

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

CRA-D-196-DB of 2011(O&M)

Date of Decision : 28.02.2017

Irshad @ Rahul

..... Appellant

Versus

State of Haryana

..... Respondent

AND

CRA-D-663-DB of 2011(O&M)

Anita @ Bali

..... Appellant

Versus

State of Haryana

..... Respondent

**CORAM: HON'BLE MR. JUSTICE S.S.SARON
HON'BLE MR. JUSTICE DARSHAN SINGH**

Present : Mr.Anil Kumar Malik, Advocate
for appellant-Irshad @ Rahul (in CRA-D-196-DB of 2011).

Mr. Gaurav Singh Hooda, Advocate
for appellant-Anita @ Bali (in CRA-D-663-DB of 2011).

Mr.S.S.Pannu, DAG. Haryana.

DARSHAN SINGH, J.

Both the appeals captioned above have been directed against the judgment of conviction dated 03.12.2010 passed by the learned Additional Sessions Judge, Gurgaon, vide which both the appellants have been held guilty and convicted for the offence punishable under Section 364-A of the Indian Penal Code, 1860 ('IPC'-for short) and the order of sentence of the even dated, vide which they were sentenced to undergo imprisonment for life.

2. The brief facts giving rise to this prosecution are that on 20.02.2010, PW-1-complainant-Hem Narain presented the written complaint (Ex.PA) to PW-16-ASI Virender Singh alleging therein that his son Vikas aged about 10 years was student of 4th class in Sideshwar School, Gurgaon. He had gone for tuition in the neighbourhood at 3.00 p.m on 19.02.2010 and when he did not return by 5.00.p.m., he wanted to know his whereabouts. But, he did not found him at home. At that time, he received a call on his mobile phone no. 9651158348 from mobile phone no. 9654021049 informing him that Vikas was in their (caller's) custody and they (caller's) said that if the complainant paid Rs. 5 lacs to them, they would release his son safe and sound. He narrated these facts to his brother-Ashok Kumar. At about 5.30 p.m. another call was received that in case the police was informed, they would kill his son-Vikas. They made his son to talk to him on phone. When, Vikas called his father as 'Papa' the phone was disconnected. At 7.30 p.m. again the phone call was received asking the complainant to reach railway station along with the amount of Rs. 5 lacs and that the child would be released. The complainant along with his brother-Ashok Kumar and the police officials kept on searching for the child on the railway station, Gurgaon, but no clue was found. Hence, he submitted the written complainant (Ex.PA). On the basis of which, the formal FIR Ex.PA/1 was registered and investigation initiated.

3. Thereafter, the Investigating Officer PW-16-ASI Virender Singh searched for the victim at bus stand and other places. The complainant thereafter received a telephonic message from his house that victim-Vikas reached at his house. Thereafter, the Investigating Officer reached there and recorded the statement of victim-Vikas and PW-Ashok

Kumar. He also prepared the memo Ex.PO. The investigating Officer collected the DVD of CCTV Camera installed at Ansal Plaza situated in Palam Vihar, Gurgaon. The Investigating Officer also prepared the site plan of place of occurrence Ex.PP. He obtained the call details Ex.PD/1 of mobile phone no. 9654021049 by making the written request Ex.PQ. The call details were taken into possession vide memo Ex.PD. The CD of the call detail of phone number 9654021049 was prepared and was taken into possession vide memo Ex.PC. The DVD of the CCTV Camera installed at Ansal Plaza situated in Palam Vihar, Gurgaon was handed over to the Investigating Officer by Satish Kumar which was taken into possession vide memo Ex.PB. The articles of the case property were deposited with the Moharir Head Constable on return to the police station. The Investigating Officer verified the subscriber of the mobile phone numbers and recorded the statement of Dhan Bahadur and Hari Bahadur PWs.

