

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

CRA-S-1840-SB-2017(O&M)

Date of decision:26.11.2019

Rahul

.....Appellant

Versus

State of Haryana

.....Respondent

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr.Jashandeep Singh Sandhu, Advocate for the appellant

Mr. Anmol Malik, AAG, Haryana

ANIL KSHETARPAL, J.

Appellant-Rahul has assailed the correctness of the judgment of conviction passed by the Court of Sessions followed by order of sentence whereby he was sentenced in the following manner:-

(i) **Under Section 120-B IPC** – Rahul is sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.5,000/-. In default of payment of fine, he shall further undergo simple imprisonment for fifty days.

(ii) **Under Section 346 IPC read with Section 120-B IPC** – Rahul is sentenced to undergo rigorous imprisonment for one year.

(iii) **Under Section 365 IPC read with Section 120-B IPC** – Rahul is sentenced to undergo rigorous imprisonment for four years and to pay a fine of

Rs.2,000/-. In default of payment of fine, he shall further undergo simple imprisonment for twenty days.

(iv) Under Section 370(4) IPC read with Section 120-B IPC and 34 IPC – Rahul is sentenced to undergo rigorous imprisonment for ten years and to pay a fine of Rs.5,000/-. In default of payment of fine, he shall further undergo simple imprisonment for fifty days.

(v) Under Section 328 IPC read with Section 120-B IPC and 34 IPC – Rahul is sentenced to undergo rigorous imprisonment for five years and to pay a fine of Rs.3,000/-. In default of payment of fine, he shall further undergo simple imprisonment for thirty days.”

Facts in the nutshell as noticed by the learned Court of Sessions are extracted as under:-

“ 2. The prosecution case, as contained in the complaint Ex.P1, is that PW1 “B” (real name withheld) is a tenant in a house situated at Raj Nagar, Panipat. She has three sons. Her youngest son PW2 “A”, on 15.11.2015 had gone away from his house for going to Budsham. When PW1 “B” inquired about him, he neither reached Budsham nor returned to his house. PW1 “B” and her family members searched for him till 17.11.2015 but could not trace him. With the said allegations, PW1 “B” lodged complaint Ex.P1

before Incharge of Police Post, 8 Marla, Panipat. On its basis, the captioned FIR was registered. Special report/s thereof were sent to the concerned authorities. On 17.11.2015, PW2 "A" made a call from Mobile No.8266901853 on Mobile number of PW1 "B". On 21.11.2015, Investigating Officer moved Constable Parveen Kumar of Cyber Cell for getting call details of the above stated Mobile. On such moving, the said Constable handed over call details of the said Phone to ASI Rajbir Singh. On enquiry by the police, it came out that the said Mobile belonged to one Mukesh son of Sadan Singh, resident of Modinagar, U.P. When the police reached the said Mukesh, he informed it that the accused Ashu Chaudhary had borrowed the said Mobile and its SIM from him by misrepresenting the facts. In consequence, the police apprehended the accused Ashu Chaudhary. On such appreciation, he was arrested in the present case. In consequence of his arrest, he was interrogated in police custody. In consequence thereto, he made a disclosure statement Ex.P12 dated 22.11.2015. In consequence to the said disclosure statement, he led the police party to his house situated at Modinagar in District Ghaziabad of U.P. Therefrom, PW2 "A" was recovered from the possession of his wife Uma in the presence of PW1 "B" etc. On such recovery, memo in respect thereof was prepared. The

