

***IN THE FAST TRACK SPECIAL COURT (POCSO)
THIRUVANANTHAPURAM.***

PRESENT : Smt.Aaj Sudarsan, Special Judge.

Tuesday, 7th February, 2023(18th Magha, 1944)

SESSIONS CASE No.913/2020
(Crime No.80/2020 of Mannanthala Police Station)

Complainant : State – represented by the Inspector
of Police, Mannanthala Police Station
Thiruvananthapuram.

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

Accused : Sundaresan Nair,

(By Adv.Sri.Biju.S.S)

Charge : Under Section 9(m) r/w 10 of the POCSO
Act, 2012.

Plea : Not guilty

Finding : Guilty

Sentence/

Order : (1) The accused is sentenced to undergo rigorous imprisonment for a period of **7 years and to pay a fine of Rs. 25,000/-** (Rupees Twenty five thousand only) for the offence punishable under Section 9(m) r/w 10 of the POCSO Act, 2012. In default of payment of the fine amount, the accused shall undergo rigorous imprisonment for a term of 6 months.

(2) In case of realization of the fine amount of **Rs.25,000/-** (Rupees Twenty Five Thousand only) the entire amount shall be given to PW1 as compensation under Section 357(1)(b) Cr.PC.

(3) The accused is allowed to get set off on the substantive sentence for the period from **23/01/2020 till 11/02/2020** the period he had undergone detention as an under trial prisoner.

Description of the Accused

Name of accused	Father's name	Occupation	Religion	Residence	Age
Sundaresan Nair	Padmanabha Pilla	Pensioner	Hindu	Uliyazhthura	65

Date of

Offence	Complaint	Appre - hension	Released on bail	Commen cement of trial	Close of trial	Sentence /order	Explanation of delay
01/01/14	22/01/20	23/01/20	11/02/20	10/06/22	25/01/23	07/02/23	No delay

This case having been finally heard on 25/01/2023 and the court on 07/02/2023 delivered the following :

JUDGMENT

This case is charge sheeted against the accused for the offences punishable under Sections 376(2)(l) IPC, 3(b) r/w 4, 5(m) r/w 6, 5(n) r/w 6, 5(p) r/w 6 of the POCSO Act, 2012 by the Inspector of Police, Mannanthala Police Station in Crime No.80/2020.

2. Prosecution case in brief is as follows:

On 01/01/2014 while CW1 the victim was aged 9 years, she used to reside with her grandmother CW8 Nalini and her deceased grandfather at Gopika House, Vengulathukonam, Tatchaparambu, Keralathyapuram. The accused and his wife CW13 Ajithakumari were her neighbours residing at Sreeja Bhavan, TC.10/2207, Sahridya Residence, Vengulathukonam, Keralathyapuram, Poundikonam Ward, Uliyazhathura Village. On the night of 01/01/2014 the grandfather of CW1 the victim developed chest pain and he was taken to the hospital. CW8 Nalini entrusted the care of CW1 the victim with CW13 Ajithakumari. The accused had also gone with her grandparents to the hospital. After he had returned back to his house, in between 11.50 pm on 01/01/2014 and 6 am on 02/01/2014 he laid down next to CW1 the victim who was sleeping in his bedroom, situated on the northern side of the hall room of his house along with his wife CW13 Ajiithakumari. While CW1 the victim was sleeping in between the accused and his wife, the accused sexually assaulted her by inserting his hands inside her dress and pressed her chest and kissed her with sexual intent. When CW1 the victim prevented the accused, he pushed her

hands aside and inserted his hands inside her panties and touched her vagina and caused pain to her vagina with his finger nails. Hence, the accused has committed the offences punishable under Sections 376(2)(l) IPC, 3(b) r/w 4, 5(m) r/w 6, 5(n) r/w 6, 5(p) r/w 6 of the POCSO Act, 2012.

3. As per Order No.1/21 dated 07/01/21 of the Hon'ble District and Sessions Judge, Thiruvananthapuram, the case was transferred to this Court for trial.

4.On issuance of summons the accused entered appearance. He was already on bail. Copies of prosecution records were given to him under Section 207 Cr.PC. After hearing both sides under Sections 226 and 227 Cr.PC, it was found that there were no grounds to discharge the accused. No offences under Sections 376(2)(l) IPC, 3(b) r/w 4, 5(m) r/w 6, 5(n) r/w 6, 5(p) r/w 6 of the POCSO Act, 2012 were made out. So, charges under Sections 7 r/w 8, 9(m) r/w 10, 9(n) r/w 10 of the POCSO Act, 2012 was framed against the accused. It was read over and explained to the accused. He pleaded not guilty.

