

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

CRA-D-70-DB of 2010(O&M)

Date of Decision : 16.05.2017

Sayeed Alarm Lari @ Babu

..... Appellant

Versus

State of Haryana

..... Respondent

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

Present : Mr. Deepender Singh, Advocate
for the appellant.

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

DARSHAN SINGH, J.

The present appeal has been preferred against the judgment of conviction dated 30.01.2009 passed by the learned Additional Sessions Judge, Faridabad, vide which the accused-appellant has 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 on the quantum of sentence dated 03.02.2009, vide which he has been sentenced to undergo imprisonment for life and to pay a fine of ₹ 5000/-, in default thereof to further undergo rigorous imprisonment for a period of six months.

2. The facts in brief giving rise to this prosecution can be summoned up as under:-

On 26.05.2007, complainant-Kundan Singh (PW-1) moved

the application Ex.PA to the SHO, Police Station Sector-55, Faridabad alleging therein that on 13.05.2007 his son-Gauri Shanker aged about 18 years had gone with Sanjay son of Ramjit. Sanjay had returned back to his house safely but his son had not returned so far. They tried their best to search with Sanjay here and there but Gauri Shanker could not be found. They suspected that his son has been kidnapped by someone. On the basis of this application, First Information Report ('F.I.R.'-for short) Ex.PE was registered.

3. On 26.05.2007, PW-3-Bhagmani, the mother of the abducted child received a miss-call on mobile phone no. 9999434563 of her husband namely Kundan Singh (complainant). Then she dialed the number on the said miss-call and on inquiry he disclosed his name as Sahil and sometime Sahid Alam and sometime Babu Khan. He told that Sanjay and Ramjit had left Gauri Shankar with him after taking some money. That person demanded ransom of ₹ 1,50,000/- and asked her to come all alone along with money. He threatened that if they will inform the police, they will not get their son-Gauri Shanker. She informed her husband-Kundan Singh. Thereafter, they brought all these facts to the notice of the police.

4. On 07.10.2007, ASI Jagvir Singh (PW-5) went to Bombay along with complainant-Kundan Singh and HC Dilbag Singh to arrest the present accused-appellant in view of the calls made by the accused-appellant from his mobile no. 9820688671 to the mobile phone of the complainant bearing no. 9999434563. He also took the help of the local police and apprehended the accused from near the Bandra Railway Station, Bombay on 09.10.2007. On interrogation, accused-appellant suffered the disclosure statement Ex.PB. From the personal search of the

accused-appellant a mobile phone make Nokia-6030 bearing sim no 9820688671 was recovered, which was taken into possession vide memo Ex.PC. On further interrogation on 13.10.2007, he suffered the disclosure statement Ex.PG dated 13.10.2007 and Ex.PG/1 dated 14.10.2007. Abducted boy Gauri Shanker could not be recovered. The Investigating Officer also obtained the call details and on completion of the investigation, the report under Section 173 of the Code of Criminal Procedure, 1973 ('Cr.P.C.'-for short) was prepared and presented in the Court.

5. It is pertinent to mention that co-accused Sanjay being juvenile was tried by the Juvenile Justice Board, Faridabad.

6. The case against the accused-appellant was committed to the Court of Sessions for trial by the learned Judicial Magistrate Ist Class, Faridabad vide order dated 08.01.2008.

7. The accused-appellant was charge sheeted for the offence punishable under Section 364-A and 34 IPC vide order dated 04.03.08 by the learned trial Court to which the accused-appellant pleaded not guilty and claimed trial.

8. In order to substantiate its case, the prosecution examined as many as six witnesses besides bringing on record the documents.

9. When examined under Section 313 Cr.PC, accused-appellant pleaded that he is innocent and has been falsely implicated.

10. No evidence was led by the accused-appellant in his defence.

11. On appreciation of evidence on record and the contentions raised by learned counsel for the parties, the learned Additional Sessions Judge, Faridabad, held guilty and convicted the appellant for the offence

punishable under Section 364-A IPC vide impugned judgment of conviction dated 30.01.2009 and he was awarded the sentence as mentioned above vide impugned order on the quantum of sentence dated 03.02.2009.

12. Aggrieved with the aforesaid judgment of conviction and order of sentence, the present appeal has been preferred by the appellant.

