IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT

THE HONOURABLE MR. JUSTICE R. NARAYANA PISHARADI

WEDNESDAY, THE 1ST DAY OF DECEMBER 2021 / 10TH AGRAHAYANA, 1943

CRL.A NO. 401 OF 2019

SESSIONS CASE NO.460/2017 OF THE COURT OF SPECIAL JUDGE FOR THE TRIAL OF OFFENCES UNDER POCSO ACT, THALASSERY

APPELLANT/ACCUSED NO.1:

ROBIN MATHEW
AGED 51 YEARS
S/O. MATHEW, VADAKKUMCHIRAYIL HOUSE, NADAVAYAL
P.O, MANANTHAVADY, WAYANAD.

BY ADVS.
B.RAMAN PILLAI (SR.)
SRI.R.ANIL
SRI.M.SUNILKUMAR
SRI.K.JOHN SEBASTIAN
SRI.SUJESH MENON V.B.
SRI.T.ANIL KUMAR
SRI.THOMAS ABRAHAM (NILACKAPPILLIL)
SRI.E.VIJIN KARTHIK
SRI.THOMAS SABU VADAKEKUT
SMT.MANJU E.R.
MAHESH BHANU.S

RESPONDENT/COMPLAINANT/*ADDL.2ND RESPONDENT:

1 STATE OF KERALA
REPRESENTED BY THE PUBLIC PROSECUTOR, HIGH COURT OF KERALA, ERNAKULAM, KOCHI-682031.

2 ADDL.R2 XXX VICTIM
IMPLEADED AS ADDITIONAL SECOND RESPONDENT, AS PER ORDER DATED 17/01/2020 IN CRL.MA NO.3/2019.

BY ADVS.
SMT.AMBIKA DEVI S, SPL.GP ATROCITIES AGAINST WOMEN & CHILDREN & WELFARE OF W & C
NANDAGOPAL S.KURUP
P.CHANDRASEKHAR
SANDHYA RAJU
SRI.K.K.MOHAMED RAVUF
GOVERNMENT PLEADER
SMT.K.VIDYA
SHRI.SATHEESH V.T.

THIS CRIMINAL APPEAL HAVING COME UP FOR ADMISSION ON 16.11.2021, THE COURT ON 01.12.2021 DELIVERED THE FOLLOWING:

"CR"

R.NARAYANA PISHARADI, J
****
Crl.A.No.401 of 2019

Dated this the 1st day of December, 2021

J U D G M E N T

The appellant was the Vicar of St.Sebastian Church at Kottiyoor in Kannur District. He was indicted for committing the offences of penetrative sexual assault and rape on a teenage girl of the parish. The trial court convicted and sentenced him for the offences punishable under Section 376(2)(f) of the Indian Penal Code and also under Section 3(a) read with Section 4 and Sections 5(f) and 5(j)(ii) read with Section 6 of the Protection of Children from Sexual Offences Act, 2012 (for short 'the POCSO Act').

2. There were altogether ten accused in the case. The proceedings against Accused 3 to 5 were quashed by the

Supreme Court as per the judgment in Sr.Tessy Jose v. State of Kerala (AIR 2018 SC 4654). As per the impugned judgment, the trial court has acquitted all other accused except the appellant, who was the first accused in the case. The State has not filed any appeal challenging the acquittal of the accused in the case.

3. In the absence of any other accused in picture now, the appellant herein shall be, for the sake of convenience, referred to also as 'the accused'.

4. The prosecution case, as against the appellant/accused, can be briefly stated as follows: The accused was the Vicar of the St.Sebastian Church, Kottiyoor. He was also the Manager of the Kottiyoor I.J.M Higher Secondary School. The victim girl used to go to the church to attend the Holy Mass. After the Holy Mass, she used to do computer work in the room attached to the church in which the accused was residing. When she was in his room, he used to sexually assault her. He had warned her not to disclose the matter to any one. One day in the month of May, 2016, the accused induced the victim girl to come to his room

and he committed rape and penetrative sexual assault on her. As a result, the victim girl became pregnant. She gave birth to a male child on 07.02.2017.

5. It appears that initially an attempt was made to hush up the whole matter. However, the matter came to the notice of the Child Welfare Committee and the police was informed. On 26.02.2017, the Sub Inspector (PW23) of Kannur Vanitha Police Station reached the house of the victim girl and recorded her statement (Ext.P2). At that time, the victim girl told the police that her own father had committed rape on her and that the father of her child was her own father.

6. On the basis of Ext.P2 statement, the SHO of Kelakam police station (PW24) registered Ext.P28 F.I.R against the father of the victim girl. The investigation revealed that it was not the father of the victim but it was the accused who had sexually assaulted her. PW37, the Inspector of Police, Peravoor conducted the investigation of the case. After completing the investigation, PW38 Inspector of Police, filed charge-sheet against the ten

accused persons. The charges levelled against the appellant/accused were for the offences punishable under Section 3(a) read with Section 4, Section 5(f) read with Section 6, Section 5(j)(ii) read with Section 6, Section 5(p) read with Section 6, Section 7 read with Section 8, Section 9(f) read with Section 10, Section 16 read with Section 17 of the POCSO Act and also under Sections 376(2)(f), 506(1), 201 and 120B of the Indian Penal Code and also under Section 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015.

7. The trial court framed charge against the accused (A1) for the offences punishable under Section 3(a) read with Section 4, Section 5(f) read with Section 6, Section 5(j)(iii) read with Section 6, Section 5(p) read with Section 6, Section 7 read with Section 8, Section 9(f) read with Section 10 of the POCSO Act and also under Sections 376(2)(f), 506(1), 201 and 120B of the Indian Penal Code and also under Section 75 of the Juvenile Justice (Care and Protection of Children) Act, 2015. The accused (A1) pleaded not guilty and he claimed to be tried.

8. During the trial of the case, the prosecution examined the witnesses PW1 to PW38 and marked Exts.P1 to P80 and Ext.C1 documents and MO1 to MO7 material objects. No oral evidence was adduced by the accused (A1) but Ext.D1 document was marked on his side.

9. The trial court found the accused (A1) guilty of the offences punishable under Section 376(2)(f) of the Indian Penal Code and also under Section 3(a) read with Section 4 and Sections 5(f) and 5(j)(ii) read with Section 6 of the POCSO Act and convicted him thereunder. The trial court acquitted him of the other charges levelled against him.

10. The trial court sentenced the accused (A1) to undergo rigorous imprisonment for a period of twenty years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a period of one year for the offence punishable under Section 376(2)(f) of the I.P.C. The trial court separately awarded him the same sentence for each of the offences punishable under Section 3(a) read with Section 4 and

Sections 5(f) and 5(j)(ii) read with Section 6 of the POCSO Act. The trial court directed that the substantive sentences of imprisonment shall run concurrently.

11. Heard learned senior counsel who appeared for the appellant/accused and also the learned Special Public Prosecutor. Perused the records including the written submissions filed in the appeal.

12. In the peculiar facts and circumstances of the case, the testimony of the victim is sufficient to prove that the accused had made sexual intercourse with her.