5. PW1 to PW21 were examined and Exts.P1 to P3, P4, P4(a), P5, P5(a), P6 to P27 were marked from the side of the prosecution. CW5, CW6, CW8, CW9, CW11, CW14, CW15, CW17, CW18, CW26, CW28, CW31 and CW32 were given up by the prosecution. The accused was examined under Section 313 (1)(b) Cr.PC on all the incriminating

circumstances against him. According to the defence, this is a false case. The accused is implicated by PW1 on the instigation of her maternal aunt PW5 due to a civil dispute regarding widening of a pathway to the house of the accused, which passes through the side of the family house of PW1. This civil dispute is attributed as the reason for the long delay of 6 years by the defence. The accused has in his examination under Section 313 (1)(b) Cr.PC has stated that he has lived a decent life. He retired from Bank. After his retirement he was taken on contract basis by the Bank for a further period of 2 years. After hearing under Section 232 Cr.PC it was found that there were no grounds to acquit the accused at this stage. So, the accused was called upon to enter into his defence. The accused did not adduce any defence evidence. Heard both sides.

6. Points that arise for consideration are as follows :

1. Whether PW1 was a child as defined under Section 2(d) of the Protection of Children from Sexual Offences Act, 2012 as on the date of occurrence, that is, on 01/01/2014?
2. Whether the accused sexually assaulted PW1 with sexual intent?
3. Whether the accused had sexually assaulted PW1 while she was a child below 12 years of age?
4. Whether the accused had sexually assaulted PW1 in spite of sharing a domestic relationship with her?
5. In the event of conviction, what shall be the order as to sentence?

7. Point No. 1 : To sustain an offence under the provisions of the Protection of Children from Sexual Offences Act, 2012 the victim should be a child as defined in Section 2(d) of the Act. Section 2(d) defines the term 'child' to mean any person below the age of eighteen years.

8. In the instant case, to prove that PW1 is a child, prosecution has relied on Ext P26 matriculation certificate which shows her date of birth as 25/10/2004. That apart, PW1 has also deposed that her date of birth is 25/10/2004. PW2, her mother has also testified that PW1 was born to her on 25/10/2004. In **Jarnail Singh v. State of Haryana (2013 KHC 4455)** the Supreme Court had considered the determination of age of victim by relying on Rule 12 of the Juvenile Justice (Care and Protection of Children) Rule, 2007 which states that in the scheme of Rule 12(3), if an option is expressed in a preceding clause, it has over riding effect over an option expressed in a subsequent clause. The highest rated option available would conclusively determine the age of a minor. In the scheme of Rule 12(3), matriculation or equivalent certificate of the child is the highest rated option. In case, the said certificate is available, no other evidence can be relied upon. Only in the absence of the said certificate Rule 12(3) envisages consideration of the date of birth entered, in the school first attended by the child. In case such an entry of date of birth is available, the date of birth depicted therein is liable to be treated as final and conclusive and no other material is to be relied upon. Only in the absence of such entry Rule 12(3) postulates reliance on a birth certificate

issued by a corporation or a municipal authority or a Panchayat. Yet again, if such a certificate is available, then no other material whatsoever is to be taken into consideration, for determining the age of the child concerned, as the said certificate would conclusively determine the age of the child. It is only in the absence of any of the aforesaid, that Rule 12 (3) postulates the determination of the age of the child on the basis of medical evidence. In the instant case, prosecution has already produced Ext P26 matriculation certificate which shows that PW1 was born on 25/10/2004. The incident took place in between 11.50 pm on 01/01/2014 and 6 am on 02/01/2014, that means PW1 was 9 years and 2 months old on the date of incident. These discussions on evidence and legal aspects are enough to conclude that PW1 was a child on the date of incident as defined under Section 2(d) of the POCSO Act, 2012. Therefore, it can be safely concluded that the prosecution has proved the first step in the case. Hence, this point is found in favour of the prosecution.

9. Point Nos.2 and 3 : Since these points are connected with each other, they are discussed together. According to the prosecution, the accused had sexually assaulted PW1 when she was aged 9 years between 11.50 pm on 01/01/2014 and 6 am on 02/01/2014 while she was sleeping at his house in between him and his wife PW11 when her grandfather was taken to hospital on the night of 01/01/2014 following chest discomfort. The accused sexually assaulted PW1 by inserting his hands inside her dress and pressed her chest and kissed her with sexual intent. When PW1 prevented the accused, he

pushed her hands aside and inserted his hands inside her panties and touched her vagina and caused pain to her vagina with his finger nails.

10. Accused has denied the prosecution case. According to him, this is a false case preferred by PW1 on the instigation of PW5, her maternal aunt who is the owner of her family house, situated next to the house of the accused over widening of a pathway leading to his house which is passing on the eastern side of her family house. The defence asserts this aspect by saying that otherwise PW1 a brilliant and bright child who had come to know about sexual abuse while studying in Class 4 at Le Cole Chempaka would have disclosed the same when it had occurred. Since, such an incident did not take place, PW1 made up a story to falsely implicate the accused in this case to help PW5 take her vengeance against him over the dispute regarding the pathway.

