

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPEAL NO. 796 OF 2010

Imran Abdul Azij Shaikh ... Appellant

V/s.

The State of Maharashtra ... Respondent

WITH

CRIMINAL APPLICATION NO.1247 OF 2012

IN

CRIMINAL APPEAL NO.801 OF 2010

WITH

CRIMINAL APPEAL NO.801 OF 2010

Imran Sayyad Yunus Sayyad ... Appellant

V/s.

The State of Maharashtra ... Respondent

WITH

CRIMINAL APPEAL NO.29 OF 2011

Ayetesham Rafiq Ahmad Momin ... Appellant

V/s.

The State of Maharashtra ... Respondent

WITH

CRIMINAL APPEAL NO.22 OF 2011

Samir Karimoddin Shaikh

... Appellant

V/s.

The State of Maharashtra

... Respondent

Mr. Chetan Agrawal for Appellant in APEAL/796/2010.

Mr. Ashish Raghuwanshi for Appellant in APEAL/801/2010.

Mr. Aniket Vagal for Appellant in APEAL/29/2011.

Ms. P. N. Dabholkar, APP for State.

Coram:- SMT. BHARATI DANGRE, J.**Reserved on: 30th MARCH, 2023****Pronounced on : 6th JUNE, 2023****JUDGMENT :-**

1 The four appeals are filed by the appellants who stood convicted at the hands of the Adhoc Additional Sessions Judge, Solapur in Sessions Case No.15 of 2008 vide judgment and order dated 20/09/2010.

The Sessions Case No.15 of 2018 tried seven accused for the offences punishable under Section 376, 364(A)/109, 366/109, 342, 452, 323, 385, 504, 506 r/w. 34, Section 506/109 and Section 114 of the Indian Penal Code (IPC, for short).

On being tried, Accused Nos.2 and 3 being the sister and the father of Accused No.1 along with Accused No.7 – Sou Jaya Rameshlal Nankarni came to be acquitted.

Imran Sayyad- Accused No.1, who faced the charge under Section 376 and 366 of IPC was sentenced to suffer rigorous imprisonment for 7 years and was imposed a fine of ₹10,000/-, in default, is directed to suffer rigorous imprisonment for 60 days, on being convicted for the offence of rape. On being convicted under Section 366 of IPC, he is sentenced to suffer rigorous imprisonment for 5 years and to pay a fine of ₹5,000/-, in default to suffer rigorous imprisonment for 30 days. He was also awarded a separate sentence on being found guilty of committing an offence punishable under Section 385 of IPC.

Being aggrieved he has preferred the Criminal Appeal which is numbered as Appeal No.801 of 2010.

As far as Accused Nos.4,5 and 6 are concerned, they are convicted, by the impugned judgment for committing an offence punishable under Sections 366, 342, 452 r/w. 34 IPC and are awarded a sentence of rigorous imprisonment for 5 years along with a fine of ₹5,000/-, in default to suffer rigorous imprisonment for 30 days. They have preferred distinct appeals, which are tagged along with the appeal filed by Accused No.1.

2 Criminal Appeal No.801 of 2010 came to be admitted on 21/02/2011 and it was tagged along with other connected appeals filed by the other accused, convicted by the impugned judgment.

When the appeals were taken up for final hearing, it is found that Accused No.1–Imran Sayyad, who was convicted for committing the offence of rape and kidnapping along with the offence of extortion, came to be released on undergoing the entire sentence imposed upon him. The other appellants who were released on bail, continued to remain on bail, pending their respective appeals. Since the record and proceedings are received, I proceeded to take up the appeals for a final hearing.

Advocate Ashish Raghuvanshi has represented the appellant in Appeal No.801 of 2010, Advocate Aniket Vagal represented the appellants in Appeal No.29 of 2011 and 22 of 2011 i.e. Accused Nos.5 and 6. Advocate Chetan Agrawal was heard for the appellant in Appeal No. 796 of 2010.

Opposing all the appeals Ms. Pallavi Dabholkar represented the State of Maharashtra.

With their able assistance, I perused the impugned judgment along with the record and proceedings, placed before me.

3 The gist of the prosecution case is culled out, on reading of the impugned judgment and I shall first refer to the same.

The prosecutrix (PW 9) was a resident of Solapur at the relevant time, where she used to reside along with her parents, her sister and brothers. After pursuing her education up to 10th standard she joined Beauty Parlour Course within the nearby vicinity, where she was required to attend the parlour from 2.00p.m. to 5.00p.m. She was acquainted with one Trupti who used to visit the beauty parlour and who was having an affair with one boy. Along with her boyfriend, the accused No.1 Imran, used to visit the beauty parlour and who was introduced to the prosecutrix by informing that he is also a resident of Solapur. The prosecutrix accompanied Trupti to a juice centre where her boyfriend was accompanied by accused No.1. After a brief introduction, a relationship sprung between the prosecutrix and the accused No.1 as they met on 3 to 4 occasions.

