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CGHC010275102019 2026:CGHC:46324

NAFR

HIGH COURT OF CHHATTISGARH AT BILASPUR

Judgment reserved on :30-09-2026

Judgment delivered on : 02-11-2026

ACQA No. 605 of 2019

1 - State of Chhattisgarh Through The Special APP, Bhanupratappur, District- Kanker, Chhattisgarh.

… Appellant

versus

1 - Sadhan Kundu S/o Jatindranath Kundu Aged About 31 Years R/o Village Panavar Nayapara, P.S. Bande, District- North Bastar, Kanker, Chhattisgarh.

2 - Ku. Usha Kundu (Deleted) In Compliance of Honble Court Order Dated 11-05-2026

--- **Respondents**

(Cause title taken from Case Information System)

For Appellant	:	Mr. R.R. Pithwa, Deputy Govt. Advocate.
For Respondent	:	Mr. Mukesh Shrivastava, Advocate.

Hon'ble Shri Justice Ravindra Kumar Agrawal, J.

CAV Judgment

1. Present is an acquittal appeal filed by the appellant/State under Section 378(1) of the Cr.P.C. against the impugned judgment of acquittal dated 15-02-2019 passed by the learned Special Judge, for trial of Protection of Children from Sexual Offences Act, 2012, Bhanupratappur, Kanker, Chhattisgarh in Special Case No.37/2017 whereby the accused-respondent No.1 has been acquitted from the offences under sections 354 A, 354 B, 354 C of the Indian Penal code, of offences defined under

Sections 7, 11 (III) (V), 13 punishable Sections 8, 12, 14 of the Protection of Children from Sexual Offences Act, 2012 and Section 67 A of Information Technology Act, 2000 and accused-respondent No.2 has been acquitted from the offence under Sections 354 A, 354 B, 354 C, r/w section 109 respectively of the Indian Penal code, of offences defined under Sections 7, 11 (II) (III) & 13 punishable under sections 8, 12, 14 r/w section 17 respectively of the Protection of Children from Sexual Offences Act, 2012 and Section 67 A r/w section 84 B of Information Technology Act, 2000.

2. Respondent No.2 has died on 14-09-2025 during pendency of the present acquittal appeal and the appeal against her has been abated.

3. The case of the prosecution in brief is that, on 10-05-2017 a written complaint Ex.-P/6A was lodged by PW-6 father of the victim with allegation that on 24-01-2017 in between 10-11:00 a.m. his minor daughter was being allured by the respondents/accused, took her to his house and applied vermilion on her head and outraged her modesty and got the outraging her modesty videographed. The respondent No.2 (since deceased) also pressurized her to marry with her brother, i.e., respondent No.1, accused-respondent No.1 threatened the victim that if she would not marry with him they will get her obscene video viral and blackmailed her. He obtained the obscene video from the accused-respondents and therefore, appropriate proceeding may be drawn. Based on this written complaint the FIR Ex.-P/7 was registered against the respondents/accused persons for the offence under Section 354A, 354B and 354C, 34 of the IPC, Section 67A of the Information Technology Act, 2000 and Section 8, 12 and 14 of POCSO Act. The victim was sent for her medical examination to Community Health Center, Bhanupratappur where she was medically examined by the doctor PW-3, who after her medical examination gave report Ex.-P/4. While medically examining the victim the doctor has not noticed any external

injuries on her body. He referred her to radiologist for age confirmation. The victim was radiologically examined at District Hospital Kanker by PW-12, Radiologist who gave his report Ex.-P/14 and opined that the bone age of the victim is between 16 to 18 years. The school register from the school with respect to date of birth and age of the victim has been seized by police vide seizure memo Ex.-P/2 and after retaining attested true copy of the school register Ex.-P/3C, the original register was returned back to the school. The statement under Section 164 of the Cr.P.C. of the victim Ex.-P/5 was recorded by the learned Judicial Magistrate First Class Bhanupratappur and her statement under Section 161 of the Cr.P.C. Ex.-P/6 was recorded by the police. Spot map Ex.-P/3 was prepared by police and Ex.-P/10 was prepared by Patwari. One mobile phone having obscene video of the victim has been seized from the complainant vide seizure memo Ex.-P/9. Accused-respondent No.1 was arrested on 10-05-2017 and from his possession one mobile phone was seized vide seizure memo Ex.-P/18. The mobile phones seized from the complainant and the accused-respondent No.1 were sent for its FSL/Cyber report to CFSL, Bhopal. Statement of the witnesses under Section 161 of the Cr.P.C. have been recorded and after completion of usual investigation charge sheet was filed against arrested accused-respondent No.1 before the learned trial Court showing accused-respondent No.2 absconding.

4. The accused-respondent No.2 surrendered before the learned trial Court on 13-11-2017 and then charges against her have been framed on 18-01-2018 and the examined prosecution witnesses were recalled for further examination/cross-examination with respect to accused-respondent No.2. The accused persons denied their charge and claimed trial.

5. In order to prove the charge against the accused persons, the prosecution examined as many as 15 witnesses. Statement of the respondents/accused persons under Section 313 CrP.C. have been

recorded, in which they denied the circumstances that appear against them, pleaded innocence and have submitted that they have been falsely implicated in the offence.

6. After appreciating the oral and documentary evidence led by the prosecution, the learned trial Court has acquitted the respondents/accused persons from all the alleged offences, hence, this appeal against acquittal.