11. At the time of giving evidence PW1 is aged 17 years and is studying in Class 12 at Al-Ameen School, Ernakulam. She would say that she was sexually assaulted by the accused who was her neighbour while she stayed with her grandparents during 2014. The incident unfolds when she discloses the unfortunate event that took place in 2014 to PW3, school counsellor when PW2 her mother took her for counselling on 06/01/2020 after PW1 started exhibiting behavioural disorders, laziness, lack of interest in studying, loss of appetite etc.

12. PW3 is the School Counsellor at Cotton Hills School, Vazhuthacaud. She has deposed that PW1 was brought to her by PW2 for counselling. During the counselling session PW1 disclosed about the sexual assault she was subjected to. So, PW3 made her write down the incident in a paper, which is produced in court and marked as Ext P4(a). PW3 has stated that PW1 found it difficult to tell her about the incident, so she adopted the technique in counselling by making PW1 write down all what she wanted to say in a paper. It is after reading the contents written by PW1 in Ext P4(a) paper that PW3 spoke further with PW1. The entry contained in Ext P4(a) paper is reproduced here for clarity sake “

.....”.

The entry contained in Ext P4(a) paper can be translated as follows: “That night, he had abused me. Did many things on my

body. He put his hands inside my dress and pressed my chest and did something. I was wearing a skirt. He removed that, removed my undergarments and did something there. It caused pain. When he was doing something at both the places, I felt like something. Thought I would die”. Ext P4(a) paper is appended to Ext P4 adolescent screening format. She has entered in Col. No. 16 of Ext P4 as answer to the question as to whether she wants to disclose any other incidents, she is seen to have written the following “I had an abusement at my age of 8 from my neighbour”. The entry in Ext P4(a) is like an explanation PW1 gave to PW3 after she has filled out Ext P4 form. The defence has challenged the genuineness of Ext P4(a) and has suggested that it was only an afterthought by the investigating officer to make the case strong. But the defence has failed to cross-examine PW3 the school counsellor to whom PW1 had given Ext P4(a) paper in that connection. PW21 investigating officer has denied that Ext P4(a) paper is fabricated to suit the case. PW5 the maternal aunt of PW1 has deposed that she came to know about the sexual abuse met out to PW1 when PW2 informed her after the counselling. She has also given evidence to the effect that it was she who had suggested to PW2 to take PW1 for counselling when PW2 had earlier told her about the changing attitude of PW1, which PW5 thought could be the onset of teenage issues. PW4 is one of the counsellors at Snehitha. She has deposed that she did counselling for PW1 when referred to her by CWC on 18/01/2020 and 19/01/2020. She would say that PW1 disclosed to her that she has written Ext P4(a) paper when she had a counselling session with PW3. PW4 who is qualified in MA (Sociology) has stated in general about the reasons why

students do not study could include family issues, mental injury, living environment etc. The defence has tried to bring in evidence that PW1 had issues with her studies due to the strained relationship of her parents. Here, the answer given by PW1 in response to question No. 7 contained in Ext P4 adolescent screening form shows that her family environment is calm and peaceful. Likewise, her answer to question No. 12 in Ext P4 adolescent screening form asking whether family issues cause her strain, she has answered in negative. Even from the evidence given by PW1 and PW2 the defence has failed to show that the relationship between her parents are strained and it is her family issues that has resulted in her moody behaviours. PW4 has also deposed that she is not aware of any marital dispute between the parents of PW1. So, the attempt by the defence to bring in evidence regarding the existence of marital discord between the parents of PW1 as the cause of her distress failed. Coming back to Ext P4(a) paper, PW3 had deposed that she had handed over Exts.P4 adolescent screening form and P4(a) paper to PW7. PW7 was the Additional Head Mistress of Cotton Hills Girls School during 2020. She would say that PW3 had given her Ext P4 adolescent screening form and Ext P4(a) paper and it is from it that she came to know about the incident. Thereafter, PW7 forwarded Exts.P4 adolescent screening form and Ext P4(a) paper to police as per Ext P7 forwarding note. PW21 investigating officer would say that in order to ascertain that PW1 is the author of Ext P4 adolescent screening form and Ext P4(a) paper, he had obtained sample handwriting of PW1 as Ext P3 on 21/06/2020 and had seized Exts.P5 Maths answer sheet, Ext P5(a) English answer sheet and Ext P6 Malayalam Note book and had

