

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

CRL.A 345/2013

Reserved on : 25.02.2020

Date of Decision : 27.02.2020

IN THE MATTER OF:

SONU SAWARKAR

..... Appellant

Through: Mr. Pratap Shanker, Advocate

Versus

STATE

..... Respondent

Through: Dr. M.P. Singh, APP for State

CORAM:

HON'BLE MR. JUSTICE MANOJ KUMAR OHRI

1. The present appeal is instituted against the judgment dated 08.01.2013 passed by Addl. Sessions Judge in FIR No. 58/2012 registered under Sections 354/367/384/34 IPC & Sections 67A and 67B of the IT Act, Police Station Chankyapuri, Delhi whereby the petitioner was convicted for the offence punishable under Section 367/354 IPC, Section 67A IT Act and also for the offence punishable under Section 384 read with Section 34 IPC.

2. That vide order on sentence dated 10.01.2013, the appellant was sentenced as under:-

(i) *rigorous imprisonment of 04 years and fine of Rs. 5,000 I- under Section 367 IPC. In default of payment of fine, convict shall undergo simple imprisonment for three months; and*

(ii) rigorous imprisonment of 02 years under Section 354 IPC; and

(iii) rigorous imprisonment of 03 years under Section 384 IPC; and

(iv) rigorous imprisonment of 04 years and fine of Rs. 5000 I- under Section 67 A if the IT Act. In default of payment of fine, convict shall undergo simple imprisonment for three months

3. Briefly the facts noted by the trial court are as under:

“1.0 Prosecution case is that the accused who lived nearby, allured the minor prosecutrix to a jungle near Madhu Limay Marg, where he molested her by caressing her breasts after making her lie down on the ground; he also forcibly made her unchain his pants and made her suck his penis. He also prepared a video clip of this act on his mobile phone. Subsequently, the accused passed on this video clip to another boy namely Sanju Topo (juvenile), who lived in the neighbourhood at D-1/68, Servant Quarter, Satya Marg, Chanakya Puri, New Delhi. The said Sanju Topo (juvenile) told the prosecutrix that accused Sonu passed on her video clip to him and that he would put it on the internet. He also told her that in case she paid him Rs.1500/-, then he will not put it on the net. On which, the prosecutrix expressed her inability to pay such a large amount. Juvenile Sanju Topo then told her that she would have to pay minimum sum of Rs.800/- otherwise, he would put the video clip on the internet. The prosecutrix gave Rs.300/- to Sanju top (Juvenile) out of her savings. But, Sanju Topo (juvenile) told her that same is not sufficient and again threatened her. On which, the prosecutrix stole her mother's tops (earrings) and locket and gave the same to Sanju Topo (juvenile).

1.1 On prosecutrix's parents discovering the said gold articles to be missing, reported the matter to police. During investigation, the prosecutrix revealed the entire facts and that she had handed over her mother's jewellery

to Sanju Topo (juvenile). On further investigation juvenile revealed that he had already sold off the said jewellery articles. During further investigation, two mobile phones of make Nokia from the custody of accused Sonu and one mobile phone of make Rokea from Sanju Topo (juvenile) were recovered and seized and the same were sent to FSL, Rohini for examination.”

4. After completing the investigation, a charge-sheet was filed against the appellant. The co-accused Sanju Topu, being a juvenile was produced before the Juvenile Justice Board-II, Delhi Gate, Delhi. On 30.07.2012, charge under Section 367/354IPC, 384/34 IPC and under Section 67A IT Act was framed against the appellant who pleaded not guilty and claimed trial.

5. The prosecution in support of its case examined a total of 11 witnesses. The accused chose not to lead any defence evidence.

MATERIAL WITNESSES

6. The prosecution examined Mamta Anand, Head Mistress as PW-5 and Maman Singh Rana as PW-6 to prove the age of the prosecutrix. As per the aforementioned witnesses deposed that as per the school record of the prosecutrix, her date of birth was 13.07.1998. A copy of the School Admission Form and the supporting affidavit of the father of the prosecutrix given at the time of admission in Class-V was exhibited as Ex. PW5/A & Ex. PW5/B respectively. The relevant entry of the admission register was exhibited as Ex. PW5/C. The prosecutrix was also medically examined for her age determination. The Medical Board opined her age to be between 14 to 16 years. From above, the trial court came to the conclusion that the prosecutrix being about 14 years of age was a minor at the time of the incident.

7. The prosecutrix was examined as PW-1. She deposed that the appellant was residing near her house and being her friend, was known to her for last 1 ½ years. In March 2012, at around 1:30-2:00 p.m., the appellant met her in the ground near her house and asked her to accompany him to Jungle where he had kept something. The appellant insisted her to accompany him. On reaching the Jungle, the appellant made her lie on the ground and lifted her shirt. He caressed her chest, unchained his pant, took out his penis and asked her to hold it, which she refused. The appellant also made a video recording on his mobile phone and when the prosecutrix objected, he stated that nobody touches his mobile phone. The appellant was identified in the Court by the prosecutrix.

8. The prosecutrix also deposed that after reaching home, she met Sanju (the co-accused) who demanded Rs.1500 from her for deleting her film which was available on the internet. As she did not have any money, she agreed to pay him Rs.800. Rs. 300 was paid and as she did not have the remaining money, she took her mother's gold pendant and a pair of gold earrings and gave them to Sanju. When her parents discovered the missing pendant and the gold earrings, on being enquired she told them that the same were given to a friend in School. Later, she confessed that the same were given to Sanju for deleting the video from the internet. Her mother confronted Sanju and subsequently her father lodged the FIR for theft of gold articles and when the Police came, she narrated the entire incident.