4. Thereafter, the investigation was handed over to PW-14-ASI Arvind Kumar. He arrested accused-appellant Anita @ Babli, Irshad @ Rahul and Sharwan Kumar (since acquitted) on 21.02.2010. On interrogation, accused-appellant-Anita @ Babli suffered the disclosure statement Ex.PE. Similarly, accused-appellant-Irshad @ Rahul suffered the disclosure statement Ex.PG. In pursuance of her disclosure statement, accused-appellant-Anita @ Babli got recovered the sim of mobile phone no. 9210638216 and also demarcated the place vide memo Ex.PE/1, where the sim was kept concealed. The said sim was taken into possession vide memo Ex.PE/2. Accused-appellant-Irshad @ Rahul demarcated the place where the Scooty was kept concealed vide memo Ex.PG/1 and in pursuance of his disclosure statement, he got recovered the Scooty marka

Honda Activa without registration number and the same was taken into possession vide memo Ex.PG/2. Co-accused Sharwan Kumar was also interrogated and he also suffered the disclosure statement Ex.PH/1 and in pursuance thereof, he got recovered the Nokia mobile phone which was taken into possession vide memo Ex.PH/2.

5. The Investigating Officer moved the application Ex.PM and Ex.PM/1 to the Ilaqa Magistrate for conducting the identification parade of accused-Irshad @ Rahul and accused-Anita and also for taking their voice samples. But, they refused to join the test identification parade and to give their voice samples vide their separate statements and on completion of the investigation, the report under Section 173 of the Code of Criminal Procedure, 1973 (for short 'Cr.P.C.') was presented in the Court.

6. The case was committed to the Court of Sessions by the learned Additional Chief Judicial Magistrate vide order dated 03.05.2010.

7. Accused-appellants were charge sheeted for the offence punishable under Section 364-A of IPC by the learned Additional Sessions Judge, Gurgaon vide order dated 17.05.2010 to which the accused-appellants pleaded not guilty and claimed trial.

8. In order to substantiate its case, the prosecution examined as many as sixteen witnesses besides producing the documents.

9. When examined under Section 313 Cr.P.C, the accused-appellants pleaded innocence and their false implication. However, they did not lead any evidence in their defence.

10. On appreciating the evidence and the contentions raised by learned counsel for the parties, the learned trial Court vide impugned

judgment of conviction dated 03.12.2010 held guilty and convicted the accused-appellants Irshad @ Rahul and Anita @ Bali for the offence punishable under Section 364-A of IPC. Accused-appellants were sentenced to undergo imprisonment for life vide impugned order on quantum of sentence of the even dated. However, their co-accused-Sharwan Kumar was acquitted of the charges.

11. Aggrieved with the aforesaid judgment of conviction and order of sentence, the present appeals have been preferred by the appellant.

12. It is pertinent to mention that at the time of arguments Sh. Gaurav Singh Hooda, Advocate appearing for the appellants-Irshad @ Rahul and Anita @ Bali in CRA-D-663-DB of 2011 did not press the said appeal insofar as appellant-Irshad @ Rahul was concerned as he had already filed the criminal appeal i.e. CRA-D-196-DB of 2011 through Sh. Anil Kumar Malik, Advocate, who is now appearing for him in the said appeal. Thus, the name of appellant-Irshad @ Rahul was struck off in CRA-D-663-DB of 2011 and said appeal was treated only on behalf of appellant-Anita @ Bali.

13. We have heard learned counsel for the parties and have meticulously examined the record of the case.

14. Initiating the arguments, learned counsel for the appellants contended that there was nine hour's delay in reporting the matter to the police. They contended that in-fact the FIR has been lodged after the child voluntarily returned to the house. The prosecution version has been fabricated after that.

15. They further contended that as per the prosecution case, the

demand of ransom was made by using the mobile phone no. 9654021049. But, sim-card no. 9210638216 was allegedly recovered from accused-appellant-Anita @ Bali. So, the accused-appellants are not connected with the call details collected by the prosecution.

16. They further contended that the ingredients of the offence punishable under Section 364-A of IPC are not made out as the demand for ransom is not proved and the child has himself returned to the house. It shows that there was no compulsion or any type of threat to pay the ransom.

17. On the other hand, learned State counsel contended that from the statement of complainant-Hem Narain coupled with the call details and the CD of conversation prepared by PW-6 Constable Gianender Singh, it is established that victim Vikas was kidnapped for extorting the ransom. He contended that from the statement of PW-4-Hari Bahadur, it is established that mobile phone no. 9654021049 was being used by the appellants. He further contended that victim Vikas has also fully corroborated the prosecution version. Thus, he contended that the appellants have been rightly convicted for the offence punishable under Section 364-A of IPC by the learned trial Court .