13. The victim girl was examined as PW1. She did not fully support the prosecution case. A summary of the evidence given by PW1, with regard to the incident, is as follows: She is a member of the Kottiyoor St.Sebastian Church. The accused was the Vicar of the church. The accused was residing in the room attached to the church. She used to go there to do computer work. The accused sexually used her in the month of May, 2016. She used to go to the church along with her brother. One day, at

about 07:00 hours, both of them went to the church. It was heavily raining after the Holy Mass. Her brother went directly to the school to attend the morning class, leaving her in the church. She went to the room of the accused. They sat there talking to each other. Meanwhile, both of them lost their control and they engaged in sexual intercourse. She did not know that she would become pregnant after sexual intercourse. She delivered a male child on 07.02.2017.

14. On cross-examination by the accused (A1), PW1 categorically stated that it was with her full consent that the accused made sexual intercourse with her. She further stated that she has got no complaint against the accused (A1).

15. Ext.C1 is the DNA analysis report in respect of the samples of blood taken from PW1, the accused and the child of PW1. The Assistant Director of the Forensic Science Laboratory who conducted the DNA analysis and issued Ext.C1 report was examined as PW31. As per the evidence given by her and as per Ext.C1 DNA analysis report, the accused is the biological father of

the child born to PW1.

16. Learned senior counsel for the appellant has not raised any contention challenging the correctness of the findings made in Ext.C1 report.

17. When examined under Section 313 Cr.P.C, the accused admitted that he had made sexual intercourse with the victm and that he is the father of the child born to PW1.

18. In the aforesaid circumstances, the evidence of PW1 is sufficient to prove that the accused made sexual intercourse with her one day in May, 2016. Ext.C1 DNA analysis report and also the admission of the accused that he had made sexual intercourse with the victim and that he is the father of the child born to the victim are circumstances corroborating the evidence of PW1 in that regard. Thus, the prosecution could establish beyond reasonable doubt that the accused made sexual intercourse with PW1 and as a cosequence, PW1 became pregnant.

19. Learned senior counsel for the appellant contended that

sexual intercourse made by the accused with PW1 was with her full and unqualified consent and since the prosecution could not legally prove that PW1 was below the age of 18 years when the accused made sexual intercourse with her, the offence punishble under Section 376 of the I.P.C and the offences under the POCSO Act are not proved against him.

20. The above contention is based on the premise that acknowledged consensual physical relationship between an adult man and an adult woman would not constitute an offence punishable under Section 376 of the Indian Penal Code and also that the offences under the POCSO Act would be attracted only if the victim is below the age of 18 years.

21. PW1 had delivered the child on 07.02.2017. The accused had made sexual intercourse with PW1 in May, 2016. According to the prosecution, the date of birth of PW1 is 17.11.1999. If the date of birth of PW1 is 17.11.1999, she was below the age of 18 years in May, 2016, when the accused made sexual intercourse with her. If that be so, consent given by PW1

for sexual intercourse with her, would be immaterial. Consent of a minor for sexual relationship is immaterial and inconsequential. Therefore, the crucial question is whether the prosecution could legally prove that the date of birth of PW1 is 17.11.1999.

22. Before analyzing the evidence adduced by the prosecution with regard to the date of birth of PW1, the legal aspects with regard to proof of the age of a victim of sexual assault, shall be taken note of.

23. Rule 12(3) of the Juvenile Justice (Care and Protection of Children) Rules, 2007 (hereinafter referred to as the 'JJ Rules, 2007') reads as under:

> "(3) In every case concerning a child or juvenile in conflict with law, the age determination inquiry shall be conducted by the court or the Board or, as the case may be, the Committee by seeking evidence by obtaining - -
>
> (a) (i) the matriculation or equivalent certificates, if available; and in the absence whereof; (ii) the date of birth certificate from

the school (other than a play school) first attended; and in the absence whereof; (iii) the birth certificate given by a corporation or a municipal authority or a panchayat;

(b) and only in the absence of either (i), (ii) or (iii) of clause (a) above, the medical opinion will be sought from a duly constituted Medical Board, which will declare the age of the juvenile or child. In case exact assessment of the age cannot be done, the Court or the Board or, as the case may be, the Committee, for the reasons to be recorded by them, may,if considered necessary, give benefit to the child or juvenile by considering his/her age on lower side within the margin of one year, and, while passing orders in such case shall, after taking into consideration such evidence as may be available, or the medical opinion, as the case may be, record a finding in respect of his age and either of the evidence specified in any of the clauses (a)(i),

(ii), (iii) or in the absence whereof, clause (b) shall be the conclusive proof of the age as regards such child or the juvenile in conflict with law".

24. In **Mahadeo v. State of Maharashtra** [**(2013) 14 SCC 637**], after making reference to the above rule, it was held as follows:

> *"Under Rule 12(3)(b), it is specifically provided that only in the absence of alternative methods described under Rule 12(3)(a)(i) to (iii) the medical opinion can be sought for. In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well".*

25. The decision in **Mahadeo** (supra) was followed by the Apex Court in **State of Madhya Pradesh v. Anoop Singh** [**(2015) 7 SCC 773**].

26. In **Jarnail Singh v. State of Haryana : AIR 2013 SC 3467**, after making a reference to the above rule, the Apex

Court held as follows:

> *"Even though Rule 12 is strictly applicable only to determine the age of a child in conflict with law, we are of the view that the aforesaid statutory provision should be the basis for determining age, even for a child who is a victim of crime. For, in our view, there is hardly any difference in so far as the issue of minority is concerned, between a child in conflict with law, and a child who is a victim of crime. Therefore, in our considered opinion, it would be just and appropriate to apply Rule 12 of the 2007 Rules, to determine the age of the prosecutrix VW-PW 6".*

Thus, principles applicable to the determination of age in the case of a juvenile or child in conflict with law would in terms apply to cases of determination of the age of a victim as well.

27. The Juvenile Justice (Care and Protection of Children) Act, 2015 (hereinafter referred to as the 'JJ Act, 2015') is a sequel to the Juvenile Justice (Care and Protection of Children) Act, 2000 (hereinafter referred to as the 'JJ Act, 2000') which has since been repealed.

28. Section 94 of the JJ Act, 2015 is extracted below:

> "94. Presumption and determination of age.- (1) Where, it is obvious to the Committee or the Board, based on the appearance of the person brought before it under any of the provisions of this Act (other than for the purpose of giving evidence) that the said person is a child, the Committee or the Board shall record such observation stating the age of the child as nearly as may be and proceed with the inquiry under section 14 or section 36, as the case may be, without waiting for further confirmation of the age.
>
> (2) In case, the Committee or the Board has reasonable grounds for doubt regarding whether the person brought before it is a child or not, the Committee or the Board, as the case may be, shall undertake the process of age determination, by seeking evidence by obtaining –
>
> (i) the date of birth certificate from the school, or the matriculation or equivalent certificate from the concerned examination Board, if

available; and in the absence thereof;

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

(iii) and only in the absence of (i) and (ii) above, age shall be determined by an ossification test or any other latest medical age determination test conducted on the orders of the Committee or the Board. Provided such age determination test conducted on the order of the Committee or the Board shall be completed within fifteen days from the date of such order.

(3) The age recorded by the Committee or the Board to be the age of person so brought before it shall, for the purpose of this Act, be deemed to be the true age of that person".