One fine day, without offering, any details of the date and time, it is the case of the prosecution that the prosecutrix was asked to accompany Imran, to his sister's house for a cup of tea. She was taken to Fatima bungalow near Sinnar Bidi Factory, Solapur and to her dismay the prosecutrix found nobody present in the house. She was however convinced that his sister would return within five minutes and she was offered a cold drink. It is the prosecution case that on

consumption of the same, she lost all her consciousness within five minutes and could regain it only after two hours. As per the prosecutrix, she was not in her senses to have a feel of the happenings around **and with her** but when she regained consciousness after a few hours, she found herself in a nude condition.

Upon inquiry with Imran, as to what was done by him, he responded by stating that he had videographed her in a nude position and he also exhibited the clips to her. He threatened her that since now he is in possession of her nude clips, she must respond and attend to his call on every occasion and act as directed. Being frightened of the consequences and apprehending that the objectionable video clips would be made viral which would defame her in society, she continued to act under the dictate of Imran. He threatened her on the telephone and asked her not to inform about the incident to anyone and also asked her to reach his residence. She was compelled to reach his house on every occasion whenever he used to call her and i.e. how she visited Fatima bungalow many times, when Imran forcibly committed sexual intercourse with her and he videographed her while preparing tea, standing in front of a mirror and also videographed the actual copulation. Being helpless and fearful, she did not report the first or the subsequent incident to anybody as she was under threat of the objectionable videos being made viral or shown to her relatives and friends.

4 As per the prosecution, on one occasion she was asked to accompany him to a lodge in Solapur where the act of sexual intercourse was repeated. The Accused No.1–Imran had gifted her mobile phone and she was threatened to be constantly in touch with him through the said phone.

It is the case of the prosecution that the accused No.7-Jaya invited her to the house and she was aware of the objectionable video clips in the custody of Imran. When the prosecutrix tried to cut off all her relationship with Imran, accused No.7 forced her to visit her house and compelled her to maintain relationship with him and they used to have sex behind the closed doors in the house of accused No.7.

5 On 25/07/2007, the prosecutrix was to get engaged to one Jaykumar of Ulhasnagar and the accused No.1-Imran upon coming to know about the engagement ceremony threatened her that she should not get married to that man or else he will exchange the video clips with the said person and defame her in the society. After 15 days of her engagement, a phone call was received from the family members of Jaykumar informing her father that he was not ready to solemnize the marriage as the video clipping was revealed to her would be husband.

Thereupon, her father took her into confidence and inquired with her about the entire episode and she narrated to him, the act of

repeated forcible sexual intercourse committed by accused no.1 on the pretext of making the video clips viral. Thereafter, her father (PW 11) and his close associate (PW 14) persuaded accused- Imran to establish a dialogue and to discontinue with his threats to the prosecutrix. As per the prosecution, accused No.1–Imran demanded an amount of ₹5,00,000/- from PW 11 to delete the objectionable video clippings.

6 On 03/10/2007, when she was present in her house along with her mother and sister, at around 3.00p.m. on the door being knocked, which was opened by her mother, four persons forcibly gained entry into her house and by applying force, her mother was made to fall down. Accused No.1 -Imran was also present amongst the persons and he held the prosecutrix by her hand and forced her to accompany him. Accused No.1–Imran threatened her that she should accompany him or else she would be defamed in society. Her mother and sister were quietened and restrained from raising any cry for help and Imran informed them that he had demanded a sum of ₹5,00,000/- from her father. The telephone lines were cut off so that no contact would be established by them with any person outside.

The three persons present were identified by the her sister (PW-8) during the test identification parade and also during the deposition in the Court and who were tried as accused Nos.4, 5 and 6.

As per the prosecution, the prosecutrix was forcefully shoved in a Maruti car which was waiting out and it proceeded towards Pune. During the journey the accused No.1 – Imran received a telephone call, and he dropped the accused Nos.4, 5 and 6 on the way and the car was driven back towards Solapur. She was made to talk to her father who made a phone call to Imran and Imran threatened her not to make any contradictory statement. Near village Bale police vehicle was waiting for them and they took custody of the accused No.1 and he was taken to the police station and arrested for committing an offence of rape, extortion, kidnapping, criminal intimidation etc.