7. Learned counsel for the appellant/State would submit that the prosecution has proved its case beyond reasonable doubt. But for minor omissions and contradictions the evidence of prosecution witnesses are reliable and sufficient to hold the respondents/accused persons guilty for the alleged offence. Even though in the radiological report the victim was opined to be aged about 16 to 18 years, yet there are positive allegation that accused-respondent No.1 has committed offence of outraging her modesty, sexual harassment and child pornography. Right from the FIR till the evidence recorded before the Court the victim has consistently stated about the alleged offence of sexual harassment by accused-respondent No.1. There is specific allegation of outraging her modesty and applying vermilion on her head and recording of obscene video of her. The minor and trivial omissions and contradictions have been given weightage by the learned trial Court while acquitting the respondents/accused persons. The electronic evidence led by the prosecution in which the alleged act of the respondent-accused No.1 clearly demonstrated that he committed the offence and the same has been proved as per its requirement and the learned trial Court also fortified the same by playing it in the Court in presence of the respondents/accused. It is further submitted by him that the evidence of the victim has been duly corroborated by the other witnesses, yet the learned trial Court has acquitted him from all the offences. The impugned judgment of acquittal suffers from illegality and

perversity and in view of the evidence of the victim, the acquittal is liable to be set aside and the accused-respondent No.1 is liable to be convicted.

8. On the other hand, learned counsel appearing for the respondent/accused opposes the submissions made by learned counsel for the appellant/State and has submitted that the prosecution has utterly failed to prove its case beyond reasonable doubt. Suspicion howsoever strong it cannot take place of proof. The learned trial Court after playing the alleged obscene video in the Court disbelieved its contents that it constitute the alleged offence against the respondents/accused. From the radiologist report Ex.-P/14 the victim is found to be major and no offence under the POCSO Act are made out. Looking to her conduct, age and the videography recorded in the mobile phone, the learned trial Court rightly comes into conclusion that there was no any sexual harassment to the victim and they were enjoying the affairs consensually. The electronic record has not been proved in accordance with law which has been elaborately dealt with by the learned trial Court in its judgment. The incident is alleged to be occurred on 24-01-2017. The written report has been lodged by the complainant on 10-05-2017 which is after more than 4 months and there is no explanation for delay in lodging the report. In between alleged period the victim frequently met with the respondents. Had there been any incident on 24-01-2017 she would not have met accused-respondent No.1 again even when she was being called by his sister i.e. accused-respondent No.2. He would further submit that even if the two views are possible, the view which would be in favour of the accused should be taken into consideration and in the present case the learned trial Court rightly did the same. In the appeal against acquittal the scope is very limited and the appellate Court though can reappreciate the evidence, but without any clinching evidence or glaring error in the impugned judgment cannot revert the same by setting aside the judgment of acquittal. Therefore, there is no merit in the acquittal appeal and the same is liable to be dismissed.

9. I have heard learned counsel appearing for the parties and perused the record of the trial Court.

10. In the case of **Ramanand Yadav v. Prabhu Nath Jha**, AIR 2004 SC 1053, the Hon'ble Supreme Court has held that the Appellate Court in considering the appeal against judgment of acquittal is to interfere only when there are compelling and substantial reason for doing so. If the impugned judgment is clearly unreasonable and relevant and convincing material have been unjustifiably eliminated in the process, it is a compelling reason for interference.

11. The scope of interference in appeal against the judgment of acquittal is also considered by the Hon'ble Supreme Court in the case of **Tota Singh and another v. State of Punjab**, AIR 1987 SC 1083, in which the Hon'ble Supreme Court has held that:-

> "6. The High Court has not found in its judgment that the reasons given by the learned Sessions Judge for discarding the testimony of PW 2 and PW 6 were either unreasonable or perverse. What the High Court has done is to make an independent reappraisal of the evidence on its own and to set aside the acquittal merely on the ground that as a result of such re-appreciation, the High Court was inclined to reach a conclusion different from the one recorded by the learned Sessions Judge. This Court has repeatedly pointed out that the mere fact that the appellate court is inclined on a re-appreciation of the evidence to reach a conclusion which is at variance with the one recorded in the order of acquittal passed by the court below will not constitute a valid and sufficient ground for setting aside the acquittal. The jurisdiction of the appellate court in dealing with an appeal against an order of acquittal is circumscribed by the limitation that no interference is to be made with the order of acquittal unless the approach made by the lower court to the consideration of the evidence in the case is vitiated by some manifest illegality or the conclusion recorded by

> the court below is such which could not have been possibly arrived at by any court acting reasonably and judiciously and is, therefore, liable to be characterised as perverse. Where two views are possible on an appraisal of the evidence adduced in the case and the court below has taken a view which is a plausible one, the appellate court cannot legally interfere with an order of acquittal even if it is of the opinion that the view taken by the court below on its consideration of the evidence is erroneous."

12. In the case of **Chandrappa v. State of Karnataka**, 2007 (4) SCC 415, the Hon'ble Supreme Court has authoritatively laid down that the Appellate Court has full power to review, re-appreciate and reconsider the evidence upon which the order of acquittal is founded, and that there is no limitation in law on its power to review such evidence. It has been held that:-

> "42. From the above decisions, in our considered view, the following general principles regarding powers of the appellate court while dealing with an appeal against an order of acquittal emerge:
>
> (1) An appellate court has full power to review, reappreciate and reconsider the evidence upon which the order of acquittal is founded.
>
> (2) The Code of Criminal Procedure, 1973 puts no limitation, restriction or condition on exercise of such power and an appellate court on the evidence before it may reach its own conclusion, both on questions of fact and of law.
>
> (3) Various expressions, such as, "substantial and compelling reasons", "good and sufficient grounds", "very strong circumstances", "distorted conclusions", "glaring mistakes", etc. are not intended to curtail extensive powers of an appellate court in an appeal against acquittal. Such phraseologies are more in the nature of "flourishes of language" to emphasise the reluctance of an appellate court to interfere with acquittal than to curtail the power of the court to review the evidence and to come to its own conclusion.