29. The JJ Act, 2000 has been repealed as per Section 111 of JJ Act, 2015 which came into force on 15.01.2016. Section 94 of the JJ Act, 2015 contemplates the documents which can be relied on for determining the age of a person and the order of preference of such documents. One of the important deviations

from the earlier provisions is that, it does not insist for the certificate from the school first attended, as it provides for certificate from the school or matriculation certificate by the concerned Examination Board. As the said provision is effective from 01.01.2016 onwards, in all matters where the date of occurrence of the crime is on or after the said date, the procedure to be followed is that contemplated under the JJ Act, 2015. In such cases, the acceptable documents and the order of preference of such documents, shall be as contemplated in the said Act.

30. In **Ram Vijay Singh v. State of Uttar Pradesh [2021 Cri.L.J 2805 (SC)**], it was observed that the procedure prescribed in Rule 12 of the JJ Rules, 2007 is not materially different than the provisions of Section 94 of the JJ Act, 2015 to determine the age of the person. It was held that there are minor variations as the Rule 12(3)(a)(i) and (ii) have been clubbed together with slight change in the language.

31. At the point of time when **Jarnail Singh** (supra) and

Mahadeo (supra) were decided by the Supreme Court, the JJ Act, 2000 and the Rules thereunder were in force. The said Act of 2000 has since been repealed and has been replaced by the JJ Act, 2015. When the incident in this case took place, the rules framed under the JJ Act, 2000 (JJ Rules,2007) were no longer in the statute book. The incident took place in May, 2016, after the JJ Act, 2015 came into force. The provisions contained in Rule 12(3) of the JJ Rules, 2007 framed under the the JJ Act, 2000, with certain modifications, are engrafted into Section 94 of the JJ Act, 2015. The principles of law laid down in **Jarnail Singh** (supra) and **Mahadeo** (supra) would apply with equal force to the provisions of Section 94(2) of the the JJ Act, 2015. Therefore, in the instant case, the provisions contained in Section 94 of the JJ Act, 2015 have to be applied to determine the age of PW1 as on the date of the incident.

32. However, with regard to the applicability of Section 94 of the JJ Act, 2015, the Division Bench of this Court has taken a different view in a series of decisions rendered recently.

33. In **Rajan v. State of Kerala** [**2021 KHC 375 : 2021 (4) KLT 274**], a Division Bench of this Court has held that, as per Section 94 of the JJ Act, 2015, there is no requirement of the certificate being from the school first attended but the said rigour has to be applied in cases where the determination of age of a minor victim arises, so as to not cause prejudice to the accused. In this case, the Division Bench was considering a case in which the incident took place before the JJ Act, 2015 came into force.

34. In **Alex V. State of Kerala : 2021 KHC 405**, the Division Bench of this Court has held that the Act of 2015 is one intended for the protection of the juveniles in conflict with law, just as the criminal justice system ensures no prejudice being caused to the accused and the requirement of the Rules of 2007, specifically of the date of birth of even a victim being determined with the certificate from the school first attended has to survive the repeal of that Rules and that the requirement cannot be diluted. In this case also, the incident had taken place before the JJ Act, 2015 came into force.

35. In **Madhu v. State of Kerala : 2021 (5) KHC 602**, the Division Bench of this Court has held as follows:

> "The first question to be considered is whether the age of the victim has been proved. A Division Bench of this Court in *Rajan v. State of Kerala* (2021 KHC 375) has held that certified copy of the extract of the Admission Register of a school cannot be valid proof of date of birth. The learned Prosecutor points out that as per the Juvenile Justice (Care and Protection of Children) Act, 2015 there is only requirement of a Birth Certificate issued from the school for proving the age of a juvenile in conflict with law which can be adopted for the victim in a rape case as held by the Hon'ble Supreme Court in *Jarnail Singh v. State of Haryana* (2013 KHC 4455). We have to notice that the offence herein was committed long before the JJ Act, 2015 came into force. As on the date of commission of the offence, Juvenile Justice (Care and Protection of Children) Rules, 2007 under the repealed Act was in force. As per the Rules existing then, *inter alia* the Birth Certificate of the school first attended was held to be valid proof in *Jarnail Singh*. In *Alex v. State of Kerala* (2021 KHC 405) it was held that since

> the POCSO Act does not contain a provision to determine the age of a victim, the proof has necessarily to be in accordance with the rigour of the requirement as insisted by the earlier JJ Act and Rules, which were adopted by the decision in *Jarnail Singh"*.
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> (emphasis supplied)

In the above case also, the incident had taken place much before the JJ Act, 2015 came into force. The Division Bench has specifically taken note of that fact.

36. In **K.Raghavan v. State of Kerala : 2021 (6) KLT 427**, the incident alleged had taken place on a day between 19.11.2015 and 17.12.2015. The Division Bench turned down the plea of the learned Special Public Prosecutor for reconsideration of the earlier decisions. The Division Bench has held as follows:

> "We bow to the proposition in *Jarnail Singh* and *Mahadeo* that the certificate from a school first attended as provided for in Rule 12 of the Juvenile Justice (Care and Protection of Children) Rules, 2007 would suffice. But we caution ourselves from stretching the dictum and diluting the rigour provided by the Hon'ble Supreme Court, in excess of the declaration made by the

> Apex Court, by making acceptable the certificate of extract of the admission register from a school, which is not the one first attended. We cannot import the provisions of the beneficial legislation; the JJ Act of 2015, aimed at conferring every benefit on the juvenile accused, to the POCSO Act for determination of the age of the victim; which in effect may prejudice the accused prosecuted under the POCSO Act. Hence, it was held that the rigour of the certificate from the school first attended as declared by the Hon'ble Supreme Court has to survive repeal of the Rules of 2007 and the fresh provisions, incorporated in the JJ Act, 2015 cannot be availed of to determine the age of the victim under the POCSO Act. We do not find any reason to take a different view from the earlier decisions".
>
> (emphasis supplied)

37. At the time, when the Supreme Court rendered the decisions in **Jarnail Singh** (supra) and **Mahadeo** (supra), the 2007 Rules were in force. The dictum laid down in the above decisions of the Supreme Court, according to me, is only that the provisions contained in the JJ Act, which are prevailing at the relevant time,

for determination of the age of the juvenile or child in conflict with law can be adopted for determination of the age of the victim also. This is clear from **Mahadeo** (supra) in which it is stated as follows:

> "In the light of such a statutory rule prevailing for ascertainment of the age of a juvenile, in our considered opinion, the same yardstick can be rightly followed by the courts for the purpose of ascertaining the age of a victim as well."
>
> (emphasis supplied)

I find no logic in finding that, even after the repeal of a statute and even after a new statute coming into force, the provisions of the repealed statute have to be followed even in a case where the incident has taken place after the new statute came into force. Law cannot be static. Law is dynamic and it is expected to diligently keep pace with time. It has to evolve and change with the needs of the society.

38. The provisions of the JJ Act as well as the provisions of the POCSO Act are traceable to Article 15(3) of the Constitution

which enables Parliament to make special provisions for the benefit of children. Article 39 of the Constitution provides that, the State shall, in particular, direct its policy towards securing that the tender age of children is not abused and their childhood and youth are protected against exploitation and they are given facilities to develop in a healthy manner and in conditions of freedom and dignity. Section 42A of the POCSO Act provides that the provisions of that Act are in addition to and not in derogation of the provisions of any other law in force. The POCSO Act has been enacted to provide for protection of children from the offences of sexual assault, sexual harassment and pornography with due regard for safeguarding the interest and well being of the child at every stage of the judicial process, incorporating child-friendly procedures for reporting, recording of evidence, investigation and trial of offences.

