), sections 6 read with 5(l), 6 read with 5(m), 8 read with 7, 10 read with 9(l), 10 read with 9(m) of Protection Children from Sexual Offences Act and sections 506 and 363 of Indian Penal Code. In view of section 71 of Indian Penal Code, no separate punishment is imposed for the offence punishable under sections 4 read 3(a) and 8 read with 7 of Protection of Children from Sexual Offences Act.

Accused is sentenced to undergo **rigorous imprisonment** for a period of **50 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 **6 months** for the offence punishable under section 6 read with section 5(l) of Protection of Children from Sexual Offences Act, 2012 and to undergo **rigorous imprisonment for 20 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 **6 months** for the offence punishable under section 6 read with 5(m) of Protection of Children from Sexual Offences Act and to undergo **rigorous imprisonment for 7 years** and to pay a fine of **Rs.10,000/-** (Rupees Ten thousand) and in default of payment of fine to undergo rigorous imprisonment for **3 months** for the offence punishable under section 10 read with 9(l) of Protection of Children from Sexual Offences Act and to undergo **rigorous imprisonment for 7 years** and to pay a fine of **Rs.10,000/-** (Rupees Ten thousand) and in default of payment of fine to undergo rigorous imprisonment for **3 months** for the offence punishable under section 10 read with 9(m) of Protection of Children from Sexual Offences Act and to undergo **rigorous imprisonment for one year** for the offence punishable under section 506 of of Indian Penal Code and to undergo rigorous improvement for **one year** and to pay fine of **Rs.5000/-** (Five Thousand) and in default of payment of fine to undergo rigorous imprisonment for further period of **one month** for the offence punishable under section 363 of Indian Penal Code. Substantive sentences shall run concurrently.

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

Accused has been in judicial custody for the period from **19/11/2019 till 20/02/2020**. Accused is entitled to get set off for 3 months and 9 days 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	Ratheesh Kumar	Velukutty	xx	Driver	41	Harvipuram

#### Date of

Occurrence	Complaint	Apprehension	released on bail	Committal	Commencement of trial	Close of trial	Sentence /order
2015 & 2019	15/02/20	19/11/19	22/02/20	Nil	11/08/22	29/08/24	31/08/24

This case having been finally heard on 29/08/2024 in the presence of the above counsel and the court on 31/08/2024 delivered the following:

## **JUDGMENT**

**Accused** faced trial for charges under sections 376AB, 363, 506(i) of Indian Penal Code, sections 4 read with 3(a), 6 read with 5(l), 6 read with 5(m), 8 read with 7, 10 read with 9(l), 10 read with 9(m), 12 read with 11 (iii) and 12 read with 11(iv) of Protection of Children from Sexual Offences Act.

### **2.Prosecution** case in brief is as follows:-

On a day at about 1.30 p.m. in the year 2015 when child victim was studying in 4th standard, she climbed in to the terrace in the house of accused for hiding herself when she was playing 'hide and seek' with her brother and accused who was feeding his pigeons in that terrace caused child victim to sit on a plastic chair there and with sexual intent inserted his hand through the skirt of child victim and touched her vagina and breast and threatened to kill child victim if she discloses the incident. On a day at about 12.30 p.m. in the year 2015 when child victim was studying in 4th standard, accused visited the house of the child victim and sat on the steps and when the child victim came to the side of the house after taking sand in the midst of play and accused took her to an area where logs were kept and trees have outgrown and lifted her skirt and inserted his penis in to vagina of child victim. During election time in 2019 accused came to House No.TC.19/2789 about 7.30 p.m. with papers similar to election notice while child victim was playing with his

brother in front of that house and sent her brother away to shop and took the child victim to a concrete slab portion near the kitchen of that house and inserted his penis in to the mouth of child victim. On 27/9/2019 at about 3.45 p.m, while child was returning home after Sports Day in the school, child victim drank water from a pan shop adjacent to Dwaraka house, Kudappanakunnu Ward along with her brother and brother's friend and accused who was standing near that shop came near the child victim and with sexual intent touched her breast and hand. On 14-11-2019 at about 4.15 p.m. accused with sexual intent touched the breast of child victim while she was standing in the queue in front of the Supplyco Supermarket, Kudappanakunnu Ward. Thereafter accused forcefully took child victim to Maruti car bearing registration number KL01-B-779 while she was returning home from Supplyco Super Market. On 15-11-2019 at about 3.15 p.m, accused demanded child victim to get into his Maruti car while she had come to Maveli Store Peroorkada to buy things and when child victim refused to get into the Maruti car, he threatened child victim that he had her photos in his mobile phone and will send that photo to all and kidnapped the child victim from there and took her to secluded place where trees had outgrown near a building under construction adjacent to Supplyco Super Market. Accused with sexual intent touched breast of child victim and inserted his penis into her mouth and then put his penis in to her vagina. Thereafter accused took child victim to Reliance Shop Peroorkada by car bearing registration

number KL01- B-7779 and demanded child victim to steal candies from there threatening that he would publish her videos. Accused with sexual intent had shown media for pornographic to the child vacuum many times while she was playing and constantly followed child victim. Accused had thus committed the above mentioned offences.

**3. Sub** Inspector of Police, Peroorkada Police Station registered first information report number 2390/2019 on the basis of first information statement given by child victim. Inspector of Police, Peroorkada Police Station conducted investigation and laid final report before the Additional District and Sessions Court (For the trial of cases relating to Atrocities and Sexual Violence against Women and Children (POCSO), Thiruvananthapuram against accused. Cognizance was taken for the offences punishable under sections 4 read with 3(a), 6 read with 5(l), 6 read with 5(m), 8 read with 7, 10 read with 9(m), 12 read with 11(iii) and 12 read with 11(iv) of Protection of Children from Sexual Offences Act. Accused appeared before court. Accused was released on bail. Accused was served with the copy of the prosecution records. Thereafter case was transferred to this court for trial and disposal. After appearance of accused, 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 sections 376AB, 363, 506(i) of Indian Penal Code, sections 4 read

with 3(a), 6 read with 5(l), 6 read with 5(m), 8 read with 7, 10 read with 9(l), 10 read with 9(m), 12 read with 11 (iii) and 12 read with 11(iv) of Protection of Children from Sexual Offences Act were framed in English, read over and explained to accused in Malayalam to which he pleaded not guilty.

**4. To** proves its case, prosecution examined PW1 to PW33 and got marked Exts.P1 to P40, MO1 and MO2. CW11, CW13, CW20, CW22, CW23, CW26, CW39 and CW40 were given up by the learned Special Public Prosecutor. Prosecution evidence was closed. Accused was questioned under section 313 of Criminal Procedure Code. Accused denied the incriminating circumstances explained to him. The defence version as seen from the statement of accused under section 313 Cr.PC was that he was innocent and his innocence would have been proved if the investigating officer had checked the CCTV cameras in or near the places of incident and investigation was not proper.

**5.Both sides** were heard under section 232 of Criminal Procedure Code. Accused was found not entitled to be acquitted under section 232 of the Criminal Procedure Code. Thereafter accused was called upon to enter on his defence and produce witnesses. Ext.D1 was marked on the side of the defence. Both sides were heard.

**6.The** points which arise for consideration are :-

1. Did accused penetrate his penis into vagina of PW1 in the year 2015 near her house and insert his penis into her mouth during election time in 2019 near house number TC 19/2788 and insert his



penis into the mouth of PW1 and insert his penis in to her vagina after 3.15 p.m. on 15/11/2019 at a secluded place near Supplyco Super Market Peroorkada and commit aggravated penetrative sexual assault to PW1 more than once and thereby commit the offence punishable under sections 6 read with 5(l) of POCSO Act?