Investigating Officer, on such recovery, prepared rough site plan of the place of such recovery. On that very date, the accused Uma was also apprehended and was arrested. When the police party, with the accused Ashu and his wife Uma etc., was returning to Panipat, on the way, it arrested the accused Rahul. He was interrogated in police custody. On such interrogation, he made a disclosure statement dated 22.11.2015. In consequence to his such statement, he got recovered a Mobile having SIM No. 8266901853. The same were taken in police possession through a separate recovery memo. On 22.11.2015 itself, the accused Ashu Chaudhary and Rahul got the place from where they had kidnapped PW 2 "A" demarcated. A demarcation memo of that date in respect thereof was prepared separately. On production before the Court, the accused Uma was sent to judicial custody whereas the accused Ashu Chaudhary and Rahul were sent to police custody. PW2 "A" was handed over to his mother. On 23.11.2015, PW2 "A" was produced before Shri Kanwal Kumar, the then Ld. JMIC, Panipat for his statement under Section 164 Cr.P.C. In consequence thereto, his statement Ex.P35, carbon copy of which is Ex.P6, of that date was recorded by the said Magistrate. On 26.11.2015, in police custody, the accused Ashu and Rahul were interrogated. On such interrogation, they made their disclosure statements. In

consequence to their such disclosure statements, the accused Ashu Chaudhary got recovered intoxicating chloroform from the place disclosed whereas accused Rahul got recovered intoxicating tablet from the place disclosed by him. Separate recovery memo/s of such recoveries were prepared. A rough site plan of the place of such recoveries was also prepared. On 28.11.2015, Investigating Officer ASI Rajbir Singh moved an application before Medical Officer of GH Panipat to get opinion about impact of above stated intoxicating chloroform and tablet in the body of PW2 "A". On such application, Dr. Divyanshu Singh gave an opinion that such opinion can be obtained from Pharmacology Department, PGIMS, Rohtak. On 28.11.2015, PW2 "A" was subjected to medico-legal examination. In that process, his blood sample was prepared and was taken into police possession through separate recovery memo. On 25.12.2015, PW7 EHC Jagbir Singh visited the place of occurrence and prepared scaled site plan of the said place. A photograph of PW2 "A" during investigation, was also taken into police possession. The articles taken in police possession in the present case were sent to FSL Madhuban for chemical analysis thereof. The same were examined therein. On such examination, concerned examiner, opined that Chloroform was detected in the articles recovered from the accused Ashu

Chaudhary whereas Etizolam and propranolol were detected in the articles recovered from the accused Rahul but no common poison/drug could be detected in the blood of PW2 “A”. On completion of investigation, Inspector Vipin Kumar prepared final report under Section 173 Cr.P.C and laid it before the Ld. Area Magistrate.”

On completion of the investigation, police report under Section 173 (2) of the Cr.P.C was submitted and convicts were chargesheeted. The prosecution in order to prove its case got recorded the following witnesses (oral evidence):-

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|------|---|---|
| “PW1 | : | “B” (complainant/mother of the victim) |
| PW2 | : | “A” (victim) |
| PW3 | : | ASI Rajbir Singh (Investigating Officer) |
| PW4 | : | SI Sunil Kumar (Investigation witness) |
| PW5 | : | Mukesh (Person handing over Mobile/SIM to the accused Ashu Chaudhary) |
| PW6 | : | Lady Head Constable Sunita (Investigation witness) |
| PW7 | : | EHC Jagbir Singh (Scaled site plan witness) |
| PW8 | : | Dr. Divyanshu Singh (Expert witness) |
| PW9 | : | Head Constable Satish Kumar (Investigation witness) |
| PW10 | : | Head Constable Sandeep (case property carrier) |
| PW11 | : | SI Dilbagh Singh (MHC) |
| PW12 | : | EHC Gulab Singh (Investigation witness) |

PW13 : Constable Parveen Kumar (call detail
record witness)

PW14 : Shri Gaje Singh, Examiner.”