(4) An appellate court, however, must bear in mind that in case of acquittal, there is double presumption in favour of the accused. Firstly, the presumption of innocence is available to him under the fundamental principle of criminal jurisprudence that every person shall be presumed to be innocent unless he is proved guilty by a competent court of law. Secondly, the accused having secured his acquittal, the presumption of his innocence is further reinforced, reaffirmed and strengthened by the trial court.

(5) If two reasonable conclusions are possible on the basis of the evidence on record, the appellate court should not disturb the finding of acquittal recorded by the trial court."

13. Further, in the case of **Ghurey Lal v. State of U.P.**, 2008 (10) SCC 450, the Hon'ble Supreme Court has held that, interference with an order of acquittal is justified, where the trial court conclusion are manifestly erroneous, based on misreading of evidence, or where material evidence has been ignored, leading to miscarriage of justice.

14. While exercising the appellate jurisdiction against judgment of acquittal, the Appellate Court are fully empowered to appreciate and re-appreciate the evidence adduced on behalf of the parties while reversing the judgment of the learned trial Court. The Appellate Court is required to discuss the grounds given by the learned trial Court to acquit the accused and then to dispel those reasons. In this context, we have gone through the evidence available on record and examined the judgment passed by the learned trial Court.

15. The first and foremost question arises for consideration would be the age of the victim as to whether the victim was minor on the date of incident or not.

16. The prosecution has relied upon the school record Ex.-P/3C which is sought to be proved by PW-2 who is the teacher of the school and the ossification test report Ex.-P/14 which is sought to be proved by PW-12

Radiologist. The learned trial Court after having examined the evidence available on record with respect to age and date of birth of the victim, the school record Ex.-P/3C, ossification test report Ex.-P/14 and in view of the judgment passed by the Hon'ble Supreme Court in the case of **Birad Mal Singhvi Vs. Anand Purohit**, AIR 1988 SC 1786, **Alamelu and another Vs. State, represented by Inspector of Police,** A.I.R. 2011 SC 715, **Jaya Mala Vs. Home Secretary, Government of Jammu & Kashmir @ other**, AIR 1982 SC 1297 and **K.P. Thimmappa Gowda Vs. State of Karnataka**, AIR 2011 SC 2564 came into conclusion that the prosecution has failed to conclusively prove that the victim was below 16 years of age on the date of incident, i.e., 24-01-2017 and the victim was minor on the date of incident and held the victim major and more than 18 years of age.

17. From the evidence of PW-2 it transpires that he was posted in the school from 2017 and he is not the author of the school register. The basis on which the date of birth of the victim is recorded in the school register has not been produced by the prosecution. Further, in the ossification test report Ex.-P/14 proved by PW-12, Radiologist opined that the age of the victim is between 16 to 18 years. He admitted in his cross-examination about the error of margin of 2 years in either side and therefore, the learned trial Court by considering the error of margin of 2 years in positive side as has been observed by the Hon'ble Supreme Court in case of **Jaya Mala** (supra) held that the victim was not minor but was major and more than 18 years of age on the date of incident. The finding recorded by the learned trial Court with respect to the age of the victim does not suffer from any perversity or illegality and therefore, the said finding is hereby affirmed.

18. So far as the other offences of sexual harassment and making her obscene video recording are concerned, this Court again examine the evidence of the victim.

19. PW-5 is the victim. She stated in her evidence that the accused persons are residing nearby her house. Accused-respondent No.2 is her aunt in

relation and accused-respondent No.1 is her uncle in relation. On 24 January accused-respondent No.2 came to her house and asked her to come with her. When she had gone to her house and watching T.V. after preparation of the report, all of sudden the accused-respondent No.1 came from her backside and applied vermilion on her head. She protested and abused him. Then, the accused-respondent No.1 proposed her and shown his intimacy and also threatened her that if she disclosed the incident to anyone she would see dead body of her parents. Thereafter, she returned back to her house and later on when she informed it to the accused-respondent No,2 she also supported the accused-respondent No.1 that her brother has never committed any wrong and asked her to follow his instruction. After about ½ month when she had gone to the house of accused-respondent No.2 to collect Mahua seeds, the accused-respondent No.1 again came there and she made conversation with her elder sister from the mobile phone of the accused-respondent No.1, thereafter she had gone inside the house of accused-respondent No.2 to leave Mahua seeds, at that time, accused-respondent No.1 again came from her backside, caught her hold, gagged her mouth by one hand and pressed her breasts by his other hand. He lifted her kurti and pressed her breasts. After 2-3 days her father asked about the incident and then she disclosed all the incident to him and then her father lodged report to P.S. Bandhe. The accused-respondent No.1 had threatened her also not to disclose the incident to her parents. At this stage, the victim was declared hostile and she was asked leading question by the prosecution then she admitted by giving his police statement Ex.-P/6. In cross-examination she admitted that her elder brother was in jail 1 and ½ years back. She admitted that accused-respondent No.2 usually called her to complete the report. She further admitted that the incident of applying vermilion on her head by accused-respondent No.1 has not been informed to anyone by her. Since accused-respondent No.1 threatened her, therefore, she has not disclosed

