

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT
CHANDIGARH**

CRA-D-1112-DB of 2009

Date of decision:- 19.9.2016

Ashwani Kumar

...Appellant

Versus

State of Haryana

...Respondent

**CORAM : HON'BLE MR.JUSTICE T.P.S. MANN
HON'BLE MR.JUSTICE GURMIT RAM**

Present: Mr. J.S. Bedi, Senior Advocate with
Mr. Sunil Sihag, Advocate for the appellant.

Mr. M.S. Sidhu, Additional A.G., Haryana.

GURMIT RAM, J.

This appeal is filed by aforementioned appellant – Ashwani Kumar against the judgment of conviction dated 4.12.2009 and order of sentence dated 7.12.2009 passed by the Court of learned Sessions Judge, Kaithal in criminal case bearing FIR No.107 dated 20.10.2007, under Section 364-A of the Indian Penal Code (for short – 'IPC'), Police Station Dhand, vide which he was held guilty for the offence punishable under

Section 364-A of the IPC and awarded sentence as described below:

Under Section 364-A, IPC	Accused was sentenced to undergo life imprisonment and to pay a fine of Rs.5,000/- and in default of payment of fine, he shall suffer further rigorous imprisonment for a period of one year
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2. The prosecution case as presented before the learned trial Court, in precise, was that on 18.10.2007, an information was received through telephone at Police Station Dhand that a child namely Aayush aged 3 years son of Siya Ram was admitted in Amritdhara Hospital, Karnal in an unconscious condition. On this SI/SHO Raj Singh along with Harpal Singh ASI and other police officials reached at Amritdhara Hospital, Karnal where complainant Siya Ram father of Aayush met him. He made his statement Ex.PA before him (ASI Harpal Singh - PW15) which was as under:

“That he is resident of village Sakra, Police Station Dhand. Besides doing the agricultural work, he also runs a shop of commission agent in grain market, Nigdu. He has two sons and one daughter. Yesterday on 17.10.2007, he along with his wife Rita Devi was returning to his village after getting medicines etc. from Dr. Rajiv Gupta of Amritdhara Private Hospital, Karnal on a motorcycle. At about 5:45 p.m., near village Sita Mai, he received a call on his mobile phone No.94169-12022 from mobile No.98124-23668 'that his younger son has been kidnapped and

tomorrow they will tell him the place where he is to come along with a sum of Rs.1 crore. If he brought this fact to the notice of the police or any member of his family, then they would kill his son. He had a talk with that person 2-3 times in this connection who also got him connected with his son Aayush on phone who called him *PAPA-PAPA* and he identified this voice to be of his son Aayush'. On reaching the village, he found his said son missing from the house. He looked for him, but failed to trace him anywhere. One Baljit son of Puran Balmiki, resident of his village brought his son Aayush at about 8:15 p.m., who was in unconscious condition. Baljit told him that he found Aayush lying near the water tank at Karnal – Sita Mai road. Complainant took his said son for treatment to many hospitals and ultimately he got him admitted yesterday in Amritdhara Hospital, Karnal, where he is still under treatment. The telephone bearer No.98124-23668, an unknown person had kidnapped his son for ransom. A request was made to take action against the culprit.”

The complainant signed his above statement after admitting it to be correct. ASI Harpal Singh made verification in respect of the above statement of complainant in village Sakra secretly and publically and came to know that Aayush was playing with the children in the street of

the village, but no body saw him being carried away by anybody. He also learnt that a person named Baljit resident of Sakra dropped the above-said child at his house at about 8:15 p.m.

On the above statement of complainant, ASI Harpal Singh made his endorsement Ex.PA/2 on the basis of which initially DDR No.13 dated 18.10.2007 was recorded, which was later on converted into FIR Ex.PR/1 on 20.10.2007. Rough site-plan of the place of occurrence was prepared after inspecting the same. Thereafter, Baljit also pointed out about the place at which he found Aayush lying in unconscious condition and site-plan in this connection was also prepared. Record of detail of calls in respect of mobile phone No.98124-23668 along with its ID of mobile set bearing IMEI No.35368400014067 used in this case of the period 16.7.2007 to 18.10.2007 was taken into police possession. Record of detail of calls of mobile No.94662-42046 along with its ID for the period 1.10.2007 to 16.10.2007 was also taken into police possession. Statements of witnesses were recorded. Accused was apprehended in this case and during his search one mobile set make Motorola, Model No.C-115 was recovered. On checking this mobile, it was found that SIM No.94662-42046 was also used in it. IMEI number of this mobile set was found to be 35368400014067. This mobile phone set and one motorcycle make Discover bearing registration No.HR08G-0837 were taken into police possession vide different memos. Thereafter, accused was formally arrested in this case. Then during interrogation, accused suffered disclosure statement that:

“Mobile SIM No.98124-23668 after making

conversation with Siya Ram on 17.10.2007, he chewed same with teeth and further enwombed the same in the paddy crop field of Ram Chander, Fauji near the reservoir tube-well room of one Sri Chand, resident of village Kaul and he could get the same recovered by making demarcation.”

