

IN THE COURT OF THE FAST TRACK SPECIAL JUDGE,
HARIPAD Present:- Smt. Saleena V.G. Nair, Special Judge

Saturday, the 6th day of February, 2021

Sessions Case No.186/2017

(Filed on: 20/04/2017)

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

Complainant : State of Kerala – rep. by Inspector of Police, Mavelikara.

*(by Adv.Sri.S. Reghu, Special Public
Prosecutor)*

Accused : 1. Sinosh Kumar @ Harinarayanan Namboothiri.

2. Radha Devi.

*(by Advs.Sri. Ajeesh P. Nair & Sri.M.S.
Karunakaran)*

Charge : U/Ss.376(2)(n) r/w S.34, 376(2)(f) r/w S.34, 376(2)(i) r/w S.34, 376(2)(k)
r/w

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

Plea of the accused : Not guilty.

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

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

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

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

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

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

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

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

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

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

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

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

DESCRIPTION OF THE ACCUSED

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

Date of:

Offence	Report	Apprehension	Release on bail	Committal
20/08/14	13/03/17	16/05/15 (A1) 19/03/16 (A1) 02/04/16 (A2)	21/08/15 28/03/16 12/05/16	
Commencement of trial	Close of trial	Sentence/order	Explanation for delay	
20/10/2020	04/02/2021	06/02/2021		

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

J U D G M E N T

'Silence encourages the tormentor, never the tormented' This case portrays and unfolds the alleged repeated rape of a 13 year old girl by her stepfather, a temple priest, for more than a year and the attempt of her mother to entomb his mad libido. The quest for justice is set in motion on the disclosure of the victim about the nightmare, while she was residing with him and her mother in the three residential buildings taken on rent by him at three different locations, wherein he was working as a priest and conducting poojas, during the alleged period of occurrence i.e. during 2014-2015.

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

her, while she was residing with him and her mother, the

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

and (l) read with 10 r/w 16 read with 17 of the PoCSO Act, as against

the second accused. It is thereby contended that the accused have committed the aforesaid offences.

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

7

U/s.164 CrPC. Accordingly, CW16, the Magistrate, recorded the 164 statement of PW1. PW17 took over the investigation. He recorded

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

8

of sexual abuse. The second accused surrendered before the Court on 20.04.2016 and she was also remanded in judicial custody. Thereafter, she obtained bail from the Principal Court of Session, Alappuzha on 30.04.2016 and the 1st accused from the Hon'ble High

Court of Kerala. The dress worn by the first accused and PW1 during the last alleged incident of sexual abuse was send for forensic examination with a forwarding note after production of the same in Court. On completing the investigation, pending the FSL report, the final report was filed before the Court by PW18.

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

9

accordance with the direction of the Hon'ble High Court of Kerala as per O.M.D7A(1)-56450/2018 dated 24.02.2020. 5. The accused persons appeared before the Court pursuance to the summons. They were permitted to continue on the same bail bonds. Thereafter, the learned Special Public Prosecutor opened the prosecution case u/S.226 Cr.P.C.

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

10

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

7. Thereupon the prosecution has examined PW1 to 18, marked Exts.P1 to P18 and identified MO1 to 4. 8. On the closure of the prosecution evidence, both the accused were examined u/s.313(1)(b) Cr.PC. They denied all the incriminating evidence and circumstances brought out against them by the prosecution. The 1st accused has

stated in his 233(2) statement that he and the second accused got married on 07.07.2014. PW9, the sister of the second accused, due to various reasons, was in inimical terms with both the accused. She was of the impression that if the second accused received share in the family property, it would be managed and enjoyed by the 1st accused. PW9, with the assistance of her relative PW12, a policeman who is the victim's sister's husband and the Panchayat member, influenced PW1 and lodged a false and fabricated case in the Konni and Nooranad Police Stations.

11

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

the basis of legal opinion, she has arrayed her sister also as an accused.

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

12

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

to her children. The second accused has also reiterated some of the other contentions of the 1st accused.

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

13

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

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

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

- 1. What was the age of PW1 at the time of the alleged occurrence?*
- 2. Is there any delay in registering the case and if so, is it justifiable?*
- 3. Are accused 1 and 2 relatives or guardians of PW1 and in a position of trust and authority towards her?*
- 4. Are the first and second accused in a position of control and dominance over PW1?*
- 5. Whether the first accused committed repeated rape on PW1?*

6. Whether the first accused voluntarily had carnal intercourse against the order of nature with PW1?

7. Whether the first accused trafficked PW1 to different residential locations for the purpose of sexual exploitation?

8. Whether the first accused criminally intimidated PW1 to cause death or grievous hurt to her with an intention to cause alarm to her or not

14

to divulge the sexual assault and rape committed on her?

