NAFR

HIGH COURT OF CHHATTISGARH, BILASPUR

CRA No. 76 of 2012

Reserved on 09.01.2018
Pronounced on 19.01.2018

(Arising out of judgment/order dated 31.12.2011 in Sessions Trial No.44/2011 of the learned 2nd Additional Sessions Judge, Bilaspur)

1. Motu alias Keshav, son of Horilal Chandrakar, aged a21 years, resident of Domanpur Chowki, Junapara, Police Station, Takhatpur, District Bilaspur (CG)

2. Jeevan Chandrakar, son of Isur Chandrakar, aged about 20 years, resident of Chirhutti, P.S. Lormi, District Bilaspur (CG)

3. Rajkumar Kashyap, son of Siyaram Kashyap, aged about 20 years, resident of Chirhutti, P.S. Lormi, District Bilaspur (CG)

---- Appellants

Versus

- State Of Chhattisgarh, through Police Station Lormi, District Bilaspur (CG)

---- Respondent

And

CRA No. 92 Of 2012

- Shrawan Kumar @ Jagga Jaiswal S/o Shri Juthe Ram Jaiswal R/o Domanpur Chowki, Junapara, Thana Takhatpur, Distt. Bilaspur C.G.

---- Appellant

Vs

- State Of Chhattisgarh Through: Distt. Magistrate, Bilaspur, Distt. Bilaspur C.G.

---- Respondent

For Appellants	:	Shri Rajesh Jain & Shri Vinay Dubey, Advocates.
For Respondent/State	:	Shri Vivek Sharma, Government Advocate

Hon'ble Shri Pritinker Diwaker &
Hon'ble Shri Sanjay Agrawal, JJ

CAV Judgment / Order

Per Sanjay Agrawal, J.

1. These appeals have been preferred by the appellants under Section 374 (2) of the Code of Criminal Procedure, 1973, against the common judgment dated 31.12.2011 passed by the learned 2nd Additional Sessions Judge, Bilaspur, in Sessions Trial No. 44/2011 whereby they have been convicted and sentenced as under:

Conviction	Sentence
Under Section 364-A/34 (inclusion of Section 363/34) of the Indian Penal Code (for short 'the IPC')	Life imprisonment and fine amount of Rs.1000/- and, in default of payment of fine amount, further Rigorous Imprisonment for 1 month each
Under Section 120-B (1) of IPC	Life imprisonment and fine amount of Rs.500/- and, in default of fine amount, further Rigorous Imprisonment for 15 days.
Sentences have been directed to run concurrently.	

2. Since both these appeals arise out of the common judgment, therefore, they are being decided by this common judgment.

3. Briefly stated, the case of prosecution is that on 25.11.2010 a girl, namely, Chandrahasini, the victim aged about 7½ yeas old, went to School, namely, Saraswati Shishu Mandir at 09:30 am, but has not returned home even at 5:00 pm. Her father Faguram Jaiswal has, therefore, made an enquiry from his neighbours and when he did not receive any information regarding whereabouts of his daughter, approached the School Headmaster Lakhan Singh Goutam, who in turn, informed him that one unknown person of 5 feet height having long hair has come to the School by his motorcycle bearing its registration No. CG-10/ED-6242 at about 12:30 pm and took the said child by saying that her father has called her for going to the village.

Further prosecution story is that in the night at about 10:45 pm, a phone call has been received from one unknown person on Mobile No. 9589178283 owned by Ramesh Jaiswal, uncle of the said child, from Mobile No.9589815893. The said call was received by the wife of said Ramesh Jaiswal, with whom, the said unknown person informed that he has kidnapped the said girl and has demanded ransom of Rs.5,00,000/- (five lakhs only) in lieu of releasing the said child. He called twice on the said mobile number.