7 The prosecutrix as well as the accused were referred to medical examination and both were found to be capable of committing sexual intercourse. The prosecutrix on medical examination was found to have a torned hymen, indicating that she was subjected to sexual indulgence. Through various panchanamas, the relevant material to establish the guilt of the accused No.1 – Imran was collated. Imran's arrest was effected on 04/10/2007 whereas accused Nos.4, 5 and 6 were arrested on distinct dates in the month of December 2007. The arrest was effected pursuant to a complaint filed by the PW 11, father of the prosecutrix on 03/10/2007. The relevant material was compiled in the charge-sheet which accused - Imran, of having committed distinct offences under Sections 376, 364A, 366 r/w. Section 109, 114, 342, 452, 323, 385 r/w. 34 of IPC

and also of committing offence under Sections 506, 504 of IPC whereas the accused Nos. 4,5 and 6, faced charge under Section 364A along with Sections 504, 506, 376, 368, 342, 452, 385, 109, 114, 323 r/w. 34 of IPC.

8 All the accused persons came to be tried by the Additional Sessions Judge, Solapur and in order to establish the charges levelled against them, the prosecution examined 21 witnesses.

The prosecutrix herself stepped into the witness box as PW 9 whereas her sister Poonam is examined as PW 8. PW 10 was examined to corroborate the incident of kidnapping of the prosecutrix on 03/10/2007. The father who had lodged a complaint deposed as PW 11 along with his friend PW -14 Mr. Chandulal Murzani.

The two Medical Officers who examined the prosecutrix as well as the accused No.1 were examined PW 15 and PW 16, and the Special Magistrate who conducted the test identification parade where the sister of the prosecutrix (Poonam- PW8) identified the accused Nos.4, 5 and 6 was examined as PW 17. Two Investigating Officers who had partly carried out the investigation, were examined as PW 20 and PW 21.

Apart from these witnesses, several panch witnesses to the seizure of various articles as well as to the Panchanama prepared

during the course of the investigation were also examined as prosecution witnesses.

9 The prosecution case hinges upon the material collated during the investigating agency the course of investigation and it is the case of the prosecution that at the time when the prosecutrix along with accused No.1 was apprehended at Bale Naka in a Maruti 800 car, the Police took personal search of the car and from the accused No.1, Imran, one mobile of Nokia make 6600 (Article 1), a mobile of reliance make (Article 2) and a cash amount of Rs.6000/- along with his driving license and identity card came to seized vide panchanama exhibit-72 which is exhibited through PW 2 and supported by PW 21- the Investigating Officer. PW 4-Piraji Pawar and PW 21, Investigating Officer proved the seizure of two CDs from Fatima bungalow (Article 3) which came to be seized on a memorandum statement of accused No.1-Imran Sayyad vide Exhibit 115. The search of the car of the accused resulted into drawing of a memorandum statement of the accused No.1 where a battery R-4311 was found beneath the seat cover of the car, which came to be seized. PW 5 and PW 12 admitted their signature on the memorandum statement (Exh-5) given by the accused No.1 -Imran. A mirror was seized from Fatima bungalow at the instance of the accused No.1 vide Exh.186 but the pancha witness did not support the said seizure though the PW 21 proved the contents of the seizure panchanama. One handset of LG reliance make was

produced by PW 11- the complainant which was seized vide panchanama vide Exh.188.

10 The accused as well as the prosecutrix were subjected to medical examination. The prosecutrix gave a history of administration of stupefying drugs in soft drink offered to her in Fatima bungalow by the accused No.1. The medical examination revealed a torn hymen admitting one finger. Sample of vaginal swab, urethral swab, public hair, fingernails and blood were collected during the course of investigation. As per the medical experts-PW 16, the prosecutrix was competent to have sexual intercourse but there was no sign of fresh sexual intercourse. The chemical analyzer's report failed to establish any semen or blood stains on the clothes of the prosecutrix as well as accused No.1-Imran. The medical opinion, was therefore, expressed that sexual intercourse might have occurred in the past, however, it has not been positively concluded that it is the accused who is responsible for torn hymen of the prosecutrix and therefore, the testimony of the prosecutrix was considered to be the sole evidence leading to the said incident, in order to establish the case that the accused No.1 for forcibly committed the sexual intercourse upon her.

11 It has therefore become necessary to appreciate the evidence of PW 9, the prosecutrix whether in order to ascertain the

charge of rape, which was levelled against the accused No.1-Imran, and held to be proved by trial court, stand sufficiently established.

Section 375 of the IPC, which defines the offence of rape necessarily contemplates a sexual act against the will and without the consent of a woman. The offence of rape is also attracted when her consent has been obtained by putting her or any person in whom she is interested, in fear of death or of hurt.

Explanation appended to the said section has described "consent" to mean an unequivocal voluntary agreement, when the woman by words, gestures or any form of verbal or non-verbal communication, communicates her willingness to participate in the specific sexual act.

12 The deposition of the prosecutrix will therefore have to be carefully scrutinized to examine whether the offence of 'Rape' is attracted since it is the case of the prosecution that the act of sexual intercourse was committed without her consent and against her will.