forwarded it to FSL for comparison as per Ext P25 forwarding note. PW22 is the Assistant Director (Documents) of State FSL, Thiruvananthapuram who made comparison of the handwriting of PW1 seen on Exts.P4 adolescent screening form and Ext P4(a) paper with her Ext P3 specimen handwritings and standard documents viz., Exts.P5, P5(a) and P6. She has deposed that the standard items supplied for comparison were marked as A1 to A20 and the specimen standard writing were marked as S1 to S30. The red enclosed questioned documents were marked as Q1 and Q2. She would say that she had carefully and thoroughly examined and compared the questioned writings and the standard writings in all aspects of handwriting identification and detection of forgery using scientific instruments in the State FSL at Thiruvananthapuram and concluded that the person who has written the standard writings is the author of the questioned writing. She has issued Ext P27 opinion with the result of the examination as “The person who wrote the blue enclosed standard writings stamped and marked A1 to A20 and S1 to S30 also wrote the red enclosed questioned writings similarly stamped and marked Q1 and Q2”. Thus, with Ext P27 report of the expert, it can be concluded that PW1 had written the entries seen in Exts.P4 adolescent screening form and Ext P4(a) paper. The defence did not succeed in showing that Ext P4(a) was an afterthought by PW21 the investigating officer. Instead the prosecution has cemented its case that Ext P4 adolescent screening form and Ext P4(a) paper were written by PW1 on 06/01/2020 when she was taken by her mother PW2 to see PW3 through the oral evidence of PW1, PW2, PW3, PW4, PW5, PW7 and PW21 and from Ext P27 expert report.

13. Coming to the main aspect in this case, whether the accused had sexually assaulted PW1 in between 11.50 pm on 01/01/2014 and 6 am on 02/01/2014, it is seen that PW1 has deposed before court that till her Class 6 she had resided with her maternal grandparents at Gopika House. The accused was her neighbour. His family was close to her family. On the night of 01/01/2014 her grandfather developed discomfort of chest. On the instructions of her grandmother, she had called her neighbours for help. She had also called the accused, whom she has addressed as Sundaresan Maman. With the aid of her neighbours and the accused her grandfather was taken to hospital. The accused had told his wife PW11 to take PW1 to their house while her grandparents were away to the hospital. PW1 has stated that PW11 took her to their house, which as per Ext P13 ownership certificate belongs to the accused. PW11 made PW1 lie down on their bed near the wall. She fell asleep. During her sleep, she felt that somebody had hugged her. She thought it was PW11 because when she had fallen asleep PW11 alone was next to her on the bed. She would further say that after hugging, that person had taken her hands and put it on that person's body and she could feel hair. In quick response, she took her hands back and opened her eyes to see that the accused is lying on the side of the wall, where she had laid down to sleep. She saw PW11 sleeping to her side with her back towards PW1. PW1 realised that she was sleeping in between PW11 and the accused. PW1 has further deposed that the accused put his hands through her dress and pressed her chest and kissed her. When she tried to block the accused with her hands, he pressed her hands down and

inserted his hands through her skirt and panties and inserted his finger into her vagina causing her pain that made her think that she is going to die. Thereafter, she is seen to have asked PW11 that she wants to sleep in another room. PW11 was not ready for that. Due to constant insistence from the part of PW1, PW11 took her to her son's room. They slept on the floor. PW1 has stated that she could identify the accused as the assaulter from the light that was reaching the bedroom from outside at night. She has described that light as the usual light one gets to see inside a room at night as coming from outside through windows. She has denied to the specific question by the defence that it is only her feeling that the accused had sexually assaulted her.

14. This is the evidence given by PW1 in this case against the accused suggesting sexual assault by him when she was aged 9 years on 01/01/2014. The learned counsel appearing for the accused has argued that PW1 had gone to the school next day, she had seen her father on the next day etc., but she did not disclose the incident to anyone for 6 years. So, this casts a doubt on the evidence given by PW1 and the court should reject her evidence in toto. Evidence adduced shows that PW1 while studying in Class 4 at Le Cole Chempaka came to understand what social abuse is when an animation movie was played at her school. She was residing with her grandparents till her Class 6, after which her parents took her with them. The learned defence counsel argues that when PW1 came to understand about social abuse while studying in Class 4, at least then she could have disclosed it to her family, friends or teachers. Here the evidence of PW1 again attains importance that