4. Based upon the aforesaid incident, an unnumbered F.I.R. (Ex.P.1) was lodged by victim's father Faguram Jaiswal on the same date, i.e., 25.11.2010 at 23:20 hours (11.20 pm) in the concerned Police Station Takhatpur, District Bilaspur. Thereafter, a numbered F.I.R. (Ex.P.24) was registered on 26.11.2010 at 10.00 am. In pursuance to the said information, the matter has been investigated and offence punishable under Sections 363, 364-A, 201 and 120-B read with Section 34 of IPC has been registered by the concerned Station House Officer while submitting its final report before the Judicial Magistrate First Class, Takhatpur, Dist. Bilaspur and, the matter was thereafter committed to the District & Sessions Judge, Bilaspur.

5. After finding the prima facie materials available on record, charges under Section 363/34, 364-A/34, 201/34 and 120-B of IPC have been framed against the appellants on 07.03.2011.

6. The appellants pleaded not guilty in connection with the aforesaid charges, as framed, and claimed to be tried.

7. In order to prove the guilt of the appellants/accused persons, the prosecution has examined as many as 18 witnesses, while none was

examined by the appellants in their defence.

8. After considering the evidence led by the prosecution, the trial Court, vide its impugned judgment, has convicted the appellants and sentenced them as aforesaid.

9. Being aggrieved, the appellants have preferred these appeals. Shri Rajesh Jain and Shri Vinay Dubey, learned counsel for the appellants submit that the judgment under appeals as passed by the trial Court is perverse and illegal, inasmuch as, it did not appreciate the evidence in its proper perspective. They submit that the 'Call details' (Ex.P.27) would show that the alleged call was made on 25.11.2010 by Mobile No. 9589815893 having its IMEI No.358236038377120 to Mobile No.9589178283, however, the seizure memo (Ex.P.7) shows that the seizure of Mobile from the appellant Shrawan Jaiswal @ Jagga Jaiswal is of a different IMEI number. Therefore, in absence of proof of any communication, no offence as such ought to have been made against them. They submit further that the 'Call details' (Ex.P.27), which is not duly supported by the certificate, as required mandatorily under Section 65-B of the Indian Evidence Act, 1872, is not at all admissible in evidence while placing their reliance in the matter of ***Anvar P.V.*** vs. ***P.K.Basheer and others,*** **(2014) 10 SCC 473.** They submit further that even in absence of any cogent and reliable evidence, the appellants have been convicted, therefore, the judgment under appeals is liable to be set aside.

10. On the other hand, Shri Vivek Sharma, learned Government Advocate for the State has supported the impugned judgment by submitting, inter alia, that the case law relied upon by the appellants is distinguishable from the facts involved in the present case and

would not be of any help to them. He submits further that the impugned judgment has been passed upon due and proper appreciation of the evidence, and therefore, does not require to be interfered.

11. We have heard learned counsel for the parties and perused the entire record carefully.

12. Faguram (P.W.1) is the father of victim Chandrahasini, who has lodged the F.I.R. when his daughter has not returned home from the School even at 5:00 pm. In his evidence, he stated that on the date of the incident, someone had called to his brother Ramesh Jaiswal's phone and demanded ransom amounting to Rs.5,00,000/- (five lakhs only) in order to get freed the victim properly. He stated further that the said call was received by his brother's wife Shakuntala and from whom, he received the said information. He stated further that Police Officer has handed over his daughter on 26.11.2010 vide Ex.P.3, who was found in mid-way of Khaira-Chapora village of Police Station Ratanpur.

13. Chandrahasini (P.W.2), who was alleged to have been kidnapped by the appellants and in whose presence, the “Test Identification Parade” (T.I.P.) (Ex.P.5) of the appellants, except appellant Shrawan, was conducted, stated in her evidence that the appellants Jeevan Chandrakar, Motu @ Keshav and their Sadu (साढ़ू) have taken her away from the School to Amarkantank. This witness, however, in her cross-examination, stated that she has identified the appellants, as per the instruction of the Police Officers and deposed further that she came to know their names only in the Police Station. She stated further that she did not say the Police Officers that she will identify

the appellants and stated further that she has narrated the things as per the instructions of counsel. This witness, thus, appears to be the tutored witness and based upon her statement, the “Test Identification Parade” (Ex.P.5) conducted on 10.12.2010 cannot be relied upon.