Further the prosecution produced the following documentary
evidence:-

Ex.P1	Complaint dated 17.11.2015
Ex.P2	Recovery memo of victim
Ex.P3	Handing over memo dated 22.11.2015
Ex.P4	Handing over memo dated 25.11.2015
Ex.P5	Photograph of PW2 “A”
Ex.P6	Carbon copy of statement under section 164 Cr.P.C
Ex.P7	Police proceedings
Ex.P8	Copy of FIR
Ex.P9	Endorsement
Ex.P10	Copy of call details
Ex.P11	Recovery memo of call details of Mobile phone No. 8266901853
Ex.P12	Disclosure statement of the accused Ashu Chaudhary dated 22.11.2015
Ex.P13	Rough site plan of the place of recovery of victim (PW2 “A”)
Ex.P14	Disclosure statement of the accused Uma dated 22.11.2015
Ex.P15	Disclosure statement of the accused Rahul dated 22.11.2015
Ex.P16	Recovery memo of Mobile phone and SIM
Ex.P17	Demarcation memo of the place of recovery
Ex.P18	Recovery memo of blood
Ex.P19	Disclosure statement of the accused Ashu Chaudhary dated 26.11.2015
Ex.P20	Disclosure statement of the accused Rahul dated 26.11.2015

Ex.P21	Recovery memo of chloroform
Ex.P22	Recovery memo of tablets
Ex.P23	Rough site plan of the place of recovery of medicine and chloroform
Ex.P24	Arrest memo of the accused Uma
Ex.P25	Scaled site plan of the place of recovery
Ex.P26	Application for opinion of concerned doctor
Ex.P27	Opinion of Dr. Divyanshu Singh
Ex.P28 to Ex.P32	Not exhibited as such
Ex.P33 to Ex.34	Zimni orders dated 23.11.2015 passed by the then Ld. JMIC, Panipat
Ex.P35	Statement of PW2 "A" under Section 164 Cr.P.C
Mark A	Envelope
Ex.PX	FSL report dated 29.4.2016."

This Court has heard learned counsel for the appellant as also counsel representing the State and with their able assistance has gone through the records and the paper book.

On the one hand, learned counsel appearing for the appellant has submitted that the victim and first informant (mother of the victim-child) had not inculpated appellant in any of the offence. He while referring to the statements of PW1 and PW2 has submitted that in view of the aforesaid depositions, the Court of Sessions has erred in convicting appellant-Rahul.

On the other hand, learned State counsel has supported the judgment of the Court of Sessions and has contended that on the disclosure statement of appellant-Rahul, the mobile used by the convicts has been recovered from the pocket of his pant as also on his disclosure statement

five intoxicating tablets were also recovered. The appellant had also led the

police party to the place where the alleged kidnapping of the child-victim took place. He, hence, supported the judgment passed by the Court of Sessions.

Before this Court proceeds to discuss the argument of the learned counsel for the parties, it would be appropriate to notice, certain material which has come on record with reference to appellant. As per the case of the prosecution, the victim-child had rang up his mother, who appeared as PW1 and that is how the mother informed the police about the call having been received and consequently traced the allottee to whom the SIM in question was issued and on his statement, Ashu Chaudhary was apprehended. On the disclosure statement of Ashu Chaudhary, the victim-child was recovered from the house of Ashu Chaudhary and therefore wife of Ashu Chaudhary, Uma was also implicated. It is the case of the prosecution that when after apprehending convicts, i.e Ashu Chaudhary and Uma-his wife, the police party alongwith the apprehended persons were coming back, on the way appellant-Rahul was also arrested and on his disclosure statement, the mobile phone in question was recovered from the pocket of the pant he was wearing at that time. Thereafter, appellant-Rahul is also stated to have suffered a disclosure statement and got recovered five intoxicating tablets which were kept for administering to the child-victim to keep him in sedative condition and on his disclosure the place where alleged kidnapping took place was identified.

Statement of the child-victim was recorded under Section 164 Cr.P.C before Judicial Magistrate who has stated that the appellant-Rahul was present with Ashu Chaudhary at the time when the child was kidnapped. However, when PW1 (mother of the victim-child) appeared in

the Court, she did not attribute any role to the appellant. In her cross-examination, she deposed that she had never seen appellant-Rahul at the place from where the boy was recovered. She had never seen Rahul before the date of deposition in the Court. Similarly, when child-victim was examined as PW2, he did not implicate Rahul and when cross-examined has stated that he has never seen Rahul previously except at the time of deposition in the Court. It is also significant to note here that the victim-child has not stated that apart from the use of handkerchief at his nose, at the time of alleged kidnapping, whereupon he became unconscious, any intoxicating substance was administered to him to keep him sedated.