it to anyone. She denied that on 24-01-2017 the accused-respondent No.1 has not committed any offence. She further admitted that she disclosed in her police statement Ex.-P/6 that at the time when accused-respondent No.1 applied vermilion on her she abused him. She also admitted giving statement before the police about the threatening given by the accused. After applying vermilion by the accused-respondent No.1 she returned back to her house by covering her head through scarf and washed her head in the house. She admitted that she had a conversation with her sister through mobile phone of accused-respondent No.1. She admitted that she had gone to the house of the accused persons to collect Mahua seeds and at the time when she had gone to the house of accused-respondent No.2 she was not there. She also admitted that during that period accused-respondent No.1 gagged her mouth by one hand and after lifting her kurti pressing her breast by another hand. She further admitted that after the said incident she rushed to her house. She further admitted that gagging of her mouth by one hand and pressing her breast by another hand by accused-respondent No.1 was videographed and recorded in the camera which was fixed in the house of the accused. She further admitted that recording was made through camera and the accused has fixed the mobile phone after fixing it in the specific place so that the obscene video could be recorded. She further admitted that the obscene video was given to her father by her maternal uncle. In further cross-examination she stated that the accused-respondent No.2 pressurized her to marry with accused-respondent No.1.

20. PW-6 is the father of the victim. He stated in his evidence that the accused-respondent No.1 informed him that his daughter is having conversation with another boy and then he raised suspicion and asked his brother-in-law to search the mobile phone of accused-respondent No.1. His brother-in-law watched the mobile phone of the accused-respondent No.1 and obtained the obscene video of outraging modesty of his daughter in a mobile chip.

The accused-respondent No.1 after lifting kurti of his daughter pressed the breasts of his daughter. The said obscene video was recorded by the mobile phone kept at the roof level. He asked from his daughter and then she disclosed about the incident that the accused-respondent No.1 applied vermilion on her head and after 20 days he recorded her obscene video. She also disclosed about threatening given by accused-respondent No.1 to her that if she would not marry with him she would see dead body of her parents. The accused-respondent No.2 regularly called his daughter to help in Aganbadi work and she also pressurized her to marry with accused-respondent No.1. The accused-respondent No.1 displayed the said obscene video to 3-4 villagers and one of them had informed and asked him to call Panchayat meeting. Thereafter, he lodged the report Ex.-P/6. In cross-examination he admitted that the accused-respondent No.1 is working with him as labourer. He admitted that there was an outstanding amount of Rs.2000/- which he has to pay to the accused-respondent No.1. He denied that there was outstanding amount of Rs.40-50 thousand. He admitted that the written report of Ex.-P/6A was scribed at Tahsil office Pakanjur. He admitted that his brother-in-law has given him mobile chip in which the said obscene video was taken by him. He kept the said chip in his house for about 8-10 days. He did not know the mobile number of the accused. He further admitted that the had shown the place where the incident was photographed. From the evidence of this witness it transpires that when he came to know about the incident he asked his daughter who disclosed the incident to him and then he obtained the videography in chip and then he lodged the report. He deposed against the accused persons on the basis of the said information disclosed by the victim PW-5 and the alleged chip in which the alleged obscene video was there.

21. PW-7 is the mother of the victim. She stated in her evidence that she came to know about the fact that her daughter was being taken by the accused-respondent No.2 to her house for Anganbadi work which has been

informed to her by her husband. Her husband had also informed that the accused-respondent No.1 applied vermilion on the head of her daughter and asked her not to disclose the incident to her parents. Her husband has also disclosed about the video recording, except this she did not know anything. At this stage, she was declared hostile and when the leading question was asked she admitted giving her police statement Ex.-P/12. In cross-examination she reiterated that she came to know about the incident when her husband informed her. She did not know about date when her husband informed about the incident. Her statement was recorded by the police on 25-06-2017. In further cross-examination she admitted that she has not made any enquiry from the accused-respondent No.2.

22. PW-4 is the Sub-Inspector of Police. She recorded the statement of the victim on 10-05-2017. In cross-examination she admitted that the victim was produced at Police Station Bhanupratappur for recording of her statement. On the telephonic instruction of SHO, P.S. Bande she recorded her statement.

23. PW-8 is the villager who stated in his evidence that his son had shown him the obscene video of the victim which was recorded in the mobile phone of accused-respondent No.1. After seeing the video he was annoyed and when he asked from the accused-respondent No.1, he admitted that he recorded the said video. At this stage he also turned hostile and leading question was asked from him. He admitted giving his police statement Ex.-P/13. In cross-examination he admitted that since he is an old aged person, his vision is not clear. He admitted that his son had not shown any video and he saw the video in mobile phone by opening it by another child. At that time his son was not present there. The said video was brought by his son from the mobile phone of accused-respondent No.1.