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 appellant contended that the accused-appellant has been falsely implicated merely on the basis of suspicion. The occurrence took place on 13.05.2007 but the application Ex.PA has been moved on 26.05.2007 it shows that parents of the victim had no apprehension of his kidnapping. He contended that in the FIR (Ex.P-6), there are absolutely no allegations against the present appellant. The parents of the abducted child had suspected that their son has been kidnapped by Sanjay and his parents. There is no evidence to establish the kidnapping or abduction of Gauri Shanker by the present appellant.

15. He further contended that as per the prosecution case complainant-Kundan Singh has moved the application Ex.PA after receiving of the miss-call and the conversation between his wife-Bhagmani and the accused. But, no reference thereof has been given in the application Ex.PA and the consequent FIR Ex.PE, which renders the story of the prosecution regarding ransom doubtful.

16. He further contended that the entire case of the prosecution is based on the call details Ex.PI which are not admissible in evidence for

want of the certificate as required under Section 65-B of the Indian Evidence Act, 1872 ('Evidence Act'-for short). He pointed out that PW-6- Gulshan Arora, Nodal Officer Vodafone Essar has categorically admitted in the cross-examination that the call details are not attested by any officer. He contended that these type of call details are not legally admissible in evidence. To support his contentions he relied upon case **Anvar P.V. Vs. P.K. Basheer and others 2015 (1) SCC (Cri) 24.**

17. He further contended that the statement of Smt. Bhagmani, the mother of the victim is vague and does not satisfy the ingredients of Section 364-A IPC. Thus, he contended that the accused-appellant has been wrongly convicted by the learned Additional Sessions Judge, Faridabad.

18. He further contended that the charge framed by the learned trial Court is wholly defective and factually incorrect. Even, the names of victim, accused-appellant and co-accused have been mentioned wrongly, which resulted in serious prejudice to the appellant.

19. On the other hand, learned State counsel contended that the statement of PW-3-Bhagmani is fully corroborated from the call details Ex.PI and the testimony of complainant-Kundan Singh. Bhagmani has categorically stated that accused-appellant has demanded ransom of Rs. 1,50,000/- for the release of Gauri Shanker. He has not even disclosed his true identity and particulars, which shows his dishonest intention. PW-3-Bhagmani has categorically deposed that the ransom was demanded by the accused-appellant from them for release of her son. He contended that these allegations clearly attract Section 364-A IPC. Thus, he contended that there is no legal infirmity in the conviction of the appellant as

recorded by the learned trial Court.

20. He also contended that co-accused-Sanjay has already been convicted by the Juvenile Justice Board, Faridabad for the offence punishable under Section 365 IPC.

21. We have duly considered the aforesaid contentions.

22. No doubt, in the FIR Ex.PE there are no allegations of kidnapping against the present appellant. The delay in reporting the matter to the police is also no ground to discard the prosecution version. It is settled principle of law that if the case of the prosecution is otherwise established from the evidence brought on record, the delay in lodging the FIR is immaterial. It is also the well settled principle of law that if the delay is satisfactorily explained by the prosecution, it will have no adverse effect on the veracity of the prosecution case. In the instant case, PW-1-Kundan Singh (complainant) and PW-3-Bhagmani, the mother of the victim have consistently deposed that they were being assured by Ramjeet and his wife (parents of co-accused-Sanjay) that their son is going to return. Thus, that may be the reason that the parents of the victim instead of immediately rushing to the police waited for his return.

23. The defects pointed out by learned counsel for the appellant in the charge framed by the learned trial Court on 04.03.2008 is merely an irregularity. Section 464 Cr.P.C reads as under:-

“464. Effect of omission to frame, or absence of, or error in, charge.

(1) No finding, sentence or order by a Court of competent jurisdiction shall be deemed invalid merely on the ground that no charge was framed or on the ground of any error, omission or irregularity in the charge including any misjoinder of charges, unless, in the opinion of the Court of appeal, confirmation or revision, a failure of justice has in fact been occasioned thereby.

(2) If the Court of appeal, confirmation or revision is of opinion that

a failure of justice has in fact been occasioned, it may-

(a) in the case of an omission to frame a charge, order that a charge be framed and that the trial be recommended from the point immediately after the framing of the charge;

(b) in the case of an error, omission or irregularity in the charge, direct a new trial to be had upon a charge framed in whatever manner it thinks fit.”