Thereafter, he led the police to the above-said disclosed place and got recovered the above-said mobile SIM which was found broken into five pieces, upon which word IDEA, written in black colour, had been appearing and the same was also taken into police possession vide a memo. Site-plan of the place of the recovery was also prepared.

Thereafter, further investigation of the case was conducted by Inspector Balwant Singh of Crime Branch, Kaithal. During investigation, it was found that SIM of mobile phone No.98124-23668 was taken by accused Ashwani Kumar from Jitender son of Hari Ram, resident of Sikri. It was also found that accused had used SIM Nos.98124-23668 and 94662-42046 in his mobile set make Motorola Model C-115 above-mentioned for demanding a ransom of Rs.1 crore from complainant Siya Ram. Then it was also found that in the application form submitted by accused at the time of getting mobile SIM No.94662-42046, he was shown to be resident of V.P.O. Kaul and its photocopy was obtained. The accused had produced the copy of ration card as proof of his ID while obtaining the above-said number in which he was shown to be resident of V.P.O. Sakra. On completion of investigation, challan in this case was presented in the Court of learned

Area Magistrate i.e. Chief Judicial Magistrate, Kaithal, who further committed this case to the Court of learned Sessions Judge, Kaithal for trial, after making compliance of the provisions of Section 207 of Code of Criminal Procedure (for short – Cr.P.C.) vide order dated 25.1.2008.

3. Finding a prima-facie case under Section 364-A of the IPC against the accused, he was charge-sheeted accordingly vide order dated 14.3.2008, to which, he pleaded not guilty and claimed trial.

4. During trial of the case, the prosecution examined as many as twenty witnesses in total in order to prove its version against the accused and further to bring him to book as per law.

5. Then the accused was duly examined as required under Section 313 of Cr.P.C. Entire incriminating evidence and other culpable circumstances as brought and appearing on the file against him were put to him, which he denied entirely and pleaded his innocence and false implication in this case. Further he took the plea that there was an old enmity of the family of complainant with his family, besides the political rivalry in their village. He never kidnapped Aayush nor did he make any talk to the complainant through mobile phone No.98124-23668. He never used this mobile phone number at any point of time nor he had ever demanded any ransom from the complainant. He also did not apply for mobile connection bearing No.94662-42046. Further, he denied that he had ever kept aforesaid mobile numbers and Motorola phone set in his possession.

In his defence, he also examined Baljit as DW1.

6. The learned trial Court after hearing the counsel for both the

parties and going through the record as well held the accused guilty for the offence punishable under Section 364-A of the IPC and awarded him sentence as mentioned in para No.1 of this judgment.

7. The appellant (accused) being not satisfied with the impugned judgment of conviction and order of sentence has approached this Court by way of instant appeal, notice of which was given to the Respondent – State. Record of the learned trial Court was also requisitioned.

8. We have heard the learned counsel for both the parties at length and also made appraisal of the evidence as available on the record with their assistance.

9. Learned counsel for the appellant has contended that only one call was received by complainant Siya Ram (PW1), the father of Aayush (kidnaped) from the alleged kidnapper made from mobile phone No.98124-23668. Herein he has contended that prosecution has miserably failed to bring on record sufficient reliable and confidence inspiring evidence in order to establish the fact that the appellant – herein (accused) was either the owner of this mobile phone number or he was exercising any kind of control over this number for using the same in his Motorola mobile phone set which was alleged to be recovered from his possession after his arrest in this case. Herein he has referred to the statement of PW14 Sukhpal, who stated that he took one SIM card bearing No.98124-23668 from Sushil Kumar, Chemist, resident of Karnal on 20.4.2006, which was post-paid one. He used this number till 4.10.2006. Then he and Sushil Kumar both went to the office of IDEA mobile company, Karnal.

He made the entire balance payment and returned this SIM card to the officials of this company, who destroyed the same.

Herein it is also contended by learned counsel for the appellant that when this SIM card bearing connection No.98124-23668 was destroyed by the officials of the IDEA company as stated above by PW14, then the question that the same very SIM of the IDEA company was being used by the appellant – herein (accused) on or about the date of the alleged occurrence does not arise at all.

10. But on the other hand, the learned State counsel has strongly denied the above contention of learned counsel for the appellant and has contended that the prosecution during the trial of the case has brought on record enough credible evidence in order to establish the link that above-said SIM card No.98124-23668 was in possession of the appellant and that further he had been using this number on his above-said Motorola mobile phone set on the relevant date.

11. Now let us see the evidence which the prosecution brought on the record in order to establish its above-said plea. PW10 Jitender Kumar stated that one Rajesh Kumar, resident of his village, was posted in the IDEA mobile company at Karnal office in the year 2007-2008. He was studying in BA IInd year in Government Post Graduate College, Karnal and Ashwani Kumar, accused present in Court was also studying in his class along with him. The said Rajesh Kumar handed over to him one SIM card of IDEA mobile company bearing No.98124-23668 for using the same. He further handed over this mobile connection number to Ashwani Kumar accused in July or August, 2007 on his demand that he

needed the same for conversation with his girlfriend.