she was afraid about the incident which was the reason why she did not disclose it to anyone. After the incident, she would say that she was reluctant to go to the house of the accused, though she was forced by her grandmother to go to his house to get clothes stitched by PW11. She is seen to have visited the house of the accused after the incident only with her grandmother. She has also stated that the accused used to run away seeing her after the unfortunate incident. This behavior from the side of the accused suggests his guilt or shame as his subsequent conduct which is a relevant fact in issue. The reason given by PW1 that she was afraid to disclose the incident to anyone soon after the incident can be because of many factors as understood from the evidence adduced like, the close relationship of her family with the family of the accused, she was residing with aged grandparents and not with her parents which must have resulted in mental agony to a small child of 9 years while her brother got to live with her parents, living with grandparents and living away from parents must have created an emotional and mental distance in her mind with her parents, non-awareness of what actually took place on the night of 01/01/2014, her fear on re-visiting the incident which she described as near death experience, lack of close friends at school etc. As answer to question No. 8 in Ext P4 adolescent screening form whether she shares her sadness to anyone, she has written that she does not share her grief to anyone. This aspect shows that she is of a peculiar type who does not share her grief or happiness to anyone, which could be due to lack of emotional bonding with her parents, friends etc. Researches and studies show that there are numerous reasons why a child or even a grown up adult may not disclose about a sexual assault and it

may linger at the bottom of their heart as their dirty, scary secret, but they open up or disclose it to someone they find they can confide in or someone whom they trust will listen to them and not judge them etc. In the instant case, according to PW1 she was afraid of the incident and also not aware of the nature of the event that occurred to her. Her subsequent reluctance to visit the house of the accused also shows that she had distanced herself from Sundaresan Maman after the incident, which unfortunately her parents failed to notice earlier. Many such factors contribute to non-disclosure of sexual assault by children. PW1 is seen to have confided in PW3. PW3 had deposed that she found that PW1 found it difficult to speak about the incident so she made PW1 write out what happened to her and Ext P4(a) paper is the result of that. So, the delay of 6 years in lodging Ext P18 FIR cannot be considered as fatal to the prosecution when PW1 has explained the reasons which has acquired the confidence of the court. In **Tulsidas Kanolkar v. State of Goa ((2003) 8 SCC 590)**, it is held that delay in lodging the FIR cannot be used as a ritualistic formula for discarding the prosecution case and doubting its authenticity. It only puts the court on guard to search for and consider if any explanation has been offered for the delay. Once, it is offered, the court is to only see whether it is satisfactory or not. In case if the prosecution fails to satisfactorily explain the delay and there is possibility of embellishment or exaggeration in the prosecution version on account of delay, it is a relevant factor. On the other hand, satisfactory explanation of delay is weighty enough to reject the plea of false implication or vulnerability of the prosecution case. In the instant case, PW1 was afraid to disclose the incident and was also unaware of the

catastrophe which had befallen on her. So, the delay in lodging Ext P18 FIR does not in any way render the prosecution version brittle.

15. The next contention raised by the defence is that the accused is falsely implicated in this case due to a civil dispute between him and PW5. PW1 admits the existence of a pathway passing through the eastern side of her family house. However, she does not know whether the family house belonged to PW5. She does not know the existence of any civil dispute between PW5 and the accused. PW5 has admitted that the family house belonged to her. She has also admitted that there is a pathway passing through the eastern side of her property. However, she has denied surrendering property for widening the pathway or existence of a civil dispute with the accused and his family. PW11 the wife of the accused has given evidence in her cross-examination that PW5 surrendered property for widening of the eastern pathway on the request of the accused for a real estate person who had agreed to pay the consideration for the same. It was in December, 2019. It is also deposed by PW11 that the accused had also surrendered property for widening of the pathway. When PW5 was not paid the consideration by the real estate person, she thought that the accused was the person behind her surrendering her property for widening the pathway and it is in order to take vengeance against the accused, she has made PW1 to file a false against him about an incident that never took place in 2014. PW11 would say that she remembers about an incident where the grandfather of PW1 was taken to hospital on 01/01/2014. But she has categorically denied taking PW1 to her house on that night. In her re-

examination, the prosecution succeeded in showing that PW11 is not a reliable witness. She failed to depose the extent of land PW5 surrendered for the widening of the pathway. She could not even state how much extent of property her husband had surrendered. She has also stated that PW5 alienated her property in 2018, which is contradictory to what she is seen to have stated in her cross-examination that PW5 had surrendered property in December, 2019. All these evidences show that PW11 is not a trustworthy witness. That apart, it may be noted that hardly any family member would fit a person in a POCSO case to take revenge by risking the future and honour of their child. Not all people are hard hearted to bring dishonour to their child. Life of a female child ends when a false accusation is levelled by her against a person only to take revenge on him. Moreover, in the instant case, evidence shows that the family of PW1 and the family of the accused were very close till PW1 disclosed the incident on 06/01/2020. The accused had taken the grandfather of PW1 to Medical College on the night of 01/01/2014. This is clear from the evidence given by PW1, PW2 and PW9. PW9 has deposed that on 01/01/2014 he along with the accused and three others have taken the grandfather of PW1 to Medical College in the car owned by Jayakumar. PW6 is the wife of said Jayakumar. She has deposed that the neighbours had taken the grandfather of PW1 in a car to the hospital on 01/01/2014. Ext P14 records show that the grandfather of PW1, Mr. Rajendran was admitted at Medical College Hospital on the night of 01/01/2014 following discomfort of chest and discharged on 03/01/2014. PW2 has stated that on receiving phone call from PW1 on the night of 01/01/2014 in the phone of PW5 about the illness of her father, she

and her family went to the Medical College from Pettah house and waited for her father to be brought there. Her mother had then informed her that PW1 is entrusted with PW11. The close relationship between the families will not generate any doubt that staying over at the neighbour's house would result in sexual assault. This confidence and trust of the family of PW1 is what made them permit her to stay with PW11 and the accused on the night of 01/01/2014. So, a conjoint reading of these evidences establish that the contention raised by the accused that he is framed in this case is not sustainable.