2. Did accused penetrate his penis into vagina of PW1 in the year 2015 near her house and insert his penis into her mouth during election time in 2019 near house number TC 19/2788 and insert his penis into the mouth of PW1 and insert his penis in to her vagina after 3.15 p.m. on 15/11/2019 at a secluded place near Supplyco Super Market, Peroorkada and thereby commit the offence punishable under sections 4 read with 3(a) of POCSO Act?
3. Did accused commit rape on PW1 when she was below 12 years of age and thereby commit the offence punishable under section 376 AB of Indian Penal Code?
4. Did accused insert his penis in to the vagina of PW1 when she was below 12 years in the year 2015 at a place where logs were kept and trees had outgrown adjacent to her house and thereby commit the offence punishable under sections 6 read with 5(m) of POCSO Act?
5. Did accused with sexual intent touch the vagina and breast of PW1 at the terrace in the house of accused in the year 2015 and with the sexual intent touch the hand and breast of PW1 at about 3.45 p.m. on 27/9/2019 near a pan shop adjacent to Dwaraka house, Kudappanakkunnu Ward and with sexual intent touch the breast of PW1 while she was standing in the queue in front of Supplyco Super Market, Kudappanakkunnu Ward at about 4.15 p.m. on 14 - 11-2019 and with sexual intent touch the breast of PW1 at secluded place near Supplyco Super Market on 15/11/2019 and

thereby commit the offence punishable under sections 8 read with 7 of POCSO Act?

6. Did accused with sexual intent touch the vagina and breast of PW1 at the terrace in the house of accused in the year 2015 and with the sexual intent touch the hand and breast of PW1 at about 3.45 p.m. on 27/9/2019 near a pan shop adjacent to Dwaraka house, Kudappanakkunnu Ward and with sexual intent touch the breast of PW1 while she was standing in the queue in front of Supplyco Super Market, Kudappanakkunnu Ward at about 4.15 p.m. on 14-11-2019 and with sexual intent touch the breast of PW1 at secluded place near Supplyco Super Market on 15/11/2019 and commit aggravated sexual assault to PW1 more than once and thereby commit the offence punishable under sections 10 read with 9( l) of POCSO Act?
7. Did accused with sexual intent touch the vagina and breast of PW1 at the terrace of his house in the year 2005 when child victim was below 12 years and thereby commit the offence punishable under section 10 read with 9( m) of POCSO Act?
8. Did accused threaten PW1 to kill her if she discloses the sexual assault in the year 2015 and threaten PW1 that he would publish photos on 15-11-2019 and thereby commit the offence punishable under section 506 of Indian penal code?
9. Did accused kidnap PW1 at about 4.15 p.m. on 14/11/2019 from the lawful guardianship of her mother while she had come to Supplyco market, Kudappanakkunnu Ward and and kidnap PW1 at about 3.15 p.m. on 15-11 -2019 while she had come to Maveli store Peroorkada and thereby commit the offence punishable under section 363 of Indian Penal Code?

10. Did accused with sexual intent show media for pornographic purposes to PW 1 and follow PW1 constantly and thereby commit the offence punishable under section 12 read with 11(iii) and 11(iv) of POCSO Act?
11. In the event of conviction what is the proper sentence to be imposed on the accused?

**7.Points 1 to 10** : Since evidence to be discussed in points 1 to 10 are interconnected, these points are considered together. Prosecution allegation was that accused committed aggravated penetrative sexual assault and sexual assault to PW1 more than once and sexual harassment to her. Prosecution further alleged that accused kidnapped PW1 and committed criminal intimidation to her.

**8. PW1 to PW7, PW10 to PW12, PW19, PW25 and PW26** were examined by the prosecution to prove the incident and the complicity of the accused in the incidents alleged in this case. PW23 is the doctor who examined accused and issued Ext.P24 potency certificate. PW 24 is the doctor who examined PW1 and issued Ext.P25 medical certificate. PW9 prepared scene plans of the place of incidents in this case. PW8 issued Exts.P5 and P6 ownership certificates. PW14 and PW31 are attestors to Ext.P14 mahazer. PW15, PW16, PW17, PW18, PW20 and PW21 are attestors to Exts.P15, P16, P17, P18, P21 and P22 mahazers respectively. PW22 was the motor vehicle inspector who inspected the car involved in this case and issued Ext.P23 certificate. PW29 was the

Joint RTO who issued Ext. P26 RC particulars of the car involved in this case. PW30 is an attester to Ext.27 mahazer. PW27 recorded Ext.P1 first information statement of PW1. PW28 recorded additional statement of PW1. PW32 registered Ext.P28 FIR. PW33 conducted investigation and laid final report.

**9. The** fundamental aspect to be proved by the prosecution is the age of PW1 on the date of incidents in this case. As per the prosecution case, accused committed sexual assault and penetrative sexual assault in the year 2015. Prosecution further that accused committed penetrative sexual assault during election time in 2019, sexual assault on 29-9-2019 and on 14-11-2019 and sexual assault and penetrative sexual assault on 15-11-3019. As per the deposition of PW1 also, accused committed sexual assault and penetrative sexual assault in the year 2015. It could be seen from the deposition of PW1 that accused committed penetrative sexual assault during election time in 2019, sexual assault on 27-10 -2019 and penetrative sexual assault on 14-11-2019 and sexual assault on 15-11-2019. Dates of incident in the prosecution case tallied with the deposition of PW1 except for the incident on 27/9/2019. That date was stated by PW1 as 27/10/ 2019. But it is clear from the deposition of PW1 that the said incident happened in the year 2019. For determining the age of PW1, the said incident can be taken as having occurred in the year 2019. So it can be concluded from the deposition of PW1 that two incidents happened in the year 2015 and two incidents happened in the

year 2019 and two other incidents happened on 14-11-2019 and on 15-11-2019.

**10.Prosecution** produced Ext.P4 verified copy of secondary school leaving certificate of PW1, Ext.P20 copy of extract of admission register of PW1 and Ext.P39 extract of birth register of PW1 to prove the date of birth of PW1. It could be understood from the deposition of PW1 that PW1 produced original secondary school leaving certificate at the time of examination and Ext. P4 was accepted after comparing the same with the original. As per Ext. P4, date of birth of PW1 is 27/07/2006. Ext. P20 is not actually the exact extract of the admission register but it was in the form of the details of extract of admission register furnished by PW19 who was the headmistress of the school in a separate paper. Ext.P20 can only be considered as a statement given to the investigating officer by PW19. Hence it cannot be accepted in evidence in view of the bar under section 161 of Cr.PC. Ext.P39 extract of birth register was marked through PW33 who was the investigating officer. The officer who issued Ext.P39 was not examined by the prosecution. Hence the contents in Ext.P39 cannot be considered as proved. For that reason Ext.P39 also cannot be acted upon for proof of date of birth of PW1. On considering the documents produced by the prosecution to prove the date of birth of PW1, it can be concluded that Ext P4 can be accepted as proof of date of birth of PW1.

11. The Hon'ble Supreme Court in **P. Yuvaprakash v State represented by Inspector of Police (2023 KHC 6709)** 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. **As per the decision in P. Yuvaprakash v State represented by Inspector of Police** mentioned supra and section 94 of the J.J Act, Ext.P4 verified copy of SSL certificate of PW1 is an authoritative document to prove date of birth of child victim. Hence date of birth of PW 1 stated in Ext. P4 as 27-7-2006 can be accepted as her date of birth. It can be concluded from Ext.P4 that PW1 was 9 years in the year 2015 and 13 years in the year 2019 and on 14/11/2019 and on 15/11/2019. So it can be safely concluded that prosecution succeeded in proving that PW1 was a child on the date of incidents in this case.

