

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

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**CRA-D-511-DB-2018 (O&M)
Date of Decision :30.08.2019**

Roopa Kashyap

... Appellant

Versus

State of Haryana

...Respondent

**CORAM: HON'BLE MR. JUSTICE AJAY TEWARI
HON'BLE MR. JUSTICE HARNARESH SINGH GILL**

Present: Mr. Kunal Dawar, Advocate for the appellant.

Mr. Randhir Singh, Addl. A.G.Haryana.

HARNARESH SINGH GILL, J.

The present appeal has arisen out of the judgment of conviction dated 05.05.2018 and order of sentence dated 07.05.2018 passed by the Additional Sessions Judge, Faridabad, vide which the appellant has been convicted and sentenced in FIR No. 554 dated 24.08.2016 under Sections 363, 366A of the Indian Penal Code (for short 'IPC') and Sections 6 and 17 of the Protection of Children from Sexual Offences Act, 2012 (for short 'POCSO') registered at Police Station Suraj Kund, Faridabad.

2. As per the prosecution, complainant- Aarti gave a statement to the effect that when she was sleeping along with her children, her daughter/prosecutrix aged about 12 years, left the house without informing her and did not return. The complainant had suspected that her daughter had been kidnapped and illegally confined by someone. The family tried to trace her but all in vain. On the basis of the complaint, a case was registered

under Section 346 IPC and during investigation the date of birth of the prosecutrix was obtained from her school and after enquiring the facts from her father, namely, Dilip Kumar, offence under Section 346 IPC was deleted and offences under Sections 363 and 366-A IPC were added in the FIR. Thereafter, the prosecutrix was recovered on 10.01.2017 from the house of appellant-Roopa Kashyap situated at Molarband, Badarpur, New Delhi. In the present case, the statement of the prosecutrix was recorded in the presence of legal aid counsel and thereafter, medico-legal examination of the prosecutrix was conducted and offences under Sections 6 and 17 of the POCSO Act were added. Appellant-accused Roopa Kashyap was arrested on 12.01.2017. The statement of the prosecutrix under Section 164 Cr.P.C. was also recorded.

3. Charges were framed against the accused under Sections 363, 366-A, 370 of IPC and Sections 6 and 17 of POCSO Act on 21.03.2017 to which she pleaded not guilty and claimed trial.

4. In order to prove its case, the prosecution had examined as many as 17 witnesses and also relied upon the documents Ex.PA to Ex.PV, Ex. PC/1 to PC/3, Ex.PD/1, PE/A and Ex.PX.

5. In the statement recorded under Section 313 Cr.P.C., the appellant-accused pleaded innocence and false implication but she did not adduce any defence evidence.

6. In the present case, complainant Aarti, mother of the prosecutrix had stepped into the witness box as PW-1. She stated that she had suspected that her daughter had been abducted by someone and had been confined with a bad intention. Her daughter was recovered after 5-6 months by the police from Molarband Badarpur, New Delhi from the house of the appellant. She further stated that though she did not know Nayak @

Rakesh, he came to her residence and narrated the fact that her daughter had been confined by the appellant. This fact was brought to the notice of the police and her daughter was recovered in an unconscious condition. On the request of the police (Ex.PE/A), Dr. Aparna Gupta (PW-4) had medico-legally examined the prosecutrix vide MLR Ex.PE. Ms.Renu Rampal Vice Principal (PW-2) had brought the original admission register of the school of the prosecutrix in which the date of birth of the prosecutrix was recorded as 04.02.2004 and the said document was produced on record as Ex.PC. Copy of the admission form Ex.PC/1 and copy of school leaving certificate Ex.PC/2 had also been placed on record.

7. After taking into consideration the evidence on record, the Additional Sessions Judge, Faridabad, vide judgment of conviction dated 05.05.2018 and order of sentence dated 07.05.2018, convicted and sentenced the appellant as under:-

<i>Sections</i>	<i>Rigorous Imprisonment</i>	<i>Fine imposed</i>	<i>Rigorous imprisonment if fine not paid</i>
370 IPC	10 (Ten) years	Rs.50,000/-	3 months
6/17 POCSO Act	12 (Twelve) years	Rs.50,000/-	3 months

Both the sentences were ordered to run concurrently.

8. Aggrieved of the said judgment and order, the appellant has preferred the present appeal.

9. We have heard learned counsel for the parties and have also gone through the record of the trial Court, with their able assistance.

10. Complainant, Aarti, (mother of the prosecutrix) in her complaint stated that her daughter had been abducted by someone. In her statement Ex.PA, she narrated that her daughter had been sleeping with her at night on 22.08.2016 and had gone somewhere without informing her and had not returned and that somebody might have kidnapped her. The