16. Regarding the time of commission of the offence, PW21 has deposed that during investigation it was revealed to him that the incident took place in between 11.50 pm on 01/01/2014 and 6 am on 02/01/2014. He has filed Ext P24 report in this regard. PW9 who knows both the families of PW1 and the accused has stated that he had taken the grandfather of PW1 in the car of Jayakumar along with the accused and 3 others on the night of 01/01/2014. He does not know the exact time when they had taken him to the Medical College. It is further deposed by him that after having spent 2 hours he and the accused had returned home. PW1 would say that she does not remember the time as she went to sleep along with PW11. It is only when she felt the accused on her that she realized that he had returned home after admitting her grandfather in the hospital. It is quite natural for a child aged 9 years not to take note of the time of any incident. She then remembers her sleeping in the room of the son of the accused with PW11. She woke up next morning when

her father had come to pick her from the house of the accused and dropped her to school that day. So, as rightly revealed in the investigation, the time of incident is in between 11.50 pm on 01/01/2014 and 6 am on 02/01/2014. Hence, this contention raised by the defence is also rejected.

17. Now, coming to the fact of how PW1 could witness the incident at night in a room where the lights were switched off. PW1 has deposed that she slept near the wall on the bed of the accused along with PW11 on her side. At night during her sleep she felt someone hugging her. In her sleep, she thought it was PW11, because she had seen only PW11 lying beside her when she went to sleep. When the person who had hugged her lifted her hands and kept on his body, she could feel hair and opened her eyes to see the accused lying next to the wall where she had earlier slept. She has categorically deposed that she could see the accused clearly from the mild light that was coming from the windows of the said room. This is an innocent answer of a child. Scientifically speaking, the pupils of our eyes constrict when there is bright light so that less amount of light enters our eyes in order to prevent damaging of retinal cells. In dim light the pupils of our eyes expand so that more light enters leading to improved vision. This phenomenon is called as Pupillary Light Reflex or Photo Pupillary Reflex. This phenomenon is responsible for a person to see things in dark. As soon as lights are turned off the already constricted pupils fail to gather enough light and thus we experience complete darkness. But as time passes the pupils expand in size allowing as much light present in the surrounding like light coming from the

moon, street lamp, lights kept switched on outside the house etc., to enter our eyes giving us visibility. This phenomenon is what is explained by PW1 in her own simple ways which made her see the accused lying next to her on the side of the wall, him hugging her and sexually assaulting her. Therefore, it can be safely concluded from these discussions that there was enough visibility for PW1 to see the accused at night and wrongs done by him on her.

18. On analyzing the oral evidence of PW1, it is to be borne in mind that no girl wishes to falsely implicate a man in a case stating that the man had sexually assaulted her. The delay in disclosing the unfortunate event to anyone causing delay of 6 years in registering Ext P18 FIR is well explained by PW1. The aspect of tutoring PW1 to give a false statement is also ruled out from the circumstances that can be understood from the evidence adduced in this case, like, her non-awareness of any enmity between PW5 and the accused, her introvert nature which makes her to keep to herself her secrets, grief, happiness etc., her behavioural changes which PW2 and PW5 had noticed, her sitting alone and appearing to be gloomy as noticed by her Math teacher PW8 etc. There is a likelihood that PW1 must have deposed more before the court than what she would narrated in Ext P1 FIS or in Ext P2 statement under Section 164 Cr.PC. or in Ext P4(a) paper. This cannot be seen as an exaggerated version of what had happened to her. This could only be because of lack of her recollecting power of an incident that took place at a tender age of 9 years. The incident she has taken courage to disclose after 6 years of its happening is embedded in her subconscious mind, but she may not

be able to depose exactly of all the incidents, which could be the reason why she has deposed that the accused had inserted his fingers into her vagina and caused her pain. Altogether reading of the evidence by PW1 inspires the confidence of the court that she was sexually assaulted by the accused when she was aged 9 years.