12. **PW1** deposed that on a day at about 1.30 p.m. in the year 2015 when she was studying in 4th standard, she went to the terrace in the house of the accused to hide herself while she was playing hide and seek with her brother and at that time accused was feeding his pigeons and made him to sit on a chair in the terrace and inserted his hand through her skirt and touched her breast and the part through which she

passes urine. PW1 resisted and accused threatened her. PW1 stated that on another day in 2015 accused came to her house and sat on the steps and her mother asked him about why he was sitting there and accused came with her to the back side of her house when she had gone there to take soil for playing with her brother and lifted her skirt and put his part through which urine is passed on her part through which urine is passed and touched her breast. As per the deposition of PW 1, he did not state the incidents happened when she was in 4th standard due to fear. Moreover accused was a goonda in the locality and she did not know what was actually happened to her at that time. PW1 gave the above explanations as the explanation for not revealing the above incidents at that time.

**13.** PW1 stated that she met accused in the year 2019 after the incidents in 2015. According to PW1 on a day at about 7.30 p.m. in the month of April 2019 during an election time accused came to her house and she was playing in her neighbourhood with her brother at that time and accused came to that house also but nobody was in that house. Accused sent her brother to shop and took her to the back side of the that house and inserted penis into the mouth of PW1 and a white foam like substance came out of his penis. PW1 stated that thereafter in the year 2019 on a day at about 3.45 p.m, her brother, brother's friend and she were standing in front of a shop near a 'Palli' adjacent to her house on the way back home from school and accused who was standing in a

shop near that shop came near her and touched her breast and hand and her brother called 'Da' and accused fled from there. Thereafter on a day at about 4.45 p.m. in the year 2019, she met accused while she was proceeding to a shop and accused took her in his car and brought her to the back side of a shop and touched her breast and put her penis into her vagina. According to PW1 accused again attempted to take her into his car and at that time one uncle saw and he released her. On the next day on 15/11/201 at 3.45 p.m. her mother sent her to shop again and accused was standing behind her in the queue while she was standing in the queue to that shop and touched her breast. Thereafter accused came with a car and asked her to get into it and when she objected, accused threatened her that he had her photos in his hand and would show the same to all. Accordingly she got into the car and accused took her to Reliance Shop and demanded her to take dairy milk from that shop. Accused threatened her when she had resisted it. Accordingly she took dairy milk from that shop and 2 to 3 aunties in that shop noticed it and they enquired about it and she told her that she took chocolates under threat from a person and they dropped her at the house and those aunties in that shop informed her mother about the assault and threat of accused. Mother informed a local party person on 15th itself and he informed police, but police came 2 days thereafter. PW1 admitted to have given Ext.P1 first information statement to the police and Ext. P2 164 statement to Magistrate.



**14. PW3 who** is father of PW1 had only hearsay knowledge regarding the incidents. PW2 who is mother of PW1 deposed that she came to know of the incident from PW1 and informed her teacher and went to the house of the accused to question the same and at that time his mother told that accused was a good person and on the night of that day accused shouted from his house. PW2 further stated that PW1 went to Maveli Store near Peroorkada junction. During cross examination PW2 stated that on 14th PW1 went to the shop and informed her that accused assaulted her and on that day she went to the house of the accused to question the same. PW2 further stated in cross examination that on the next day ie. on 15th Reliance people brought PW1 home and informed her neighbour to tell her to come to Reliance with PW1. Accordingly she went there with PW1 and they informed her what was stated by PW1 to them. PW2 informed the local party person and he promised to inform the police and accordingly case was filed. PW2 stated that on 19/11/2019 she informed the school about the assault of accused to PW1. During re-examination PW2 stated that she could not remember whether she had sent PW 1 to Maveli Store on 14-11-2019.

**15. Defence side** challenged the evidence of PW1 regarding the incidents in the year 2015 mainly on the ground that it was not revealed by PW1 while giving Ext D1 first information statement. PW1 admitted that she filed a case against another person prior to this case. PW1 admitted Ext. D1 as the first information statement given by her in that

case. PW1 categorically admitted that she did not state the incidents in 2015 in this case in Ext.D1. Ext. D1 first information statement was seen given on 15-3-2016. PW1 stated that she did not state the incidents in 2015 in the present case in Ext. D1 1st information statement due to fear. The specific case of PW1 was that she could not reveal the incidents in 2015 due to fear. Ext.D1 was lodged actually with respect to some other person. The mere fact that Ext.D1 was given subsequently to the incidents in 2015 in this case and PW1 did not state the incidents in 2015 in this case in Ext. D1 is no ground to conclude that incidents stated by PW1 in 2015 did not happen. Hence non mentioning of the incidents in 2015 in this case in Ext.D1 cannot be considered as a ground to doubt the credibility of the evidence adduce by PW1 in respect of that incidents.

**16. Another** contention advanced by by the defence side with the respect to the incident of penetrative sexual assault in 2015 was based on the deposition of PW2. As per the deposition of PW1, on a day in 2015 accused came to her house and sat on the steps of her house and mother asked her why he was sitting there and came to the back side of her house and committed committed penetrative sexual assault on her. PW2 stated in cross examination that accused does not come to her house usually and one day he came to her house in search of his pigeons and she also joined in his search and accused returned without tracing out his pigeons. The above visit might have been the one visit of accused to

her house in the memory of PW2. The general answers of PW2 that accused was not a frequent visitor to her house and came one day in search of pigeons are no ground to discard the evidence of PW1 regarding the visit of accused to her house on a day in 2015 and commission of penetrative sexual assault at the back side of her house. The above mentioned general answers of PW2 during cross examination cannot be interpreted to assume that accused did not visit the house of PW1 in the year 2015 as stated by PW1.

**17. Defence** side relied upon the evidence of PW25 to contend that accused had no business of pigeon. Hence deposition of PW1 that accused was feeding his pigeons when she had entered the terrace of his house in the year 2015 can not be believed. Deposition of PW1 was that accused was feeding his pigeons when she had entered the terrace of the accused to hide herself in the midst of play and accused assaulted her. PW25 who is mother of accused deposed that accused was growing pigeons and stopped pigeon raising 11 years ago as her son developed allergy. PW25 was examined in the court on 26/ 5/2023. If the deposition of PW25 is taken as true, accused had pigeons only till 2012. PW12 who is the owner of an aquarium and pet shop in Ambalamukku stated that accused was raising pigeons and birds and would come to his shop to supply pigeons and birds. PW12 did not state how long accused have been growing pigeons and birds. PW25 who is mother of PW1 is not expected to adduce evidence against accused. Hence the deposition of

PW25 being highly interested that accused stopped pigeon business 11 years ago cannot be accepted as true. It is pertinent to know that whether accused was growing pigeon in the year 2015 or not is not the material question to be considered in this case. It is true that PW1 deposed that accused was feeding his pigeons when she had entered the terrace of his house. Nothing has been forthcoming from the cross examination of PW1 to discredit her evidence regarding the assault of accused to her at the terrace of his house on that day. Hence the mere fact that prosecution did not adduce evidence to prove that accused had pigeon business in the year 2015 is not a valid reason to reject the evidence of PW1.

**18. Defence** side attacked the deposition of PW1 that accused committed penetrative sexual assault to PW1 at the backside of a house in the neighbourhood during election time in April 2019 and sexual assault to PW1 near a shop in 2019 based on the deposition of PW2. PW2 stated that accused was not a frequenter in her house and came to her house once in search of pigeons. PW2 further stated that PW1 told her that accused assaulted her only once on 14-11-2019. According to PW2, PW1 told her that accused caught hold of her while she was drinking water from a shop and on that day she went to the house of accused to question it. It was already found with respect to the incidents in 2015 that the mere fact that PW2 could not state the visits of accused to her house on other occasion is no ground to reject the evidence of PW1. Similarly the evidence of PW2 that accused came to her house

during election time in 2019 cannot be doubted on the basis of the evidence of PW2. Nothing has been forthcoming from evidence of PW1 to discredit her evidence regarding commission of penetrative sexual assault at the back side of neighbour's house and sexual assault near a shop by accused. Hence the evidence of PW1 that accused was not a regular visitor in her house and came to her house once in search of pigeons and PW1 stated her that accused assaulted her only once on 14/11/2019 are no grounds to discard the evidence of PW1 regarding the other two incidents stated to have been occurred in the year 2019 prior to 14-11-2019.

