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IN THE HIGH COURT OF BOMBAY AT GOA
CRIMINAL APPELLATE JURISDICTION
CRIMINAL APPEAL No. 32 of 2013.

Marconi Estevan
Rodrigues son of Jose
Rodrigues, age 52 years,
Indian National,
resident of House No.594
(76), Murida, Cuncolim,
Salcette, Goa 403 703

.. APPELLANT.

The State of Goa through
the Verna Police
Station, through the
Public Prosecutor, High
Court of Bombay at Goa,
Panaji, Goa

.. RESPONDENT.

Mr. Ryan Menezes, Advocate for the Appellant.
Mr. Mahesh Amonkar, Addl.Public Prosecutor for the
Respondent-State.

CORAM : C.V. BHADANG,J.
RESERVED ON: 22nd March, 2017.
PRONOUNCED ON:3rd April, 2017.

(THROUGH:VIDEO CONFERENCING)

JUDGMENT:

1. This is an appeal challenging the
conviction of the appellant/accused for an offence
punishable under Section 292 (2) (a) of the Indian

Penal Code ("the IPC" for short). The appellant has been sentenced to undergo simple imprisonment for a period of two years and fine of Rs.2000/-and in default to undergo simple imprisonment for three months.

2. The facts necessary for the disposal of the appeal may be stated thus :-

That the complainant PW 4 Middle Fernandes lodged a complaint on 11th May, 2006 with Police Station Verna complaining that the appellant has had forcible sexual intercourse with her from the year 2003 to 1st May, 2006. According to the complainant, the incident took place at Murida, Cuncolim at the residence of the appellant. It was also claimed that the appellant took nude photographs of the complainant with the means of a mobile phone and Polaroid camera and also recorded her indecent nude videos. It was further claimed that the appellant threatened to circulate the said photographs of the complainant under the said threat the appellant had forcible sexual intercourse with her on many occasions.

3. The complainant had married PW 5 Rovey Rebello on 28th January, 2006. Even after her marriage, the appellant insisted the complainant to visit her house under the threat of circulating nude and obscene video footage/photographs. It appears from the complaint and the evidence of the prosecutrix that even after her marriage the complainant had visited the house of the appellant. According to her, owing to the threat held out, the appellant had sexual intercourse with her after her marriage. However, when she refused to oblige the appellant, the appellant showed the photographs / video footage to the husband of the prosecutrix namely PW 5 Rovey Rebello, his sister Renny and a neighbour Bernard D'silva. This was on 1st April, 2006 on account of which serious disputes and differences, arose between the prosecutrix and her husband PW-5 Rovey Rebello. The Prosecutrix was sent back to her maternal place and she has been divorced. Ultimately, the prosecutrix lodged the complaint

of the incident against the appellant with Verna Police Station on 11th May, 2006.

4. It appears that on the basis of the complaint an offence punishable under Section 376, 292 (2) (a) and 506 (II) of IPC was registered against the appellant. During the course of the investigation, the Investigating Officer recorded the statement of the complainant and other witnesses. The complainant and the appellant were sent for medical examination. The mobile phone and the Polaroid camera containing the obscene photographs/video footage were seized. The Investigating Officer also seized a compact disk /CD in which the photographs/video footage were downloaded and recorded. A spot panchnama was drawn. After completion of the investigation, a charge-sheet came to be filed against the appellant, which was eventually committed to the Court of Sessions at Margao and was registered as Sessions Case No.25 of 2009.

5. The learned Sessions Judge on 31st August, 2009 framed charge against the appellant for the offence punishable under Sections 376, 506 and 292 (2) (a) of the IPC to which the appellant pleaded not guilty and claimed to be tried. The defence of the appellant as elicited from the record, appears to be that of total denial and in the alternative the act being consensual. The appellant denied that the obscene photograph and video was circulated as such within the meaning of Section 292 (2) (a) of IPC.

6. At the trial the prosecution examined as many as nine witnesses and produced the contemporary record of the investigation. The learned Additional Sessions Judge recorded the statement of the appellant under Section 313 of Cr.P.C. The appellant neither entered into witness box nor examined any defence witnesses.

