

GAHC010115272023



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2024:GAU-AS:9870-

**THE GAUHATI HIGH COURT**  
**(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)**

**Case No. : CRL.A(J)/87/2023**

KARTIK MANDAL

VERSUS

THE STATE OF ASSAM AND 2 ORS  
REPRESENTED BY PP, ASSAM

2:SMTI ANITA BHOWMIK  
W/O- SRI SANU BHOWMIK  
GOPAL  
RESIDENT OF- NO. 2  
NAYAPARA  
PS AND DIST- BONGAIGAON  
ASSA

**Advocate for the Petitioner** : MR. S BISWAS, MS D DEVI  
**Advocate for the Respondent** : PP, ASSAM,

**:: PRESENT ::**

**HON'BLE MR. JUSTICE PARTHIVJYOTI SAIKIA**

|                          |   |                                         |
|--------------------------|---|-----------------------------------------|
| For the Appellant        | : | Mr. S. Biswas,<br>Advocate.             |
| For the Respondent No.1: | : | Mr. K.K. Parasar,<br>Addl. P.P., Assam. |
| Date of Hearing          | : | 06.08.2024.                             |
| Date of Judgment         | : | 30.09.2024.                             |

### **JUDGMENT AND ORDER (CAV)**

Heard Mr. S. Biswas, learned counsel appearing for the appellant. Also heard Mr. K.K. Parasar, the learned Addl. Public Prosecutor, Assam.

**2.** This is an appeal under Section 374 of the Code of Criminal Procedure against the judgment dated 23.03.2023 passed by the learned Special Judge, Bongaigaon, Assam in Special (P) Case No.13(BGN) of 2021.

**3.** On 04.11.2020, the informant lady had alleged that on 26.10.2020 at about 8 P.M., while her daughter along with her friend was at the house of Gopal Biswas, the appellant came in and pressed her cheeks. The young girl tried to run away but the appellant slapped her.

**4.** The informant has alleged that since many days the appellant was making obscene gestures and also throwing obscene words towards the girl.

**5.** On conclusion of investigation, police filed the *charge sheet* against the present appellant under Section 354/354(D) of the IPC read with Section 12 of the POCSO Act. The trial court framed the said charges against the appellant. The appellant pleaded total denial and hence the trial followed.

**6.** At the time of hearing, the prosecution examined six witnesses. The appellant also examined one witness.

**7.** On the basis of the evidence on record, the trial court arrived at the impugned finding.

**8.** I have gone through the evidence available with the record.

**9.** The first witness is the victim herself. She has stated in her evidence that while she was sitting in the house of Gopal Biswas, the appellant pressed her cheeks. She has stated that prior to that incident, the appellant said to her that he loved her and wanted to marry her, though the appellant already married. According to the victim

girl, regarding that issue, there were village meetings on 2/3 occasions. But on every occasion, the appellant remained absent.

**10.** In her statement made before police, the victim girl did not tell that the appellant proposed her for marriage. When this fact was brought to her notice during cross-examination, she simply denied it.

**11.** The second prosecution witness is Sanatan Biswas. He is the brother of the mother of the victim girl. He stated in his evidence about whatever he had heard from his sister.

**12.** The third prosecution witness is Gopal Biswas. He has stated that on 26.10.2020, the appellant pressed the mouth of the victim girl and also slapped her.

**13.** The fourth prosecution witness is the informant. She has stated on 26.10.2020 at about 7 P.M., her daughter went to the house of Gopal Biswas along with her two friends namely- Prabhati and Angita. She said that the appellant asked her daughter whether she will marry him. According to the informant, on that day, she also went to the house of Gopal Biswas. After hearing from her daughter, she confronted the appellant who used obscene languages to answer her questions.

**14.** There is nothing relevant in her cross-examination.

**15.** The fifth prosecution witness is a shopkeeper and is known to the informant and the appellant. He has stated in his evidence that he had heard that the appellant had squeezed the cheeks of the victim girl.

**16.** The sixth prosecution witness is the police investigating officer. He spoke about the investigation.

**17.** The only defence witness is Bhabani Ray, aged about 14 years. She has stated that on the day of occurrence, there was a *kirtan* in the local *kali mandir* and she attended the said *kirtan* along with other children of the village. She has stated that the appellant brought her along with 10/12 other children in his car for dropping them

in their respective houses. The car stopped in front of the victim of this case for dropping the nephew of the victim. The defence witness stated that at that time, the victim girl along with her friend Prabhati was standing in the *varandah* in the house. The defence witness has stated that the appellant told the victim girl that her photos had become viral in social media and asked her as to whether her brother knows about the fact. The defence witness has stated that the victim girl became very angry and threw water on the face of the appellant from her mouth. The victim allegedly made *hulla* and the parents of the girl also came out. She has stated that after that incident she and the appellant came out of the house.

**18.** The defence witness has stated in her cross-examination that she did not know whether the appellant had proposed the victim girl to marry him and if he had touched her mouth.

**19.** I have considered the evidence on record.

**20.** In this case, the victim is the only eye witness to the occurrence though at the time of occurrence, she was accompanied by her friends Prabhati and Angita. They were not made witnesses in this case.

**21.** There are two allegations against the appellant. First one is that he had proposed the victim girl for marriage with him. The second allegation is that he had squeezed the cheeks of the victim girl.

**22.** Squeezing, *per se*, of the cheeks of a minor girl is not an offence under Section 9 of the POCSO Act. For committing sexual assault upon a minor, it must be accompanied with sexual intention. If sexual intention of the accused is proved, then he can be held guilty under the different provisions of the POCSO Act.

**23.** So far as proposing the girl for marriage, there is no corroborative evidence to support the evidence of the victim girl. Her mother's evidence is based on whatever she has heard from her daughter.

**24.** The learned trial court had drawn up presumptions under Sections 29 and 30 of the POCSO Act. It is a settled position of law that court can draw presumption under the POCSO Act when the basic foundation of the case is established. It cannot be disputed that no presumption is absolute and every presumption is rebuttable. It cannot be countenanced that the presumption under [Section 29](#) of the POCSO Act is absolute. It would come into operation only when the prosecution is first able to establish facts that would form the foundation for the presumption under [Section 29](#) of the POCSO Act to operate. Otherwise, all that the prosecution would be required to do is to file a charge sheet against the accused under the provisions of the said Act and then claim that the evidence of the prosecution witnesses would have to be accepted as gospel truth and further that the entire burden would be on the accused to prove to the contrary. Such a position of law or interpretation of the presumption under [Section 29](#) of the POCSO Act cannot be accepted as it would clearly violate the constitutional mandate that no person shall be deprived of liberty except in accordance with procedure established by law. The learned trial court has erroneously drawn up the presumption.

**25.** Under the aforesaid circumstances, this Court is of the opinion that the learned trial court had erroneously interpreted the evidence as well as the legal provisions and arrived at an incorrect finding.

**26.** For the aforesaid premised reasons, the appeal is allowed. The judgment dated 23.03.2023 passed by the learned Special Judge, Bongaigaon, Assam in Special (P) Case No.13(BGN) of 2021, is set aside.

**27.** If the appellant is in judicial custody, he shall be released forthwith.

The criminal appal is disposed of accordingly.

**JUDGE**

**Comparing Assistant**