24. PW-9 is the son of PW-8. He stated in his evidence that the victim is his niece and her father is his brother-in-law. His brother-in-law asked him to obtain the videography related to his daughter which was in the mobile

phone of accused-respondent No.1. In the night, at the time when the accused-respondent No.1 was watching TV he took his mobile phone and took a copy of the same in his mobile phone through bluetooth and gave it to his father, PW-8. In the said video it was seen that accused-respondent No.1 was pressing breasts of his niece. In cross-examination he admitted that on being asked by his brother-in-law on 30-04-2017 he checked the mobile phone of the accused-respondent No.1. He informed the police person that he had taken the obscene video through bluetooth. He also admitted that while transferring the data through bluetooth the mobile number of the person concerned were not displayed. He admitted that the second mobile number from which he transferred the data from bluetooth belongs to whom, he did not know. He voluntarily stated that the said mobile phone belonged to the accused-respondent No.1. He further admitted that he himself had not produced the said video recording to the police. He further admitted that he had never transferred the obscene video from his mobile phone to the mobile phone of his brother-in-law. He did not disclose it in his police statement Ex.-D/2 and if it is there he could not tell the reason. In further cross-examination he admitted that he did not know about the accused-respondent No.2.

25. PW-11 is the Constable posted at Police Station Bande. He is a witness of seizure memo Ex.-P/9 through which the micro chip was seized from the complainant.

26. PW-13 is the Investigating Officer who has stated about the investigation which he carried out after registration of the FIR. He being the procedural witness supported the prosecution case about the investigation which he conducted.

27. PW-14 is another Constable witnessing the seizure of school register through seizure memo Ex.-P/2.

28. PW-15 is another witness to the seizure memo Ex.-P/9 by which the micro chip has been seized from the complainant and the mobile phone of the accused-respondent No.1 through seizure memo Ex.-P/18.

29. From the evidence available on record, this Court finds that the learned trial Court has not properly appreciated the material part of the testimony of the victim, PW-5. Though the victim has subsequently been declared hostile, in the leading question asked from her, she supported the prosecution's case that she had given the police statement Ex.-P/6. The portion of her testimony which inspires confidence and is consistent with the other evidence on record can be relied upon. In **Khujji alias Surendra Tiwari v. State of Madhya Pradesh**, (1991) 3 SCC 627, the Hon'ble Supreme Court has held that the evidence of a hostile witness is not liable to be rejected in toto and that the part of the testimony which is otherwise acceptable can be relied upon. Further, in the case of **Rohtash Kumar v. State of Haryana**, 2013 (14) SCC 434, the Hon'ble Supreme Court has held in para Nos. 25 to 27 that:-

> "25. It is a settled legal proposition that evidence of a prosecution witness cannot be rejected in toto, merely because the prosecution chose to treat him as hostile and cross-examined him. The evidence of such witnesses cannot be treated as effaced, or washed off the record altogether. The same can be accepted to the extent that their version is found to be dependable, upon a careful scrutiny thereof.
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> 26. In State of U.P. v. Ramesh Prasad Misra [(1996) 10 SCC 360] this Court held, that evidence of a hostile witness would not be rejected in entirety, if the same has been given in favour of either the prosecution, or the accused, but is required to be subjected to careful scrutiny, and thereafter, that portion of the evidence which is consistent with either the case of the prosecution, or that of the defence, may be relied upon. [See also C. Muniappan v. State of T.N. [(2010) 9 SCC 567], Himanshu v. State (NCT of Delhi) [(2011) 2 SCC 36] and Ramesh Harijan v. State of U.P. (2012) 5 SCC 777]

> 27. Therefore, the law permits the court to take into consideration the deposition of a hostile witness, to the extent that the same is in consonance with the case of the prosecution, and is found to be reliable in careful judicial scrutiny."

30. In the present case, the victim PW-5 has specifically deposed that when she went to the house of accused/respondent No. 2 to collect Mahua seeds, accused-respondent No. 1 came from behind, caught hold of her, gagged her mouth with one hand and pressed her breasts with the other hand after lifting her kurti. She has further stated that immediately after the incident, she rushed back to her house. In her cross-examination, she reiterated the material facts concerning the physical acts committed by accused-respondent No. 1. These acts, if considered in their entirety, clearly establish unwelcome physical contact accompanied by an explicit sexual overture. The absence of external injuries on the victim's body does not, by itself, discredit her testimony regarding the incident. Further, the defence had given the positive suggestion during the cross-examination of the victim PW-5 in para 30, 31, 33, 34, 39, 42, 44, 45, 47, 48, 49, 51 in which she deposed about the alleged act of respondent No.1/accused. The positive suggestion given by the defence is an incriminating circumstance against him as has been held by the Hon'ble Supreme Court in the case of **Balu Sudam Khalde and another v. State of Maharashtra**, 2023 (13) SCC 365 in which the Hon'ble Supreme Court has held in Para Nos. 32 to 39 that:-

> "32. We noticed that in the cross-examination of the original first informant, PW 1 Asgar Shaikh (Ext. 7), few suggestions were put to him by the defence counsel. We quote the relevant part of the cross-examination of the first informant:
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> > "The attack on us was sudden. The first blow was hit on my head. I was assaulted severely on the head. Due to assault, I suffered a bleeding injury. It is not true that I felt

> giddy due to assault. Yes I however suffered pain. At that time, I did not feel that I should save my life. I dia not feel that I should run away or I should try to hide myself. I went towards the side of Lohiya Nagar Police Chowkey. I did feel that I was being assaulted without any reason. Abbas was screaming while he was being assaulted.…"

33. We are of the view from the aforesaid that the suggestions put by the defence counsel in the cross-examination of the eyewitnesses establishes the presence of PW 1 Asgar Shaikh at the scene of offence and the factum of assault could also be said to have been admitted. The reply to the suggestions answers the submission canvassed by the learned counsel for the appellants that PW 1 Asgar Shaikh should not be believed or relied upon as there is nothing on record to indicate that he was an injured eyewitness. The defence could be said to have admitted the presence of PW 1 Asgar Shaikh. When the aforesaid part of the cross-examination of PW 1 Asgar Shaikh was brought to the notice of the defence counsel, he submitted that a suggestion put by defence counsel to a witness in his cross-examination has no evidentiary value and even if the same is incriminating in any manner would not bind the accused as the defence counsel has no implied authority to admit the guilt of the facts incriminating the accused.