**19. Prosecution** relied upon upon the evidence of PW4 and PW5 also to corroborate the evidence of PW1 regarding the incident in the year 2019 near a shop. PW4 who is brother of PW1 stated that PW1 was standing some distance away from the shop while he and his friend were drinking water from a shop on the way back home after attending Sports Day in the school. According to PW4 accused touched the body of PW1 that time and he called out 'da' and accused walked away. PW4 stated the time of that incident as 4.00 p.m. During cross examination PW4 stated that he actually witnessed accused touching the portion just below the shoulder of PW1 in back. The above deposition of PW4 was heavily relied upon by the defence side to contend that entire prosecution case was false. It is true that as per the deposition of PW4, he witnessed accused touching the body of PW1 just below the shoulder. But as per

the deposition of PW1, accused touched her breast and hand at that time. Since PW4 had no case that accused touched the body part which was stated by PW4, deposition of PW4 in that regard cannot be accepted. Nothing has been forthcoming from the cross examination of PW4 to doubt his evidence regarding the presence of the accused near the shop from where they had drunk water. Hence presence of accused on a day near the shop while PW1, PW4 and his friend were returning from school can be believed from the deposition of PW4. It is clear from the deposition of PW4 that PW1 was seen in the company of accused near the shop while they were drinking water from that shop. This actually lend support to the deposition of PW1 regarding the presence of accused near the shop room where the incident had happened. PW5 also stated that accused was standing near the shop while PW1, her brother and he were drinking water from that shop and PW1 told the incident to her. PW5 did not see the incident. But presence of accused near the shop room while PW1 and others were drinking water is proved from the deposition of PW5 also. On a combined analysis of the deposition of PW1, PW4 and PW5, it could be seen that accused was in the vicinity when they were drinking water from a shop. Deposition of PW1 made it clear that accused touched her breast and hand at that time. Nothing has been forthcoming from the cross examination of PW1 to discredit that version. Defence side challenged the deposition of PW1 on that score on the ground that the shop owner was not made as witness in this case and

PW4 did not attend school on that day. PW33 deposed that as per investigation conducted by him, PW 4 was not present in the school on the Sports Day, but he came to know that he was present in the shop. It is evident from the deposition of PW5 that PW1 and PW4 were present in the shop from where they had drunk water. Hence the deposition of PW33 that PW4 did not attend the school on that day do not cast doubt on the presence of PW4 near the shop where the incident was stated to have happened. PW33 explained that he interrogated Babu who was the owner of that shop but he did not witness the incident as he was engaged in the shop. Hence he was not made as a witness. There was sufficient explanation from PW34 for not citing the shop owner as a witness in this case. Moreover presence of PW1 and PW4 in the shop room were proved from the deposition of PW5 who was was the independent witness. Hence this court found any reason to discard the evidence adduced by PW1 in respect of the incident near the shop room and the evidence of PW4 and PW5 regarding the presence of accused near the shop room on that day.

**20. Another** important aspect to be considered is whether difference in the date of incident pertaining to the incident near the shop stated by PW1 as against the prosecution case would affect the credibility of the evidence adduced by PW1. As per the prosecution case, the incident near the pan shop occurred on 27-9-2019. PW1 mentioned that date as one day in the year 2019 on the date of her initial examination

before the court. On that day, PW1 was bound over for examination to some other day. On the next date of examination PW1 stated the date of incident after the incident during election time in 2019 as 27/10/2019. It is evident from the deposition of PW1, PW4 and PW5 that the incident stated to have been happened near a shop cannot be rejected as false. This Court is mindful of the ordeal of PW1 in narrating the several incidents of assault suffered by her. Deposition of PW1 clearly proved that the incident near the shop occurred in the year 2019 after the incident during election time in 2019. So the variance in date of incident stated by PW1 cannot be considered as a circumstance to throw her evidence overboard. Considering the several incidents which PW1 had to depose before the court, the variance in the date of incident near the shop stated by PW1 from the prosecution case is liable to be discarded.

**21. As per** the deposition of PW1 before the court, he met accused at about 4.45 p.m. on a day in 2019 while she was proceeding to a shop after the incident near the shop and accused took her in a car to the back side of the shop and touched her breast and put his penis into her vagina. PW1 stated that on the next day her i.e. on 15/11/2019, her mother again sent her to shop at about 3.45 p.m. and accused who was standing in the queue of the same shop behind her touched her breast and took her in a car threatening that he would publish her photos with him and reached Reliance Shop and demanded her to take chocolate from there and she took chocolates from there under threat from accused



and was caught by some persons in the shop and she told them that she took chocolates under threat from a person. On scrutinizing the above deposition of PW1, it is crystal clear that the sequence of above incidents narrated by PW1 did not tally with the prosecution case. As per the prosecution case, on 14/11/2019, at about 4.15 p.m, accused who was standing in the queue to Supplyco Supermarket behind PW1 touched her breast and took her in a car and on 15/11/201 at about 3.15 pm, accused touched the breast of PW1 and took her to a secluded place near a building under construction adjacent to Supplyco Supermarket and touched her breast and inserted his penis into her mouth and put her penis into her vagina. It is pertinent to note that PW1 stated incident of penetrative sexual assault and sexual assault on 15/11/2019 in the prosecution case as having happened on 14/11/2019 and the incident of sexual assault on 14/11/2019 in the prosecution case as having happened on 15/11/2019. The above discrepancy in the deposition of PW1 can be considered as a major defect to discredit the entire deposition of PW1 is the pivotal question to be considered. It could be understood from the deposition of PW1 that she erred in stating the sequence of incidents happened on two days that is on 14/11/2019 and on 15/11/2019. On scrutinizing the deposition of PW1 it is evident that the above mistake happened when she deposed the last two incident at the last last portion of her chief examination. PW1 had to depose 6 incidents in this case out of which four incidents pertain to the year 2019. Nothing has been

forthcoming from the cross examination of PW1 to doubt her evidence regarding the offending acts of accused. Hence the error in the sequence of incidents with respect to the incident on 14/11/2019 and 15/11/2019 in the deposition of PW1 can only be considered as a latent human error committed by her while narrating several incidents of sexual assault to her. On the basis of the error in the sequence of events stated by PW1 pertaining to the incident on 14/11/2019 and 15/11/ 2019, deposition of PW1 with respect to the above incidents cannot be rejected in evidence. It can be concluded from the deposition of PW1 that accused touched her breast on one day and again touched her breast and put his penis into her vagina on another day among two dates of 14/11/2019 and 15/11/2019.

**22. Deposition** of PW1 that she had to take chocolates from Reliance Shop under threat from accused after the assault on 15/11/2019 was corroborated by the evidence of PW6 and PW7. PW6 who was the lady security in Reliance Fresh Peroorkada deposed that on 15/11/2019 in between 3.45 pm to 4 pm five Dairy Milk chocolates were found in the bag of a child and on questioning that child told that one 'Chettan' sent her to take chocolate and that Chettan had her videos and took her to many places and he was outside the shop. PW6 could not find anybody outside the shop when they had looked outside the shop room. PW 6 and others took the child to the school but school functioned half day only that day and took her to her house but parents were not there and they contacted father from the phone of a neighbour and father

promised to come and thereafter parents and child came to the shop and they told the incident to mother and mother agreed to lodge complaint. PW7 who was a staff in the Reliance store also reiterated the version of PW6. According to PW7, PW1 told that Chettan would assault her if she did not take chocolate and assaulted her many times. PW2 also deposed the visit to Reliance store after PW1 was dropped in the house by Reliance people. The specific defence of the accused was that PW1 created a false story to escape from the incident of theft in Reliance Store. It is evident from the deposition of PW6 and PW7 that PW1 took chocolate from their store and confessed to have taken it under threat from a chettan at that time itself and told that Chettan took her to many places. The above deposition of PW6 and PW7 corroborated deposition of PW1 regarding what had happened after accused committed sexual assault on her on 15/11/2019. PW1 stated to have taken chocolate under threat from a Chettan to PW6 and PW7 immediately after she was caught by the Reliance people. Thereafter mother of PW1 visited Reliance store and got information as to what was stated by PW1 to them and took initiative to set the criminal law in motion. If it is a totally false case created by PW1 to escape from the stealing incident in Reliance store, there is no explanation forthcoming as to why accused was specifically named as the perpetrator of 6 incidents of sexual assault suffered by her. No evidence has been forthcoming to prove that PW1 and their family had any enmity towards accused. So it cannot be

concluded that accused was dragged falsely in to this case. The incident at Reliance store stated by PW1 and corroborated by the deposition of PW6 and PW7 also supported the version of PW1 regarding the involvement of accused in the incident on 15/11/2019.