18. We have given our thoughtful consideration to the aforesaid contentions.

19. In our opinion, the delay in lodging the FIR is well explained. The matter was of very sensitive nature. The life of the child i.e. son of the complainant-Hem Narain was at stake. It is categorically mentioned in the FIR itself that at about 5.30 p.m. complainant received a call from the accused-appellants that in case the police is informed they would kill his

son Vikas. The complainant had come to know about the kidnapping of his son at about 5.00 p.m. on receiving the first call on his mobile phone from the accused-appellants and within half an hour, he received another call threatening him that if the matter was reported to the police his son will be killed. In that situation, it was what natural that instead of immediately rushing to the police, the family members of the victim will take some time to make up their mind. Thus, in these circumstances, the delay of nine hours in reporting the matter to the police is of no consequences and it cannot be concluded that the prosecution version has been fabricated.

20. No doubt, on the basis of the disclosure statement Ex.PE, accused-appellant Anita @ Bali has got recovered sim-card no. 92106-38216. Whereas, as per the prosecution story, sim-card no. 9654021049 was used by the accused-appellants to demand the ransom. This contradiction in the sim-card number is of no help to the appellants as the case of the prosecution is not based only on the call details, rather there is a direct evidence against the appellants regarding kidnapping of Vikas, the son of the complainant. Vikas, the victim himself stepped into the witness box as PW-2 and has categorically stated that he was going to take tuition in the neighbourhood when Irshad @ Rahul and Anita @ Bali accused present in the Court met him and asked his name and name of his father. He told them his name and name of his father. Then, they asked him to show the bakery shop which his father was running. He told them that he was getting late. Accused Anita @ Bali told him that they would leave him at the place where he was to go for tuition on scooter after seeing the bakery shop of his father. Irshad and Anita accused made him to sit in

between them on their scooter and took him to a park. Then, they took him to market and a mall. At about 12.00/ 1.00 mid night he was left by them near his house from where he went to his home. Thus, the victim has categorically deposed that the accused-appellants were the persons who had kidnapped him. He identified both of them in the Court. He was the best witness to depose about the identity of the kidnappers. In the cross-examination, the testimony of PW-2-Vikas, the victim has totally gone unchallenged with respect to the identity of the accused-appellants.

21. PW-2-Vikas Kumar, the victim is a child witness. He was aged about ten years. Before recording his statement, the learned trial Judge has put him the elementary questions and thereafter he recorded the note that after putting the questions to the witness he has satisfied himself that he is in a position to understand the questions put to him and given rational answers to those questions. Therefore, he was a competent witness. Thus, PW-2-Vikas Kumar was found to be a competent witness by the learned trial Court. He was in a position to understand the questions and give the rational answers thereof. The Indian Evidence Act, 1872 does not prescribed any particular age as a determinative factor to treat a witness to be reliable and competent one. As per Section 118 of the Evidence Act all the persons shall be competent to testify, unless the Court considers that they are prevented from understanding the questions put to them or from giving rational answers to those questions because of tender age, extreme old age or disease. In the instant case PW-2-Vikas Kumar Gupta was found to be a competent witness by the learned trial Court. He has given the natural narration of the trauma undergone by him. The careful and close scrutiny of the testimony of PW-2-Vikas Kumar shows

that there is an impress of truth in it and there is no obstacle in the way of accepting his evidence. Reference can be made to cases **State of U.P Vs. Krishna Master & Ors. 2010(3) R.C.R. (Criminal) 843** and **Nivrutti Pandurang Kikate & Ors. Vs. State of Maharashtra 2008(2) R.C.R (Criminal) 74**. Moreover, the testimony of PW-2-Vikas Kumar is also corroborated from the other ocular as well as documentary evidence brought on record.

22. PW-3-Dhan Bahadur has deposed that he had sold his telephone connection of Vodaphone Telecom Company to his friend Hari Bahadur. In the cross-examination, he deposed that the telephone no. 9654021049 was sold by him to Hari Bahadur in the month of September/October, 2009. Said Hari Bahadur has appeared as PW-4 and has deposed that he had purchased the telephone connection no. 9654021049 from Dhan Bahadur about one year back. The said telephone connection along with telephone apparatus was taken from him by accused-appellant Anita in the month of February, 2010. She was known to him and used to visit his house. The telephone number was not used by him after it was taken away by Anita accused. Interestingly, the testimonies of PW-3-Dhan Bahadur and PW-4-Hari Bahadur have totally gone unchallenged as they were not subjected to any cross-examination by the learned defence counsel. So, from the unchallenged testimonies of both these witnesses, it comes out that telephone connection bearing no. 9654021049 was handed over by PW-4 Hari Bahadur to accused-appellant Anita @ Bali in the month of February, 2010 and was being used by the accused-appellants who are husband and wife. The call details Ex.PD/1 shows that the said mobile phone number was used in order to contact