9. During investigation, two mobile Phones of make 'Nokia' were seized from the appellant and a mobile phone of make 'Rokea' was

seized from the co-accused. The mobile phones were sent to FSL lab. Dr. N.P. Waghmare, Assistant Director, FSL, Rohini was examined as PW-10 who proved his report as PW-10/A. He deposed that the SIM cards of the two Nokia phones as well as the phones itself could not be attached to the UFED device, hence no data could be retrieved from them. The memory cards from the three seized mobile phones were also forensically examined and a video was found in the memory card of seized Rokea mobile phone. The video CD prepared by him of the video found in the Rokea phone was exhibited as Ex.PW1/C.

10. During the deposition of the prosecutrix, the video CD prepared by Dr. N.P. Waghmare was played in the Court. The prosecutrix, after seeing the CD identified the recording to be the same which was made on the day of the incident by the appellant. She reiterated that the act shown in the CD was committed by the appellant where he forced her to suck his penis and put the same in her mouth. In cross examination, she stated that the incident occurred in March, 2012. She admitted that she did not ask any passer-by to nab the accused. She also admitted that after returning from the Jungle, she did not inform her mother and brother about the incident. She also admitted that when Sanju asked her for money, he was alone.

11. The other witnesses examined were WSI Kusum Dhama (PW-3), who recorded the statement of the prosecutrix; S.I K.L. Yadav (PW-9), who had accompanied WSI Kusum Dhama. Inspector Neelmani, the I.O. was examined as PW-11.

12. Learned counsel for the appellant contended that the testimony of the prosecutrix is not creditworthy as there are material contradictions in

her statements recorded during investigation and her deposition before the Court. He submitted that the ingredient of the offence under Section 367 IPC are not made out as no evidence of any enticement has come on record. It was further submitted that nothing incriminating was recovered from the mobile phones seized from the appellant and even as per the testimony of the prosecutrix, the demand of Rs.1500/- was made by the co-accused when he was alone. He further contended that the video clipping cannot be relied on as the same does not show the face of the appellant.

13. Per contra, learned APP for the State has supported the impugned judgment. It was submitted that the appellant was already known to the prosecutrix and her testimony is creditworthy and reliable.

14. I have heard learned counsel for the parties and gone through the case records.

15. The prosecution in terms of the evidence of Ms. Mamta Anand (PW-5) & Maman Singh Rana (PW-6) has proved that at the relevant time, the prosecutrix was a minor of about 14 years of age.

16. The testimony of the prosecutrix so far as role of the present appellant is concerned, is consistent. The contradictions pointed out by the learned counsel for the appellant as to her location whether she was at home or in the ground outside her home, when the appellant has approached her on the day of the incident, are immaterial. The prosecutrix has unequivocally stated that it was the appellant who had asked her to accompany him to the Jungle to show her something and on her refusal, he insisted her to come along. The identity of the appellant was not disputed. The prosecutrix deposed that the appellant was already

known to her for about 1 ½ years. The prosecutrix has narrated in detail the incident that occurred in the Jungle. It is proved on record that the appellant had insisted upon the prosecutrix to accompany her to the Jungle to commit the offence. The prosecutrix, being a minor was thus enticed to go to the jungle by the appellant.

17. The prosecutrix deposed that the appellant had made a video on his mobile phone while he committed the offence. Though the prosecution seized two mobile phones from the appellant, but in the FSL examination nothing could be retrieved from the mobile phones/SIM cards/memory cards recovered at the instance of the appellant. The video clip was retrieved from the memory card of the mobile phone make 'Rokea' which was seized at the instance of the co-accused. Learned counsel for the appellant contended that the Investigating Agency did not bring any evidence on record to prove that the video clip was transferred from the appellant's phone to the mobile phone of the co-accused. Although no data could be retrieved from the appellant's phones and at the time of demanding money, the co-accused was alone but the fact remains that a video clip was found and retrieved from the mobile phone of Sanju and the prosecutrix identified it to be the same video which was recorded by the appellant. For the aforesaid reasons, I do not find any force in the contentions of the learned counsel for the appellant that no offence under Section 67A IT Act or under Section 384/34 IPC is made out.

18. Lastly, it was contended that the CD was not accompanied by a certificate under Section 65B of the Evidence Act. However, since no objection to the same was taken before the trial court, the same cannot be taken at this stage. In the case of Sonu @ Amar v. State of Haryana

reported as (2017) 8 SCC 570, it was held that mode and method of proof is procedural and objections, if not taken at the trial cannot be permitted at the appellate stage.

19. The testimony of prosecutrix is both credible and trustworthy. The appellant could not bring anything on record to shake her testimony.

20. From the above discussion, the prosecution has been able to prove its case against the appellant. The appellant's conviction and sentence awarded under the aforesaid Sections is upheld.

21. As per the nominal roll received, the appellant has already been released after completing his sentence and payment of fine.

22. Accordingly, the appeal is dismissed.

23. A copy of this order be communicated to the trial court.

(MANOJ KUMAR OHRI)
JUDGE

FEBRUARY 27, 2020

p'ma