23. Defence side challenged the evidence of PW1 regarding the incident on 14/11/2019 and 15/11/2019 on the ground of absence of independent witnesses and of the failure of the prosecution to produce CCTV footages to prove the complexity of accused in that incidents. As per the deposition of PW1, 10 to 25 persons were in the queue when the incident had happened and nobody in the queue witnessed the incident and she did not reveal the incident to anybody in the queue. It is well evident from the deposition of PW1 that accused committed the offending act without the other persons in the queue witnessing it. Moreover PW33 also deposed that he interrogated the staff in that shop and they stated that they did not see the incident. Hence the absence of independent evidence to prove the incident while PW1 and accused were standing in the queue to a shop cannot be considered as a valid ground to reject the evidence of PW1. As per the deposition of PW6, there was CCTV inside the Reliance Shop room and front of that shop room was not covered in the CCTV. According to PW6, CCTV in the hotel in front of the Reliance store have coverage up to the front of Reliance store. PW6 stated that police inspected the CCTV in the hotel. PW33 deposed that there was no CCTV in the shop where the incident of sexual assault

had happened and CCTV in Peroorkada junction was not functioning at that time and there was no CCTV from the house of PW1 to Reliance store. PW33 deposed that he checked CCTV footage in the hotel in front of Reliance store but it was not covered up to the front of the Reliance store and entire road road portion was not visible in it. PW33 sufficiently explained the inability to produce CCTV footage to prove the complicity of the accused in the incident on 14/11/2019 and on 15/11/2019. Accused did not adduce any evidence to prove that the places of incident stated by PW1 were under CCTV surveillance. In these circumstances it cannot be accepted that PW33 suppressed CCTV footage in this case to implicate accused falsely in this case.

**24. PW33** deposed that he seized MO1 and MO2 phones used by accused as per Ext.P18 mahazar and produced the same before the court as per Ext.P36 property list. As per the deposition of PW 3, PW26 who is wife of accused produced MO1 and MO2 mobile phones before him. PW11 who was the state nodal officer of Reliance Jio infocom produced Ext.P11 customer application form of mobile No.8921391646 and Ext.P12 CDR of that mobile number from 22/6/2019 and 19/11/2019. As per the deposition of PW11 and Ext.P11, the above stated mobile connection was issued to accused in this case. Deposition of PW 11 and Ext.P12(a) entry in Ext.P12 show that there was a call from the mobile number of accused to number 9207179400 at time 16:20:04 on 14-11-2019. PW11 stated that at the time of above said call,

the mobile connection was under the tower location Kudappanakkunnu. Exact location of that mobile number of accused on 14/11/2019 was not stated by PW11. The above tower location of mobile number of accused in Ext.P12(a) was also relied upon by the prosecution to prove the presence of accused in the place of incident on 14/11/2019. As per the prosecution case, the incident on 14/11/2019 occurred while PW1 was standing in the queue of Supplyco Supermarket, Kudappanakkunnu. Since exact location of mobile number of accused within the Kudappanakkunnu tower location was not stated by PW11 and not shown in Ext.P12(a), deposition of PW11 and Ext.P12(a) cannot be acted upon to conclude that accused was present in the place of incident stated by PW1 on 14/11/2019.

**25. As per the** prosecution case, accused kidnapped PW1 on 14/11/2019 and on 15/11/2019 in his Mauti car bearing registration No.KL-01-7779. PW26 deposed that the above car was in her ownership. As per Ext.P26 RC particular issued by PW29, PW26 was the owner of above mentioned car. PW1 did not state the number of the car by which she was taken to a place behind the shop by accused. PW6 deposed in cross examination that PW1 told that accused took her to the Reliance store by bike. But during re-examination PW 6 stated that she remembered that PW1 stated so. The specific case of PW1 was that accused took her to a car and then brought her to a place behind a shop and then to Reliance store. Hence deposition of PW 6 cannot be relied

upon to conclude that car was not involved in the incident stated by PW1. PW1 stated to have got into the car of PW1 under threat. In that mental state, PW1 might not note the number of that car. It is evident from the deposition of PW1 that accused took her in a car. There is nothing to discredit that version of PW1. Hence the absence of car number in the deposition of PW1 cannot be considered as a reason to reject the evidence of PW1.

**26. Defence side** attacked evidence of PW1 on the ground that Ext.P3 complaint given by PW1 did not mention the entire incidents stated by PW1 before the court. Exhibit P3 was actually the complaint given by PW1 to PW19 on 19/11/2019 after lodging Ext.P1. PW1 deposed that she mentioned the incident on 15/11/2019 in Ext.P3. Since Ext.P3 was given by PW1 to PW19 after the lodging of Ext.P1 in this case, the non mentioning of the entire incidents stated by PW1 in Ext. P3 cannot be considered as a valid circumstance to reject the evidence of PW1 before the court.

**27. The delay** in lodging Ext.P1 was also canvassed by the defence side to substantiate their contention regarding the falsity of the prosecution case. Deposition of PW1 made it clear that she did not reveal the incidents in 2015 due to fear as accused was an intimidating figure there. PW1 did not state the incidents in 2019 also to her mother due to fear. The fact that PW1 was scared of accused was corroborated from the evidence of PW 10 also. PW10 stated that PW1 came running to her

house stating that she was scared of accused at about 10.00 a.m. on a day in the year 2019 when a program was being held in a ground adjacent to her house. According to PW10, she took PW1 to her friend's house and they advised PW1 to inform her home and dropped her in her house. Later PW1 came to attend the program and told her that she did not inform home. The above incident stated by PW 10 supported the version of PW1 that she could not reveal the incident due to fear of accused. It can be concluded from the deposition of PW1 and PW10 that PW1 could not reveal the incidents immediately after the occurrence of the same due to fear of accused. It is further evident from the deposition of PW 1 and PW2 that PW2 became aware of the assault of accused to PW1 on 15/11/2019. Deposition of PW 1 and PW 2 revealed that PW2 informed the incident to a local party person on 15/12/ 2019 and he promised to inform the police and police came after 2 days and the statement of PW 1 was recorded. Ext.P1 first information statement was seen recorded on 18/11/2019. So it could be seen that there was delay of 3 days in lodging Ext. P1 first information statement after the incidents came to light. Delay in lodging Ext. P1 first information statement in sexual assault cases is to be considered in a different angle for the reason that there is an inherent bashfulness to reveal those incidents.