As per the provisions of Section 464 (1) Cr.P.C, no finding, sentence or order by a Court of competent jurisdiction shall be deemed to be invalid merely on the ground of any error in charge, unless a failure of justice has in fact occasioned thereby. In the instant case, learned counsel for the appellant has not been able to point out as what prejudice has been caused to the accused-appellant due to error in the charge and how it resulted in failure of justice.

24. We found substance in the contentions of learned counsel for the appellant that call details Ex.PI are not legally admissible in evidence as the requirements of Section 65-B of the Evidence Act are not satisfied. The Hon'ble Apex Court in **Anvar P.V. Vs. P.K.Basheer and others** case (**supra**) has laid down as under:-

“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.

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.

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.

16. Only if the electronic record is duly produced in terms of Section 65B of the Evidence Act, the question would arise as to the genuineness thereof and in that situation, resort can be made to Section 45A – opinion of examiner of electronic evidence.

17. The Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65B of the Evidence Act are not complied with, as the law now stands in India.”

25. The same legal position has been reiterated by the Hon'ble Apex Court in case **Harpal Singh @ Chhota Vs. State of Punjab 2016 (4) R.C.R. (Criminal) 936.**

26. In view of the aforesaid ratio of law laid down by the Hon'ble Apex Court, the electronic record can only be taken into consideration if the requirements of Section 65-B of the Evidence Act are complied with. But, in the instant case, the call details Ex.PI do not bear any certificate as required under Section 65 B of the Evidence Act. Rather, PW-6-Gulshan Arora, Nodal Officer Vodafone Essar has categorically stated in the cross-examination that there is no attestation of any officer on the call details. So, the call details Ex.PI relied upon by the prosecution cannot be taken into consideration due to non compliance of Section 65-B of the Evidence Act.

27. In order to prove the demand of ransom, the prosecution was banking upon the call details. But, those are inadmissible in evidence. The Hon'ble Apex Court in **Anvar P.V. Vs. P.K.Basheer and others** case **(supra)** has further laid down that the Evidence Act does not contemplate or permit the proof of an electronic record by oral evidence if requirements under Section 65-B of the Evidence Act are not complied with, as the law now stands in India. In view of this legal position, the oral

testimonies of PW-1- Kundan Singh (complainant) and PW-3-Bhagmani will also not be of much assistance to the prosecution.

28. However, we found considerable substance in the contentions raised by learned counsel for the appellant that the prosecution has not been able to establish the ingredients of the offence punishable under Section 364-A IPC.

29. The offence punishable under Section 364-A IPC is an offence which is an aggravated form of kidnapping or abduction which was introduced w.e.f. 22nd May, 1993 by amending Act 42 of 1993, which reads as under:-

"364-A. Kidnapping for ransom etc. - Whoever kidnaps or abducts any person or keeps a person in detention after such kidnapping or abduction, and threatens to cause death or hurt to such person, or by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt, or causes hurt or death to such person in order to compel the Government or any foreign State or international inter-governmental organization or any other person to do or abstain from doing any act or to pay a ransom, shall be punishable with death, or imprisonment for life, and shall also be liable to fine."

The essential ingredients of the offence punishable under Section 364-A IPC can be detailed as under:-

- (a)(i) kidnaps or abducts any person; or
- (ii) keeps a person in detention after such kidnapping or abduction; and
- (b)(i) threatens to cause death or hurt to such person; or
- (ii) by his conduct gives rise to a reasonable apprehension that such person may be put to death or hurt; or
- (iii) causes hurt or death to such person; and
- (c) In order to compel the Government or any foreign State or international inter-governmental organization or any other person to do or abstain from doing any act or to pay a ransom."

30. In view of the aforesaid ingredients, the offence punishable

under Section 364 IPC is divided into three heads. The first head consists of kidnapping, abduction or keeps such person in detention after kidnapping or abduction. Secondly, the issuance of a threat giving rise to a reasonable apprehension of such person may be put to death or hurt or actually causes hurt or death and thirdly the purpose of such kidnapping is in order to compel the Government or foreign state or international organisation or any person to pay a ransom or to do or abstain from doing something.