19. Sexual intent is the crux of the offence of sexual assault.

Intention and knowledge are different states of mind. They are nonetheless facts which can be proved, of course not by direct evidence. They are to be inferred from circumstances of each case. Such an inference, one way or the other, can only be made if a reasonable man would, on the facts of the case, make it. The circumstances in which touch or physical contact occurs would be determinative of whether it is motivated by 'sexual intent'. There could be a good explanation for such physical contact which include the nature of the relationship between the child and the offender, the length of the contact, its purposefulness; also, if there was a legitimate non-sexual purpose for the contact.

20. The act of the accused shows that he after lying next to PW1

hugged her, made her to hug him, then inserting his hand inside her dress and pressing her chest and kissing her and by pressing her hands down when she resisted and then inserting his fingers inside her panties cannot be termed as something he has done with good intention. The only word that can be used to describe such an act from the side of the accused is his sexual intent. So, the

prosecution is aided with presumption under Sections 29 and 30 of the POCSO Act as the prosecution has already laid foundation for its case, which the accused failed to rebut by preponderance of probability.

21. Other contentions raised by the defence is that Ext P9 scene mahazar prepared on 23/01/2020 cannot be said to be fool proof as PW21 did not investigate the age of the furniture present in the bedroom as furniture that were present there in the year 2014. These are trivial contentions. It is immaterial whether PW21 mentions the age of the furniture in Ext P9 scene mahazar or not or PW14 Village officer mentions it in Ext P12 scene plan or not. Non-seizure of dresses worn by PW1 and the accused on 01/01/2014 is also not fatal to the prosecution considering the facts and circumstances of this case.

22. As already discussed that when PW1 has satisfactorily explained the delay in lodging Ext P18 FIR and the explanation is found satisfactory by the court and accepted, when the evidence of PW1 is consistent which has inspired the confidence of the court and is corroborated by the evidence of other prosecution witnesses as an abundant caution, it can be said that the prosecution has proved that the accused had committed sexual assault on PW1 while she was aged 9 years and 2 months in between 11.50 pm on 01/01/2014 and 6 am on 02/01/2014. Thus, these points are found in favour of the prosecution.

23. Point No. 4 : Admittedly, the accused was the neighbour of PW1 while she was staying at her family house along with her grandparents. Evidence adduced in this case shows that the families of PW1 and the accused were close for years till 06/01/2020. There is no evidence that the accused and PW1 are related in any manner so as to share a domestic relationship. An offence punishable under Section 9(n) r/w 10 of the POCSO Act is attracted only when the child is subjected to sexual assault by a relative through blood or adoption or marriage or guardianship or foster care or having a domestic relationship with a parent of the child or who is living in the same or shared household with the child. The accused has not shared any one such kind of relationship with PW1. Therefore, it can be safely concluded that the prosecution has failed to prove this point.

24. Point No. 5 : From the discussions made in the aforesaid points, it is found that the accused is not guilty of the offence punishable under Section 9(n) r/w 10 of the POCSO Act, 2012. The accused is found guilty of the offences punishable under Sections 7 r/w 8 and 9(m) r/w 10 of the POCSO Act, 2012.

In the result,

(1) The accused is acquitted of the offence punishable under Section 9(n) r/w 10 of the POCSO Act, 2012 under Section 235 (1) Cr.PC.

(2) The accused is convicted of the offences punishable under Sections 7 r/w 8, 9(m) r/w 10 of the POCOS Act, 2012 under Section 235 (2) Cr.PC.

(Dictated to the Confidential Assistant, typed by her, corrected and pronounced by me in the open court on this the 7th day of February, 2023).

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25. The accused is heard on the question of sentence. He pleaded for mercy. He is aged 63 years. He submits that he is looking after his aling wife. His wife is fully dependent on him. He further submitted that his source of livelihood is his pension amount of Rs.18,000/- per month. No criminal antecedents of the accused is proved or brought out by the prosecution. Sexual abuse or sexual harassment is never contained to a present moment. It lingers across a person's lifetime and has pervasive long-term ramifications. From the facts and circumstances of this case, it is found that it is not a fit case to invoke the provisions of the Probation of Offenders Act, 1958. The object of imposing sentence to an accused is also to be seen as a deterrence to the society. Sentencing the accused in this case is based on the evidence adduced and the gravity of the offence committed by him on a 9 year old child along with the factors concerning him.

26. In view of Sections 71 IPC and 26 of the General Clauses Act, 1897 separate sentences cannot be imposed on the accused for the offences punishable under Sections 7 r/w 8 and 9(m) r/w 10 of the POCSO Act in view of Art. 20(2) of the Constitution. The punishment for the offence under Section 9(m) r/w 10 of the POCSO Act is an aggravated form of sexual assault which is contained in Section 7 r/w 8 of the POCSO Act. Therefore, the accused can be sentenced only for the offence punishable under Section 9(m) r/w 10 of the POCSO Act, 2012 which prescribes for a higher degree of punishment when the prosecution has succeeded in proving that PW1 was aged only 9 years and 2 months when the incident took place.