14. Ramesh Jaiswal (P.W.3) is the uncle of said Chandrahasini, in whose Mobile, the alleged call was received by his wife Shakuntala. It is stated by him that when his wife has received the alleged call and asked about who is calling, it was then replied by him that abductor of the child was speaking and informed her that child will be freed properly only upon fulfillment of his demanded ransom of Rs.5,00,000/- (five lakhs only).

15. Shakuntala (P.W.4), wife of Ramesh Jaiswal (P.W.3), who has received alleged call from her husband's Mobile, stated that the said person was demanding ransom of Rs.5,00,000/- (five lakhs only).

16. Lakhan Singh Goutam (P.W.7), the Principal of the said School, in whose presence, the said child was abducted by an unknown person on 25.11.2010, stated in his evidence that he was unable to identify the appellants. Thus, this witness has not supported the prosecution case. The other prosecution witnesses did not depose anything with regard to the alleged offence committed by the appellants.

17. The “Test Identification Parade” (Ex.P.5) of the appellants, except appellant Shrawan, conducted on 10.12.2010 in presence of the victim Chandrahasini (P.W.2) and the Principal of her School, namely, Lakhan Singh (P.W.7), cannot be held to be a reliable piece of evidence as both these witnesses, as observed herein above, utterly

failed to identify the appellants. In absence of proof of their identification as such, it is difficult to hold, based upon the said 'Test Identification Parade' (Ex.P.5), that the appellants are involved in connection with the alleged crime.

18. The another important document, in order to ascertain the alleged involvement of the appellants in crime in question, is the 'Call details' (Ex.P.27). The authenticity of this document (Ex.P.27) has been questioned by the appellants on two counts: firstly, on the ground that since the 'Call details' are not accompanied by a certificate as contemplated under Section 65-B (4) of the Indian Evidence Act, 1872, therefore, it is not admissible in evidence, in view of the principles laid down in **Anvar P.V.** vs. **P.K.Basheer and others** (supra) and based upon which, the appellants cannot be held to be liable for the commission of alleged crime. Secondly, on the ground that even if it is held to be admissible in evidence, the appellants cannot be held to be liable for punishment as a close scrutiny of this 'Call details" (Ex.P.27) would show that the alleged call was received from the Mobile No.9589815893 having its IMEI No. 358236038377120 to Ramesh Jaiswal's Mobile No. 9589178283, however, Nokia Mobile of black colour alleged to have been seized from the appellant Shrawan Jaiswal vide seizure memo (Ex.P.7) is of different IMEI number, i.e., 358236/03/837712/1. Therefore, under such circumstances, it is contended vehemently that no communication as such demanding ransom of Rs.5,00,000/- (five lakhs only) could be held to be attributable to the appellants, so as to hold them liable for the commission of alleged crime.

19. We have examined the aforesaid contention and the principles laid

down in the said judgment as relied upon by the appellants. It is true that the alleged 'Call details' (Ex.P.27) are not accompanied by a certificate as required under Section 65-B (4) of the Indian Evidence Act, 1872, but merely on this ground and particularly when its admissibility was not objected during trial, the authenticity of it cannot be doubted. In a similar situation, the Supreme Court recently in the matter of ***Sonu alias Amar* v. *State of Haryana,* AIR 2017 SC 3441** has held that when Call Details Records (CDR), which are not accompanied by a certificate, are not reliable due to violation of the procedure prescribed in Section 65-B(4) of the Indian Evidence Act, 1872, but its reliability cannot be permitted to be raised when it was admitted in evidence without any objection. While considering the said issue, it has been observed at paragraphs 26, 27 and 30, which read as under:-