39. Section 42 of the POCSO Act makes it clear that where an offence is punishable, both under POCSO Act and also under the Indian Penal Code, then the offender, if found guilty of such

offence, is liable to be punished under that Act, which provides for more severe punishment. This is against the traditional concept of criminal jurisprudence that if two punishments are provided, then the benefit of the lower punishment should be given to the offender. The POCSO Act was enacted for the protection of children with a view to ensure that children of tender age are not abused during their childhood and youth. The Court has to keep in mind the object of the statute. Therefore, the line of thinking that adopting the provisions under Section 94 of the JJ Act, 2015 for determination of the age of the victim would cause prejudice to the accused, cannot be accepted. In fact, when the incident has taken place on a date after the coming into force of the JJ Act, 2015, adopting the provisions of that Act to determine the age of the victim does not cause any prejudice to the accused.

40. Inspite of the above view taken by me, judicial propriety and discipline compel me to follow the decision of the Division Bench of this Court in **K.Raghavan v. State of Kerala**

(**2021 (6) KLT 427**). Therefore, I shall now examine whether the prosecution has proved the age of the victim in accordance with the provisions contained in the JJ Rules, 2007.

41. As per clause (a) of Rule 12(3) of the JJ Rules, 2007, the documents which can be considered for determining the age of a person are : (i) matriculation or equivalent certificate if available; (ii) in the absence of (i), the date of birth certificate from the school first attended; and (iii) in the absence of (ii), the birth certificate given by a corporation, municipal authority or panchayat.

42. Clause (a) of Rule 12(3) of the JJ Rules, 2007 contains a hierarchical ordering, evident from the use of the language "in the absence whereof". This indicates that where a matriculation or equivalent certificate is available, the documents adverted to in (ii) and (iii) cannot be relied upon. The matriculation certificate, in other words, is given precedence. It is in the absence of a matriculation certificate that the date of birth certificate of the school first attended can be relied upon. It is in

the absence of both the matriculation and the birth certificate from the school first attended that a birth certificate issued by the corporation, municipal authority or panchayat could be obtained [See **Sanjeev Kumar Gupta v. State of U.P : (2019) 12 SCC 370**].

43. In the instant case, the documents produced by the prosecution to prove the date of birth of the victim are : (i) extract of the birth register which is kept in the local authority (Ext.P14) and (ii) certified copy of the admission register maintained at the I.J.M Higher Secondary School, Kottiyoor (Ext.P34).

44. The prosecution has not produced the matriculation or equivalent certificate in respect of the victim. In the absence of that document, the next document which can be relied upon to prove the age of the victim is the date of birth certificate from the school first attended by her. Ext.P34 is not a certificate or extract of register issued from the school first attended by the victm. Therefore, it cannot be relied upon to prove the date of

birth of the victim.

45. In the absence of the matriculation or equivalent certificate and in the absence of the date of birth certificate from the school first attended by the victim, the next document which the prosecution could rely upon to prove the date of birth of the victim, is the birth certificate given by a corporation, municipal authority or panchayat.

46. Ext.P14 is the extract of the birth register produced by PW14, who was the Registrar of Births and Deaths in the Kuthuparamba Municipality.

47. Ext.P14 bears the name of the victim girl. The date of her birth shown in it is 17.11.1999. The place of birth shown in Ext.P14 is 'hospital'. The name of that hospital shown in Ext.P14 is "Christuraj Hospital, Thokkilangadi".

48. Learned senior counsel for the appellant pointed out that many columns in Ext.P14 are left blank. The column for recording the address of the house (place of birth) is left blank in Ext.P14. Since the birth of the child was in hospital, no question

of filling up that column arises. The only other columns against which particulars are not recorded in Ext.P14 are the columns for recording the address of the parents of the child at the time of birth and the name and address of the person who had given information regarding the birth of the child. In the instant case, it cannot be found that these are matters which affect the correctness of the date of birth and the name of the child shown in the birth register. The victim, her mother and father, when examined as PW1 to PW3 respectively, have given evidence that according to the entry made in the birth register, the date of birth of PW1 is 17.11.1999.

49. Certain other particulars, including the name of the child born and the permanent address of the parents, are seen subsequently recorded in the birth register. In olden days, the usual practice was to register the birth of the child at the time of its birth and to subsequently incorporate the name of the child after name is given to the child or after the "naming ceremony". It is a matter of common knowledge that the birth certificate

issued by the Municipality generally does not contain the name of the child, for the reason, that it is recorded on the basis of the information furnished either by the hospital or parents just after the birth of the child and by that time the child is not named (See **Murugan Settu v. State of Tamil Nadu : AIR 2011 SC 1691**). This explains the subsequent incorporation of the name of the child in the birth register.

50. PW14, the Registrar of Births and Deaths in the Kuthuparamba Municipality, has given evidence as to the entries made in Ext.P14. PW14 has stated on cross-examination that he was not the Registrar of Births and Deaths at the time of making entries in the birth register. He has also stated that, in order to register the birth of a child, the parturition register kept in the hospital would be verified. However, on re-examination, PW14 has deposed that all births are registered not on verification of the parturition register. He has stated that births are registered on the basis of the birth report, which is known as "live birth report", received from the hospital.

51. There is no force in the contention of the learned senior counsel for the appellant that, in order to prove the entries in the birth register, the person who made the entries has to be examined. In **Harpal Singh v. State of H.P : AIR 1981 SC 361**, the Supreme Court has held as follows:

> "There is yet another document viz., Ex.PD, a certified copy of the relevant entry in the birth register which shows that Saroj Kumari, who according to her evidence was known as Ramesh during her childhood, was born to Lajwanti wife of Daulot Ram on 11.11.1957. Mr. Hardy submitted that in the absence of the examination of the officer/chowkidar concerned who recorded the entry, it was inadmissible in evidence. We cannot agree with him for the simple reason that the entry was made by the concerned official in the discharge of his official duties, that it is therefore clearly admissible under Section 35 of the Evidence Act and that it is not necessary for the prosecution to examine its author."
>
> (emphasis supplied)

52. In **State of Kerala v. Jose : 1989 (1) KLT 296**, this Court has held as follows:

> "Entries in birth registers may be the best evidence regarding date of birth even in the absence of the examination of the person who gave the information or made the entry or is maintaining the record unless it is shown to be wrong".

53. Section 35 of the Evidence Act provides that, any entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty, specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

54. Section 35 of the Evidence Act requires that the following conditions to be fulfilled before a document can be admissible under this section; (i) the document must be in the nature of an entry in any public or other official book, register or record (ii) it must state a fact in issue or a relevant fact (iii) the

entry must be made by a public servant in the discharge of his official duties or in performance of his duties especially enjoined by the law of the country in which the relevant entry is kept (See **State of Bihar v. Sri Radha Krishna Singh : AIR 1983 SC 684**).