When I turn my attention to the testimony of PW 9, the prosecutrix who admittedly was above 16 years, it would reveal that she was introduced to the accused No.1 and she developed a relationship with him and on distinct occasions, she accompanied him to the juice centre.

In the extensive cross-examination, a suggestion was given to her that she was frequently visiting the juice centre along with the accused No.1 to reveal that they shared a relationship. It is the version of the prosecutrix that one fine day, though she do not recollect the exact date and time, and she even do not give the year when it happened, since as per her own version, she was introduced to the accused No.1 a while ago but she unable to give the date and time when she accompanied, Imran to Fatima bungalow. It is the case of the prosecutrix that her drink was jinked with some stupefying substance and she found herself in a naked condition when she regained consciousness. Some videos of hers were alleged to have been clicked by Imran and these videos formed the foundation of the subsequent acts, when the prosecutrix was forced into a sexual relationship as she was threatened that the video clip would be made viral.

The prosecutrix also alleged that thereafter whenever she used to visit Fatima bungalow on being compelled to satisfy the lust of the accused-Imran, he used to record her videos in different positions including the actual act of sexual intercourse. For how long this was continued is not established by the prosecution, as the date of the first incident is not revealed by the prosecutrix.

However, in her cross-examination, she has clearly admitted that she used to accompany Imran to a fresh juice parlour, though she has

narrated before the Court that she was forced to accompany him. She admit that they used to be there for 20-25 minutes; she specifically denied the suggestion that they used to sit there for at least 5 to 6 hours. She denied the suggestion that they frequently visited the juice centre but admitted that she accompanied him on 3 to 4 occasions. She is confronted with the statement given by her on 03/10/2007 as well as 10/10/2007 and the portion marked in the said statement has been clearly put to the Investigating Officers, a reference to which would be made by me a little later.

13 It is the case of the prosecution that on the pretext of the first video clipping, she was forced to abide by the directions given by the accused - Imran and she accompanied him to the juice centre, to Fatima Bungalow and even to the lodge. She has categorically admitted that the phone which was used for recording the video was of model 6630. The clipping recorded in the said mobile was never produced as according to the prosecution itself, the said mobile phone was never seized from the accused and it was revealed during the investigation that the said mobile phone was sold.

Therefore, the prosecution never brought on record the first video clipping which formed the basis of theory of forced consent of the prosecutrix, on every subsequent occasion, when she visited

Fatima bungalow and Accused No.1 established physical relationship with her.

What is exhibited and brought before the Court are the video clips and clippings in CDs.

In the course of her evidence, on the request of the prosecutor, video clippings came to be exhibited on the computer and the Accused-Imran was called to view the same.

The learned Judge on carrying out the exercise has recorded as under:

"9. Now on the request of the learned Prosecutor, video clippings are exhibited on a computer. Accused No.1-Imran Sayyad as per his request called to see the exhibition of video clippings. All eight video clippings are exhibited along with the speaker as requested by the defence counsel. There was no voice except the picture, seen. Two C.D. Are shown to the witness and party counsel and accused No.1 Imran Sayyad, In the C.D., at some places, there appears some sound of utensils, but not of the speech while committing sexual intercourse etc.

10. Prosecutor has operated the mobile handset article-1. Initially, he finds out option "Gallary" and thereafter "MemoryCard". The clips there are being shown to the witnesses.

11. There are total eight clips shown to the witness and seen one after another, In the video clips seen today, and in

the C.D, which was seen on previous date, in both the girl which was shown is protecutrix. In both these articles i.e. clips and C.D. the boy who was seen is accused Imran. The shooting of the picture shown in the clip and C.D. was done in Fatima bungalow. The shooting was done by means of mobile handset. In the shooting, my nude photographs are seen. They are video clips. Entire my clothes were removed and accused Imran was rotating hands on entire my body. He used to commit sexual intercourse with me. He used to ask me to stand in front of the mirror, and to prepare tea. Before the video shooting was to be taken, I was threatened by accused No.1. Video clippings and clippings in C.D. were taken separately, more specifically at different occasions. The mobile handset by which video clippings were taken is not the same out of the four mobile handsets kept before me today in the Court. The mobile handset which was used by the accused Imran for taking shooting of video clips is not out of these four kept before me today in the Court. Video clipping No.2 of the handset article No.10 being shown to the witness. The mobile handset shown in the said clipping used by accused Imran is not out of those four kept before me today in the Court. The mobile handset which was used by the accused Imran was of Nokia Make and its number was 6630-model."

