

**IN THE SPECIAL COURT FOR THE TRIAL OF OFFENCES AGAINST
CHILDREN (ADDITIONAL SESSIONS COURT-I), MANJERI.**

Present:- Sri. A.V. Narayanan, B.A., LL.B., Addl. District & Sessions Judge-I, Manjeri.

Saturday, the 24th day of August, 2019

SESSIONS CASE No. 01/2018

Complainant	:	State of Kerala: Represented by the Police Inspector, Nilambur. (Crime No. 494/2017 of Nilambur Police Station)
Name of the Accused	:	Rajesh , Aged 39 years, S/o. Podiyan (Late) Thaikkad Veedu, Muthukad Colony, Ramamkuth, Malappuram District (Custody).
Charges	:	u/S. 377 IPC, Section 5(l) r/w 6 of the POCSO Act and section 75 of the JJ (CPC) Act.
Plea of the Accused	:	Not guilty
Finding of the Judge	:	Found not guilty and acquitted under section 235(1) of Cr.P.C of the offences punishable u/s. 377 of IPC and section 6 of the POCSO Act and Section 75 of the Juvenile Justice Act.
Sentence/ Order	:	The accused is found not guilty for the offences punishable under sections 377 of IPC and section 5 of the POCSO Act and Section 75 of the Juvenile Justice Act and he is acquitted u/s 235(1) of Cr.P.C. The accused is set at liberty.
No. of Crime and Name of Police Station	:	Crime No. 494/2017 of Nilambur Police Station.
Prosecution conducted by	:	Smt. Aisha P. Jamal, Special Public Prosecutor, Manjeri.
Accused defended by	:	Sri. N Sree Prakash, Advocate, Manjeri.

Final report received from the Police Inspector , Nilambur on 26-12-2017.

DESCRIPTION OF THE ACCUSED

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| 1. Serial Number | : SC. No.01/2018 |
| 2. Name of Police Station and
Crime Number of the offence | : Nilambur Police Station,
Crime No.494 /2017. |
| 3. Name of Accused | : Rajesh |
| 4. Father's Name | : Podiyan (Late) |
| 5. Occupation | : Coolie |
| 6. Residence | : Thaikkad Veedu, Muthukad
Colony, Ramamkuth, Malappuram
District. |
| 7. Age | : 39/2019 |
| 8. Date of Occurrence | : 01-09-2017 and two subsequent days |
| 9. Date of Complaint | : 26-12-2017 |
| 10. Date of Apprehension | : 12-11-2017 |
| 11. Date of Release on Bail | : In Custody |
| 12. Date of Commitment | : Charge sheet filed before this court |
| 13. Date of Commencement of Trial | : 07-03-2018 |
| 14. Date of Close of Trial | : 21-08-2019 |
| 15. Date of Sentence/ Order | : 24-08-2019 |
| 16. Service of copy of Judgment/
Order to the Accused. | : ----- |
| 17. Explanation for the delay | : Vide separate sheet attached |

Sd/-
Special Judge/
Addl. District & Sessions Judge-I

This case coming on for hearing before me upon perusing the records of evidence and proceedings and upon duly considering the same after hearing the public prosecutor and counsel for the accused on 21-08-2019 I do adjudge and pass the following:-

J U D G M E N T

This is a case registered by Nilambur police against the accused in crime No.494/2017 for the offences punishable under sections 377 of IPC, section 6 R/w 5(m) of the POCSO Act and Section 75 of the Juvenile Justice Act.

2. The prosecution case, in short, is as follows:- That on 1-9-2017 at about 4 pm and two subsequent days at about 6 pm, in the residential building bearing door No.XXI/101 of Nilambur municipality, in the bed room on the south-west of the building, the accused committed unnatural sex against the victim, a 13 year old boy, by inserting penis into the mouth. So the accused is alleged to have committed the above said offences.

3. On completion of the investigation, final report submitted before this court where it was received on file as SC 1/2018 and took cognizance of the offences. The accused who had been in judicial custody, since his arrest, was produced before the court. He was furnished with the copy of prosecution records and accompanying documents. The learned Public Prosecutor opened the case stating briefly of the facts and circumstances of the case and also of the nature of the evidence proposed to adduce in support of thereof.

4. As the accused was furnished with copy of records, heard both sides u/s. 227 of Cr.P.C. Having perused the materials on record and arguments of the learned Public Prosecutor and learned defence counsel, this court decided to frame charge against the accused as per section 228(1)(b) of Cr.P.C for the

offences punishable under sections 377 of IPC and section 6 r/w 5 (m) of the POCSO Act and Section 75 of the Juvenile Justice Act.