> "**26.** That an electronic record is not admissible unless it is accompanied by a certificate as contemplated under Section 65-B (4) of the Indian Evidence Act is no more res integra. The question that falls for our consideration in this case is the permissibility of an objection regarding inadmissibility at this stage. Admittedly, no objection was taken when the CDRs were adduced in evidence before the Trial Court. It does not appear from the record that any such objection was taken even at the appellate stage before the High Court. In Gopal Das v. Sri Thakurji, AIR 1943 PC 83, it was held that:
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> > "Where the objection to be taken is not that the document is in itself inadmissible but that the mode of proof put forward is irregular or insufficient, it is essential that the objection should be taken at the trial before the document is marked as an exhibit and admitted to the record. A party cannot lie by until the case comes before a Court of Appeal and then complain for the first time of the mode of proof."
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> > In RVE Venkatachala Gounder *(AIR 2003 SC 4548)*, this Court held as follows:
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> > "Ordinarily an objection to the admissibility of evidence should be taken when it is tendered and not subsequently. The objections as to admissibility of documents in evidence may be classified into two classes: (i) an objection that the document which is sought to be proved is itself inadmissible in evidence;

and (ii) where the objection does not dispute the admissibility of the document in evidence but is directed towards the mode of proof alleging the same to be irregular or insufficient. In the first case, merely because a document has been marked as 'an exhibit', an objection as to its admissibility is not excluded and is available to be raised even at a later stage or even in appeal or revision. In the latter case, the objection should be taken before the evidence is tendered and once the document has been admitted in evidence and marked as an exhibit, the objection that it should not have been admitted in evidence or that the mode adopted for proving the document is irregular cannot be allowed to be raised at any stage subsequent to the marking of the document as an exhibit. The later proposition is a rule of fair play. The crucial test is whether an objection, if taken at the appropriate point of time, would have enabled the party tendering the evidence to cure the defect and resort to such mode of proof as would be regular. The omission to object becomes fatal because by his failure the party entitled to object allows the party tendering the evidence to act on an assumption that the opposite party is not serious about the mode of proof. On the other hand, a prompt objection does not prejudice the party tendering the evidence, for two reasons: firstly, it enables the Court to apply its mind and pronounce its decision on the question of admissibility then and there; and secondly, in the event of finding of the Court on the mode of proof sought to be adopted going against the party tendering the evidence, the opportunity of seeking indulgence of the Court for permitting a regular mode or method of proof and thereby removing the objection raised by the opposite party, is available to the party leading the evidence. Such practice and procedure is fair to both the parties. Out of the two types of objections, referred to hereinabove, in the later case, failure to raise a prompt and timely objection amounts to waiver of the necessity for insisting on formal proof of a document, the document itself which is sought to be proved being admissible in evidence. In the first case, acquiescence would be no bar to raising the objection in superior Court." [Emphasis supplied]

It would be relevant to refer to another case decided by this Court in PC Purshothama Reddiar v. S Perumal, (1972) 1 SCC 9: *(AIR 1972 SC 608)*. The earlier cases referred to are civil cases while this case pertains to police reports being admitted in evidence without objection during the trial. This Court did not permit such an objection to be taken at the appellate stage by holding that:

"Before leaving this case it is necessary to refer to one of the contentions taken by Mr. Ramamurthi, learned Counsel for the respondent. He contended that the police reports referred to earlier are inadmissible in evidence as the Head-constables who covered those meetings have not been examined in the case. Those reports were marked without any objection. Hence it is not open to the respondent now to object to their admissibility."