31. Words “in order to” used in Section 364-A IPC has great importance and consequence to interpret the provision. The Hon'ble Apex Court in case **State of West Bengal Vs. Mir Mohammad Omar, 2000 SCC (Cri.) 1516** interpreting the words, “in order that” held as under:-

"So the important task of the prosecution was to demonstrate that abduction of Mahesh was for murdering him. Even if the murder did not take place, the offence would be complete if the abduction was completed with the said objective. Conversely, if there was no such objective when the abduction was perpetrated, but later the abductors murdered the victim, Section 364 IPC would not be attracted, though in such a case the court may have to consider whether the offence of culpable homicide (amounting to or not amounting to murder) was committed."

32. Thus, the object to compel the payment of ransom had to exist when the unlawful act of abduction was carried out. But, in the instant case, it is not even the case of the prosecution that victim-Gauri Shanker was kidnapped or abducted by co-accused Sanjay in order to compel his parents to pay the ransom. In the application Ex.PA and FIR Ex.PE, there are no allegations of kidnapping or abduction against the present appellant. Thus, it cannot be stated that the kidnapping or abduction of Gauri Shanker was 'in order to' compel his parents to pay the ransom. In

the absence of this basic ingredient, the act committed by the appellant does not fall within the purview of Section 364-A IPC.

33. Even otherwise, there is no cogent and convincing evidence to establish the demand of ransom by the accused-appellant. As per the case of the prosecution itself, the accused-appellant has made the telephone call by concealing his identity. He has also not specified any place, date and time to hand over the ransom. He has also not dictated the manner in which the ransom was to be handed over to him. Moreover, in one of his disclosure statement Ex.PG, he has stated that he has only demanded ₹ 70/- and denied that he ever demanded the ransom of ₹ 1,50,000/-. Complainant-Kundan Singh has also stated in his statement that on interrogation by the police accused neither disclosed his correct address nor gave proper clue about his son. He (accused) stated that he had not asked for ₹ 1,50,000/- and had only asked for some money for expenditure. The aforesaid evidence clearly establishes that the kidnapping or abduction of Gauri Shanker was not in order to compel his parents to pay the ransom.

34. However, from the statement of PW-1-Kundan Singh (PW-1) and his wife Bhagmani (PW-3), it comes out that victim-Gauri Shanker was in the custody of the present appellant. Otherwise, there was no need for the appellant to contact the parents of the victim. The parents of the victim have consistently deposed that their son was kidnapped by Sanjay and his parents. Thus, there are no allegations against the present appellant for actual kidnapping or abduction of Gauri Shanker. But, it comes out from the evidence on record that said Gauri Shanker was in the custody of the present appellant after kidnapping. Section 368 IPC reads as under:-

“Wrongfully concealing or keeping in confinement, kidnapped or abducted person.—Whoever, knowing that any person has been kidnapped or has been abducted, wrongfully conceals or confines such person, shall be punished in the same manner as if he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose as that with or for which he conceals or detains such person in confinement.”

35. As per the aforesaid provision of law whoever knowing that any person has been kidnapped or abducted wrongfully conceals or confines that person, shall be punished in the same manner as he had kidnapped or abducted such person with the same intention or knowledge, or for the same purpose. It is an admitted fact that whereabouts of victim-Gauri Shanker could not be traced out and he could not be found even yet. So, certainly he was kidnapped by co-accused Sanjay with intention to secretly and wrongfully confine victim Gauri Shanker. It further comes out from the evidence on record that victim Gauri Shanker was confined by the accused-appellant after his kidnapping by his co-accused being fully aware of such kidnapping. Thus, by virtue of Section 368 IPC, accused-appellant shall also be liable for punishment in the same manner as if he had kidnapped or abducted victim-Gauri Shanker with intent to secretly and wrongfully confine him. However, as already discussed the act committed by the appellant does not fall within the mischief of Section 364-A IPC.

36. Thus, keeping in view our aforesaid discussion, the present appeal is hereby partly allowed. The conviction and sentence of the appellant for the offence punishable under Section 364-A IPC is set aside; however, he is held guilty and convicted for the offence punishable under Section 365 read with Section 368 IPC. The appellant is accordingly

sentenced to rigorous imprisonment for seven years; besides, he shall pay a fine of ₹ 5000/- and in default of payment thereof to further undergo rigorous imprisonment for a period of two months. In case, the appellant has completed his sentence of imprisonment and deposits the fine, he shall be set at liberty forthwith if not wanted in any other case.

(S.S.SARON)
JUDGE

(DARSHAN SINGH)
JUDGE

May 16, 2017
s.khan

Whether speaking/reasoned : Yes/No

Whether Reportable : Yes/No