55. Under Section 35 of the Evidence Act, all that is necessary is that the document should be maintained regularly by a person whose duty it is to maintain the document (See **Umesh Chandra v. State of Rajasthan : AIR 1982 SC 1057**).

56. Entries in official records, which have been made so many years ago, are presumed to be correct. Statements in public documents are receivable to prove the facts stated on the general ground that they were made by the authorized agents of the public in the course of official duty and respecting facts which were of public interest or required to be recorded for the benefit of the community. In many cases, indeed, in nearly all cases, after a lapse of years it would be impossible to give evidence that the statements contained in such documents were in fact true,

and it is for this reason that such an exception is made to the rule of hearsay evidence (See **Ghulam Rasul Khan v. Secretary of State : AIR 1925 PC 170**).

57. Birth registers are maintained by public servants in the discharge of their official duty, a duty specially enjoined by law. In the generality of cases the entries in those registers furnish the best evidence of the date of birth and can safely be accepted unless they are shown to be wrong (See **Kunhiraman v. Krishna Iyer : 1962 KLJ 289**).

58. However, a party can ask the court to examine the probative value of the contents of the document. Admissibility of a document is one thing and its probative value quite another. These two aspects cannot be combined. A document may be admissible and yet may not carry any conviction and weight of its probative value may be nil. Even if the entry was made in an official record by the concerned official in the discharge of his official duty, it may have weight but still may require corroboration by the person on whose information the entry has

been made. The entry made in the official record by an official or person authorised in performance of an official duty is admissible under Section 35 of the Evidence Act but the party may still ask the Court to examine its probative value. The authenticity of the entry would depend on whose instruction/information such entry stood recorded and what was his source of information. [See **Satpal Singh v. State of Haryana : (2010) 8 SCC 714** and **Murugan Settu v. State of Tamil Nadu : AIR 2011 SC 1691**].

59. The Registration of Births and Deaths Act, 1969 (for short 'the Act') came into force in Kerala with effect from 01.04.1970. The Act is intended to provide for the regulation of registration of births and deaths. Section 8 of the Act deals with the persons who are required to give information to the Registrar with regard to the birth of children. As per Section 8(1)(b) of the Act, in respect of birth in a hospital, it is the duty of the medical officer in charge or any person authorised by him to give such information.

60. As per the entries in Ext.P14 extract of the birth register, information with regard to the birth was given from the Christuraj Hospital. Therefore, the authenticity of the entry in Ext.P14 has to be tested on the basis of the information given from that hospital.

61. Ext.P46 is the photocopy of the live birth report produced from the Kuthuparamba Municipality. It is attested by the Secretary of the Municipality. It is alleged to be the report given from the Christuraj Hospital to the Municipality informing the details of the birth of the victim. The original of the report was produced before the trial court by the Secretary of the Municipality (PW34). The deposition of PW34 reveals that the trial court had compared the copy (Ext.P46) with the original of the report.

62. Dr.P.V.Jose, who had issued Ext.P46, was examined as PW36. He has deposed that he had worked as Consultant Gynecologist in the Christuraj Hospital at Kuthuparamba during the period 1997-2001. He has stated that he had signed and

issued Ext.P46 report. He would say that it was prepared at the labour room in the hospital and it contains the date of birth, sex, the place of birth, the permanent address of the patient and the details of the parents of the child born. He further stated that, as per Ext.P46, the date of birth of the child is 17.11.1999 and the report was sent to the Kuthuparamba Municipality.

63. On cross-examination, PW36 has stated that the birth certificate of the child would be normally sent by the concerned doctor and not by the administrator of the hospital. He admitted that the entries in Ext.P46 report are not in his handwriting. He has stated that the report was prepared by the staff in the labour room. He would also say that the basic document with regard to the birth of a child in a hospital is the parturition register.

64. The date of birth of the child shown in Ext.P46 report is 17.11.1999. The place of birth of the child is shown in Ext.P46 report as Christuraj Hospital, Kuthuparamba. The name of the father of the child shown in Ext.P46 report is that of PW3 (the father of the victim) and the name of the mother of the child

shown in Ext.P46 is that of PW2 (the mother of the victim). It is also mentioned in Ext.P46 report that it was a normal delivery. The name of the person who gave information with regard to the birth of the child to the Municipality is shown as Dr.P.V.Jose in Ext.P46. The date of birth of the child shown in Ext.P14 birth register tallies with the date of birth shown in Ext.P46 live birth report. The names of the parents of the child shown in Ext.P46 and the names of the parents of the victim shown in Ext.P14 birth register are the same. Merely for the reason that the address of the parents (at the time of birth of the child) which was shown in Ext.P46 report is not recorded in Ext.P14, it cannot be found that the entries in Ext.P14 are false or that they are not genuine.

65. Much ado has been made by the defence on Ext.P46 live birth report sent from the hospital to the local authority for informing the birth of the child. Learned senior counsel for the appellant would contend that the basis of making entries in the birth register is the parturition register kept in the hospital and it

is not the live birth report.

66. Explanation for the non-production of the parturition register has been given by the prosecution through the evidence of PW35, the Nursing Superintendent of the Christuraj Hospital. She has stated that she is the custodian of the records in the hospital. She deposed that there is parturition register kept in the hospital but it is maintained as "delivery register". She would further say that such a register has to be kept in the hospital only for a period of fifteen years and that the register which contained the details in respect of the birth of the victim is not available in the hospital and it might have been destroyed after the period for which it had to be kept, which is fifteen years. There is nothing to show that the prosecution had deliberately suppressed from evidence the relevant parturition register.

67. There is no force in the contention of the appellant that proper document was not sent from the hospital to the Municipality informing the birth of the child. The word 'parturition' means the act or process of giving birth of a child.

Live birth report is a document prepared in the labour room of the hospital at the time of delivery of the child. The parturition register is kept in the hospital which contains details of the births in a hospital. On the other hand, the live birth report is one prepared in the labour room. Whatever be the document sent from the hospital to the local authority regarding the birth of a child, the question is only whether correct and required information was sent. The evidence of PW36 would show that proper information, in the form of live birth report, was sent from the hospital regarding the birth of the child and that the information given was correct. The entries in the birth register were made not on the basis of the parturition register but on the basis of the live birth report. Therefore, the availability or otherwise of the parturition register cannot cast a doubt on the entries in the birth register.

68. The birth register maintained by the statutory authority raises a presumption of correctness [See **CIDCO v. Vasudha Gorakhnath : (2009) 7 SCC 283**]. Once an entry is made in

the register maintained by competent authority in accordance with the statutory provision, it raises a presumption of correctness to the entry regarding date of birth (See **Subin Mohammed v. Union of India : 2016 (1) KLT 340**).

69. The presumption, of course, is rebuttable. The accused did not produce any materials in the trial court to show that the entries in Ext.P14 birth certificate/register with regard to the date of birth of the child are false or wrong or that those entries do not relate to the victim. The presumption or correctness attached to such entries can be rebutted only on the basis of evidence of impeccable reliability. No such evidence was let in by the accused. Nothing was also brought out in the cross-examination of PW14 and PW36 which would create suspicion regarding the correctness of the entries in Ext.P14 register.

70. Ext.P14 is a document which comes under Rule 12(3)(a)(iii) of the JJ Rules, 2007. The prosecution could prove that Ext.P14 relates to the victim and that her date of birth is 17.11.1999.