**28. The Hon'ble Supreme Court in State of Punjab v. Gurmit Singh and Others (1996 KHC 711) and State of Maharashtra v. Chandraprakash Kewalchand Jain (1990 KHC 737) observed that “**



In sexual offences, delay in lodging the FIR can be due to a variety of reasons particularly the reluctance of the prosecutrix or her family members to go to the police and complain about the incident which concerns the reputation of the prosecutrix and the honour of her family. It is only after giving it a cool thought that a complaint of sexual offence is generally lodged. A girl in a tradition bound non-permissive society in India would be extremely reluctant even to admit that any incident which is likely to reflect upon her chastity had occurred, being conscious of the danger of being ostracized by the society or being looked down by the society. In the normal course of human conduct an unmarried minor girl would not like to give publicity to the traumatic experience she had undergone and would feel terribly embarrassed in relation to the incident to narrate it to others overpowered by a feeling of shame and her natural inclination would be to avoid talking about it to any one, lest the family name and honour is brought into controversy. The Courts must while evaluating evidence, remain alive to the fact that a case of rape, no self respecting woman would come forward in a Court just to make a humiliating statement against her honour such as is involved in the commission of rape on her. In cases involving sexual molestation, supposed considerations which have no material effect on the veracity of the prosecution case or even discrepancies in the statement of the prosecutrix should not, unless the discrepancies are such as are of fatal nature, be allowed to throw out an otherwise reliable prosecution case.

The inherent bashfulness of the females and the tendency to conceal outrage of sexual aggression are factors which the Courts should not overlook. The testimony of the victim in such cases is vital and unless there are compelling reasons which necessitate looking for corroboration of her statement, the Courts should find no difficulty to act on the testimony of a victim of sexual assault alone to convict an accused where her testimony inspires confidence and is found to be reliable. Seeking corroboration of her statement before relying upon the same, as a rule, in such cases amounts to adding insult to injury. If the totality of the circumstances appearing on the record of the case disclose that the prosecutrix does not have a strong motive to falsely involve the person charged, the Court should ordinarily have no hesitation in accepting her evidence”.

**29. Deposition** of PW1, PW2 proved that they sought the help of a local party person to set the criminal law in motion and waited for the arrival of the police as promised by that person. Police came after 2 days and recorded this statement of PW1 on 18/11/2019. Delay in lodging first information statement assume paramount importance when there is enmity between victim and perpetrator. No such enmity was proved in this case. No circumstances has been forth coming to prove the case of false implication of accused also in this case. Deposition of PW1 and PW2 clearly revealed that Ext.P1 first information statement was lodged after a cool thought and discussion with a local party person.

No evidence was brought about to doubt the testimony of PW1 regarding the penetrative sexual assault and sexual assault committed on her by accused. In these circumstances, it can be concluded that 3 days delay in lodging Ext.P1 first information statement occurred due to the reasons stated by PW1 and PW2 and the said delay do not affect the credibility of the case advanced by the prosecution.

**30. On evaluating** the deposition of PW1 in the light of other evidence adduced by the prosecution and of the contentions of the accused, it could be seen that accused was not able to bring forth any circumstances casting doubt on the incidents of sexual assault and penetrative sexual assault stated by PW1. PW1 remained consistent in respect of the sexual assault and penetrative sexual assault suffered by her from accused even though she was subjected to thorough cross examination. Nothing could be found to discredit the evidence by PW1 regarding 6 incidents of sexual assault suffered by her from accused. Hence deposition of PW1 can be accepted as convincing and reliable.

**31. It is evident** from the deposition of PW1 that accused inserted his penis into the mouth of PW1 at the back side of her house in the year 2015 and put his penis into her vagina on two occasions in the year 2019. As per the deposition of PW1, the above two incidents in the year 2019 occurred at the back side of the house of a neighbour and at a place behind a shop. The important aspect to be considered is whether deposition of PW1 that accused put his penis into her part through which

she passes urine on two occasions in the year 2019 can be considered as a penetrative sexual assault within the meaning of section 3 of POCSO Act. It is worthwhile to note the decision in **Ramesh v. State of Kerala, 2020 (3 KHC) 560** wherein a similar question was considered by the Honorable High Court. In that case the evidence of victim was that accused put his penis into her vagina. The Hon'ble High Court in Ramesh's case held that although scope of the offence of rape has been substantially enlarged in terms of Act 13 of 2013, penile penetration to any extent into vagina is still retained within scope of the offence of rape. Explanation to the amended definition in addition clarifies that for the purposes of the section, vagina shall also include labia majora, indicating clearly that even the slightest penetration into vulva or labia majora would constitute rape and penile vaginal entry namely actual passing of penis into the vagina is not essential to constitute rape. The Hon'ble High Court further held that although definition of 'penetrative sexual assault' does not have an explanation for the word 'vagina' as contained in Explanation 1 to S.375 of the IPC, as amended in terms of Act 13 of 2013, the said explanation can be read into the POCSO Act in the light of section 2 (2) of that Act. The Hon'ble High Court held that even in the absence of a provision in the POCSO Act the word vagina contained in section 3 of the POCSO Act defining penetrative sexual assault has to be understood in the manner in which the word is understood in the context of the offence of rape under the IPC, or otherwise it would appear that

penile vaginal entry is required for making out a case of penetrative sexual assault, while the same is not required for making out a case of rape. Such an interpretation would certainly go against the object of the POCSO Act, viz, to secure tender aged children from sexual abuses of all kinds. In other words, penetration of male genital organ within the labia majora or the vulva with or without any emission of semen or even an attempted penetration into the private part of the victim completely, partially or slightly would make out the offence of penetrative sexual assault under the POCSO Act as well. Based on the above reasoning the Hon'ble High Court held the placing of male genital organ at the external genitalia of victim girl as penetrative sexual assault.

**32. In the present** case also evidence was adduced by PW1 to the effect that accused put his penis into her external genitalia on two occasions. In view of the above decision in **Ramesh's case** mentioned supra , the act of the accused placing his penis into the external genitalia of PW1 can be considered as penetrative sexual assault. As per the deposition of PW24 who conducted potency examination of accused and issued Ext. P24 potency certificate, there was nothing to suggest that in accused was in capable of performing the sexual act. So it can be concluded that accused inserted his penis into the mouth of PW1 on one occasion and put his penis into the external genitalia of PW1 on two other occasions and committed penetrative sexual assault to PW1 on three occasions.

33. PW24 who examined PW1 on 18 /11/ 2019 and issued Ext.25 medical certificate deposed that hymen of PW1 was intact. The non rupturing of the hymen of PW1 deposed by PW24 would affect the case of penetrative sexual assault canvassed by the prosecution is the important question to be considered in this case. In **Mohammed v. State of Kerala (1987 KHC 525)** the Hon'ble High Court held that "it is true that there is a distinction between vulval penetration and vaginal penetration. Vulva is the external female genitalia. Labia Majors is outer fold of the skin of the external female genitalia. Vagina is the passage leading from the uterus to the vulva. In the eye of law vulval penetration with or without violence is as much rape as vaginal penetration. It is not necessary that hymen should be ruptured in every case. Hymen is the virginal membrane which is a fold of mucous membrane partially closing the external orifice of the vagina in a virgin. That need be ruptured only if penetration went beyond the vulva to the vagina. Rupture is not a must. To constitute penetration, it is enough to prove that same part of the virile member of the accused was within the labia of the pudendum of the woman, no matter how little. Vulval penetration is sufficient under the law in India to constitute rape. Injury to the private parts itself is not a must in all cases. No marks of blood or semen is necessary. In girls under the age of 14, the vaginal orifice is usually so small that it would hardly allow the passage of the little finger, and passage of the penis is rather difficult. This aspect has also to

be taken into account. When partial penetration of the penis within the labia majora of the vulva or pudendum with or without emission of semen is quite sufficient for the purpose of law, the absence of rupture of hymen, absence of semen or absence of injury to the vagina cannot be taken as circumstances to find that there was no rape but only an attempt to commit rape''. Same view was taken by the Hon'ble Supreme Court in **Wahid Khan v. State of Madhya Pradesh (2010 KHC 6059)**. In view of the above cited decisions, it cannot be contended that non-rupturing of hymen is an indication of absence of penetration. **Moreover** putting of penis into the external genital of victim is a penetrative sexual assault as per the decision in **Ramesh v. State of Kerala** mentioned supra. Hence non rupturing of hymen of PW1 is not a reason to rule out the occurrence of penetrative sexual assault stated by PW1. It can be concluded from the deposition of PW1 that accused subjected PW1 to penetrative sexual assault on 3 occasions and thereby commit the offence punishable under section 6 read with 5 (I) of POCSO Act.