7. The learned Sessions Judge, found that the prosecution had failed to establish the

offence punishable under Section 376 and Section 506 of IPC. However, the learned Sessions Judge found that the appellant had taken obscene photographs of the complainant and recorded obscene video on his mobile and "exhibited it" to her husband and has thereby committed offence punishable under Section 292 (2) (a) of IPC for which the appellant was sentenced as set out hereinabove. The appellant however came to be acquitted of the offence punishable under Section 376 and Section 506 (II) of IPC. Feeling aggrieved by the conviction and sentence, the appellant is before this Court.

8. I have heard Shri Menezes learned Counsel for the appellant and Shri Amonkar, the learned Additional Public Prosecutor for the Respondent/State. With the assistance of the learned Counsel for the parties, I have gone through the evidence and the impugned judgment passed.

9. It is submitted by Shri Menezes, the learned Counsel for the appellant that the offence punishable under Section 292 (2) (a) of IPC cannot be said to have been made out against the appellant. It is submitted that Section 292 (2) (a) of IPC requires distribution, public exhibition or circulation of the obscene material, none of which is established in this case. The learned Counsel strenuously urged that exhibition of the photographs/video footage to PW 5 Rovey Rebello and some others namely, his sister Renny and a neighbour Bernard D'silva cannot amount to distribution, public exhibition or circulation within the meaning of Section 292 (2) (a) of the IPC. For this purpose, the learned Counsel has referred to the definition of "circulation"/ "circulate" as contained in Dictionary.com. It is submitted that the act of circulation involves moving in a circle or circuit or pass through a circuit, back to the starting point or to pass from place to place and from person to person. It is submitted that mere exhibition of the

photographs / video footage to PW 5 Rovey Rebello and two others cannot amount to circulation. It is submitted that in any event the intention of the appellant in exhibiting the material was not to evoke any lascivious or prurient interest in the person to whom the material is exhibited. In other words, it is submitted that the intention to evoke lascivious or prurient interest in the persons to whom the material was circulated is the gist of the offence which is lacking in this case even according to the prosecution.

10. It is submitted that the appellant had not parted with the copies of the obscene material, either in hard or soft copies.

11. The learned Counsel has placed reliance on the decision of this Court in the case of **Jeevan Govardhan Band Vs. The State of Maharashtra 2014 ALL MR (Cri) 841** and **Jagdish Chavla Vs. State of Rajasthan [1999] CrLJ 2562**. He therefore submits that the appellant be acquitted.

12. On the contrary, it is submitted by the learned Additional Public Prosecutor, that there is overwhelming material on record to show that the appellant had taken nude/obscene photographs of the complainant and had also recorded a video footage which was shown by the appellant to PW 5 and two others with the intention of coercing the complainant to continue with the relationship and/or to disrupt the marriage of the appellant with PW 5. It is submitted that the learned Sessions Judge has rightly applied the theory of "contemporary community standard" in order to hold the appellant guilty under Section 292 (2) (a) of IPC. The learned APP was at pains to point out that once the photographs/video footage was shown to more than one person namely PW 5 Rovey Rebello along with his sister Renny and a neighbour Bernard D'silva it will amount to circulation within the meaning of Section 292 (2) (a) of the IPC. It is submitted that merely because the appellant had not passed on the copies (hard or soft copies) of the photographs or the

video footage to these persons would not make any difference. The learned APP submitted that the cases relied upon on behalf of the appellant are clearly distinguishable on facts .