14 In her deposition before the Court, the prosecutrix was confronted with the clippings on the computer. All the clippings came to be exhibited on the computer and after going through the clips the prosecutrix categorically admitted that none of that clips is/are the one which were shown to her on the very first day when she was taken to Fatima bungalow, when she was offered thumps up with stupefying substance and when she became unconscious for two hours

and on regaining conscious her clipping in a nude condition was shown to her by Imran.

Admittedly, the basis of the threat administered to the prosecutrix and which according to her continued on every occasion, when she accompanied the accused to Fatima bungalow where he forced himself upon her, was not brought before the trial court by the prosecution.

15 The learned Judge has adopted a strange method of confronting the prosecutrix with the clippings, admittedly not of the first act which the prosecutrix complained of, having taken place when she was under the influence of the stupefying substance and unable to understand the consequences of the act. She was confronted with the computer clippings and she has responded to all eight clips where she is seen in different positions.

The clips are exhibited at the request of the defence Counsel and when confronted with clip No.1, where she is seen preparing tea, she admit that she is in a happy mood and she is not in a nude condition but she states that she was threatened by Imran and i.e. how she featured in the clip.

16 On being confronted with the remaining seven clips, though she admits that she was in a happy mood, she stated that she was threatened. On being confronted with the said clips, which has

clearly recorded her demeanour, an explanation coming from the prosecutrix that she was under threat, as found in her deposition from paragraphs 31 to 38, it can be clearly inferred and rightly recorded by the trial Judge as per her own version that she was videographed in different positions of copulation and though she admits that she was enjoying sex, she offered an explanation, that she had no other alternative. The prosecutrix is seen in a clip in different positions of sex and is observed to be an active participant in the act, but the explanation offered by her is "I had no other alternative".

Surprisingly, the learned Judge failed to appreciate the evidence of the prosecutrix on being confronted with the eight clips, which are admittedly, the recording, after the first alleged incident, when she was videographed and compelled to have sex with the accused-Imran on distinct occasions, subsequent to the said recording.

17 The clips which were exhibited during the course of recording of testimony of the prosecutrix also revealed that it reflected a creation date and the date and time on which the clip was modified. If one minutely runs through the version of the prosecutrix as recorded by the learned Judge in paragraph 39, it will be seen that the recordings are of distinct dates in the month of September 2007 and most of them, of 15/09/2007. The said clips appeared to have been

modified as it is indicated on the computer and surprisingly in her deposition it is recorded as under:

“These details are stated by the operator F.I.Patel, who is brought to the Court by prosecution itself, in view of the details depicted on the computer scrutiny itself”.

Admittedly F.I. Patel is not examined as a witness nor did the investigating agency produce 65B Certificate as contemplated, in the Indian Evidence Act.

18 The special provision as to the evidence relating to electronic records came to be inserted in the Indian Evidence Act, 1872 w.e.f. 17/10/2000 where a special procedure is prescribed for the admissibility of the electronic evidence. Section 65B of the Act contemplates that any information contained in an electronic record which is printed on a paper, stored, recorded or copied in optical or magnetic media produced by a computer (referred to as the computer output) shall be deemed to be also a document, if the conditions mentioned in this section are satisfied in relation to the information and computer in question and it shall be admissible in any proceedings, without further proof or production of the original, as evidence or any contents of the original or of any fact stated therein of which direct evidence would be admissible.

The conditions in respect of the computer output are prescribed in sub-section (2) of Section 65 B and sub-Section (4) specifically reads thus:

“(2) The conditions referred to in sub-section (1) in respect of a computer output shall be the following, namely: — (a) the computer output containing the information was produced by the computer during the period over which the computer was used regularly to store or process information for the purposes of any activities regularly carried on over that period by the person having lawful control over the use of the computer; (b) during the said period, information of the kind contained in the electronic record or of the kind from which the information so contained is derived was regularly fed into the computer in the ordinary course of the said activities; (c) throughout the material part of the said period, the computer was operating properly or, if not, then in respect of any period in which it was not operating properly or was out of operation during that part of the period, was not such as to affect the electronic record or the accuracy of its contents; and (d) the information contained in the electronic record reproduces or is derived from such information fed into the computer in the ordinary course of the said activities.

(4) In any proceedings where it is desired to give a statement in evidence by virtue of this section, a certificate doing any of the following things, that is to say, — (a) identifying the electronic record containing the statement and describing the manner in which it was produced; (b) giving such particulars of any device involved in the production of that electronic record as may be appropriate for the purpose of showing that the electronic record was produced by a computer; (c) dealing with any of the matters to which the conditions mentioned in

sub-section (2) relate, and purporting to be signed by a person occupying a responsible official position in relation to the operation of the relevant device or the management of the relevant activities (whichever is appropriate) shall be evidence of any matter stated in the certificate; and for the purposes of this subsection it shall be sufficient for a matter to be stated to the best of the knowledge and belief of the person stating it.”