PW7 Manoj Madan, Nodal Officer, IDEA Cellular Ltd., Haryana State stated that mobile connection number 98124-23668 was allotted to one Sushil Kumar, Sarthak Medical Hall, Shiv Colony, Karnal on his application on 18.4.2006. Earlier this mobile connection was post-paid which was later on converted to pre-paid and then it was handed over to one Rajesh Kumar, an outsourcing employee, working on deputation in their office at Karnal. This witness sent the detail of calls both incoming and outgoing in respect of mobile No.98124-23668 to the office of Superintendent of Police, Kaithal vide E-mails Ex.PL, Ex.PL/1 and Ex.PL/2. Record pertaining to detail of these calls was stated to be correct as per their electronic record.

PW6 Parbhakar Singh, Junior Telecom Officer, BSNL, Ambala Cantt. stated that mobile phone No.94662-42046 exists in the name of Ashwani Kumar, the accused in this case. He sent the detail of both incoming and outgoing calls of this mobile number for the period w.e.f. 16.10.2007 to 20.10.2007 to the office of Superintendent of Police, Ambala through E-mails Ex.PJ, Ex.PJ/1 and Ex.PJ/2. Further, he also sent the detail of calls of three mobile connections i.e. 94169-12022, 94662-42046 and 94660-28653 to the office of Superintendent of Police, Ambala vide E-mails Ex.PK/1 to Ex.PK/24. As per his statement, above-said mobile No.94169-12022 was in the name of Siya Ram, the complainant of this case, whereas mobile No.94660-28653 was in the name of one Mahender son of Bhagat Ram, resident of V.P.O. Sakra, District Karnal and mobile No.94662-42046 was in the name of Ashwani

Kumar, accused in this case.

PW9 Madan Gopal, Assistant Director, BSNL Head Quarters, Delhi produced the record with regard to issuance of mobile telephone No.94169-12022. As per his statement, this cell phone connection was issued in the name of above-said Siya Ram (PW1) through their franchise namely M/s Saraswati Gas Service, Nilokheri. It was on this mobile number of the complainant threatening call with a demand of ransom of Rs.1 crore was received from the alleged kidnapper.

PW8 Jai Narain, S.D.E.(Commercial), BSNL, Kaithal produced the record with regard to mobile connection No.94662-42046 issued in the name of Ashwani Kumar, the accused in the present case, through Krishan Garg, STD-PCO No.231143 who had a franchise of BSNL.

12. So far the above discussed oral statement of PW14 Sukhpal that he along with Sushil Kumar went to the office of IDEA mobile company, Karnal and the officials of this company had destroyed SIM card No.98124-23668 in their presence was concerned, it is found to be not reliable for the reason that when the accused was arrested in this case, he suffered disclosure statement Ex.PX regarding concealment of a SIM card of IDEA company which was used for extending the threats, in the paddy crop field of one Ram Chander, Fauji, resident of village Sakra. Then he also got recovered this SIM card broken into five pieces which were of IDEA phone and the same were taken into police possession vide memo Ex.PX/1 on 21.10.2007, after converting the same into a parcel bearing seal of 'RS'. Then there came no date in the statement of PW14 –

Sukhpal when he along with Sushil Kumar allegedly went to the office of IDEA company at Karnal and SIM card No.98124-23668 was broken in their presence nor any witness from this company was examined in order to provide cloth of authenticity to the above plea of the appellant. Then it also came in the disclosure statement Ex.PX stated to be made on 21.10.2007 by the appellant that this SIM card was bitten by him with his teeth and then concealed the same as above discussed.

13. Then it came in the statement of PW16 Raj Singh, SI/SHO that when the accused was apprehended in this case, then during his personal search one mobile set make Motorola C-115 of black colour containing SIM No.94662-42046 was recovered from his possession along with one motorcycle bearing registration No.HR-08G-0837 make Discover which were taken into police possession vide memo Ex.PV. Further he also proved the above-said mobile set as Ex.P5 and SIM Card Ex.P6. In the recovery memo Ex.PV, EMEI number of the above-said Motorola set allegedly recovered from the accused was recorded as 35368400014067 and SIM card No.94662-42046 above mentioned was found inserted in it on its checking which was taken out of it.

14. In order to determine the fact as to whether the appellant – herein (accused) had been using SIM card No.98124-23668 and 94662-42046 in the above-said Motorola mobile set which was recovered from his possession, calls' detail of SIM card No.94662-42046 for the period 16.10.2007 to 20.10.2007 Ex.PJ and calls' detail of above-said SIM card No.98124-23668 for the period 17.10.2007 to 18.10.2007 Ex.PK/1 are found to be relevant. As per the calls' detail Ex.PK/1, appellant – herein