34. According to the learned counsel such suggestions could be a part of the defence strategy to impeach the credibility of the witness. The proof of guilt required of the prosecution does not depend on the satisfaction made to a witness.

35. In Tarun Bora v. State of Assam[1], a three-Judge Bench of this Court was dealing with an appeal against the order passed by the Designated Court, Guwahati, in TADA Sessions case wherein the appellant was convicted under Section 365 IPC read with Sections 3(1) and 3(5) of the Terrorist and Disruptive Activities (Prevention) Act, 1987.

36. In Tarun Bora case, this Court, while considering the evidence on record took note of a suggestion which was put to one of the witnesses and considering the reply given by the witness to the

1 (2002) 7 SCC 39

suggestion put by the accused, arrived at the conclusion that the presence of the accused was admitted. We quote with profit the following observations made by this Court in paras 15,16 and 17, respectively, as under: (Tarun Bora case, SCC pp. 43-44).

> 15. The witness further stated that during the assault, the assailant accused him of giving information to the army about the United Liberation Front of Assam (ULFA). He further stated that on the third night he was carried away blindfolded on a bicycle to a different place and when his eyes were unfolded, he could see his younger brother-Kumud Kakati (PW 2) and his wife Smt Prema Kakati (PW 3). The place was Duliapather, which is about 6-7 km away from his Village Sakrahi. The witness identified the appellant Tarun Bora and stated that it is he who took him in an Ambassador car from the residence of Nandeswar Bora on the date of the incident.
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> 16. In cross-examination the witness stated as under:
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> 'Accused Tarun Bora did not blind my eyes nor he assaulted me.'
>
> 17. This part of cross-examination is suggestive of the presence of accused-Tarun Bora in the whole episode. This will clearly suggest the presence of the accused Tarun Bora as admitted. The only denial is that the accused did not participate in blind-folding the eyes of the witness nor assaulted him."

37. In Rakesh Kumar v. State of Haryana[2], this Court was dealing with an appeal against the judgment of the High Court affirming the order of the Sessions Judge whereby the appellant and three other persons were convicted under Section 302 read with Section 34 IPC. While reappreciating the evidence on record, this Court noticed that in the cross-examination of PW 4 Sube Singh, a suggestion was made with regard to the colour of the shirt worn by one of the accused persons at the time of the incident. This Court taking into consideration the nature of the suggestion put by the defence and the reply arrived at the conclusion that the presence

2 (1987)2 SCC 34

of the accused, namely, Dharam Vir was established on the spot at the time of occurrence. We quote the following observations made by this Court in paras 8 and 9, respectively, as under: (SCC p. 36)

> "8. PW 3, Bhagat Singh, stated in his examination-in-chief that he had identified the accused at the time of occurrence. But curiously enough, he was not cross-examined as to how and in what manner he could identify the accused, as pointed out by the learned Sessions Judge. No suggestion was also given to him that the place was dark and that it was not possible to identify the assailants of the deceased.
>
> 9. In his cross-examination, PW 4 Sube Singh, stated that the accused Dharam Vir, was wearing a shirt of white colour. It was suggested to him on behalf of the accused that Dharam Vir was wearing a shirt of cream colour. In answer to that suggestion, PW 4 said 'It is not correct that Dharam Vir accused was wearing a shirt of cream colour and not a white colour at that time. The learned Sessions Judge has rightly observed that the above suggestion at least proves the presence of accused Dharam Vir, on the spot at the time of occurrence."

38. Thus, from the above it is evident that the suggestion made by the defence counsel to a witness in the cross-examination if found to be incriminating in nature in any manner would definitely bind the accused and the accused cannot get away on the plea that his counsel had no implied authority to make suggestions in the nature of admissions against his client.

39. Any concession or admission of a fact by a defence counsel would definitely be binding on his client, except the concession on the point of law. As a legal proposition we cannot agree with the submission canvassed on behalf of the appellants that an answer by a witness to a suggestion made by the defence counsel in the cross-examination does not deserve any value or utility if it incriminates the accused in any manner."

31. Section 354A(1)(i) of the IPC provides that a man who commits physical contact and advances involving unwelcome and explicit sexual overtures is guilty of sexual harassment. In **Amit @ Lalu v. State**, decided on

25.05.2017, the Delhi High Court, in Criminal Appeal No. 858 of 2016, considered the distinction between Sections 354 and 354A of the IPC and explained that unwelcome physical contact involving explicit sexual overtures attracts Section 354A, whereas assault or criminal force accompanied by the requisite intention to outrage the modesty of a woman attracts Section 354 IPC. In the case of Amit @ Lalu (supra) it has been held in para Nos. 7 to 9 that:-

> “7. The issue whether an accused could be simultaneously convicted for offences punishable under Sections 354 and 354A IPC came up for consideration before this Court in the decision reported as 237 (2017) DLT 271 T. Manikandan v. The State (Govt. of NCT of Delhi) wherein this Court held-
>
> "6. Sections 354 and 354A to 354D IPC read as under:
>
> "354. Assault or criminal force to woman with intent to outrage her modesty. Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of either description for a term which shall not be less than one year but which may extend to five years, and shall also be liable to fine.
>
> 354 A. Sexual harassment and punishment for sexual harassment.-(1) A man committing any of the following acts-
>
> (i) physical contact and advances involving unwelcome and explicit sexual overtures, or
>
> (ii) a demand or request for sexual favours; or
>
> (iii) showing pornography against the will of a woman; or
>
> (iv) making sexually coloured remarks, shall be guilty of the offence of sexual harassment.
>
> (2) Any man who commits the offence specified in clause(i) or clause (ii) or clause (iii) of sub-section(1) shall be punished with rigorous imprisonment for a term

which may extend to three years, or with fine, or with both.