71. In **Ram Vijay Singh v. State of U.P** [**2021 Crl.L.J 2805 (SC)**], a three Judge Bench of the Apex Court has held as follows:

> "The Court is not precluded from taking into consideration any other relevant and trustworthy material to determine the age as all the three eventualities mentioned in sub-section (2) of Section 94 of the Act are either not available or are not found to be reliable and trustworthy."

The same principle applies to Rule 12(3) of the JJ Rules, 2007. Therefore, even if for any reason it is assumed that Ext.P14 is a document which does not come under Rule 12(3)(a)(iii) of the JJ Rules,2007, it is a material which can be taken into consideration by the court to find out the age of the victim.

72. The evidence of PW1 to PW3 regarding the date of birth of the victim (PW1) shall be now considered.

73. When examined as PW1, the victim girl has stated that her date of birth is 17.11.1997. However, she would admit that her date of birth shown in the birth certificate and in the school

admission register is 17.11.1999.

74. PW1 has admitted that when she gave Ext.P2 statement to the police, she had told that her date of birth is 17.11.1999. In Ext.P2 first information statement given to the police, PW1 has stated that her date of birth is 17.11.1999.

75. On cross examination of PW1 by the public prosecutor with the permission of the court, PW1 reiterated that her date of birth is 17.11.1997 but she would admit that that the date of birth shown in the Secondary School Leaving Certificate is 17.11.1999. PW1 has stated that it was her parents who told her that her date of birth is 17.11.1997 but there is no document to show that she was born in the year 1997.

76. Not much reliance can be placed upon the testimony of PW1 regarding her date of birth. But, even according to the version of PW1, her date of birth shown in the birth certificate and the school records is 17.11.1999 and not 17.11.1997.

77. The mother of the victim girl was examined as PW2. She did not fully support the prosecution case. She was declared

hostile to the prosecution and with the permission of the court, she was cross-examined by the public prosecutor. On such cross examination, PW2 has stated that she delivered the victim girl at her house and not at the Christuraj Hospital and the delivery was in the year 1997.

78. PW2 has stated that her daughter (the victim girl) was baptized when she was aged seven or eight years. PW2 further stated that, when the victim girl was baptized, the date of birth given in the church was 17.11.1999.

79. It has come out in the evidence of PW2 that, in order to save the accused, who was the priest of the church, she had no qualms to give information at the hospital that the father of the child delivered by her daughter was one Benny. In the light of Ext.P46 live birth report issued from the hospital, at a point of time when there was no dispute regarding the date of birth of the victim girl, the evidence of PW2 that it was at her house that she delivered PW1, cannot be given any weight.

80. However, the fact that PW2, the mother of the victim,

had given the date of birth of the victim as 17.11.1999 at the time of baptizing the victim is a crucial circumstance which strengthens the conclusion that the date of birth of the victim is 17.11.1999.

81. The father of the victim girl was examined as PW3. He also did not fully support the prosecution case. He has stated that the date of birth of his daughter, the victim girl, is 17.11.1997 but there is no document with him to prove it. He admitted that he had given an application before the District Legal Services Authority for granting interim compensation to the victim. He also stated that such an application was given by him without any threat or persuasion from any other person. He admitted that he had stated the age of the victim as sixteen years in that application.

82. It is well settled that the evidence of prosecution witnesses cannot be rejected in toto merely because the prosecution chose to treat them as hostile and cross examined them. The evidence of such witnesses cannot be treated as

effaced or washed off the record altogether but the same can be accepted to the extent that their version is found to be dependable on a careful scrutiny thereof [See **Hari v. State of U.P** (Judgment dated 26.11.2021 of the Supreme Court in Criminal Appeal No. 186 of 2018].

83. In the instant case, from the very beginning, there has been attempt on the part of the family of the victim to save the accused, who was the vicar of the local church, from the clutches of law. The victim girl, when she gave the first information statement to the police, had no qualms to state that the father of her child was her own father. She had even stated to the police that her own father (PW3) committed rape on her at their house. As noticed earlier, PW2, the mother of the victim, with the sole intention to save the accused, gave information at the hospital that the father of the child born to her daughter was one Benny. It has also come out in evidence that the child born to the victim was immediately removed from the hospital and separated from its mother. The evidence given by PW2 and PW3 that the date of

birth of the victim is 17.11.1997 has to be appreciated in the above background. There are no documents which show the date of birth of the victim as 17.11.1997. At the same time, PW2 and PW3 have admitted that, as per the birth register and other documents, the date of birth of their daughter, the victim, is 17.11.1999.

84. Ordinarily the oral evidence can hardly be useful to determine the correct age of a person, and the question, therefore, would largely depend on the documents and the nature of their authenticity. Oral evidence may have utility if no documentary evidence is forthcoming (See **Umesh Chandra v. State of Rajasthan : AIR 1982 SC 1057**).

85. In **Vishnu v. State of Maharashtra : AIR 2006 SC 508**, it has been held that in the case of determination of the date of birth of the child, the best evidence is of the father and the mother. In the very same decision, it has been held that the birth register and hospital records relating to the birth of a child are documents which could be relied upon to prove the date of

birth of a child.

86. In **Murugan Settu** (supra) the Supreme Court has observed as follows:

> "In the instant case, in the birth certificate issued by the Municipality, the birth was shown to be as on 30.3.1984; registration was made on 5.4.1984; registration number has also been shown; and names of the parents and their address have correctly been mentioned. Thus, there is no reason to doubt the veracity of the said certificate. More so, the school certificate has been issued by the Head Master on the basis of the entry made in the school register which corroborates the contents of the certificate of birth issued by the Municipality. Both these entries in the school register as well, as in the Municipality came much before the criminal prosecution started and those entries stand fully supported and corroborated by the evidence of Parimala (PW.15), the mother of the prosecutrix. She had been cross examined at length but nothing could be elicited to doubt her testimony. The defence put a suggestion to her that she was talking about the age of her younger daughter and not of Shankari (PW.4), which she flatly

> denied. Her deposition remained unshaken and is fully reliable".
>
> (emphasis supplied)

87. In the present case, the father and mother of the victim have not stated the truth before the court. Though in the present case, the mother of the victim would say that the date of birth of the victim is 17.11.1997, her evidence shows that at the time of baptizing the victim, the date of birth given in the church was 17.11.1999. For the reasons already stated, the entry regarding the date of birth of the victim shown in the birth register, which is supported by the live birth report prepared at the hospital where the victim was born and also the evidence of the doctor who attended the delivery (PW36), proves beyond reasonable doubt that the date of birth of the victim is 17.11.1999. It means that, the victim was aged below 18 years and a child as defined under Section 2(d) of the POCSO Act, when the accused had sexual intercourse with her, that is, in May, 2016.

88. The other contentions raised by the learned senior counsel for the appellant shall be considered now.

89. Learned senior counsel for the appellant pointed out that Dr.P.V.Jose (PW36) and the Secretary of the Kuthuparamba Municipality (PW34) were not persons who were originally cited as witnesses by the prosecution. Learned senior counsel contended that examination of the additional witnesses by the prosecution and production of additional documents during the trial of the case had caused serious prejudice to the accused.

