

**CRA-S-1107-SB-2004 &  
CRR-2354-2004**

**[1]**

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

(Sr. No.319)

**CRA-S-1107-SB-2004**

**Date of Decision:-April 20, 2017**

Mukesh Kumar

.....Appellant

V/S

Central Bureau of Investigation

.....Respondent

2.

**CRR-2354-2004**

S.S. Saran

.....Petitioner

V/S

Mukesh Kumar & Others

.....Respondents

**CORAM: HON'BLE MR. JUSTICE A.B. CHAUDHARI**

Present : Mr. K.D.S. Hooda, Advocate,  
Mr. Pawan Hooda, Advocate,  
Mr. Virender Chandak, Advocate,  
for the appellant.

Mr. R.N. Lohan, Advocate for the petitioner in CRR-2354-2004

Mr. Sumeet Goel, Retainer Counsel for respondent-CBI.

Mr. Arjun Singh Yadav, AAG Haryana.

**A.B. Chaudhari, J.** (Oral)

CRA-S-1107-SB-2004 as well as CRR-2354-2004 are being  
disposed of by this common order.

Criminal appeal No.1107-SB-2004 was filed by the appellant-  
Mukesh Kumar son of Shri Randhir Singh, Constable No.1486/HSR against  
the judgment and order dated 01.04.2004, recorded by the Additional  
Sessions Judge, Ambala by which the appellant-Mukesh Kumar was held  
guilty for the offence under Section 364 of Indian Penal Code, 1860 and

was sentenced to undergo rigorous imprisonment for a period of ten years and to pay a fine of ₹1,000/- and in default of payment of fine, to undergo further simple imprisonment for a period of two months.

CRR-2354-2004 was filed by the complainant putting to challenge the said impugned judgment and order by which the trial Court recorded the acquittal of other accused persons Shailender Kumar Bishnoi, Kuldeep Singh Godara, Subhash Bagri for the charge under Sections 120-B, 364, 346, 302 and 201 of Indian Penal Code, 1860.

### **Facts**

The prosecution case in brief is that Sushil Kumari who was working as Junior Lecturer in Government Senior Secondary School for Girls at Hisar was abducted by unknown persons and was thereafter never found. On the request of the Government of Haryana, CBI was asked to investigate and accordingly CBI registered the case RC-28(S)/94/CHG under Section 364 IPC on 07.07.1994.

The case of the prosecution is that the appellant-Mukesh Kumar was the main suspect because he used to come to the school during the board examination of 1993 in order to help his wife for using unfair means in the examination. The appellant had a grouse against Sushil Kumari because she did not smoothly allow the wife of appellant Mukesh Kumar to indulge into use of unfair means in the examination. It is in this background, she was abducted and thereafter was never found nor the corpus delicti was ever found. The trial Court recorded the evidence of the prosecution witnesses produced by the CBI and thereafter inter alia relying on the confessional statement Ex.PW34/C of the appellant Mukesh Kumar,

recorded the order of conviction and sentenced him accordingly, while recorded the order of acquittal against the other accused persons. Hence, this appeal.

In support of the appeal, the learned counsel for the appellant submitted that the reading of the judgment of the trial Court shows that the trial Court has heavily relied on the confession Ex.PW34/C of the appellant for convicting him. According to him there was hardly any other circumstances or evidence on record much less in corroboration to the confessional statement supporting the prosecution case. He then submitted that the trial Court committed a serious error in ignoring the fact that the confession that was relied upon by the trial Court was recorded on solemn affirmation i.e. on oath of the appellant Mukesh Kumar. The confession recorded on oath has been held to be violative of Article 20(3) of the Constitution of India. He cited a decision in the case of **Akanman Bora Versus State of Assam, 1988 Crl.J.573.** rendered by Division Bench of the Gauhati High Court. He then submitted that at any rate, evidence in the form of a confessional statement is a weak piece of evidence being inculpatory statement. In any case in the present case need for corroboration was necessary to the confession, before recording a finding of conviction. He then submitted that in the narration of facts the trial Court itself has stated that the investigating agency-CBI found qua the other four accused that the confessional statement was false and, therefore, according to him the confession should have been rejected in the wake of the said finding by the CBI. Lastly he prayed for setting aside the impugned judgment and order.

In support of the revision application against acquittal, the learned counsel for the complainant revision petitioner vehemently argued that the impugned judgment and order recording acquittal of the other accused persons is wholly perverse and the acquittal order recorded in respect of those accused persons is required to be set aside.

This Court has power under the revisional jurisdiction to reverse the acquittal in the eventuality of recording of perverse findings by the trial Court. He, therefore, prayed for reversal of the order of acquittal of the other accused persons Shailender Kumar Bishnoi, Kuldeep Singh Godara and Subhash Bagri.

Learned counsel for the CBI Mr. Sumeet Goel stoutly opposed the contentions raised by the learned counsel for the appellant and contended that the confessional statement of the appellant can very well be accepted in evidence and there is no bar in law that the same should be ignored or rejected merely because the same is stated to be on solemn affirmation. According to him the trial Court has rightly relied upon the evidence in the form of the confession of the appellant Mukesh Kumar and recorded the order of conviction. He invited my attention to the evidence as well as the reasons recorded by the learned trial Judge and contended that no interference can be made with the reasons recorded by the learned trial Judge which are quite satisfactory and based on evidence. He, therefore, prayed for dismissal of the appeal.

The present appeal was taken up for final hearing and since the appellant was absent, this Court had issued non bailable warrant and now there is a report that the non bailable warrant has been executed and the

appellant Mukesh Kumar has been put in District Jail, Sirsa.