19 The aforesaid provision of law has been subjected to legal dissection for a considerable period of time and the position of law has been now laid to the effect that the production of the certificate as contemplated into Section 65B(4) is mandatory, only in case of secondary evidence i.e. where the primary evidence is not lead/original is not produced. It is also well settled that depending upon the facts of each case, the Court exercising the discretion shall ensure that the accused is not prejudiced for want of a fair trial. It is also permissible in appropriate cases, to allow the prosecution to produce a certificate at the time of trial, though not filed at the time of filing of the chargesheet.

But the long legal debate has been put to rest by decision of the Three judges Bench in the case of **Arjun Panditrao Khotkar v/s. Kailash Kushanrao Gorantyal**¹ by categorically holding that the certificate required under Section 65B(4) is a condition precedent to the admissibility of the secondary evidence by way of electronic records i.e. as laid down in Anvar P.V. Case. Oral evidence in the place

¹[(2020) 7 SCC 1]

of such a certificate cannot suffice, as Section 65B(4) is a mandatory requirement of law and clearly states that secondary evidence is admissible only if lead in the manner stated and not otherwise.

20 Section 65B differentiates between the original information contained in the “computer” itself and copies made therefrom; the former being primary evidence and the latter being secondary evidence.

It has been categorically ruled by their Lordships of the Apex Court that the required Certificate under Section 65B(4) is unnecessary if the original document itself is produced and this can be done by the owner of a laptop, computer, a computer tablet or even a mobile phone, by stepping into the witness box and proving that the concerned device, on which the original information is first stored, is owned and/or operated by him. In cases where “computer”, as defined, happens to be a part of a “computer system” or “computer network” and it becomes impossible to physically bring such network or system to the Court, then the only means of proving information contained in such electronic record can be in accordance with Section 65B(1), together with the requisite certificate under Section 65B(4).

21 In **Arjun Khotkar**(supra), the position as regards the certificate to be issued stand concluded in the following words:

“60. It may also be seen that the person who gives this certificate can be anyone out of several persons who occupy a ‘responsible official position’ in relation to the operation of the relevant device, as also the person who may otherwise be in the ‘management of relevant activities’ spoken of in Sub-section (4) of Section 65B. Considering that such a certificate may also be given long after the electronic record has actually been produced by the computer, Section 65B(4) makes it clear that it is sufficient that such a person gives the requisite certificate to the “best of his knowledge and belief” (Obviously, the word “and” between knowledge and belief in Section 65B(4) must be read as “or”, as a person cannot testify to the best of his knowledge and belief at the same time).

61. We may reiterate, therefore, that the certificate required under Section 65B(4) is a condition precedent to the admissibility of evidence by way of electronic record, as correctly held in Anvar P.V. (supra), and incorrectly “clarified” in Shafhi Mohammed (supra). Oral evidence in the place of such a certificate cannot possibly suffice as Section 65B(4) is a mandatory requirement of the law. Indeed, the hallowed principle in Taylor v. Taylor (1876) 1 Ch.D 426, which has been followed in a number of the judgments of this Court, can also be applied. Section 65B(4) of the Evidence Act clearly states that secondary evidence is admissible only if led in the manner stated and not otherwise. To hold otherwise would render Section 65B(4) otiose.”

22 The impugned judgment has completely ignored the above aspect of the Evidence Act and there is complete ignorance on the part of the learned Sessions Judge in not considering this aspect or

not calling for a certificate as contemplated under sub-section (4) of Section 65B of the Evidence Act.

It is the case of the prosecution that the video recordings in the form of clippings are recorded in Nokia mobile 6630, which was never seized during the course of the investigation and rather the investigation has revealed that the device is already sold. Therefore, the said mobile handset/device in which the clips were recorded was not produced in original before the Court. It can be seen that two CDs which have videographed the prosecutrix in a nude condition which were prepared by the accused No.1-Imran were recovered in recovery panchanama from Fatima bungalow. These CD's were exhibited on a computer and were played during the course of trial. The prosecutrix was confronted with these clips but, transferring the data from the mobile phone to the computer and from the computer to the CDs which were displayed in the Court necessarily warranted a Certificate under Section 65 B(4) of Evidence Act. It is apparent that some mobile clippings were also played during the course of the examination of PW 9 as the learned Judge has referred to a mobile handset and the clipping therein but this is again without a certificate as contemplated under Section 65B of the Evidence Act, so as to have them read in evidence.

Admission of such evidence produced before the Court in the form of CD or through a mobile clipping from a mobile other than the one on which it was recorded definitely becomes inadmissible in the wake of the imperative mandate of admissibility of electronic evidence subject to it being compliant with the requirement prescribed by statute i.e. Section 65 B of the Indian Evidence Act. The evidence, therefore, is completely inadmissible and the whole process adopted by the learned Judge in confronting the prosecutrix with the said clippings and deriving a conclusion on the basis of her statement that she was forced into the act though she is seen in a happy mood in the clippings, and therefore, the offence of rape is attracted is too erroneous conclusion to be derived and sustained.