9. Whether the accused had a domestic relationship with PW1 and were living in the same household during the alleged occurrence?

10. Whether the first accused committed aggravated penetrative sexual assault more than once or repeatedly on PW1?

11. Whether the first accused, while committing penetrative sexual assault, caused bodily harm and injury on PW1?

12. Whether the first accused used deadly weapon to commit penetrative sexual assault on PW1?

13. Did accused 1, in furtherance of the common intention shared with accused 2, subject PW1 to rape?

14. Whether the first and second accused, having actual charge and control over PW1, assaulted or abused, or wilfully neglected her in a manner likely to cause her unnecessary mental or physical suffering?

15. Whether the second accused procured PW1 to be assaulted, abused and exposed in a manner likely to cause her unnecessary mental or physical suffering?

16. Whether the second accused abetted the 1st accused in committing the offence of aggravated penetrative sexual assault on PW1?

17. *Whether the 2nd accused had knowledge that an offence has been committed on PW1 by the first accused under the PoCSO Act and, if so, she failed to report the commission of such offence to the Special Juvenile Police Unit or local police?*

15

18. *Whether the victim is suffering from conduct misbehavior which renders her evidence not believable, as contended by the accused?*

19. *Whether the accused committed the offences with which they are charged?*

20. *If the accused are found guilty, what should be the proper sentence?*

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

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

Shastra. PW4 is the house owner of the building wherein the accused and family

16

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

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

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

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

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

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

proceeding before the Special Court whether a person is a child or not,

such question shall be determined by the Special Court after satisfying itself about the age of such person and it shall record in writing its reasons for such determination. However, there is no provision under the PCSO Act as to how the age has to be determined . So, the relevant provisions in the Juvenile Justice (Care and Protection of Children) Act are made applicable in POCSO Act cases also.

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

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

20

child who is a victim of a crime.

In the matter of age determination, the same principle is followed by our Hon'ble High Court in **Abhilash Vs State of Kerala**

(2019 (3) KHC 1002). The question to be decided here is the standard of proof and the mode in which the age of the victim can be ascertained and proved before a court of law.

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

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

21

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

certificate from the previous school is recorded as 1/10/2014.

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

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

22

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

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

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

23

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

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

interconnected with each other.

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

24

old due to cancer. After her father's death, her mother had shifted all her three sisters and herself into an institution named Jyothirmayi at Karukachal and thereafter she and her sister were shifted to Sabari Balika Sadanam. Her elder sister, after her plus two, joined Nursing studies at a hospital in Thrissur. The other sisters were also shifted to Balika Sadan by her mother. It was thereafter, the second accused married the first accused. Later, as decided by both the accused, her eldest sister was brought from Thrissur to a lodge in Ernakulam, wherein the accused were residing. The first accused made a demand for his marriage with

the eldest sister, but her mother was not ready for the same. Subsequently, her sister eloped with a person with whom she was in love. Thereafter, the accused moved to a rented building in a place called Nediyaavila at Ernakulam. PW1 was also taken to that house. After sometime, the 2nd accused forced her mother to bring the other two sisters to the house and she did it. That house had only one room. Her step father and mother slept on the one side of the

25

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

25. Her sisters informed their grandfather about the sexual harassment by the stepfather. Their grandfather, in turn, conveyed it to their aunt (PW9). She asked the entire family to reach her residence. The accused and all the 3 girls and the grandfather went to PW9's residence. Thereafter, her sisters refused to return back with the accused and they decided to go back to the Sabari Bala Sadanam. She found her mother

crying in the auto when all the three daughters refused to accompany her. Seeing this, she had joined her mother and went along with her and the stepfather. After about two days, the stepfather started sexually harassing her by catching hold of her breast. When she told him that she would inform her mother, he threatened her that he would finish her off and also that he would inform the police that

26

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

26. PW1 further testifies that during her mother's menstrual days, her stepfather used to approach her and repeated such acts. He inserts his penis into her vagina and when she tries to cry, he used to gag her and ask

her not to give out any sound. He used to apply oil in her vagina and made penetrations. One day, when she had gone to her grandfather's place, she brought a plastic stick so as to make a needle for paper earrings. While she was watching the TV, her stepfather approached her, pulled up her

27

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

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

28

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

her and she signed the statement.

29

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

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

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

clarified that she bought that from her grandfather's house. She denied

vehemently to the suggestion that she was instrumental in lodging a false case in connivance with PW9, PW12 and others. She stated that she has only expressed the pain and suffering she has undergone.

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

32

informed her. PW9 further testifies that the three children informed her that their stepfather was making attempts to sexually harass them and they pleaded to be taken away and protected. PW9 further testifies that one day

the three children and both the accused came to her house. The older girls refused to go back with them. The youngest (PW1) accompanied her mother. When she found PW1 crying in the auto, she thought PW1 did not actually want to go with them.