5. As the accused refused to plead, the prosecution was asked to adduce evidence. In support of the prosecution case, PWs 1 to 15 were examined and Exts. P1 to P16 were marked. On the close of prosecution evidence, the accused was examined u/s. 313 (1) (b) of Cr.P.C highlighting all the incriminating aspects in the prosecution evidence. The accused denied every incriminating material and maintained his innocence. Heard u/s 232 Cr. PC and decided to proceed with trial.

6. Heard both sides in detail.

7. The points that arise for consideration are:-

1. How far the prosecution succeeded in proving the specific incident mentioned in its case?
2. What are the offences, if any, made out from the facts proved?
3. What should be the sentence, if any, or other appropriate order?

8. **Point No.1:** The incident highlighted in the prosecution is sought to be proved with the oral testimony of the crucial witness, that is, the victim who is examined as PW1 and also the other supporting and corroborating evidences of other witnesses.

9. The specific case of the prosecution is that the incident occurred on 01-09-2017 at 4 pm and two days subsequent thereto. From the evidence in this case and all the material produced from the side of prosecution, we find that the prosecution case is centered around the specific incident that alleged to have taken place on 01-09-2017. About the subsequent events mentioned

there is no evidence. So we have to analyze the evidence. The learned defence counsel has cautioned that the court should be very cautious and meticulous in analyzing and appreciating the evidence, particularly that of the victim. In chief examination, PW1 has deposed that he returned from school 4.30 pm and had his tea. When the accused, Rajesh, his neighbour beckoned him, he reached the house of Rajesh. There was no one else. They together sit and chatted and after some time, the younger brother of PW1 also came. PW1 has categorically stated in the chief examination that Rajesh did nothing to him.

10. The learned counsel has argued that when the witness spoken this, his examination stopped and further examination resumed after lunch. In the afternoon, when the witness mounted the box the first sentence he had spoken to was that Rajesh made the victim suck his penis. Altogether, there were three occasions Rajesh done so. Then he proceeded to say that the police came and recorded his statements. There he has written his name, and that is Ext.P1 first information statement.

11. The case of the prosecution and the versions of PW1 were unreasonable, unbelievable, inconsistent and contradictory. PW1 has stated that when he returned from the school at 4 pm, he had tea. Thereafter at around 4.30 pm he had gone to the residence of the accused. At this juncture, the learned counsel would say that this story is inconsistent with the real situation that 01-09-2017 was indisputably a Second Saturday and there was no class. The version of PW1 on that day there was class in the school is unreasonable and inconsistent with the real fact. Whether the incident alleged to have taken place on a working day or holiday. The fact yet to be ascertained.

12. On the above aspect, the learned defence counsel again referred to the Ext.P1 first information statement and evidence of PW11, the Woman Cell Sub- Inspector. who recorded it and also the evidence of the doctor, PW4, who examined the victim and issued Ext.P3 medical certificate. The doctor examined the victim on 11-11-2017 where the date of the alleged incident was told to the doctor as 8-11-2017 that is almost two months after the date mentioned in the police case and also in the first information statement. Whereas, in Ext.P1 first information statement, the date is noted as 1-9-2017. So with respect to the time of incident or the date of the incident, we have he evidence which are further confusing. First we have to consider whether it was a working day or holiday. If it was on a working day, then the incident was not on 1-9-2017 because it was the Second Saturday holiday. If it was on 8-11-2017 as noted in Ext.P3, medical certificate, it was the date two months after the specific prosecution. Here, the fact to be noted is that Ext.P1 first information statement was recorded on 11-11-2017. Ext.P3 medical certificate also issued immediately thereafter the same day that is 11-11-2017. But the date of incident is entirely different that is, 1-9-2017 and 8-11-2017. The prosecution is unable to clarify the position and to ascertain as to actually what was the date of occurrence, and whether it was a working day or holiday.

13. PW1 has deposed that he did not mention the month or date on which the incident have taken place. Even pertaining to the incident everything was told to the police by his grandfather who accompanied the victim to the clinical psychologist who is examined as PW10. It was the grandfather who narrated everything to the police and doctor. On this aspect the evidence of PW3 is also the same that her father in law, that is the

grandfather of the victim, took him to the doctor, PW10. It is vehemently argued by the defence counsel that the grandfather, even though cited as a witness by the prosecution, is not examined before court. From the evidence on record, it is quite clear that the grandfather was the person who furnished information to the doctors and police about the incident. Then, if there is any discrepancy as to the date, time or other material particular pertaining to the incident, he is the proper person to give light to the doubtful areas. It is true that the prosecution has the liberty to examine or not to examine the witness whose name happened to be in the list of witnesses. For the reasons stated, as we have already considered, it is quite clear that the non examination of the grandfather is cited in the prosecution CW3, Mohammed, though his detailed statements were recorded, strengthen defence view. The non examination of CW3 Mohammed is fatal to the prosecution case and that amount to suppression of fact and resulted in non disclosure of truth before court.