In view of the aforesaid, material question which this Court is called upon to answer is as to what is the evidenciary value of the statement under Section 164 Cr.P.C.

On careful examination of the scheme of the Code of Criminal Procedure, 1973 and the Indian Evidence Act, 1872, it is apparent that statement of a witness under Section 161 Cr.P.C or Section 164 Cr.P.C is not a substantive evidence. It can only be used for corroboration or contradicting the witness at the time of deposition in the Court. The only difference is that statement under Section 161 Cr.P.C is recorded by the police whereas statement under Section 164 Cr.P.C is recorded by the Metropolitan/Judicial Magistrate. The statement under Section 164 Cr.P.C is recorded on oath, signed/ thumb marked by the witness and is admissible in evidence only to the extent that it can be used for corroboration or contradiction of the witness who has made statement. However, such statement of the victim or witness cannot be treated as a substantive piece of evidence to be used for conviction without looking for corroboration.

However, what happens, when the victim/prosecution witness resiles from his alleged previous statement recorded under Section 164 Cr.P.C by the Judicial Magistrate. Such statement may not be of any relevance nor can it be considered as substantive evidence to face conviction solely thereon.

Now let us deal with the facts of the case. As per the case of the prosecution Rahul-appellant had suffered a disclosure statement which resulted in recovery of the alleged mobile phone which belongs to Mukesh from the pocket of the pant he was wearing. First document in this regard is confessional statement of Rahul recorded by the police on 22.11.2015 wherein he states that he alongwith Ashu Chaudhary-co-convict had kidnapped the victim-child by administering him intoxicating substance and thereafter kept the mobile phone with him as child-victim had spoken to his mother. Alleged confessional statement is Ex.P-15, whereas recovery memo is Ex.P-16. Thereafter on the demarcation of Ashu Chaudhary and Rahul, the place where the alleged kidnapping took place was identified and memo of demarcation Ex.P-17 was prepared. It may be noted here that these three documents i.e Ex.P-15, Ex.P-16 and Ex.P17 have been prepared without associating any independent witness. Recovery of the mobile phone from the appellant is also not beyond doubt. False implication of Rahul cannot be ruled out. The victim-child or his mother have not inculcated the appellant. They have stated that we have never seen Rahul previously except in the Court at the time of deposition. As noticed above, statement under Section 164 Cr.P.C is only a piece of evidence and it is not a substantive evidence. The victim-child has deposed in the Court that he was in the detention of the two other convicts i.e Ashu Chaudhary and his

wife-Uma. When he got opportunity he immediately called his mother through a mobile phone which was lying nearby but when other two convicts named above came to know, they snatched the phone in question. Child has never stated that later on the mobile was handed over to Rahul. Still further, it is stated by the investigating officer that when they were coming back after recovery of the child in the presence of his mother who has appeared as PW1, Rahul-appellant was apprehended and mobile phone was recovered. But this fact is not corroborated by the statement of the mother of the child who has appeared as PW1. No independent witness was examined. The owner of the mobile also does not implicate Rahul-appellant.

Learned Court of Sessions has erred in relying upon the statement under Section 164 Cr.P.C recorded before the Judicial Magistrate. Such statement as already noticed could not be relied upon once the victim-child has retracted from his statement and resiled therefrom. Other evidence available on the file does not establish the case of the prosecution beyond the shadow of reasonable doubt.

Keeping in view the facts, appellant in the considered view of this Court is entitled to the benefit of doubt. Hence, while accepting the appeal and setting aside the judgment of conviction qua the appellant-Rahul only, he is directed to be released, if not required in any other case.

Appeal stands allowed.

26 .11. 2019

rekha

Whether speaking/reasoned

Whether Reportable

(ANIL KSHETARPAL)

JUDGE

Yes / No

Yes / No