23 Surprisingly, it is not a case that the learned Judge was not aware of the provisions of the Indian Evidence Act and in particular regarding the electronic evidence as it can be seen that while appreciating the evidence tendered in defence by the accused persons, through DW1 Sachin Shinde serving in Idea Cellular Ltd and Dw2 Kalyandurg Allabaksha of BSNL Company to establish the case of accused No.1 that from 2002-2006, there was continue telephonic calls between the accused No.1-Imran and the prosecutrix from her landline. The learned Judge discarded the said evidence projected in order to establish that the prosecutrix and the accused-Imran shared a close proximity which continued from 2002 to 2006. The learned

Judge brushed aside the said evidence by recording that there is no compliance of Section 65B and therefore, the documents in form of the call details were held to be not worth acceptance.

24 The prosecution has to establish its case beyond reasonable doubt and when it alleged that the prosecutrix was subjected to repeated sexual assault/forcible sexual intercourse on the pretext that on one fine day, she was made unconscious by jinking her drink and her nude photographs/videos were recorded, but the prosecution has miserably failed to prove this circumstance. No evidence is brought on record regarding the said recording which according to the prosecutrix created a fear in her mind of being defamed or exposed to public glare. She herself had admitted that the eight clippings exhibited and shown to her, though without complying the requirement of law, did not include the first video which was recorded which formed the basis of the threats administered to her.

I need not comment upon the conclusion derived by the learned Judge in the impugned judgment, as the same is not supported by the requirements of law and thereof there arise no question of appreciating the recordings in the video, and to derive a conclusion that it was without her consent. If this particular piece of evidence is not at all admissible in law in the absence of compliance of the requisite requirement, no comments are required to be offered on the said

evidence or an attempt be made to test its creditworthiness. The learned Judge has completely erred in appreciating the said evidence on confronting the prosecutrix with the same, when in the absence of the requisite certificate, it was not permissible to read the same in evidence.

The prosecution has therefore failed to prove a case against accused No.1 for establishing that he is guilty of committing an offence of rape.

25 The defence taken by the accused No.1 is of a consensual relationship between two adults and as it can be seen that the prosecutrix was acquainted with the accused No.1 and accompanied him at different locations, for enjoying his company and moved with him in public places like the juice centre and subsequently to isolated places like Fatima bungalow, a private lodge without any hesitancy, which would clearly assume her consent. For a considerable period of 3-4 years, the relationship between the two continued but she did not raised a single protest, either by reporting it to her family members or reporting the same to the police. Further, the case of the prosecution that she was engaged to a third person and he was confronted with the video clippings which made him leap back on the marriage proposal is also not established, since the third person is not examined as a witness.

In defence the accused No.1 had specifically taken a stand that a love relationship was shared between the duo but since PW 11 was opposed to the same and he had fixed the marriage of the prosecutrix with the third person, she has attempted to elope with him as she was keen on marrying the accused, who obviously belonged to a different religion and this alliance was strongly opposed by her family members. From an extensive cross-examination of the prosecution, several suggestions were given in the said direction though they were specifically turned down by her, an inference can be drawn that the consent which is alleged to have been obtained on coercion, is not proved by the prosecution. The conviction of the accused under Section 376 of the IPC for committing offence of rape therefore is not conclusively established and the accused No.1-Imran deserves his acquittal from the said charge.

26 The accused No.1 is also charged for committing an offence under Section 364A which prescribes punishment for kidnapping or abducting any person for ransom.

For establishing the said charge the prosecution has relied upon the testimony of PW 11 and PW 14, who have deposed that for deleting the clipping, the accused No.1 demanded a sum of ₹5,00,000/-. No evidence except the deposition of the two witnesses without offering any details about when such demand was raised is

produced. No other positive evidence is brought on record for establishing the charge that the kidnapping of the prosecutrix was for ransom.

PW 11, the complainant has deposed that the engagement ceremony of his daughter was performed on 25/07/2007 and after 15 days he received a telephone call from the father of the prospective bridegroom that his son was shown video clips of the prosecutrix in nude condition and he was confronted with the said video clip and the marriage was called off.

On confronting his daughter about the reason for calling off the marriage, it was disclosed by his daughter that her videos are recorded by the accused-Imran and she was under the threat of getting maligned, through the video clips. It is a version of PW 11 that on a request being made to Imran to delete the video he put up a condition that only on payment of ₹5,00,000/- the video would be deleted. However, according to PW 11, when for establishing a dialogue he was invited to a hotel in the presence of PW 14, Imran i.e. accused No.1 met the two and assured that he would delete the video clips. According to PW 11, Imran did not ask for ₹5,00,000/- and when he was questioned as to how they should trust him, he expressed his readiness to take oath in Dargah and accordingly, they reached the Dargah, where he vowed that he will not defame the prosecutrix.