13. I have given much anxious consideration to the rival circumstances and the submissions made.

14. It has come on record in the evidence of PW 4 that she met the appellant for the first time in the year 2001 and lastly in the year 2006. She claimed that she had visited the house of the appellant for the first time in the year 2003 and had also visited the house of the appellant two to three days after her marriage. She further stated that she used to visit the house of the appellant between 3:00 p.m. to 4:00 p.m. and the appellant used to reach her to the bus stop, after half an hour. She was cross-examined with reference to certain voice recording in which she had stated that she loves the appellant. She claimed that she lodged the complaint as her marriage with PW 5

Rovey Rebello broke up. She used to accompany the appellant without any objection or resistance. She further admitted that she used to call the appellant daily on her mobile where she used to talk to the appellant more than half an hour regularly. It was in the year 2002 that she had sex, for the first time, with the appellant when the appellant took her nude photographs and on the subsequent occasion also whenever they have sex the appellant used to take her nude photographs. The learned Sessions Judge had noticed that both the appellant and PW 4 were major. Evidence of PW 6 Dr. Rodrigues who had examined PW 4 shows that there were no signs of recent forcible intercourse. The Medical Officer had also opined that PW 4 was used to sexual intercourse and there were no signs of any injury showing resistance. It is in these circumstances that the learned Sessions Judge has come to the conclusion and to my mind rightly so that PW 4 was a consensual party to the act of sexual intercourse.

15. Be that as it may, we are presently concerned with the conviction of the appellant, for the offence punishable under Section 292 (2) (a) of the IPC which reads thus :

292. Sale, etc., of obscene books, etc.

(1) For the purposes of sub-section (2), a book, pamphlet, paper, writing, drawing, painting, representation, figure or any other object, shall be deemed to be obscene if it is lascivious or appeals to the prurient interest or if its effect, or (where it comprises two or more distinct items) the effect of any one of its items, is, if taken as a whole, such as to tend to deprave and corrupt person, who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it.]

(a) sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, or

(b) ..

16. The Hon'ble Apex Court in the case of **Aveek Sarkar & Anr Vs. State of West Bengal & Ors** reported in (2014) 4 SCC has inter alia held that the 'Hicklin test', is not the correct test to be

applied, rather the court has to apply the "community standard test" to determine as to what is obscene.. The Hon'ble Apex Court has held that a bare reading of Section 292 (2) (a) makes it clear that a picture or article shall be deemed to be obscene (i) if it is lascivious, or (ii) it appeals to the prurient interest; or (iii) it tends to deprave and corrupt persons who are likely to read, see or hear the matter, alleged to be obscene. The Hon'ble Apex Court has further held that once the matter is found to be obscene, the question is whether the matter falls within any of the exceptions as contained in Section 292 of IPC.

17. The word "obscene" has not been defined in IPC. A picture of a nude/semi-nude woman, as such, cannot per se be called obscene unless it has the tendency to arouse the feeling of or revealing an overt sexual desire. The picture should be suggestive of a depraved mind and designed to excite sexual passion in persons who are likely to see it, which will depend on the

particular posture and the background in which the nude/semi-nude woman is depicted. It is only those sex-related materials which have a tendency of "exciting lustful thoughts" which can be held to be obscene. The Apex Court has held that obscenity has to be judged from the point of view of an average person, by applying contemporary community standards. (See paragraph 23 of the judgment in the case of **Aveek Sarkar** (supra)). It can thus be seen that what is obscene and what is not would largely depend upon the nature of the picture the context in which it appears including the nature of posture and other relevant factors. This would entirely depend upon the facts and circumstances of each case.

18. The learned Sessions Judge has considered the nature of the photographs/video clipping from paragraph 34 onwards of the impugned judgment, in order to hold that the photographs in the video recording are absolutely vulgar in nature, disgusting and repulsive and on applying the

'contemporary community standard' the photographs/video clippings appeal predominantly to lascivious and prurient interest of the person viewing it.

19. The learned counsel for the appellant had confined the arguments to the question whether the exhibition of the photographs to PW 5 Rovey Rebello, would amount to 'public exhibition' or 'circulation.' within the meaning of section 292 (2) (a) of the IPC. Thus, I would proceed to consider the issue. There cannot be any manner of dispute with the proposition that penal provision has to be construed strictly. Unless and until the act with which the appellant/accused is charged squarely falls within the requirement and ingredients of the concerned section, no offence can be said to be made out. Sub-section (2) (a) of Section 292 of the IPC with which we are presently concerned provides that whoever sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or for purposes of

sale, hire, distribution, publication exhibition or circulation, makes, produces or has in his possession any obscene book, pamphlet, paper, drawing, painting, representation or figure or any other obscene object whatsoever, would be deemed to commit such an offence.