complainant-Hem Narain at his mobile phone no. 9654158348 number of times on 19.02.2010. The call details fully corroborates the version of the complainant about the timings of the call made by the accused to him. PW-6-Constable Gianender Singh has even prepared the CD of conversation by putting telephone no. 9654021049 on observation. Thus, from the aforesaid evidence, there is no escape from the conclusion that the accused-appellants had kidnapped PW-2-Vikas, the son of the complainant.

23. However, we found substance in the contentions raised by learned counsel for the appellants that ingredients of the offence punishable under Section 364-A of IPC are not made out in the instant case from the evidence brought on record. In order to attract the provisions of Section 364-A of IPC, the prosecution was required to prove the following ingredients:-

- (i) That the accused kidnapped or abducted a person; or
- (ii) That the accused kept such person under his detention;
- (iii) That the accused threatened to cause death or hurt to such person or caused death or hurt to him;
- (iv) **That the accused did commit so as to compel:**
 - (a) the Government; or
 - (b) any foreign State or international; or
 - (c) inter-government organization; or
 - (d) any other person.
- (v) That the accused compelled to do or abstain from doing any act for a ransom.

In the instant case, it comes out from the statement of PW-2-Vikas, the victim and complainant-Hem Narain that the victim had himself returned to his house. PW-2-Vikas has categorically stated that at about 12.00/1.00 in the midnight, he was left by the appellants near his house from where he went to his home. It shows that Vikas was not kidnapped to

compel the complainant for ransom. In order to constitute the offence punishable under Section 364-A of IPC, it was required to be established that accused-appellants had kidnapped Vikas in order to compel the complainant for ransom. But, that ingredient is completely missing in this case. The conduct of the appellants to leave the victim near his house without receiving any ransom makes it evident that they had no intention to compel the complainant to pay ransom for the release of his son. Mere demand of ransom at the initial stage cannot attract the offence punishable under Section 364-A of IPC. Reference can be made to cases **Vishwanath Gupta Vs. State of Uttranchal 2007 (2) R.C.R. (Criminal) 511, Rafiq @ Anr. Vs. State 2008 (149) DLT 306, Mangal Debbarma Vs. State of Tripura 2011 (9) R.C.R. (Criminal) 772 and Jamil Ahmed vs. State (NCT) of Delhi 2014 (8) R.C.R. (Criminal) 404.**

24. Thus, the act committed by the appellants does not attract Section 364-A of IPC. However, at the same time there is no denial to the fact that accused-appellants had kidnapped Vikas in order to put him in danger of being murdered as per the tenor of the telephone calls received by the complainant from accused-appellants. So, the offence punishable under Section 364 shall be attracted.

25. As per the custody certificate submitted by the learned State counsel, accused-appellant Irshad @ Rahul has undergone actual imprisonment of six years, nine months and twenty one days as on 13.12.2016 and with remissions, he has undergone imprisonment of seven years, ten months and twenty-eight days as on 13.12.2016. It was also submitted that accused-appellant Anita @ Bali has been in custody and she has also undergone similar period of imprisonment. Thus, both the

appellants have already undergone a substantial period in jail.

26. Thus, keeping in view our aforesaid discussion, the appeals are partly allowed and the conviction of the appellants Irshad @ Rahul and Anita @ Bali are set aside for the offence punishable under Section 364-A of IPC and they are instead convicted for the offence under Section 364 of IPC. Appellants Irshad @ Rahul and Anita @ Bali, in their respective appeals, are sentenced to the period already undergone by them in jail; besides, they shall pay a fine of Rs. 75,000/- each and in default thereof, undergo imprisonment for a period of one year. The amount of fine shall be deposited by the appellants in the Court of learned Chief Judicial Magistrate at Gurugram and the same shall after giving notice be paid to Vikas Kumar Gupta (victim) son of Sh. Hem Narain.

(S.S.SARON)
JUDGE

(DARSHAN SINGH)
JUDGE

February 28, 2017

s.khan

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No