**34. Deposition** of PW1 made it clear that accused subjected PW1 to penetrative sexual assault on one occasion in the year 2015. PW1 was aged only 9 years in 2015. So it can be concluded that prosecution succeeded in proving that accused subjected PW1 to penetrative sexual assault while she was 9 years in the year 2015 and thereby committed the Offence punishable under sections 6 read 5( m) of POCSO Act.

**35.**It is to be noted that my predecessor in office framed the charge for the offence under section 376 AB of Indian Penal Code against the accused. The incident of penetrative sexual assault was occurred to PW1 when she was 9 years of age in the year 2015. Section 376 AB of the Indian Penal Code was brought to statute book only on 21-4-2018. Hence accused cannot be charged for the offence under section 376 AB of Indian Penal Code in respect of an incident which had happened in the year 2015. It can be concluded that the offence under section 376 AB of Indian Penal Code will not lie against the accused in this case.

**36. Deposition** of PW1 proved that accused touched her breast and vagina in the year 2015 and touched her breast and hand in the year 2019 and again touched her breast on two days ie.14/11/2019 and 15/11/2019. It could be understood from the deposition of PW 1 that accused committed assault to PW1 on four occasions mentioned above. it is evident from the decisions 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**, 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 acts. Prosecution



succeeded in proving that PW1 was a minor at the time of incidents and accused touched breasts, vagina and hand of PW1 on four times. Hence it can be safely concluded with the aid of section 30 of POCSO Act and from the nature of the acts committed by accused that accused touched breasts, vagina and hand of PW1 more than once with sexual intent. Accused failed to rebut the prescription drawn by this court in respect of the culpable mental state of the accused while committing sexual assault on PW 1 on four times. Prosecution succeeded in proving that accused committed aggravated sexual assault on PW1 more than once. Prosecution succeeded in proving that accused committed the offence punishable under sections 10 read with 9(l) of POCSO Act.

**37. It is evident** from the deposition of PW1 that accused touched the vagina and breast of PW1 in the year 2015. Prosecution succeeded in proving that PW1 was aged in 9 years at that time. Hence it can be concluded from the evidence adduced by the prosecution that accused committed the offence punishable under section 10 read with 9(m) of Protection of Children from Sexual Offences Act.

**38. Deposition** of PW1 revealed that accused took her in a car on a day in November 2019 and brought her to a place behind a shop room for committing penetrative sexual assault and committed sexual assault and penetrative sexual assault to her and took her to Reliance Shop under threat. Deposition of PW1 made it clear that accused kidnapped the PW1 in a car for that purpose when her mother had sent

her to a shop. So it can be concluded that accused kidnapped PW1 from the lawful guardian ship of her mother. Prosecution succeeded in proving that accused committed the offence punishable under section 363 of Indian Penal Code.

**39.Prosecution** alleged that accused threatened to kill PW1 if she discloses the incident in 2015. PW1 deposed that accused threatened her with respect to that incident. But there was nothing in the deposition of PW1 to prove that accused caused fear of death to her and fear of any injury to her person and reputation in respect of the incident in 2015. So it can be stated that prosecution failed to prove that accused caused the fear of death to PW1 in respect of the incident in 2015. It is proved from the deposition of PW1 that accused threatened to show her photos to others and brought her to Reliance shop and directed her to steal chocolate from that shop and PW1 took chocolates under that fear. PW1 explained that accused did not show any photo to her but she was under the impression that accused had the photo of her assault in his possession. So it could be inferred from the deposition of PW1 that accused actually threatened to cause injury to the reputation of PW1 by publishing the photos in his hand and thereby caused PW1 to commit theft of chocolates from Reliance shop which she was not legally bound to do. Deposition of PW1 revealed that the above act of the accused come under the ambit of criminal intimidation in section 503 of Indian

Penal Code. So accused can be held liable for committing the offence under section 506 of Indian Penal Code

**40. Prosecution** alleged that accused committed the offence punishable under sections 12 read with 11(iii) and 11(iv) of POCSO Act by showing media for pornography to PW1 and by following her constantly with the sexual intent. No evidence was adduced by PW1 to prove that accused showed any pornographic materials to her and followed her constantly. It can be concluded that prosecution failed to prove that accused committed the offence under sections 12 read with the 11(I) and 11( iv) of POCSO Act. Points 1, 2 and 4 to 9 found in favour of the prosecution. Points No.3 and 10 found against the prosecution.

**41.Point No.11:** In view of the finding on point number 3 and 10, accused is not guilty of the offences punishable under section 376 AB of Indian penal code and sections 12 read with the 11(iii) and 11 (iv) of Protection of Children from Sexual Offences Act. Hence accused is acquitted under 235(1) of Cr.PC for the offences punishable under section 376 AB of Indian Penal Code and sections 12 read with 11(iii) and 11(iv) Protection of Children from Sexual Offences Act.

**42.In view of** the finding on points 1, 2 and 4 to 9, accused is found guilty of the offences punishable under sections 4 read 3(a), 6 read with 5(l), 6 read with 5(m),10 read with 9(l), 8 read with 7, 10 read with 9(m) of Protection Children from Sexual Offences Act and sections 506 and 363 of Indian Penal Code. Hence accused is convicted under section

235(1) Criminal Procedure Code for the offences punishable under sections 6 read with 5(l), 6 read with 5(m), 10 read with 9(l), 10 read with 9(m) of Protection Children from Sexual Offences Act and sections 506 and 363 of Indian Penal Code.

**43.Considering** the gravity of the offence committed by accused several times on PW1 who was a 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.

**44.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 **31<sup>st</sup> day of August, 2024.**

REKHA.R  
SPECIAL JUDGE.

**45.Accused** was heard on the question of sentence under section 235(2) of Cr.PC. Accused submitted that he was innocent. Accused is aged 41 years. His family comprises wife, son and mother. His son is aged 11 years and studying in 6<sup>th</sup> standard. Wife of accused has no job. Accused was not working anywhere permanently after this case to appear before the court regularly. Accused who is a driver works for his family

friends only at present. The learned Special Public Prosecutor prayed for maximum punishment to the accused. Plea of innocence raised by the accused is not a relevant consideration at this stage. 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. 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 punishments. Submissions of accused during the hearing on sentence are not mitigating factors. Considering the gravity of the offences committed by the accused, adequate punishment should be handed out to the accused to prevent recurrence of similar offences and to give a strong message to the society. Invoking 71 of Indian Penal Code, no separate sentences are imposed for the offences punishable under sections 4 read with 3 (a) and 8 read with 7 of Protection of the Children from Sexual Offences Act.

**46. In the result,**

Accused is sentenced to undergo **rigorous imprisonment for a period of 50 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 **6 months** for the offence punishable under section **6 read with section 5(l)** of Protection of Children from Sexual Offences Act, 2012 and to undergo **rigorous imprisonment for 20 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 **6 months** for the offence punishable under section 6 read with 5(m) of Protection of Children from Sexual Offences Act and to undergo rigorous imprisonment for **7 years** and to pay a fine of **Rs.10,000/-** (Rupees Ten thousand) 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 9(l) of Protection of Children from Sexual Offences Act and to undergo rigorous imprisonment for **7 years** and to pay a fine of **Rs.10,000/-** (Rupees Ten 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 9(m) of Protection of Children from Sexual Offences Act and to undergo **rigorous imprisonment for One year** for the offence punishable under section 506 of Indian Penal Code and **rigorous imprisonment for One year** and to pay fine of **Rs.5000/-** (Five Thousand) and in default of payment of fine to undergo rigorous imprisonment for a for a further period **2 months** for the offence punishable under section 363 of Indian Penal Code. Substantive sentences shall run concurrently.