(accused) made a call to complainant on his mobile set bearing No.94169-12022 from his above-said Motorola phone set by using his SIM card No.98124-23668 on 17.10.2007 at 6:05 p.m., which was of the duration of 38 seconds. Then he further made another call to the complainant on his above-said mobile number from his Motorola mobile phone set by using his SIM card No.98124-23668 at 6:39 p.m. which was of the duration of 1671 seconds. Then further he also made another call to the complainant on his above-said mobile number from his above-said mobile set by using SIM card No.98124-23668 at 7:07 p.m. which was of the duration of 18 seconds. In this process, he further made three other calls to the complainant at 7:08 p.m., 7:24 p.m. and 7:49 p.m. which were of the duration of 348 seconds, 59 seconds and 18 seconds, respectively. Then as per this calls' detail, complainant also made a call to him (the accused) from his said mobile number on the above-said mobile phone number of the accused at 7:53 p.m., duration of which was 17 seconds. Then as per calls' detail Ex.PJ, appellant – herein (accused) made an another call to the complainant on his mobile set No.94169-12022 from his above-said Motorola phone set by using his SIM card bearing No.94662-42046, which SIM card was found to be inserted in his said Motorola phone set when he was allegedly arrested in this case. This call was made by him to the complainant on 17.10.2007 at 22:33 p.m., duration of which was 21 seconds. The IMEI number of the mobile set used by appellant – herein (accused) in both these calls' detail Ex.PJ and Ex.PK/1 was recorded as 35368400014067. So it is now amply clear that the appellant – herein (accused) had been using both above-said SIM

numbers i.e. 98124-23668 and 94662-42046 on the date of alleged occurrence on his Motorola mobile set aforementioned. So in the light of this documentary evidence, the above discussed statement of PW14 Sukhpal carries no significance and as a result thereof, the above contention of learned counsel of the appellant is held to be not tenable.

15. Then learned counsel for the appellant has further assailed the above discussed record of detail of calls on the ground that the same cannot be looked into for the reason that no certificate of competent authority regarding the accuracy of the contents thereof thereby ensuring their authenticity as required under the provisions of Section 65-B, Clause (4) of the Indian Evidence Act, 1872 (hereinafter referred to as *the Act*), has been appended to the same. Admittedly, in the case in hand, there is no such certificate appended to the record of detail of calls in question. Herein, the learned counsel for the appellant has submitted that if the record of detail of these calls is ignored due to above-said technical legal flaw, then there remains no evidence worthwhile on the file to connect the appellant – herein (accused) with the commission of alleged crime, the benefit whereof is to be given to him. In support of his above contention, he has relied upon the case law as delivered by the Hon'ble Apex Court in **Anvar P.V. Versus P.K. Basheer and others, 2015(1) L.A.R. 225.** Para Nos.13, 14, 15, 21 and 22 of this case law are found to be relevant with regard to the above contention of learned counsel for the appellant which are reproduced as under:

Para No.13:

Any documentary evidence by way of an electronic record under the [Evidence Act](#), in view of [Sections 59](#) and [65A](#),

can be proved only in accordance with the procedure prescribed under [Section 65B](#). [Section 65B](#) deals with the admissibility of the electronic record. The purpose of these provisions is to sanctify secondary evidence in electronic form, generated by a computer. It may be noted that the Section starts with a non obstante clause. Thus, notwithstanding anything contained in the [Evidence Act](#), 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 shall be deemed to be a document only if the conditions mentioned under sub-Section (2) are satisfied, without further proof or production of the original. The very admissibility of such a document, i.e., electronic record which is called as computer output, depends on the satisfaction of the four conditions under [Section 65B\(2\)](#). Following are the specified conditions under [Section 65B\(2\)](#) of the Evidence Act:

- (i) The electronic record containing the information should have been produced by the computer during the period over which the same was regularly used to store or process information for the purpose of any activity regularly carried on over that period by the person having lawful control over the use of that computer;*
- (ii) The information of the kind contained in electronic record or of the kind from which the information is derived was regularly fed into the computer in the ordinary course of the said activity;*
- (iii) During the material part of the said period, the computer was operating properly and that even if it was not operating properly for some time, the break or breaks had not affected either the record or the accuracy of its contents; and*
- (iv) The information contained in the record should be a reproduction or derivation from the information fed into the*

computer in the ordinary course of the said activity.

Para No.14:

Under [Section 65B\(4\)](#) of the Evidence Act, if it is desired to give a statement in any proceedings pertaining to an electronic record, it is permissible provided the following conditions are satisfied:

- (a) There must be a certificate which identifies the electronic record containing the statement;*
- (b) The certificate must describe the manner in which the electronic record was produced;*
- (c) The certificate must furnish the particulars of the device involved in the production of that record;*
- (d) The certificate must deal with the applicable conditions mentioned under [Section 65B\(2\)](#) of the Evidence Act; and*
- (e) The certificate must be signed by a person occupying a responsible official position in relation to the operation of the relevant device.*

Para No.15:

It is further clarified that the person need only to state in the certificate that the same is to the best of his knowledge and belief. Most importantly, such a certificate must accompany the electronic record like computer printout, Compact Disc (CD), Video Compact Disc (VCD), pen drive, etc., pertaining to which a statement is sought to be given in evidence, when the same is produced in evidence. All these safeguards are taken to ensure the source and authenticity, which are the two hallmarks pertaining to electronic record sought to be used as evidence. Electronic records being more susceptible to tampering, alteration, transposition, excision, etc. without such safeguards, the whole trial based on proof of electronic records can lead to travesty of justice.