90. In my view, production of Ext.P46 live birth report by PW34, the Secretary of the Municipality and proving of that document by summoning Dr.P.V.Jose as additional witness by the prosecution have not caused any prejudice to the accused. The accused was very well aware of the fact that the age of the victim was an important aspect which the prosecution had to prove in the case. The prosecution had produced Ext.P14 extract of the birth register in respect of the victim along with the final report and the prosecution examined PW14 to prove that document. It was only for the purpose of substantiating the entries in Ext.P14 birth register that the prosecution summoned Ext.P46 live birth

report through PW34 and proved it through PW36. The prosecution had to adopt such a course in view of the hostile attitude adopted by PW1 to PW3 towards the prosecution.

91. In **Hemudan Nanbha v. State of Gujarat : AIR 2018 SC 4760**, it has been observed as follows:

> "Her deposition was recorded nearly six months after the occurrence. We find no infirmity in the reasoning of the High Court that it was sufficient time and opportunity for the accused to win over the prosecutrix and PW-1 by a settlement through coercion, intimidation,persuasion and undue influence. The mere fact that PW-1 may have turned hostile, is not relevant and does not efface the evidence with regard to the sexual assault upon her".

92. Neither the accused nor the victim can be permitted to subvert a criminal trial by stating falsehood and resort to contrivances to make the trial a mockery. In **State v. Sanjeev Nanda : AIR 2012 SC 3104**, the Apex Court has observed as

follows:

> "Courts, however, cannot shut their eyes to the reality. If a witness becomes hostile to subvert the judicial process, the Courts shall not stand as a mute spectator and every effort should be made to bring home the truth. Criminal judicial system cannot be overturned by those gullible witnesses who act under pressure, inducement or intimidation."

93. At any rate, in order to have a just decision in the case, the trial court had the power and discretion to permit the prosecution to produce additional documents and summon additional witnesses.

94. Section 311 Cr.P.C provides that any Court may, at any stage of any inquiry, trial or other proceeding under the Code, summon any person as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it to be essential to the just decision of the case.

95. The object underlying Section 311 Cr.P.C is that there may not be failure of justice on account of mistake of either party in bringing the valuable evidence on record or leaving ambiguity in the statements of the witnesses examined from either side. The determinative factor is whether it is essential to the just decision of the case. The aim of every Court is to discover the truth. Section 311 Cr.P.C is one of many such provisions which strengthens the arms of a court in its effort to unearth the truth by procedure sanctioned by law. At the same time, the discretionary power vested under Section 311 Cr.P.C has to be exercised judiciously for strong and valid reasons and with caution and circumspection to meet the ends of justice. The second part of Section 311 Cr.P.C, which is mandatory, imposes an obligation on the court (i) to summon and examine or (ii) to recall and re-examine any such person if his evidence appears to be essential to the just decision of the case (See **V.N.Patil v. K.Niranjan Kumar : AIR 2021 SC 1276**).

96. In the instant case, in view of the hostile attitude of

PW1 to PW3 towards the prosecution, in order to discover the truth and in order to have a just decision in the case, it was rather mandatory on the part of the Court to permit the prosecution to examine additional witnesses.

97. Learned senior counsel for the appellant contended that the application made by the appellant/accused to conduct ossification test in respect of the victim to prove her age was improperly rejected by the trial court.

98. A specific question was put to the victim (PW1) by the learned Public Prosecutor as to whether she was willing to undergo scientific examination for proving her age. She categorically stated that she was not willing to undergo any such test. Again, on cross-examination by the accused, she specifically stated that there was no need to conduct any scientific examination as she had no doubt about her age. In view of this stand adopted by the victim in her testimony, the trial court had rightly rejected the application filed by the accused to subject the victim to any scientific examination to prove her age. It is true

that PW1 had subsequently submitted an application by herself for conducting scientific examination to prove her age but it was also rejected by the trial court. But, the change in stand adopted by her was not with a view to prove the truth but only to help the accused. In such circumstances, there was no illegality committed by the trial court in rejecting the application filed by the accused for subjecting the victim to scientific examination to prove her age.

99. Moreover, even according to the learned senior counsel for the appellant, the age of the victim has to be proved only on the basis of the documents mentioned in Rule 12(3) of the JJ Rules, 2007. Clause (b) of Rule 12(3) states that, only in the absence of the documents mentioned in that provision, medical opinion can be sought to ascertain the age. This is also the view taken by the Apex Court [See **State of M.P v. Anoop Singh : (2015) 7 SCC 773]**. The same is the position with regard to the provision contained in Section 94 of the JJ Act, 2015.

100. Further, there would always be margin of error in the

age ascertained by radiological examination (See **Jaya Mala v. Home Secretary : AIR 1982 SC 1297**).

101. Learned senior counsel for the appellant has contended that the charge framed against the appellant by the trial court for the offence under Section 3 read with Section 4 of the POCSO Act was defective and it caused serious prejudice to the accused.

102. The charge framed against the appellant/accused by the trial court, as far as it relates to the offences for which the appellant has been convicted by the trial court, reads as follows:

> *"That during the period of three years prior to May,2016, A1 among you committed penetrative sexual assault against the victim who was a minor girl and thereby committed offence punishable u/s.3(a) r/w Sec.4 of Protection of Children from Sexual Offences Act, 2012 which is within the cognizance of the Court of Session.*
>
> *That A1 among you being a Priest in the management of St.Sebastian Church at Kottiyoor committed penetrative sexual assault on the victim at the said Church and thereby committed offence punishable u/s.5(f) read with Sec.6 of Protection of Children from Sexual Offences Act, 2012 which is within*

the cognizance of the Court of Session.

That A1 among you after committing penetrative sexual assault on the victim made the victim pregnant as consequences of sexual assault and thereby committed offence punishable u/s.5(j)(iii) r/w Sec.6 of Protection of Children from Sexual Offences Act, 2012 which is within the cognizance of the Court of Session.

****

That A1 among you on a day during the Month of May, 2016 committed rape on the victim at the bed room of A1 at the building of the above mentioned Church and thereby committed the offence punishable u/s.376(2)(f) of IPC which is within the cognizance of the Court of Session."

103. Learned senior counsel for the appellant pointed out that the prosecution case was that in May, 2016, the appellant committed penetrative sexual assault on the victim. However, the charge under Section 3(a) read with Section 4 of the POCSO Act states that it was during the period of three years prior to May, 2016 that he committed such an act on the victim.

104. There is merit in the contention of the learned senior counsel for the appellant that there was error or defect in the charge framed against the appellant for the offence under Section

3(a) read with Section 4 of the POCSO Act. The specific case of the prosecution is that one day in the month of May, 2016 the appellant committed penetrative sexual assault on the victim. However, the charge framed against him by the trial court is that, "during the period of three years prior to May, 2016", he committed such act on the victim.

105. However, the question is whether any failure of justice has been occasioned by the above error in the charge. Section 464 (1) Cr.P.C provides that, no finding, sentence or order by a court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

106. The object of framing a charge is to enable an accused to have a clear idea of what he is being tried for and of the essential facts that he has to meet. The charge must contain the

particulars of date, time, place and person against whom the offence was committed, as are reasonably sufficient to give the accused notice of the matter with which he is charged. The accused is entitled to know with certainty and accuracy, the exact nature of the charge against him, and unless he has such knowledge, his defence will be prejudiced.