(3) Any man who commits the offence specified in clause (iv) of sub-section (1) shalı be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both

354B. Assault or use of criminal force to woman with intent to disrobe. - Any man who assaults or uses criminal force to any woman or abets such act with the intention of disrobing or compelling her to be naked, shall be punished with imprisonment of either description for a term which shall not be less than three years but which may extend to seven years, and shall also be liable to fine.

354C. Voyeurism.- Any man who watches, or captures the image of a woman engaging in a private act in circumstances where she would usually have the expectation of not being observed either by the perpetrator or by any other person at the behest of the perpetrator or disseminates such image shall be punished on first conviction with imprisonment of either description for a term which shall not be less than one year, but which may extend to three years, and shall also be liable to fine, and be punished on a second or subsequent conviction, with imprisonment of either description for a term which shall not be less than three years, but which may extend to seven years, and shali also be liable to fine.

354D. Stalking.- (1) Any man who-

(i) follows a woman and contacts, or attempts to contact such woman to foster personal interaction repeatedly despite a clear indication of disinterest by such woman;

(ii) monitors the use by a woman of the internet, email or any other form of electronic communication, commits the offence of stalking:

Provided that such conduct shall not amount to stalking if the man who pursued it proves that-

(i) it was pursued for the purpose of preventing or detecting crime and the man accused of stalking bad been entrusted with the responsibility of prevention and detection of crime by the State; or

(ii) it was pursued under any law or to comply with any condition or requirement imposed by any person under any law; or

(iii) in the particular circumstances such conduct was reasonable and justified.

(2) Whoever commits the offence of stalking shall be punished on first conviction with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and be punished on a second or subsequent conviction, with imprisonment of either description for a term which may extend to five years, and shall also be liable to fine."

7. The short issue before this Court is whether the appellant can be convicted for both the offences punishable under Section 354 and 354A IPC simultaneously. Section 354 IPC provides for the offence relating to assault or criminal force to woman with intent to outrage her modesty. Section 354A which was inserted by criminal law (Amendment) Act, 2013 provides for punishment for sexual harassment.

8. The two necessary ingredients of Section 354 IPC are 'assault' or 'use of criminal force to any woman and with the intention to outrage or knowing it to be likely that he will thereby outrage her modesty. Sections 350 and 351 IPC define 'criminal force' and 'assault' as under:

350. Criminal force. Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence, or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury, fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

351. Assault.-Whoever makes any gesture, or any preparation intending or knowing it to be likely that such

gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person, is said to commit an assault.

Explanation.-Mere words do not amount to an assault. But the words which a person uses may give to his gestures or preparation such a meaning as may make those gestures or preparations amount to an assault.

9. Thus when the modesty of a woman is outraged or it is likely to be an outraged coupled with an assault or criminal force, Section 354 IPC would be attracted. Though assault can be by mere gesture or preparation intending or knowing that it is likely that such gesture or preparation will cause any person present to apprehend use of criminal force. This is an act more than mere physical contact with advances involving unwelcome and explicit sexual overtures. Ingredients of Section 354 IPC would show that the same mandate an actus reas of assault or criminal force with an intention to outrage or likely to outrage the modesty whereas a mere physical contact with advances as noted above would attract Section 354A IPC Though in certain fact situations there may be cases where there may be an overlap of both Sections 354 and 354A IPC however, there may be cases which may exclusively falı either in Section 354 or Section 354A IPC Once an offence falls under Section 354 IPC even it ingredients of Section 354A IPC are satisfied, the accused will be punished for Section 354 IPC the same being more serious in nature as it prescribes the minimum sentence of one year and term for imprisonment which may extend to five years."

8. On the allegations as proved by the prosecution, ingredients of offence punishable under Section 354 IPC i.e. assault/criminal force to a woman to outrage her modesty as well as Section 354A IPC i.e. physical contact with explicit sexual overtures and demand of sexual favour are fulfilled. Thus, the prosecution has proved beyond reasonable doubt that the appellant committed the offences punishable under Section 354 IPC as well as Section 354A IPC

> 9. As regards offence punishable under Section 8 of the POCSO Act, the prosecution has proved that the prosecutrix was a minor studying in 8th standard. The Act of the appellant amounts to a sexual assault without penetration with sexual intent involving physical contact satisfying the ingredients for offence punishable under Section 8 POCSO Act. Hence the conviction of the appellant for offence punishable under Section 8 of the POCSO Act is also upheld."

32. In the present case, the testimony of PW-5 regarding the accused catching hold of her, gagging her mouth and pressing her breasts after lifting her kurti establishes, beyond reasonable doubt, the ingredients of the offence punishable under Section 354A(1)(i) of the IPC.