A distinct version comes from the witness, when he has stated that after 2 to 4 days he received a telephone call from Imran who inquired about the decision and gave a choice whether his marriage will be performed with the prosecutrix or he will pay ₹5,00,000/-. The insistence of the accused was on performance of marriage or an amount of ₹5,00,000/- and PW 11 assured that he would consider on the option.

It is the case of the prosecution that PW 11 attempted to contact with Imran's father and sister but he was informed that Imran is keen to perform marriage with the prosecutrix or else they should satisfy the demand. On 17/09/2007 the complaint was lodged by the PW 11 with the Police Commission but a request was made not to take any action immediately as it revolved around the future of his daughter.

After this entire episode, the alleged incident of 03/10/2007 as surfaced on record through PW 11 as well as PW 8 sister of the prosecutrix.

27 In order to establish the incident of kidnapping, the PW 8 has entered into the witness box and deposed that her sister was forcibly asked to accompany the accused person who barged entry into the house which included Imran. When the version of PW 8 is compared with PW 9, it suffers from glaring inconsistency. Though PW 8 has identified accused Nos. 1,4 and 6 in the test identification

parade, which is conducted after a gap of 1 to 1 ½ month, but no explanation is offered for the delay. As far as the incident of kidnapping is concerned, according to PW 1, she was aposted in a car along with accused Nos.4, 5 and 6 but she has deposed that when the accused No.1 received a phone call he got out of the car and spoke on the phone. She also came out of the car to drink water but was surrounded by other accused persons. Clearly, there was no attempt on her part to flee away or secure her release by seeking any help, when they were on the highway driving towards Pune. According to her own version, on receipt of a phone call, she was made to talk to her father and other accused persons were made to leave and she returned in the car along with the accused but on the way of reaching a particular point the accused No.1 was arrested.

28 The offence of kidnapping necessarily involve an element of compulsion and Section 366 punishes an act of a person to kidnap or abducts any woman with the intention.that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse. The aforesaid ingredients of Section 366 with which the accused are charged is conspicuously absent.

PW 11 himself has deposed that the father and sister of accused No.1 had disclosed to him that he was keen on marrying the prosecutrix. With the long association between the two, the possibility that the prosecutrix was also interested in the marriage could not be completely overruled. The offence under Section 364A as well as Section 366 is therefore not made out. As far as the demand of ransom or extortion is concerned, it is only coming through PW 11 without any corroboration to establish the said demand being established by the prosecution.

29 When the testimony of Investigating Officers is carefully perused, it can be seen that various statements are marked in the testimony of the prosecutrix and the contradiction and omissions have been brought on record through the two Investigating Officers PW 20 and PW 21. The same are exhibited and which definitely impair the credibility of PW 9-the prosecutrix. Glaring omissions are brought on record through the two Investigating Officers about the entire incident of the alleged abduction, and there are glaring contradictions. The omissions in the statement of PW 8 and PW 9 are clearly proved which makes the prosecution's case doubtful on the aspect of kidnapping as well as the demand of ransom.

30 The prosecution has therefore failed to prove its case by bringing on record cogent and reliable evidence sufficient to establish

a conviction of the accused No.1 for committing an offence of rape and for kidnapping for ransom as well as attempt to extort a sum of ₹5,00,000/- for not making the video clips viral.

As far as the accused Nos.4,5 and 6 are concerned, since the offence for which they are convicted i.e. Section 366, 342, 452 r/w. 34 is not established by the prosecution beyond reasonable doubt and hence deserve reversal and they are entitled for acquittal.

31 In the wake of the aforesaid, though the accused No.1-Imran Sayyad has undergone his complete sentence, he deserves his acquittal since the prosecution has failed to prove its case beyond reasonable doubt and the benefit must accrue to him. Similarly, the accused Nos.4,5 and 6 are also entitled to be acquitted of the charges levelled against them. They are directed to be set at liberty by reversing the impugned judgment.

32 The the end result of the aforesaid discussion, is setting aside the impugned judgment dated 20/09/2010 passed by the Adhoc Additional Sessions Judge, Solapur in Sessions Case No.15 of 2008 against the above appellants who stand acquitted of the charges levelled against them.

Appeal No.796/2010, Appeal No.801/2010, Appeal No.29/2011 and Appeal No.22 of 2011 are allowed.

In view of the disposal of the Appeals, Criminal Application No.1247/2012 stand disposed off.

SMT. BHARATI DANGRE, J.