20. In so far as the offence under Section 292 (2) (a) of IPC, is concerned the appellant was charged as under :

"In the month of April 2006 you have also shown the nude photographs of Ms. Middle Rebello and a recording on a mobile phone of an indecent scene to her husband Rovey Rebellow".

21. A bare perusal of Section 292 (2) (a) of the IPC shows that it has two parts (i) where the accused sells, lets to hire, distributes, publicly exhibits or in any manner puts into circulation, or (ii) for purposes of sale, hire, distribution, public exhibition or circulation, makes, produces or has in his possession any obscene book. We are presently concerned with the former. Even here

it is not the case that the appellant had sold or let for hire the obscene material or has distributed the same. Thus, the question is whether the appellant can be said to have 'publicly exhibited' or in any manner put into 'circulation' the 'obscene material', within the meaning of Section 292 (2) (a) of the IPC.

22. It can thus be seen that the charge against the appellant is only of 'exhibiting' obscene material to PW 5 Rovey Rebello which can neither amount to 'public exhibition' or putting the obscene material in circulation. Assuming that the obscene material was shown to PW 5 Rovey Rebello in the presence of his sister Renny and a neighbour Bernard D'silva, it cannot be said to be either by way of 'public exhibition' or putting the obscene material into 'circulation'. The word "circulate" as per Oxford Concise Dictionary means, "to go round from one place or person, etc. to the next and so on or cause to go around and put into circulation". "Circulation" means a

movement to and fro from and back to a starting point.

Webster Dictionary defines "circulation" as under:-

"cause to pass from place to
place or from person to
person; to spread"

It can, thus, be seen that "circulation" involves an act by a person, which facilitates or triggers the matter to go from one person to another and so on. In my considered view, the act of exhibiting the obscene material to PW 5 Rovey Rebello can neither amount to 'public exhibition' nor to 'circulation' of the obscene material. This aspect appears to have not been considered by the learned Sessions Judge while holding the appellant guilty of the offence punishable under Section 292(2) (a) of the IPC.

23. In the case of **Jeevan s/o Govardhan Band vs. The State of Maharashtra** reported in 2014 ALL MR (Cri)841 this Court had held that mere

possession of an obscene material is not an offence under Section 292 (2) (a) of the IPC unless it is found that the accused had circulated the obscene material. In the case of **Jagdish Chavla & Ors Vs. State of Rajasthan**, the Rajasthan High Court had held that the possession of the obscene object is punishable if the possession is for the purpose of sale, hire, distribution, public exhibition or circulation.

24. In the case of **Vinay Kumar & Ors Vs. The State of Maharashtra (Criminal Application No.2809 of 2010)** dated 24th November, 2010 the accused were charged for watching an obscene film in a private bungalow. This Court held that no offence in such a case can be said to have been made out under section 292 (2) (a) of the IPC. Be that as it may, it cannot be accepted that a mere exhibition of the photographs and the video footage to PW 5 Rovey Rebello can either amount to public exhibition or circulation of the obscene material. I am conscious of the fact that on account of the

act of the appellant the marriage between the complainant and PW 5 Rovey Rebello was broken. However, considering the fact that penal provision has to be applied strictly, I do not find that any different view can be taken in the circumstances of the case.

25. In the result, the following order is passed:

- (i) The appeal is allowed;
- (ii) The conviction and sentence awarded to the appellant under section 292 (2) (a) of the IPC, is hereby set aside;
- (iii) The appellant is acquitted of the offence punishable under Section 292 (2) (a) of the IPC;
- (iv) Bail bonds of the appellant-accused stand cancelled; and
- (v) Fine, if paid, be refunded to the appellant.

(C.V. Bhadang, J)