33. Consequently, this Court is of the considered opinion that, notwithstanding the acquittal of accused-respondent No. 1 from the offences under Sections 354A, 354B and 354C of the IPC by the learned trial Court, the material evidence of PW-5 establishes the commission of the offence of sexual harassment punishable under Section 354A(1)(i) of the IPC. The finding of acquittal, insofar as it relates to the said offence, cannot be sustained in view of the material evidence which has not been properly appreciated by the learned trial Court. Accordingly, the acquittal appeal deserves to be allowed to the aforesaid extent, and accused-respondent No. 1 is liable to be convicted for the offence punishable under Section 354A(1)(i) of the IPC.

34. So far as the acquittal of accused/respondent No. 1 for the offences punishable under Sections 354B and 354C of the IPC is concerned, upon reappreciation of the evidence available on record, this Court finds that the prosecution has failed to establish all the essential ingredients of the said offences beyond reasonable doubt. Although the victim PW-5 has deposed regarding the accused catching hold of her, gagging her mouth, lifting her kurti and pressing her breasts, the evidence on record does not satisfactorily establish the specific ingredients necessary to constitute the offences under Sections 354B and 354C of the IPC. In particular, the

prosecution has failed to establish the requisite act contemplated under Section 354B or the publication or transmission of an image of a private area in the circumstances contemplated under Section 354C of the IPC. Consequently, the findings recorded by the learned trial Court acquitting accused/respondent No. 1 of the offences punishable under Sections 354B and 354C of the IPC do not warrant interference and are hereby affirmed.

35. As regards the offence punishable under Section 67A read with Section 84B of the Information Technology Act, 2000, this Court finds that the prosecution has not satisfactorily established, in accordance with law, the publication or transmission, or the abetment thereof, by accused/respondent No. 1 of material containing a sexually explicit act in electronic form.

36. The evidence of PW-9 regarding the transfer of the alleged video through Bluetooth, coupled with the deficiencies in proving the electronic record, does not establish the essential ingredients of the said offence beyond reasonable doubt. The evidence of PW-8 and PW-9, insofar as it relates to obtaining the alleged video clipping from the mobile phone of accused/respondent No. 1, does not inspire complete confidence regarding the manner in which the electronic record was procured and transferred. PW-8 stated that he had seen the video, but in his cross-examination he admitted that his son had not shown it to him and that he had viewed it on a mobile phone operated by another child. PW-9 deposed that, at the instance of the victim's father, he accessed the mobile phone of accused/respondent No. 1 and transferred the video to his own mobile phone through Bluetooth and thereafter gave it to PW-8. However, he admitted that he had not produced the video before the police, had not transferred it from his mobile phone to the victim's father's mobile phone, and had not disclosed these material facts in his police statement Ex. D/2. He also admitted that he could not identify the mobile number from which the video had been transferred. These material inconsistencies create

doubt regarding the chain of custody and the provenance of the alleged video clipping. In the absence of satisfactory proof establishing the authenticity and integrity of the electronic record in accordance with the applicable law, the testimony of PW-8 and PW-9, by itself, cannot conclusively establish the alleged publication or transmission of sexually explicit material by accused-respondent No. 1. In this regard, the principles laid down by the Supreme Court in **Arjun Panditrao Khotkar v. Kailash Kushanrao Gorantyal**, (2020) 7 SCC 1, concerning proof and admissibility of electronic records, are relevant.

37. Further, as regards the offences punishable under Sections 7, 11(iii) and 11(v), 13, 8, 12 and 14 of the POCSO Act, this Court has already affirmed the finding of the learned trial Court that the prosecution failed to establish that the victim was below eighteen years of age on the date of the incident. Since the applicability of the aforesaid provisions depends upon the victim being a child within the meaning of the Act, the essential jurisdictional ingredient for attracting the said provisions is not established. Accordingly, the acquittal of accused/respondent No. 1 for the aforesaid offences is affirmed.

38. Consequently, the acquittal appeal is **allowed in part** and the impugned judgment of acquittal to the extent of acquitting the respondent/accused No.1 for the offence under Section 354A of the IPC is hereby **set aside** and the acquittal of the respondent/accused No.1 from all other offences are hereby affirmed. The respondent/accused No.1 is sentenced for the offence under Section 354A of the IPC.

39. The offence of Section 354A of the IPC does not provide any minimum sentence which may extend to three years, or with fine, or with both, if the accused commits the offence specified in clause (i) or clause (ii) or clause (iii) of sub-section 1 of Section 354A of the IPC. In the present case, the respondent/accused No.1 is found guilty for commission of offence under

Section 354A(1)(i) of the IPC, therefore, the sentence provided in Section 354A(2) of the IPC is applicable here.

40. The respondent No.1/accused has already remained in jail for 5 months and 30 days; he was 31 years of age at the time of the incident; the offence is of the year 2017, considering the overall facts and circumstances of the case, this Court deem it appropriate to sentence the respondent No.1/accused for the period already undergone by him with fine of **Rs.15,000/-**. In default of payment of fine, the respondent No.1/accused shall further undergo R.I. for one month.

41. The fine amount shall be deposited within three months from today. On being so deposited the fine amount by the respondent No.1/accused, the same shall be paid to the victim PW-5 as compensation as provided under Section 395 of the BNSS, 2023.

42. The record of the trial Court be sent back to the learned trial Court along with a copy of this judgment for necessary compliance.

Sd/-

(Ravindra Kumar Agrawal)
Judge

Aadil