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

33

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

so she informed the Sub Inspector.

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

34

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

When her mother was not there, he inserted a stick into her vagina. PW1 also told her that she was lastly assaulted sexually at a place called Cherumukham in Pandalam.

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

35

stated that the matter was reported to the Konni Police on 11.05.2015 and the statement of the victim was given to Nooranad Police on 12.05.2015. PW12, her relative was also present at Konni Police station along with her on 11.05.2015. In her cross examination she denied the presence of DW2 her sister but admitted the presence of her father, her husband and PW12. She stated that her father came to support the accused and questioned as to why a complaint was lodged for aadhar cards. She admitted that her father taught poojas and rituals to A1. She stated that in her complaint for

adhaar card she had stated that the children were not safe and secure in the house of the accused and therefore she had to take responsibility for the children. She denied the existence of any property dispute and stated that there was never such talks and that her father does not have large properties and he was in huge debts and only now he has purchased little land and is living there. She denied the defence suggestion that she has vengeance against A1. She denied the existence of any case lodged by her father against her and stated a case was lodged by her father against his sons at Manimala

36

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

33. PW12 testifies that she had accompanied PW9 to the police station . PW1 narrated to PW9 and her about the incidents of sexual abuse inflicted by her

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

37

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

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

38

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

consistent with the alleged history. her cross examination she stated that she cant say 100 percent that there was sexual assault without

39

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

35. The prosecution also relies on the

40

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

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

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

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

notice, and P13 intimation notice informing the factum of his

arrest to the relatives. Thereafter, the accused was taken for potency examination and he obtained Ext.P8 certificate, and produced it before Court.

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

43

02.04.2016. He obtained Ext.P7 birth certificate of PW1 from Pandalam NSS GHSS, and also obtained Ext.P5 scene plan

from PW10, Village officer. PW18 deposed that during the relevant period he was the Circle Inspector of Mavelikara Police Station and he had verified the investigation conducted in this case and submitted the final report against both the accused.

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

44

him to leave. He stated that he has seen the wife and the daughter of the first accused in the temple. In the cross examination he admitted that Devaswom Board now

recognizes even non-brahmins as priests in temples but some tantris and private temples have not recognized. There was no challenge to the other facts stated in his chief examination.

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

45

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

41. PW4 deposed that the 1st accused and his wife & daughter used to reside in his house on rental basis. He had

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

46

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

42. PW5 deposed that he is the secretary of Gurunathan Kavu Ardhanareeswara temple. The first accused

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

47

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

44. According to the learned defence counsel, there

are four motives for PW1, in connivance with PW9 and PW12, in foisting a false case against both the accused which are stated hereunder;

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

48

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

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

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

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

49

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

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

prove that the defence version is probable and the accused are falsely implicated.

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

50

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

analysis of the entire evidence, to avoid repetition of facts and evidence.

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

51

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

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

(MANU/KE/2427/2020). Therein it was held that –

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

52

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

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

3. Penetrative sexual assault

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

a. he penetrates his penis, to any extent, into the vagina,

mouth, urethra or anus of a child or makes the child to do so with him or any other person; or

53

b. he inserts, to any extent, any object or a part of the body, not being the penis, into the vagina, the urethra or anus of the child or makes the child to do so with him or any other person; or

c. he manipulates any part of the body of the child so as to cause penetration into the vagina, urethra, anus or any part of body of the child or makes the child to do so with him or any other person; or

d. he applies his mouth to the penis, vagina, anus, urethra of the child or makes the child to do so to such person or any other person.

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

50. PW1's substantive evidence on the facts that the first accused is her stepfather and the 2nd accused is her

mother and they were in a position

54

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

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

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

accused had inserted his penis into her vagina and her mouth.

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

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

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

57

judicial reliance on the testimony of the prosecutrix is not a requirement of law but a guidance of prudence under given circumstances. It must not be overlooked that a women or a girl subjected to sexual assault is

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

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

“Undoubtedly, the testimony of victim of

58

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

not suffer from any basic infirmities or improbabilities which render it unworthy of credence.”