Para No.21:

It may be seen that it was a case where a responsible official had duly certified the document at the time of production itself. The signatures in the certificate were also identified. That is apparently in compliance with the procedure prescribed under [Section 65B](#) of the Evidence Act. However, it was held that irrespective of the compliance with the requirements of [Section 65B](#), which is a special provision dealing with admissibility of the electronic record, there is no bar in adducing secondary evidence, under [Sections 63 and 65](#), of an electronic record.

Para No.22:

The evidence relating to electronic record, as noted herein before, being a special provision, the general law on secondary evidence under [Section 63](#) read with [Section 65](#) of the Evidence Act shall yield to the same. Generalia specialibus non derogant, special law will always prevail over the general law. It appears, the court omitted to take note of [Sections 59 and 65A](#) dealing with the admissibility of electronic record. [Sections 63 and 65](#) have no application in the case of secondary evidence by way of electronic record; the same is wholly governed by [Sections 65A and 65B](#). To that extent, the statement of law on admissibility of secondary evidence pertaining to electronic record, as stated by this court in Navjot Sandhu case (supra), does not lay down the correct legal position. It requires to be overruled and we do so. An electronic record by way of secondary evidence shall not be admitted in evidence unless the requirements under [Section 65B](#) are satisfied. Thus, in the case of CD, VCD, chip, etc., the same shall be accompanied by the certificate in terms of [Section 65B](#) obtained at the time of taking the document, without which, the secondary evidence pertaining to that electronic record, is

inadmissible.

16. This case law was under Representation of The People Act, 1951 pertaining to election of 034 Eranad Legislative Assembly Constituency, Kerala. The evidence which was produced was in the shape of C.D., V.C.D., Chip etc. without any certificate appended thereto for ensuring their authenticity as contemplated under Section 65B of the Act. Moreover, these C.D., V.C.D., Chip etc. were prepared by some private agencies and not by any agency authorized by the Government. It was held that Evidence Act does not contemplate or permit the proof of an electronic record by way of oral evidence, if requirements under Section 65B of the Act are not complied with, as the law now stands in India.

The principles laid down in *Anvar P.V.'s* case (supra) were further followed by this court in case law titled as *Ram Kishan Fauji Versus State of Haryana through Chief Secretary, Government of Haryana, Main Civil Secretariat, Haryana at Chandigarh and others, 2015(2) R.C.R.(Criminal) 289*. In this case, the allegations against the Chief Parliamentary Secretary was that he demanded a sum of Rs.5 crores for doing some favour. Lokayukta ordered registering of FIR without entering a finding with regard to the authenticity of the C.D. and the reliability of its contents. This order of Lokayukta was quashed by this Court in this case law.

17. Now let us see the facts of the case in hand and the evidence led by the prosecution to prove the allegations against the appellant – herein (accused).

PW6 Prabhakar Singh, Junior Telecom Officer, BSNL, Ambala Cantt. sent the calls' detail of mobile No.94169-12022, 94662-42046 and 94660-28653 to the office of Superintendent of Police, Ambala vide certain e-mails which were brought on the record as Ex.PK/1 to Ex.PK/24. He gave the details of subscriber and calls' record detail as per the record maintained by their office.

Then in the cross-examination of this witness, it came on the record that he himself had downloaded the record and sent the same to the quarter concerned. There has not been any complication in their computer system during this tenure. He was posted in BSNL Office, Ambala Cantt. on 2.4.2007 and he is still working there.

PW7 Manoj Madan, Nodal Officer, IDEA Cellular Ltd., Noida produced the record with regard to mobile phone No.98124-23668. He sent the detail of calls of this mobile number both incoming and outgoing vide e-mails Ex.PL, Ex.PL/1 and Ex.PL/2 to the quarter concerned. This record of detail of calls was stated to be correct as per their electronic record. The testimony of this witness had remained unchallenged on the record since no question was put to him in his cross-examination despite the granting of opportunity to do so.

PW8 Jai Narain, SDE, BSNL, Kaithal produced the customer application form and I.D. proof of mobile No.94662-42046 which was stated to be in the name of Ashwani Kumar, accused in this case. Then in his cross-examination, he stated that photograph on the application form Ex.PM tallies with the accused present in the Court and there are signatures of the accused on the photograph. Since the signatures of the

accused were not taken in his presence, therefore, he cannot say as to whether the accused had not affixed these signature. Then it also came in his cross-examination that this application form for abovementioned mobile connection in the name of Ashwani Kumar was not prepared in his presence as the same was received through their franchise. Further, he stated that he could not say that this mobile connection was not issued to accused Ashwani Kumar and it was not used by him.

Then as per the case of prosecution, this SIM card No.94662-42046 was found inserted in the Motorola Mobile phone set allegedly got recovered from the accused during the personal search after his arrest in this case. This mobile phone set and SIM card during the trial of the case were produced as Ex.P5 and Ex.P6, respectively in the statement of PW16 SI/SHO Raj Singh.