14. As to when the incident had taken place, we have already noted, that there is no definite idea. At this juncture, it is also pertinent in to look Ext.P3 and also version of PW11, the Sub Inspector. PW3 has stated that she recorded first information statement at the school in the presence of teachers. She would admit in the cross examination that it was a second Saturday holiday. There was no class and normally no staff would be available. In Ext.P1 the name of the PW1 was written immediately below the matter recorded. But it was far below that signature and designation of PW11 entered. That there is an unusual gap indicating that her signature obtained in advance and the statement was recorded sometimes thereafter. That is why the gap is there. Though PW11 denied that suggestion the fact remained unexplained and that the conclusion is that the defence version is justified by

the circumstance that there happened to be date of Ext.P1 as 11-11-2017 when school remained closed. So the circumstances rendered it impossible that PW11 recorded Ext.P1 in the school on a working day in the presence of teachers. Here also we looked into the testimony of PW1. It was CW3, his grandfather, who divulged everything to the police.

15. Another important aspect to be looked into is that even if PW11 is believed to have recorded Ext.P1, where in the incident stated to have occurred two months prior to the date of furnishing the information, as to this undue delay, no query raised from the side of the Senior Officer. No explanation is forthcoming from any official witness as to why they failed to inquire as to the undue delay in lodging complaint. This also is to be viewed as a strong suspicious circumstance, particularly in view of the discrepancies and inconsistencies we have noted above.

16. PW1 in his chief examination has stated that he had told about the incident to the mother during night. Whether it was in the night of 1-9-2017 or 8-11-2017. But PW3, the mother denied it. She would say that she came to know about the offences perpetrated by the accused later when PW10, the chemical psychologist was consulted. So according to PW3 and other witnesses, the teachers, PW8, PW9, PW12 that they had occasions to notice money in the hands of the victim, PW1. They asked about the source of money. He did not disclose anything. PW3, the mother of the victim also would say that she contacted teachers and they also failed to furnish information but only advised her to consult PW10. It was from PW10 PW3 the mother and CW3 the grandfather of the victim got information about the alleged sexual abuse of the child. Then the source of information is PW10, not PW1, nor the mother of PW1, nor even CW3, Mohammed. PW10 in his chief

examination stated that the child was accompanied by the grandfather and mother and after eliciting information from the victim, he told about the accused to the mother PW3 and grandfather. PW3 has stated she did not go to the doctor but the child was taken to the doctor by CW3, grandfather. That means, PW3 did not go to the clinic of PW10. But PW10 would say that she came there and to whom she delivered the information elicited. Here as to the presence of PW3 in the clinic of PW10, we have inconsistent or rather mutually contradictory versions. Shall we believe PW3 or PW10 in this case?.

17. From the evidence of PW3, we find that no incriminating statement deposed to by PW3 against the accused, has a corresponding statement in the previous statement u/s161 C.P.C. That means that every material version of PW3 is against the accused is an omission amounting to contradiction within the meaning of section 162 Cr.P.C. Those aspects were highlighted when PW3 was cross-examined with reference to her previous statements and also highlighted when the investigation officer examined as PW15. Referring to the contradictions or rather omissions amounting to contradiction of PW3, we find that PW3 is not reliable witness on any particular incriminating aspect.

18. When PW10 is cross examined, the same is the result that with respect to the incriminating materials. In chief examination, PW10 has deposed many things of which there is no corresponding version in the previous 161 statements recorded by police. So as to the source of information pertaining to the incident alleged in the prosecution case, we have no clear idea. Not even a believable idea. Having regard to all these, we have to conclude that the prosecution failed to prove the specific incident alleged to have taken place. Therefore, the point is answered against the prosecution.

19. **Point No.2:** In order to attract the offence punishable 6 r/w 5(m)

of the POCSO Act, in addition to proving the penetrative sexual assault, there should be the evidence as to the age of the victim that he should be below 12 years. On that aspect we have the evidence of PW3, the mother. The incident had taken place on 01-09-2017 and according to the version of PW3 and the evidence of PW9, the Head Mistress, of the school where the child was studying, the date of birth of the victim is 16-06-2004. So by 16-06-2016, the victim had completed 12 years of age. The alleged incident had taken place in the next year that is 1-9-2017 after completion of 13 years. So the aggravated nature of the offence in view of section 5 (m) is not attracted. That is, at the time of alleged incident, the victim was above 13 years of age.

