

HIGH COURT OF CHHATTISGARH, BILASPUR**Criminal Appeal No.629 of 2010**

Ankan Mundu, Son of Manjul Mundu, 19 years, Resident of Railway Colony,
Bangla Para, Dongargarh, District Rajnandgaon, Chhattisgarh

---- Appellant

versus

State of Chhattisgarh through District Magistrate, Rajnandgaon, District
Rajnandgaon, Chhattisgarh

--- Respondent

For Appellant : Shri Prafull N. Bharat and Shri Keshav Dewangan,
Advocates
For Respondent : Shri H.S. Ahluwalia, Dy. Adv. General

Hon'ble Shri Justice Arvind Singh Chandel

Judgment on Board

11.2.2021

1. The instant appeal has been preferred against the judgment dated 7.11.2009 passed by the Additional Sessions Judge, Link Court Dongargarh, District Rajnandgaon in Sessions Trial No.13 of 2009, whereby the Appellant has been convicted and sentenced as under:

<u>Conviction</u>	<u>Sentence</u>
Under Section 67 of the Information Technology Act	Rigorous Imprisonment for 8 months 25 days and fine of Rs.20,000/- with default stipulation

2. Prosecution case, in brief, is that on the date of incident the prosecutrix (PW9) was a major girl aged about 20 years. According to the case of prosecution, on 14.12.2008, the prosecutrix went

along the Appellant for a picnic at Karwari Dam where he offered her few eatables and cold drink. After consuming those eatables and drink, she got unconscious. Taking advantage of this situation, he committed rape with her and also prepared a video clip of the incident on his mobile phone and tried to blackmail her. He also transmitted the said video clip to co-accused Purmanand Kanwar alias Purva (acquitted). On 11.2.2009, First Information Report (Ex.P14) was lodged by her. During the course of investigation, one mobile phone was seized from the possession of the Appellant vide Ex.P5. One other mobile phone was seized from the possession of co-accused Purmanand vide Ex.P6. Statements of the prosecutrix and other witnesses were recorded under Section 161 of the Code of Criminal Procedure. On completion of the investigation, a charge-sheet was filed. The Trial Court framed charges against the Appellant under Sections 376(1), 292 of the Indian Penal Code and Section 67 of the Information Technology Act and against co-accused Purmanand under Section 67 of the Information Technology Act.

3. In support of its case, the prosecution examined as many as 10 witnesses. In examination under Section 313 of the Code of Criminal Procedure, the accused persons denied the guilt and pleaded innocence. No witness has been examined in their defence.
4. On completion of the trial, vide the impugned judgment, the Trial Court acquitted co-accused Purmanand of the charge under Section 67 of the Information Technology Act and also acquitted

the Appellant of the charges under Sections 376(1) and 292 of the Indian Penal Code, but convicted him under Section 67 of the Information Technology Act and sentenced him as mentioned in first paragraph of this judgment. Hence, this appeal.

5. Learned Counsel appearing for the Appellant submits that without there being clinching and sufficient evidence on record against the Appellant, the Trial Court has wrongly convicted him. None of the prosecution witnesses has supported the case of the prosecution. The Trial Court has convicted the Appellant only on the basis of statement of Investigating Officer M.N. Bathi (PW10). From the statements of the witnesses, it is clear that none of the witnesses has seen any video clipping or obscene photo of the prosecutrix. There is no evidence on record on the basis of which it could be said that the Appellant had published or transmitted the obscene video clipping. Therefore, conviction of the Appellant under Section 67 of the Information Technology Act is not sustainable.
6. Learned Counsel appearing for the State opposes the above submission and supports the impugned judgment of conviction and sentence.
7. I have heard Learned Counsel appearing for the parties and perused the entire record with due care.
8. Ku. Sandhya Shende (PW1), Sanni Gwala (PW2), Shailendra Kumar Pardhi (PW3) and Mahesh Kumar Sen (PW4) have not supported the case of the prosecution. They have turned hostile.

Layakram (PW5), father of the prosecutrix has only deposed that the prosecutrix had told him that the Appellant had committed wrong act with her and he had also taken out her naked photographs. In paragraphs 10 and 11, this witness has categorically admitted that he himself has not seen those photographs.

9. The prosecutrix (PW9) has also deposed that during the picnic, they had taken breakfast and cold drink and thereafter she had got unconscious. On getting her conscious back, she felt that something wrong was committed with her. She has further stated that later on she came to know that someone had also taken out her obscene photographs. This witness has not supported the case of the prosecution and turned hostile. She has also admitted that she herself has not seen those obscene video clipping and photographs. She has stated that she saw those video clipping and photographs for the first time in the Court during her examination.
10. Station House Officer M.N. Bathi (PW10) is the witness who investigated the offence in question. This witness has deposed that during the course of investigation, on the basis of memorandum statement (Ex.P3) of the Appellant, he seized one mobile phone of Samsung make vide Ex.P5. In the said mobile phone, one micro chip was installed which had contained a video clipping of physical relationship of the Appellant with the prosecutrix. That video clipping was also seen by the Court during examination of this witness. This witness has further deposed that during the course of investigation, one other mobile phone was seized from the

possession of acquitted co-accused Purmanand vide Ex.P6. According to this witness, the obscene video clipping saved in the mobile phone of the Appellant was transmitted to the mobile phone of acquitted co-accused Purmanand.

11. Before examining the above evidence of the prosecution, it would be appropriate to go through Section 67 of the Information Technology Act, which runs thus:

“67. Punishment for publishing or transmitting obscene material in electronic form.—Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees.”

12. The words “transmit” and “publishes” are defined in the Explanation Clauses (a) and (d) of Section 66E of the Information Technology Act, respectively. The definitions are as under:

“66E. Punishment for violation of privacy.—Whoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without

his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both.

Explanation.—For the purposes of this section—

(a) “transmit” means to electronically send a visual image with the intent that it be viewed by a person or persons;

xxxxx

xxxxx

xxxxx

(d) “publishes” means reproduction in the printed or electronic form and making it available for public;”

13. On examination of the evidence led by the prosecution in the light of above-quoted provisions of the Information Technology Act, I find that none of the prosecution witnesses has seen the obscene video clipping in question. The conviction of the Appellant is based only on the statement of Investigating Officer M.N. Bathi (PW10). According to his statement, the obscene video clipping was transmitted from the mobile phone of the Appellant to the mobile phone of acquitted co-accused Purmanand, but when, how, in what manner and by whom the said obscene video clipping was transmitted to the mobile phone of acquitted co-accused Purmanand, no evidence is available in this regard. Only on the basis of the fact that the video clipping was available in both the aforesaid mobile phones, it cannot be concluded that the video clipping was transmitted or published by the Appellant. Since there is no evidence in this regard, conviction of the Appellant under

Section 67 of the Information Technology Act is not sustainable. The finding of the Trial Court is not in accordance with the evidence available on record.

- 14.** Consequently, the appeal is allowed. The impugned judgment of conviction and sentence is set aside. The Appellant is acquitted of the charge framed against him.

Sd/-

(Arvind Singh Chandel)
Judge