PW9 Madan Gopal, Assistant Director, BSNL, Head Quarters, Delhi produced the record pertaining to issuance of mobile phone No.94169-12022 to Siya Ram, the complainant in this case through their franchise M/s Saraswati Gas Service, Nilokheri. Further, he proved the memo Ex.PQ vide which the application form of this mobile connection along with its I.D. proof was taken into police possession.

18. The record of above-said detail of calls was duly maintained in due course of business in the public offices. PW6 Parbhakar Singh, PW8 Jai Narain and PW9 Madan Gopal were also the public servants posted in their respective offices, when this record was prepared. They have no enmity or any kind of ill-will against the appellant – herein (accused) in order to make any kind of tampering or fabrication in this

record for securing his conviction. Then as above-said, it came in the cross-examination of PW6 Parbhakar Singh that he himself downloaded the record and sent the same to the quarter concerned. He was posted in the office of BSNL, Ambala Cantt. on 2.4.2007, where he is still working and that during this tenure there did not develop any complication in their computer system. Then in his statement, it also came that he sent the detail of subscriber and calls' record detail as per record maintained by their office.

So far as PW7 Manoj Madan was concerned, he was posted as Nodal Officer in IDEA Cellular Ltd. for whole of the Haryana State. It came in his statement that calls' record which was sent to the office of Superintendent of Police, Kaithal through e-mails Ex.PL, Ex.PL/1 and Ex.PL/2 was correct as per their electronic record. This witness was not cross-examined at all despite granting the opportunity. So there is nothing on the record to discredit the testimony of this witness or to disbelieve the record of calls' detail produced by him as above discussed.

Then PW10 Jitender Kumar, who had handed over the SIM No.98124-23668 of IDEA mobile company to the accused who was his classmate as well as friend, had no occasion to depose against the accused in this regard falsely nor anything had come on record in his cross-examination that he had deposed to this extent against the accused for any motive or any other consideration. As above-said, he specifically stated in his statement that he handed over this SIM card to the accused on his request that he wanted the same for having conversation with his gill-jill.

19. The facts of the case in hand are entirely on different footings than the facts of **Anvar P.V.'s** case (supra). During any general election of Parliament or of the Legislative Assembly of any State etc., a person who is interested in the election can go up to any extent to procure any kind of evidence either by way of tampering or fabrication, in order to tarnish the reputation and image of his opponent just to get any political mileage. So in a case under the Representation of The People Act, 1951, when any evidence in the shape of electronic record i.e. C.D., V.C.D., pen-drive etc. are produced, then they are to be scrutinized very carefully and in that eventuality certificate of the competent authority in order to ensure their credibility and authenticity is must. So far the above discussed **Ram Kishan Fauji's** case (supra) is concerned, it was also found to be a result of some political vendetta. Since the facts of the case in hand are quite distinguishable from the facts of both the case laws cited supra, so it is to be disposed of in the light of its own facts and the evidence led thereto by the prosecution to prove the same.

Though in the case in hand, no certificate of the competent authority as required under the provisions of Section 65B (4) of the Act is appended to the record of calls' detail in question, even then the same can be read into evidence for the reason that the officials (person) who had prepared the same had appeared in the witness-box to state on oath that the record of detail of calls in question is correct as per the record maintained in their respective offices. So in the light of the statements made by above-said PW6 to PW9 on oath before the Court, the purpose which was to be achieved by appending the certificate of competent

authority to this record of calls' detail has been served. So the above contention of learned counsel for the appellant is also declined and disposed of accordingly.

20. Learned counsel for the appellant has further contended that the complainant Siya Ram in this case as well as appellant – herein (accused) are admittedly residents of the same village. Then he also referred to the cross-examination of PW1 Siya Ram, complainant wherein he stated that house of accused is situated at a distance of 100 feet from their house. In order to further elaborate his contention, the learned counsel for the appellant has contended that since complainant Siya Ram and the appellant – herein (accused) were the residents of same locality and as such the complainant could have identified the appellant – accused from his voice when the alleged threatening call with a demand of ransom of Rs.1 crore, failing which to eliminate his son Aayush, was received by him on his mobile phone No.94169-12022 and further to disclose this fact with regard to identity of the appellant to the police immediately without any delay. But it is a fact that when any kidnapper is to make a demand of some ransom from the complainant family under the threat that he (kidnapper) had kidnapped any member of the complainant family, then he will not make this conversation with the complainant in his routine natural dialect, rather he will change his voice by fitting some sort of appliances in front of his mouth in order to terrorize the complainant that the alleged kidnapper is a deadly furious person with a further motive to extort the ransom amount from the complainant as soon as possible. Then as per the record of this case, there were only few calls received by the

complainant on his mobile phone from the kidnapper with regard to the demand of ransom amount and further to kill his son if this ransom amount is not paid. The conversation which took place between the complainant and the kidnapper in this regard was not got recorded by taking help of any tape-recorder etc. So in these circumstances, the plea that complainant could have identified the voice of the kidnapper while make threatening calls in question to him is held to be not tenable. Moreover, one becomes perplexed and totally confused when any threatening call with demand of ransom is received on the ground that any child or any member of his family is in the custody of the kidnapper and further to eliminate the kidnappee, in case the ransom amount is not paid as directed by kidnapper.