In the result,

(1) The accused is sentenced to undergo rigorous imprisonment for a period of 7 **years** and to pay a fine of **Rs.25,000/-** (Rupees Twenty five thousand only) for the offence punishable under Section 9(m) r/w 10 of the POCSO Act, 2012. In default of payment of the fine amount, the accused shall undergo rigorous imprisonment for a term of 6 months.

(2) In case of realization of the fine amount of **Rs.25,000/-** (Rupees Twenty Five Thousand only) the entire amount shall be given to PW1 as compensation under Section 357(1)(b) Cr.PC.

(3) The accused is entitled to get set off on the substantive sentence for the period from **23/01/2020 till 11/02/2020** the period he had undergone detention as an under trial prisoner.

(Dictated to the Confidential Assistant, typed by her, corrected and pronounced by me in the open court on this the 7th day of February, 2023).

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Appendix

Prosecution Witnesses:

- PW1. Victim
- PW2. Deepa Lekshmi N.R
- PW3. Aswani.R.S, School Councilor, Cotton Hill
School, Vazhuthacaud
- PW4. Anithakumari.S, Councilor of Snehitha
- PW5. Rajalekshmy.N.R
- PW6. Maya.K.R
- PW7. Winsty.C.M, Additional Headmistress
Cotton Hill Girls School.
- PW8. Amina Roshni.E, Teacher, Cotton Hill
School.
- PW9. Abhilash.A.S
- PW10. V.Surendran Nair
- PW11. Anithakumari.L
- PW12. Dr.Manoj.R, Assistant Surgeon in Casualty
General Hospital, Thiruvananthapuram.
- PW13. Anoop Roy.R.P., Sub Registrar, Birth & Death
Thiruvananthapuram Corporation.

- PW14. Arun Bose.K.S, Village Officer, Uliyazhthura.
 PW15. Lalithambika.T, Charge Officer in Sreekaryam
 Zonal Office, Thiruvananthapuram Corporation.
 PW16. Usha Kumary.A, Medical Records Superintendent
 Thiruvananthapuram Medical College.
 PW17. Dr. Shaliya James.R, Junior Consultant
 Gynecology, W&C Hospital, Thycaud.
 PW18. Kala Kairaly.S.R, Sub Inspector of
 Police, Vanitha Police Station.
 PW19. Sreejith.G.C, Senior Civil Police Officer
 Mannanthala Police Station.
 PW20. Gopichandran.O.V, Sub Inspector of Police
 Mannanthala Police Station.
 PW21. G.P.Sajukumar, Inspector of Police
 Mannanthala Police Station.
 PW22. Anaswara. I.P, Assistant Director(Documents)
 State Forensic Science Laboratory
 Thiruvananthapuram.

Exhibits for Prosecution :

- P1. FI Statement dated 22/01/2020.
 P2. 164 statement of the victim
 dated 23/01/2020.
 P3. Handwriting Specimen dated - Nil
 P4. Adolescent Screening Format
 dated 06/01/2020.
 P4(a) Writings
 P5. Answer Sheet (Maths) dated 04/03/2020.
 P5(a) Answer sheet (English) dated 03/03/2020.
 P6. Note Book of the victim
 P7. Forwarding Letter dated 11/03/2020.
 P8. Inventory Mahazar (Answer sheet)
 dated 10/06/2020.
 P9. Scene mahazar dated 23/01/2020.
 P10. Potency Certificate of the accused
 dated 23/01/2020.

- P11. Birth Certificate of the victim dated 05/05/2020.
- P12. Scene Plan dated 16/03/2020.
- P13. Ownership Certificate dated 11/03/2020.
- P14. Treatment Records from Medical College Hospital dated 01/01/2014.
- P15. Medical Examination report of the victim dated 22/01/2020.
- P16. Inventory Mahazar (Adolescent Screening Format) dated 11/03/2020.
- P17. Inventory Mahazar (Note book) dated 12/06/2020.
- P18. FIR dated 22/01/2020.
- P19. Arrest Memo dated 23/01/2020.
- P20. Inspection memo dated 23/01/2020.
- P21. Address report dated 23/01/2020.
- P22. Proceedings of Child Welfare Committee dated 20/01/2020.
- P23. Section added report dated 09/10/2020.
- P24. Correction report (time) dated - Nil
- P25. Forwarding Note to FSL dated 19/08/2020.
- P26. Copy of SSLC Certificate of the victim dated 10/11/2022.
- P27. FSL report dated 18/02/2022.

Defence Witness : Nil

Exhibits : Nil

Material Objects : Nil

//True Copy//

**AAJ SUDARSAN
SPECIAL JUDGE.**

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SPECIAL JUDGE.**