107. There will be no prejudice or failure of justice where there was an error in the charge and the accused was aware of the error. Such knowledge can be inferred from the defence, that is, if the defence of the accused showed that he was defending himself against the real and actual charge and not the erroneous charge. In judging a question of prejudice, the court must act with a broad vision and look into the substance and not the technicalities. The main concern should be to see whether the accused had a fair trial, whether he knew what he was being tried for, whether the main facts sought to be established against him were explained to him fairly and clearly, and whether he was given a full and fair chance to defend himself. It is for the

accused to prove that omission to frame charge has occasioned in a failure of justice (See **Kamil v. State of U.P : AIR 2019 SC 45**).

108. In the instant case, the appellant/accused was very well aware of the fact that, according to the charge-sheet filed against him by the police, the allegation against him was that he committed penetrative sexual assault on the victim one day in May, 2016. Further, in the charge framed against him by the trial court for the offence under Section 376(2)(f) of the I.P.C, it was specifically stated that it was on a day in the month of May, 2016 that he committed rape on the victim. Therefore, the accused had sufficient notice, before the commencement of the trial of the case, as to what charge against him he had to defend. The appellant/accused had clearly understood that the charge against him was that he committed penetrative sexual assault on the victim one day in May, 2016. He was not in any way misled by the charge framed against him by the trial court for the offence under Section 3(a) read with Section 4 of the

POCSO Act. It cannot be found that failure of justice has been occasioned by the error in the charge framed against him for that offence.

109. The question now arises what offences have been proved to be committed by the appellant/accused.

110. The trial court has convicted the appellant/accused for the offences punishable under Section 376(2)(f) of the Indian Penal Code and also under Section 3(a) read with Section 4 and Sections 5(f) and 5(j)(ii) read with Section 6 of the POCSO Act.

111. As already found, the prosecution could prove beyond reasonable doubt that the accused committed sexual intercourse with the victim who was then aged below 18 years. Such act constitutes the offence punishable under Section 3(a) read with Section 4(1) of the POCSO Act. Conviction of the appellant/accused by the trial court under Section 3(a) read with Section 4 of the POCSO Act has to be confirmed.

112. Sexual intercourse with a girl who is aged below 18 years, with or without her consent, amounts to the offence of

rape which is punishable under Section 376 of the Indian Penal Code.

113. Section 376(2)(f) of the Indian Penal Code is attracted when a person who being a relative, guardian or teacher of, or a person in a position of trust or authority towards the woman, commits rape on such woman. Merely for the reason that the appellant/accused was the priest/vicar of the local church, it cannot be found that he had held any position of trust or authority towards the victim girl. While finding the appellant/accused not guilty of the offence under Section 5(p) of the POCSO Act, the trial court has made a categorical finding that the appellant/accused cannot be regarded as a person in position of trust or authority of the victim. The State has not challenged the acquittal of the appellant/accused of the offence under Section 5(p) of the POCSO Act. In such circumstances, in the given facts of the present case, he cannot be found to be a person who was holding any position of trust or authority towards the victim girl so as to attract the offence punishable under

Section 376(2)(f) of the Indian Penal Code. Conviction of the appellant/accused by the trial court under Section 376(2)(f) of the Indian Penal Code has to be altered to conviction under Section 376(1) of the Indian Penal Code.

114. Section 5(f) of the POCSO Act provides the punishment to a person who being on the management or staff of an educational institution or religious institution and who commits penetrative sexual assault on a child in that institution. The offence under Section 5(f) of the POCSO Act is attracted to the act committed by the appellant/accused. Conviction of the appellant/accused under Section 5(f) of the POCSO Act is liable to be confirmed.

115. Since the appellant/accused had made the victim pregnant by his act of penetrative sexual assault the offence under Section 5(j)(ii) of the POCSO Act is also attracted and conviction of him by the trial court for that offence is liable to be confirmed.

116. The offence under Section 3(a) read with Section 4(1)

of the POCSO Act, before amendment by Act 25 of 2019, was punishable with a minimum sentence of imprisonment of either description for a term of seven years. The offence under Section 5 read with Section 6 of the POCSO Act, before amendment by Act 25 of 2019, was punishable with a minimum sentence of rigorous imprisonment for a term of ten years. The offence under Section 376(1) of the Indian Penal Code, before the amendment by Act 22 of 2018, was punishable with a minimum sentence of imprisonment of either description for a term of seven years. The maximum sentence of imprisonment for the above offences, now and before amendment, is imprisonment for life. Section 42 of the POCSO Act provides that, where an act or omission constitutes an offence punishable under the Act and also under Section 376 of the Indian Penal Code, then, notwithstanding anything contained in any law for the time being in force, the offender found guilty of such offence shall be liable to punishment only under the Act or under the Indian Penal Code as provides for punishment which is greater in degree.

Considering the facts and circumstances of the case, this Court finds that awarding the appellant/accused a sentence of rigorous imprisonment for a period of ten years and fine of Rs.1,00,000/- for the offence under Section 5(j)(ii) read with Section 6 of the POCSO Act would meet the ends of justice in the case.

117. Consequently, the appeal is allowed in part and it is ordered as follows:

(i) Conviction of the appellant/accused by the trial court for the offence under Section 376(2)(f) of the Indian Penal Code is altered to conviction under Section 376(1) of the Indian Penal Code.

(ii) Conviction of the appellant/accused by the trial court under Section 3(a) read with Section 4 and under Sections 5(f) and 5(j)(ii) read with Section 6 of the POCSO Act is confirmed.

(iii) In supersession of the sentence awarded by the trial court for different offences, the appellant/accused is sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.1,00,000/- (Rupees one lakh only) and in default

of payment of fine, to undergo rigorous imprisonment for a period of one year for the offence under Section 5(j)(ii) read with Section 6 of the POCSO Act.

(iv) In view of the provisions contained in Section 42 of the POCSO Act and Section 71 of the Indian Penal Code, no separate sentence is awarded for the other offences proved to have been committed by the appellant/accused.

(v) The appellant/accused is entitled to get set off under Section 428 Cr.P.C.

The appeal stands disposed of as above.

R. NARAYANA PISHARADI
JUDGE

jsr/lsn

APPENDIX OF CRL.A 401/2019

RESPONDENTS' ANNEXURES

ANNEXURE A1	TRUE COPY OF COMMUNICATION DATED 03.01.2020 FROM THE TITULAR ARCHBISHOP OF CERVETERI.
ANNEXURE R5(a)	A COPY OF THE ARTICLE ON EPIDEMIOLOGICAL OVERVIEW OF CHILD SEXUAL ABUSE.
ANNEXURE R5(b)	A COPY OF THE STUDY CHILD SEXUAL ABUSE IN INDIA : A SYSTEMATIC REVIEW
ANNEXURE R5(c)	A COPY OF THE ONLINE NEWS REPORT, BY SCROLL
ANNEXURE R6(a):	A COPY OF THE VICTIM REHABILITATION SCHEME BY NALSA.
ANNEXURE R6(b):	A COPY OF THE KERALA VICTIM REHABILITATION SCHEME.

TRUE COPY

PS TO JUDGE