21. Then the learned counsel for the appellant has also pin pointed about the delay in lodging the FIR in this case. In the case in hand, the alleged occurrence took place on 17.10.2007 at about 5/5:40 p.m. Then on the same day one Baljit son of Puran Balmiki, resident of the village of complainant brought his son Aayush (kidnappee) to his house who was in unconscious condition at about 8:15 p.m. On seeing the condition of the child, the complainant took him to Amritdhara Hospital, Karnal where he was got admitted for his treatment. The matter in this regard was reported to the police on 18.10.2007 at 1:00 p.m. by Siya Ram - complainant vide his statement Ex.PA, on the basis of which initially DDR No.13 of the said date was recorded at Police Station Dhand. As mentioned in the endorsement Ex.PA/2 made on the above-said statement of the complainant, police initially did not take this matter seriously may

be for the reason that the child has been recovered and dropped at his parents' house. It verified the facts and other circumstances as recorded in the statement Ex.PA of the complainant and thereafter on finding something substantial during inquiry lodged the FIR Ex.PR/1 on 20.10.2007 at 1:30 p.m. Since the condition of child Aayush was not good when he was brought at his house by above-said Baljit, so the first anxiety of his parents was to take him to the hospital for providing him all the necessary medical aid to make him stable and feel good. In his statement Ex.PA, the complainant did not make any attribution against the appellant – herein (accused) or anybody else and the FIR Ex.PR/1 in this case was recorded on the basis of same facts as mentioned in the above statement Ex.PA. So the delay of about two days in lodging the FIR in this case cannot be said to be fatal to the case of prosecution. The involvement of the appellant – herein (accused) in this case was found during investigation of this case from the record of detail of calls above discussed.

22. Then it has also been contented by learned counsel for the appellant that as per prosecution version Aayush (kidnaped) was of the age of three years when the alleged occurrence took place. Herein he has contended that when this child became stable after getting medical treatment, then he was required to be examined under Section 161 of Cr.P.C. in order to establish the fact as to whether he was able to identify the appellant – herein (accused) or not. Since this child was not examined at any stage either during the investigation of this case or during trial of the case before the Court, so on this ground also, the prosecution version

as alleged smells a rat about its credibility. Herein, he has also contended that it was admitted case of both the parties that complainant's family and the appellant – herein (accused) are residents of same locality and the house of accused was at a distance of about 100 feet from the house of complainant. But it came on the record that when this child was medically examined in Amritdhara Hospital, Karnal, he was found to be completely nervous, shocked and traumatized. Then it cannot be said with any certainty as to whether a child of tender age of three years may be able to understand the sanctity of the oath with regard to statement to be made in the Court. Moreover, even each and every parents generally do not want to involve their small kids in the litigation for the sake of their future prospects by looking the same from all the angles.

23. Then it was also contended by the learned counsel for the appellant – herein (accused) that as per prosecution case, one Baljit resident of the village of the complainant had brought Aayush (kidnaped) to the house of complainant at about 8:15 p.m. on the same day, when the alleged occurrence took place. Herein he has contended that this Baljit was initially cited as a witness by the prosecution as he was to tell about the facts as to from where he took the above kidnaped and in what condition he was at that time. But during the trial, the prosecution did not examine him and rather gave him up being won over by the accused. This Baljit was examined by the accused in defence as DW1, who did not support the prosecution version. But testimony of this witness does not inspire any confidence for the reason that initially he was cited as a prosecution witness and later on did not support it being won over by the

accused.

24. Then it is also the contention of learned counsel for the appellant that one of the brothers of the complainant namely Ram Chander - PW20 also did not support the prosecution version. Then in his cross-examination made by learned Public Prosecutor, he stated that he had no personal knowledge that Siya Ram's son namely Aayush was kidnapped, but he had heard about the same in the village. Further, he deposed to the extent that he does not know whether accused Ashwani Kumar has been facing the trial relating to kidnapping of Aayush. So this witness was found to be stating a white lie, may be for any motive or for any other ulterior purpose. So his testimony was not fatal to the case of prosecution in any manner.

25. Then it was also one of the ground taken in the grounds of appeal that in this case, only offence under Section 363 of the IPC simpliciter can be made out against the appellant – herein (accused) and not under Section 364-A of the IPC. But this plea of the learned counsel for the appellant – herein (accused) is not found to be tenable for the reason that it is very well proved on the record during the trial of the case from the evidence led by prosecution that there was a threatening call with a demand of ransom of Rs.1 crore on the part of appellant – herein (accused) to the complainant, failing which, to liquidate his son Aayush (kidnappee).

26. PW1 Siya Ram complainant deposed before the Court as per his statement Ex.PA made by him before the police on 18.10.2007. Further, he proved the memo Ex.PB vide which clothes of his son Aayush

i.e. T-shirt (Ex.P1), Nikkar (Ex.P2), Baniyan (Ex.P3) and a pair of Sandals (Ex.P4) were taken into possession by preparing a parcel thereof by the police.