27. It is nobody's case that CDRs which are a form of electronic

record are not inherently admissible in evidence. The objection is that they were marked before the Trial Court without a certificate as required by Section 65B (4). It is clear from the judgments referred to supra that an objection relating to the mode or method of proof has to be raised at the time of marking of the document as an exhibit and not later. The crucial test, as affirmed by this Court, is whether the defect could have been cured at the stage of marking the document. Applying this test to the present case, if an objection was taken to the CDRs being marked without a certificate, the Court could have given the prosecution an opportunity to rectify the deficiency. It is also clear from the above judgments that objections regarding admissibility of documents which are per se inadmissible can be taken even at the appellate stage. Admissibility of a document which is inherently inadmissible is an issue which can be taken up at the appellate stage because it is a fundamental issue. The mode or method of proof is procedural and objections, if not taken at the trial, cannot be permitted at the appellate stage. If the objections to the mode of proof are permitted to be taken at the appellate stage by a party, the other side does not have an opportunity of rectifying the deficiencies. The learned Senior Counsel for the State referred to statements under Section 161 of the Cr.P.C. 1973 as an example of documents falling under the said category of inherently inadmissible evidence. CDRs do not fall in the said category of documents. We are satisfied that an objection that CDRs are unreliable due to violation of the procedure prescribed in Section 65 B (4) cannot be permitted to be raised at this stage as the objection relates to the mode or method of proof.

30. Section 294 of the Cr. P.C. 1973 provides a procedure for filing documents in a Court by the prosecution or the accused. The documents have to be included in a list and the other side shall be given an opportunity to admit or deny the genuineness of each document. In case the genuineness is not disputed, such document shall be read in evidence without formal proof in accordance with the Evidence Act. The judgment in Shaikh Farid's case *(1983 CriLJ 487 (Bom) (FB))* is not applicable to the facts of this case and so, is not relevant. The Effect of Overrule ”

20. By applying the aforesaid principles to the present case, the first contention raised by the appellants based upon the said case law, i.e., **Anvar P.V.** vs. **P.K.Basheer and others** (supra) is noted to be rejected as the alleged 'Call details' (Ex.P.27) was duly exhibited and admitted in evidence without any objection being raised during the trial. Therefore, the principles laid down in the said case law is entirely on different footing and is distinguishable from the facts involved in the present case.

21. There is, however, substance in their second contention, if we examine the alleged 'Call details' (Ex.P.27) along with the seizure memo (Ex.P.7) by which Nokia Mobile of black colour has been seized from the appellant Shrawan Jaiswal. We have examined both these documents carefully. A close scrutiny of the said document (Ex.P.27) would show that on 25.11.2010, the alleged call was received from Mobile No.9589815893 having its IMEI No.358236038377120 to Ramesh Jaiswal's Mobile No.9589178283. However, Nokia Mobile of black colour, alleged to have been seized from the appellant Shrawan Jaiswal, vide seizure memo Ex.P.7 is of different IMEI number, i.e., 358236/03/837712/1. Thus, on bare perusal of both these documents, it is difficult to hold that the alleged call was made from Nokia Mobile, seized from the appellant Shrawan Jaiswal, vide seizure memo (Ex.P.7). Therefore, by stretch of any imagination, it cannot be held that on the said date, i.e., 25.11.2010, any communication as alleged by the prosecution was ever made by the appellants, so as to hold them guilty with regard to the commission of alleged crime.

22. Accordingly, the 'Call details' (Ex.P.27) cannot be taken into consideration for holding the involvement of the appellants in any manner with regard to the commission of alleged crime. In essence, what we have gathered under the facts and circumstances of the case is that the communication demanding ransom of Rs.5,00,000/- (five Lakhs only), the material link, was completely missing in the case. In such an eventuality, it cannot be held that the appellants are involved in any manner with regard to the commission of the alleged crime.

23. Consequently, both these appeals are allowed and the conviction of the appellants under Sections 364-A/34, 120-B (1) of IPC and the sentence awarded thereunder vide judgment dated 31.12.2011 in Sessions Trial No. 44/2011 is set aside. The appellants are hereby acquitted of the aforesaid charges. They shall be set at liberty forthwith, if not required in any other case.

Sd/-
(**Pritinker Diwaker**)
JUDGE

Sd/-
(**Sanjay Agrawal**)
JUDGE

Anjani