Be that as it may, I have heard learned counsel for the rival parties at length and also perused the evidence. I have carefully perused the reasons given by the trial Judge and I find that the trial Judge has heavily relied on the confession Ex.PW34/C of the appellant Mukesh Kumar and resultantly recorded the conviction of the appellant as aforesaid.

The second submission made by learned counsel for the appellant that investigating agency itself found confession qua four other accused persons to be false. Therefore, the same analogy should also be applied in respect of appellant Mukesh Kumar, must be rejected out right, as the doctrine: falsus in *uno*, falsus in omnibus has no application in India.

The next contention raised by the learned counsel for the appellant about the recording of confession of appellant Mukesh Kumar on oath has been carefully examined by me. I have seen the recorded confession itself Ex.PW34/C, in which it is clearly recorded that the confession was recorded on solemn affirmation by the learned Magistrate. Having thus found substance on facts in the submission made by learned counsel for the appellant that the confession was recorded on oath, I think the judgment rendered by Gauhati High Court and particular paragraph-6, thereof, will squarely apply to the case at hand. I quote Para 6 from the said judgment, which reads thus:-

*“6. An accused is at liberty to make any statement or complain verbally or in writing to the arresting authority or to the Magistrate before whom he is produced for the purpose of remand. His statement in writing or verbal as to his complicity in a crime, made to police is inadmissible in evidence; whereas such statement before a Magistrate is admissible in evidence. If such verbal statement as to*

*his complicity in a crime makes (sic) before a Magistrate or expresses to make it, then it is mandatory to the Magistrate to record the same after duly observing all formalities prescribed under the provision of S. 164 of the Criminal P.C. and by following the instructions given in the Schedule Form referred to above. S. 4(2) of the Oath Act prescribes administering of oath to a witness. This Act nowhere prescribes administration of oath to an accused at any stage of investigation, inquiry or trial. Exception to this general rule is to be made applicable under the provision of S.315 of the Criminal P.C. when the accused offers himself as a defence witness. At such stage he is characterised not as an accused but as a competent witness. Administering oath is barred in the recording of confessional statement by the clear provision of sub-s. (5) of S. 164 of the Criminal P.C. which runs as:-*

*“Any Statement (other than a confession) made under sub-s. (1) shall be recorded in such manner hereinafter provided for the recording of evidence as is, in the opinion of the Magistrate, best fitted to the circumstances of the case; and the Magistrate shall have power to administer oath to the person whose statement is so recorded.”*

*Confession should be recorded in the manner provided for recording statement of an accused/suspect and not in the manner provided for recording evidence. If it is recorded in the manner provided for recording evidence by administering oath, then it loses its character in so far the maker is concerned. The fact of administering oath at the recording of confession virtually means that the maker is compelled to give evidence against him, placing him in the status of a witness at the stage of investigation in violation of Art.20(3) of the Constitution of India read with sub-sec.(5) of S. 164 of the Code of Criminal Procedure. Administering oath for recording confession will only mean the recording of evidence of the maker for use in subsequent stage against the maker and which is prohibited in law. Such confession is bad in law, and is inadmissible in evidence.”*

Following the aforesaid dicta, I hold that the confession recorded on oath violates the fundamental right and violates Article 20(3) of the Constitution, read with Section 164(5) of the Code of Criminal Procedure. I am, therefore, inclined to hold accepting the contention raised

by the learned counsel for the appellant that the evidence in the form of confession Ex.PW34/C was wholly inadmissible in law and could not have been relied upon by the trial Court and that is a mistake of law made by the learned trial Judge.

Apart from the confession the record does not show any other evidence much less satisfactory evidence about the complicity of the present appellant in the alleged crime. The incident is stated to have taken place on 01.05.1993 and FIR was lodged on 08.05.1993 and the investigation was handed over to CBI on 04.03.1994. In such a situation, it was extremely difficult for the CBI to find out the truth as they were clearly disabled by virtue of lapse of almost a period of a year. In the peculiar facts of the present case where the allegation was that Sushil Kumari went missing a year before, the prime agency like CBI cannot be expected to find her out. At any rate, in the absence of any other evidence except the inadmissible confession Ex.PW34/C, I think, the order of conviction recorded by the trial Court will have to be set aside

Insofar as the revision preferred by the complainant revision petitioner is concerned, there is no evidence even worth the name against any of acquitted accused and, therefore, the trial Court rightly recorded the acquittal of the other accused persons by names Shailender Kumar Bishnoi, Kuldeep Singh Godara, Subhash Bagri and Mukesh Kumar. In the absence of any evidence against the other accused persons, no interference can be made with the order of acquittal by this Court.

The upshot of the above discussion is that the following order is inevitable:-

**ORDER**

1. CRA-S-1107-SB-2004 is allowed.
2. The impugned judgment and order dated 01.04.2004 passed by Additional Sessions Judge, Ambala, convicting and sentencing the appellant-Mukesh Kumar for offence under Section 364 of Indian Penal Code, 1860 is set aside and the appellant Mukesh Kumar is acquitted of the charge framed against him.
3. CRR-2354-2004 filed by the complainant revision petitioner is dismissed.
4. Fine if paid, be refunded.
5. Appellant Mukesh Kumar be released forthwith from jail, if not required in any other crime.

**April 20, 2017**  
Pankaj

**(A.B. Chaudhari)**  
**Judge**

Whether speaking/reasoned  
Whether reportable

Yes/No  
Yes/No