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

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

59

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

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

“Conviction for rape can be founded on the testimony of the prosecutrix alone unless there are compelling reasons for

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

60

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

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

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

61

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

54. In exhibit P1, PW1 narrated the very same sexual assaults that she narrated before Court. She has deposed in tune with the various incidents of sexual assaults, the nature and manner in which the first accused had subjected her to penetrative sexual assaults. Exhibit P1 corroborates her evidence. She was subjected to a medical examination by PW13 doctor who prepared exhibit

P6 medical certificate in which the history of the alleged incident corroborates the version given by PW1 before the Court. The doctor found that her hymen was torn and vagina was loose. The doctor also opined that her findings on examination of the victim was consistent with the history of penetrative sexual assault. So, the medical evidence and the

62

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

55. PW1 is consistent with her version before the police in her First Information Statement and the Court regarding the overt acts alleged against the accused. It is also proved that PW1 conveyed the alleged acts of the first accused to PWs 9 and 12. They have given evidence that they got the information about the sexual acts of the first accused from PW1. The evidence of PW1 regarding the acts of the accused

is corroborated by her previous statements to the doctor, her relatives and before the police, in her FIS, as provided under section 157 of the Indian Evidence Act. This section provides that in order to corroborate the testimony of a witness, any former statement made by such witness relating to the same fact at or about

63

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

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

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

64

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

56. Here, in this case, it can be safely concluded that there was no chance of any concoction or tutoring prior to the matter being informed to PWs 9 and 12 and also to the

Police and doctor and hence the delay is immaterial and the testimony of PWs 9, 12 and 13 can be used for corroborating the evidence of PW1.

65

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

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

arisen.

66

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

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

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

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

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

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

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

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

70

DW2 are close relatives of the 2nd accused and they have adduced evidence in favour of the accused.(What is evidence

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

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

71

substantiate her alleged ill-motive. PW1 has not stated that her dislike is on the basis of caste or community. On an objective analysis of the evidence, it is evident that PW1 or any of her relatives has any enmity towards the first accused because of

his community. PW12 has nothing to do with the accused and family and her motive to implicate the accused in a PoCSO case is bereft of any reasonableness. The 2nd accused has stated in her statement U/s 313 Cr.PC, to question No.125, that she has seen PW12 for the first time at the upanayana of PW9's son. PW12 has deposed that she knows nothing about such issues in the family of the accused. Considering all these aspects, it appears that there is no truth in the case of the defence in this regard-and is found to have been raised only as an experimental basis.

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

72

here that the defence themselves could not explain with clarity as to what is the property dispute that existed between the accused and PW9. The vague contention is that 10 cents of property was transferred by the father Namboodiri to the 2nd accused, and PW9 wanted her to transfer the same in favour of PW1 and her sisters. In 313 questioning, both the accused

have stated that this ten cents property has been surrendered back to the father. However, no documentary evidence has been adduced to establish such a fact. PW1 expressed her ignorance about any such transactions. DW2 stated that the dispute is related to a case filed by the father Namboodiri against his sons. Though the best person to throw light on the existence of dispute, if any, regarding any such property is the father of the 2nd accused, he is not examined to substantiate the contention of the accused. Nothing was brought out in evidence of any witnesses regarding any property dispute which can

73

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

65. The defence strongly argued that the complaint in the Konni Police station was in respect of a settlement talk about the share in the property. However, the accused or DW1 and DW2 could not explain as to why the discussion of property had to take place in Konni Police Station, when the property is

within the jurisdiction of Cheruthoni police station in Kottayam, wherein the grandfather of PW1 is residing. The 1st accused, in his 313 questioning, has answered question number 42 that they were summoned to the police station for the purpose of handing over the adhaar card and he had taken it along with him to the police station and had handed over the same to them. The 2nd accused also repeated the same answer that she was called to the police station on the adhaar issue. Here , it is noted that the version of PW1 and

74

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

66. At this juncture, PW9's version that at the Konni Police Station, a complaint was lodged for the purpose of Aadhar card for the children who stayed in an institution within the Konni Police Station limit is believable and reliable. If a false case of sexual assault has to be preferred against the accused, it need not have been in the Konni Police Station as

the accused were residing within the Mavelikara police station and if it was property issue, it ought to have been in a Police Station in Kottayam as the property is situated within Kottayam jurisdiction. The evidence of the prosecution in this respect is supported by the answers given by the accused in their 313 statements. In this backdrop of facts, it is proved that the case filed before the Konni Police Station was regarding adhaar card of

75

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

67. The defence also raised a case that PW1 has mental disorders and utilising her mental abnormality, PW9 influenced her to lodge a false complaint. The entire case of mental disorder is based on Exhibit B1, a medical certificate issued by the DW3. In this respect, PW1, in her cross-examination, has stated that while she was in her seventh class, she had informed her class teacher about the sexual assault inflicted on her. She added that her teacher had

informed the matter to her grandfather and that her grandfather had told the teachers that she has anger issues and therefore not to believe her. She deposed that her mother, step father and grandfather feared that the issue would get out of hand and immediately took her away from the school and she was thereafter admitted in a school in Pandalam. She stated that her

76

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

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

asked whether she has anger issues and was given medicine.

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

77

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

Her mother had told that she used to destroy things in the house. The child has not stated any symptoms or history. He stated that the mother reported that she did not study properly and did not do

78

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

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

mental disorders. It is also to be noted here that her parents

79

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

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

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

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