20. In order to prove the case of the prosecution case, they also adduced the medical evidence. PW4, the doctor was examined. In Ext.P3, the doctor recorded the statement of the victim which is more or less in terms of the prosecution case. But on examination of the person of the victim, the doctor had recorded that there was no evidence of recent or past anal penetration. Even if the story of the victim is admitted, the medical evidence has not supported the prosecution case. We have already noted that there is no reliable evidence to hold that the incident as described in the prosecution case had taken place. Simply because the offence alleged is aggravated penetrative sexual assault no judicial finding can be arrived referring to Section 29 of the POCSO Act. The learned defence counsel cited the recent decision of the Apex Court in *Digamber Vaishnav & Anr V. State of Chhattishgarh*, where it has been reiterated that “One of the fundamental principles of criminal jurisprudence is undeniably that the burden of proof squarely rests on the prosecution and that general burden never shifts. There can be no conviction the basis of surmises and conjectures or suspicion howsoever strong it may be.

Strong suspicion, strong coincidences and grave doubt cannot take the place of proof". That is the ingredients of the offence as defined in section 5(m) of the POCSO Act punishable u/s. 6 of the Act is not proved. It also follows the offence u/s. 377 of IPC is also not made out in this case. So there does not arise any question of discussing about the application of section 75 of the Juvenile Justice Act. That none of the offences alleged against the accused is proved to have been committed in the prosecution case. Therefore, the order naturally follows is that of the acquittal of the accused. The point is, therefore, answered in favour of the accused.

21. **Point No.3:** As the points considered above are answered against the prosecution and that no offences is proved to have been committed, the accused is entitled to be acquitted under section 235(1) of Cr.P.C of the offences punishable u/s. 377 of IPC and section 6 of the POCSO Act and Section 75 of the Juvenile Justice Act. The point is answered accordingly.

In the result, the accused is found not guilty for the offences punishable under sections 377 of IPC and section 5 of the POCSO Act and Section 75 of the Juvenile Justice Act and he is acquitted u/s 235(1) of Cr.P.C. The accused is set at liberty.

Dictated to the Confidential Assistant, transcribed by him, corrected and pronounced by me in the open court on this the 24th day of August, 2019.

Sd/-

Special Judge/
Addl. District & Sessions Judge-I

WITNESSES EXAMINED FOR THE PROSECUTION SIDE:

- PW1 : Salman Fais
- PW2 : Baburajan
- PW3 : Fousiya
- PW4 : Dr. Renjima G (Casualty Medical Officer, District Hospital, Nilambur)
- PW5 : Dr. Sunil Joyson (Casualty Medical Officer, District Hospital, Nilambur)
- PW6 : Akash (Secretary, Nilambur Municipality)
- PW7 : Joseph V J (Village Assistant, Village Office, Nilambur)
- PW8 : Prasanna Kumari B (Teacher, Mannam Smaraka Nair Service Society Higher Secondary School, Chakkalakuth, Nilambur)
- PW9 : Preethi K (Headmistress in-charge, Mannam Smaraka Nair Service Society Higher Secondary School, Chakkalakuth, Nilambur)
- PW10 : Dr. Shajiee George (Clinical Psychologist, NIMS Hospital, Wandoor)
- PW11 : Eliyamma TV (Sub Inspector of Police, Nilambur Police Station)
- PW12 : Bency George (High School Assistant, Mannam Smaraka Nair Service Society Higher Secondary School, Chakkalakuth, Nilambur)
- PW13 : Raphel E V (Judicial First Class Magistrate -II, Manjeri)
- PW14 : Binu Thomas (Sub inspector of Police, Nilambur Police Station)
- PW15 : Biju K M (Circle Inspector of Police, Nilambur)

WITNESSES EXAMINED FOR THE DEFENCE SIDE:Nil**EXHIBITS MARKED ON THE PROSECUTION SIDE:**

- P1 11-11-2017 : First Information Statement
- P2 12-11-2017 : Scene Mahazhar

- P3 11-11-2017 : Report of examination of a victim of unnatural offence.
- P4 -Dated Nil- : Certificate of examination of potency
- P5 22-11-2017 : Ownership Certificate
- P6 30-11-2017 : Sketch/Plan
- P7 23-11-2017 : Extract of admission register
- P8 11-11-2017 : Statement of Victim recorded u/s 164 of Cr.Pc.
- P9 11-11-2017 : First Information Report
- P10 12-11-2017 : Arrest Memo
- P11 12-11-2017 : Arrest Notice
- P12 12-11-2017 : Inspection Memo
- P13 13-11-2017 : Report to add full name and address of the accused in the accused column of first information report
- P14 30-11-2017 : Report to add full name of victim and to delete section
- P15 26-12-2017 : Report to carry out the correction in the name of victim.
- P16 01-02-2019 : Certificate of one and same.

EXHIBITS MARKED ON THE SIDE OF DEFENCE:NIL
MATERIAL OBJECTS MARKED: NIL

Sd/-
 Special Judge/
 Addl. District & Sessions Judge-I

//True copy//

Special Judge/
 Addl. District & Sessions Judge-I

Typed by: Shaini T T
Copy ready on: 24-08-2019.

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Fair/Copy of Judgment in S.C.01/2018

Dated: 24-08-2019

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