**47. 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.

**48. Accused** has been in judicial custody for the period from 19/11/2019 till 20/02/2020. Accused is entitled to get set off for 3 months and 9 days against the substantive term of imprisonment.

**49. MO1 and MO2 being valueless and** reported as physically damaged and could not be power on as per FSL report shall be destroyed after the appeal period or after the disposal of appeal if appeal is filed.

**50. 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.

(Dictated to the Confidential Assistant, transcribed and typed by her, corrected by me and pronounced in the Open Court on this the **31<sup>st</sup> day of August, 2024.**

REKHA.R  
SPECIAL JUDGE.

### Appendix

#### Prosecution witnesses

PW1. 24/04/2023	Child victim
PW2. 25/04/2023	Mother of child victim
PW3. 25/04/2023	Father of child victim
PW4. 25/04/2023	Brother of child victim
PW5. 25/04/2023	Shemeer, neighbour of victim

PW6. 26/04/2023	Resmi.V.I, Lady Security of Reliance Fresh Peroorkada.
PW7.26/04/2023	Prameela.Y.E, Staff of Reliance Fresh Peroorkada
PW8. 02/05/2023	Kumari Viji.R Charge Officer Kudappanakunnu Zonal Office Thiruvananthapuram Corporation.
PW9. 03/05/2023	Lal.R.S, Village Officer, Kudappanakunnu
PW10.03/05/2023	Praveena.S.Pramodan, Witness
PW11. 09/05/2023	Aji Shankar, State Nodal Officer of Reliance Jio Infocom.
PW12. 09/05/2023	T.R.Dennis, Witness
PW13. 09/05/2023	Bijukumar.B, Scene mahazer witness
PW14. 09/05/2023	Joy, Scene mahazer witness
PW15. 09/05/2023	Raju.J, mahazer witness
PW16. 12/05/2023	Shaji.R, Scene mahazer witness
PW17. 12/05/2023	Jose.S.P, Car mahazer witness
PW18. 12/05/2023	Harshakumar, ASI, Peroorkada Police Station & Phone mahazer witness
PW19. 12/05/2023	Shylaja.S, Headmistress
PW20. 18/05/2023	Arun.S.O, Scene mahazer witness
PW21. 18/05/2023	Surendran.R, Office Attendant of PSNM Govt. HSS.
PW22.25/05/2023	Arun Kuamr.K, Motor Vehicle Inspector RTO, Thiruvananthapuram.
PW23. 26/05/2023	Dr.Kalyani.S.Nair, Casualty Medical Officer General Hospital, Thiruvananthapuram.
PW24. 26/05/2023	Dr.Anupama.V.T, Junior Consultant Gynecology at District Model Hospital Peroorkada.
PW25. 26/05/2023	Kumari, Mother of accused
PW26. 26/05/2023	Thankamani.T.T, Wife of accused
PW27. 26/05/2023	Kala Kairaly.S.R, Sub Inspector of Police



PW28. 29/05/2023	Vanitha Police Station. Minu.J.J, Civil Police Officer Peroorkada Police Station.
PW29. 22/06/2023	Joy.R, RTO, Thiruvananthapuram.
PW30. 22/06/2023	Shabu, Scene mahazer witness
PW31. 22/06/2023	Bhaskara Pilla, Scene mahazer witness
PW32. 03/07/2023	Sanju Joseph, Sub Inspector of Police Peroorkada Police Station.
PW33. 21/11/2023	V.Saijunath, Inspector of Police Peroorkada Police Station.

**Prosecution Exhibits :-**

P1.18/11/2019	First Information Statement proved by PW1 on 24/04/2023.
P2. 18/11/2019	164 statement proved by PW1 on 24/04/2023.
P3. 19/11/2019	Written complaint proved by PW1 on 24/04/2023.
P4. 25/04/2023	Verified copy of SSLC book proved by PW1 on 24/04/2023.
P5. 17/12/2019	Ownership certificate proved by PW8 on 02/05/2023.
P6. 30/11/2019	Ownership certificate (TC.19/2812) proved by PW8 on 02/05/2023.
P7. 28/01/2020	Scene plan proved by PW9 on 03/05/2023.
P8. 28/01/2020	Scene plan proved by PW9 on 03/05/2023.
P9. 17/01/2020	Scene plan proved by PW9 on 03/05/2023.
P10. 17/01/2020	Scene plan proved by PW9 on 03/05/2023.
P11.21/04/2017	Customer Application form(Jio) proved by PW11 on 09/05/2023.
P12. 07/07/2020	CDR of accused proved by PW11 on 09/05/2023.
P12(a) 14/11/2019	Exact location latitude – longitude proved by PW11 on 09/05/2023.
P13. 19/11/2019	Scene mahazer proved by PW13 on 09/05/2023.
P14. 07/12/2019	Scene mahazer proved by PW14 on 09/05/2023.
P15. 19/11/2019	Scene mahazer proved by PW15 on 09/05/2023.

- P16. 06/12/2019 Scene mahazer proved by PW16 on 12/05/2023.  
P17.06/12/2019 Mahazer (car bearing No.KL01-J-7779) proved by PW17 on 12/05/2023.
- P18. 19/11/2019 Mahazer (Mobile phone of accused) proved by PW18 on 12/05/2023.
- P19. Nil Letter along with complaint of victim proved by PW19 on 12/05/2023.
- P20. 30/12/2019 Extract of Admission register of victim proved by PW19 on 12/05/2023.
- P21. 19/11/2019 Scene mahazer proved by PW20 on 18/05/2023.  
P22. 28/11/2019 Mahazer (Letter to HM) proved by PW21 on 18/05/2023.
- P23. 06/12/2019 Inspection Report (Maruti Zen Car bearing No.KL01-J-7779) proved by PW22 on 25/05/2023.
- P24. 19/11/2019 Potency certificate of accused proved by PW23 on 26/05/2023.
- P25. 18/11/2019 Medical examination certificate of victim proved by PW24 on 26/05/2023.
- P26. 29/11/2019 RC particulars of vehicle No. No.KL01-J-7779 proved by PW29 on 22/06/2023.
- P27. 06/12/2019 Scene mahazer proved by PW33 on 21/11/2023.
- P28. 18/11/2019 First Information Report proved by PW32 on 03/07/2023.
- P29. 19/11/2019 Arrest memo of accused proved by PW33 on 21/11/2023.
- P30. 19/11/2019 Inspection memo proved by PW33 on 21/11/2023.
- P31. 19/11/2019 Arrest intimation proved by PW33 on 21/11/2023.
- P32. 20/11/2019 Address report of accused proved by PW33 on 21/11/2023.
- P33. 13/01/2020 Report (section added) proved by PW33

- on 21/11/2023.
- P34. 11/01/2020 Mahazer (colour photo of victim) proved by PW33 on 21/11/2023.
- P35.11/02/2020 Forwarding Note (mobile phone and photo) proved by PW33 on 21/11/2023.
- P36.19/11/2019 Property list (mobile phones of accused) proved by PW33 on 21/11/2023.
- P37. 06/12/2019 Property list (car of accused) proved by PW33 on 21/11/2023.
- P38. 20/11/2019 Report (section added) proved by PW33 on 12/03/2024.
- P39.12/12/2019 Birth certificate of victim proved by PW33 on 12/03/2024.
- P40. 17/12/2019 Ownership certificate of house bearing No.TC.19/2789 proved by PW33 on 12/03/2024.

Defence witnesses:- Nil

Defence Exhibits:-

- D1. 24/04/2023 Certified copy of FIS in crime No.455/2016 of Peroorkada Police Station.

Material Objects :-

- MO1 - Mobile phone  
MO2 - Mobile phone

REKHA.R  
SPECIAL JUDGE.

Judgment in SC.443/2020  
Dated: 31/08/2024.