PW4 Dr.Rajiv Gupta of Amritdhara Hospital, Karnal stated that the child namely Aayush aged 3 years son of Siya Ram was admitted in their hospital on 17.10.2007 at 10:30 p.m. with alleged history of kidnapping. The child was drowsy but responding to painful stimuli. There was no mark of injury but he appeared to be scared. He was managed conservatively on the lines of sedative overdose. He regained full consciousness gradually and was discharged on the next date. Further, he proved the MLR of this patient as Ex.PE.

PW2 Pawan Kumar was the brother of complainant Siya Ram and his statement was to the effect that on 17.10.2005 at about 5:30 p.m., he was going from his house towards his field and many children were playing in Karaon Wali Chopal including his nephew Aayush. Ashwani Kumar, accused present in the Court, was also found present there with his motorcycle. Accused called Aayush towards him and gave him a toffee. He left the place since he had no suspicion and further accused Ashwani Kumar was also inhabitant of their *mohalla*. He came back to his house at 8/8:30 p.m. and came to know from the villagers that his nephew Aayush has been kidnapped. When he went to the house of Siya Ram - PW1, he found that Aayush had already been taken to the hospital. He made his statement before the police on 20.10.2007.

Learned counsel for the appellant has contended that it had come in the cross-examination of this witness that when he came back to

his house on 17.10.2007, then only ladies were found available in the house. Herein he has submitted that this PW2 did not share the fact with the ladies present in his house that he had seen the accused present near the place where children including Aayush were playing in Karaon Wali Chopal and that he (accused) had attracted Aayush towards him by giving him toffee when he came back to the house on 17.10.2007 and as such this conduct on his part, gives indication that his statement to this extent is concocted and made up one. But it has come in the statement of this witness that accused was residing in his *mohalla* and at that time he had no suspicion against him. Then it is also to note that when he went to the house of his brother Siya Ram on his return from the field on 17.10.2007, Aayush was already taken to the hospital, so as such at that time he had no occasion to have a talk in this regard with his brother Siya Ram who was away to hospital along with his child Aayush. By that time, he was also not aware as to whether any threatening call had been received by his above-said brother Siya Ram with the demand of ransom from any kidnapper of his son Aayush. So the plea that this witness did not disclose the above-said fact to the lady members found present in his house after his returning from the field, is quite immaterial, having no bearing on the merits of this case.

PW3 Constable Pala Ram received the special report of this case at 1:30 p.m. and delivered the same to Area Magistrate at about 2:30 p.m.

PW5 Lachhman Singh, was the Draftsman, who prepared the scaled site-plan Ex.PG on visiting the spot of occurrence.

PW12 Constable Vijender Singh produced the daily diary register of Police Station City, Karnal. He proved the DDR No.29 dated 17.10.2007 Ex.PS which was made on receipt of medical ruqqa from Amritdhara Hospital, Karnal regarding the admission of one Aayush son of Siya Ram.

PW15 ASI Harpal Singh was posted at Police Station Dhand on 18.10.2007. On receipt of a V.T. Message in the police station, he went to Amritdhara Hospital, Karnal wherein one Aayush aged about three years was admitted who was not found fit to make statement. Then he recorded statement Ex.PA of his (Aayush's) father Siya Ram.

PW16 Raj Singh SI was posted as SHO Police Station Dhand on 20.10.2007. On recording the FIR Ex.PR/1 in this case, he inspected the scene of occurrence and the place at which Baljit had lifted the child in an unconscious condition. He prepared the rough site-plan of both these places Ex.PT and Ex.PT/1. Further, he proved the memo Ex.PU vide which calls' detail of mobile No.98124-23668 and mobile No.94662-42046 were taken into police possession. Then his statement with regard to the arrest of the accused and recovery made from the accused has already been discussed above in para No.2 of this judgment. Then on completion of investigation, report under Section 173 of Cr.P.C. was prepared by him.

PW11 ASI Karan Singh was posted as MHC on the relevant date at Police Station Dhand. On receipt of one ruqqa Ex.PR, he recorded FIR Ex.PR/1 in this case. Further, he and one Constable Labh Singh (PW17) joined the investigation of this case on 20.10.2007 along with

PW16 SI/SHO Raj Singh. Both of them corroborated the statement of PW16.

In addition to this, PW11 also deposed about the case property which was deposited with him on 20.10.2007 and 21.10.2007 by SI/SHO Raj Singh - PW16.

PW18 Karam Singh, Inspector, State Crime Branch, Kurukshetra proved the memo Ex.PT vide which documents regarding mobile connection No.98124-23668 were taken into police possession.

PW19 Balwant Singh (Retired Inspector) proved the memo Ex.PVV vide which detail of calls both incoming and outgoing of mobile phone Nos.94169-12022 and 98124-23668 were taken into police possession on 21.11.2007.

27. In the light of above discussion, there is no merit in this appeal. Hence, this appeal stands dismissed. The judgment of conviction and order of sentence under appeal are upheld accordingly.

Copy of this order be sent to the quarter concerned for strict compliance.

19.9.2016 Brij	(T.P.S.MANN) JUDGE	(GURMIT RAM) JUDGE
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Whether speaking/reasoned : Yes/No

Whether reportable : Yes/No