statement was got recorded by the complainant on 24.08.2016 but while recording her statement in Court, the complainant stated that one Nayak @ Rakesh had narrated that her daughter was available in the house of the appellant from where she had been recovered after 5-6 months. In her cross-examination she admitted that the house of the appellant was surrounded by a cluster of houses from where her daughter had been recovered. She was accompanied by police party from Suraj Kund Police Station and went to Molarband Badarpur, New Delhi. Regarding this, no document on record had been placed on record to show that information was given to the Delhi police at the time of recovering the prosecutrix from the house of Roopa Kashyap. As far as the cross-examination of PW-4 Dr. Aparna Gupta is concerned, she specifically stated that there had been no external or internal injury on the person of the prosecutrix. Not only this, ASI, Satish Kumar who was the first Investigating Officer (PW-16) deposed that on 24.08.2016 he along with police party had been on patrol duty when the complainant made a complaint Ex.PA whereon endorsement Ex.PR was recorded by the police. As per the cross-examination of PW-16, the prosecutrix was recovered on 10.01.2017 on the basis of a secret information and they had reached Molarband extension at about 10:30 a.m. No independent witness was joined at the time of recovery. It was stated that the local police had been informed after the recovery of the prosecutrix. However, there was no such document on record. ASI Suman Lata, the second Investigating Officer (PW-6) deposed that on 12.01.2017, appellant-Roopa Kashyap had been arrested and interrogated and in pursuance of her disclosure statement, the appellant had led the police party to the place of occurrence and the demarcation of the same was made vide Ex.PK. The

disclosure statement of the appellant was recorded at about 6/7:00 pm at Molarband Badarpur, New Delhi.

11. As per the statement of prosecutrix under Section 164 Cr.P.C. (Ex.PU) recorded on 11.01.2007, on 08.08.2016 at about 7/8 p.m, she met Renu @ Pooja in the street along with her husband who offered her to consume cold drink and she became unconscious and when she gained her consciousness, she found herself in the house of Roopa Kashyap (appellant). From there she made a telephone call to her neighbour Nisha, but the appellant gave her beatings and forced her to do wrongful acts and to sleep with men/boys. This fact has not been proved. Neither Nisha nor Renu @ Pooja nor her husband was arrested or ever questioned by prosecution agency. Even the complainant in her complaint Ex.PA did not suspect involvement of any person in the kidnapping/abduction of her daughter. ASI-Suman Lata (PW-6) testified that she had visited the place of occurrence with the prosecutrix but site plan Ex.PF does not contain the signature of prosecutrix.

12. Furthermore, the prosecution did not examine prosecutrix/minor daughter of the complainant (PW-1) as she again went missing and regarding this the complainant had lodged FIR Ex.D-1 under Section 363 IPC on 26.03.2017. Even father of prosecutrix, Dalip Kumar, had not been examined by the prosecution.

13. Prosecutrix is alleged to have made a telephone call to Nisha, her neighbour secretly but in the morning the appellant threatened the parents of prosecutrix telephonically and since then she had been raped by 10 to 15 persons per day, meaning thereby from 22.08.2016 onwards the parents of prosecutrix remained silent and as per their story after 5-6

months, one Nayak alias Rakesh informed that their daughter was in the house of the appellant. Thus the statement of complainant, Aarti (PW-1) is not trustworthy.

14. Prosecutrix also gave a similar statement before the Child Welfare Society (Ex.PD) on 11.01.2017. As per her statement, a secret call was made to her neighbour Nisha regarding her illegal confinement. Neither the prosecution had brought on record telephonic conversation nor Nisha was examined as a prosecution witness.

15. Learned counsel for the appellant has relied upon the judgment ***Brij Nath Sah Versus State of Bihar***, 2010(5) JT 398, in which victim, who was kidnapped made statement under Section 164 Cr.P.C. but did not appear in Court to give statement. It was held by the Hon'ble Supreme Court that the statement under Section 164 Cr.P.C. is not a substantive evidence. Hence, in the absence of the victim not appearing before the Court, the said statement could neither be used to corroborate the witness nor to contradict her. The conviction of accused was set aside.

16. In the case ***Ramprasad Versus State of Maharashtra***, 1999(2) R.C.R. (Criminal) 819, it was held by the Hon'ble Apex Court that the statement was recorded by the Magistrate under Section 164 Cr.P.C. becomes usable to corroborate the witness as provided in Section 157 of Evidence Act.

17. In the case of ***Guruvindapalli Anna Rao Versus State of A.P.***, **2003(3) CCR 84**, a Division Bench of the Andhra Pradesh High Court held that statement recorded by the Magistrate under Section 164 Cr.P.C. is not a substantive piece of evidence, but it is only a previous statement and cannot be treated as substantive piece of evidence.

18. In the instant case, admittedly the prosecutrix had not been

examined as a witness. Still further one Nisha, to whom the prosecutrix had allegedly made a telephone call regarding her illegal confinement, had also not been examined. Moreover, the conduct of the prosecutrix in leaving her parental house repeatedly also causes a dent in the prosecution story. In our considered opinion, such material aspects have been totally ignored by the trial Court.

19. In view of the above, we allow this appeal and set aside the judgment of conviction 05.05.2018 and order of sentence dated 07.05.2018 passed by the Additional Sessions Judge, Faridabad. The appellant is acquitted of the charges framed against her. Appellant be released forthwith, if not required in any other case.

20. Since the main case is decided pending CRM if any, stands disposed of.

30.08.2019 pooja saini	(AJAY TEWARI) JUDGE	(HARNARESH SINGH GILL) JUDGE
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<i>Whether speaking/reasoned?</i>	<i>Yes/No</i>
<i>Whether reportable?</i>	<i>Yes/No</i>