

Mubarak Vs. The State of Karnataka

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Court : Karnataka

Decided On : Oct-28-2014

Judge : Anand Byrareddy

Appeal No. : Criminal Appeal No.648 of 2009

Appellant : Mubarak

Respondent : The State of Karnataka

Judgement :

(Prayer: This Criminal Appeal filed under Section 374(2) of the code of Criminal Procedure, 1973, by the advocate for the appellant praying to set aside the judgment dated 1.7.2009 in Special Case No.176/2006 passed by the Second Additional City Civil and Sessions Judge (CCH-17), Bangalore - convicting the appellant/accused for the offence punishable under Section 363 of IPC. and sentenced to undergo R.I. for three years and to pay a fine of five thousand rupees and in default of payment of fine to suffer further R.I. for one year for the offence punishable under Section 363 of IPC.)

1. The appellant was the accused before the court below in the following circumstances.

According to the complaint by one Mary, dated 11.11.2005, her daughter, Soumya, aged about 15 years who had gone to school as usual and who should have returned after her tuition classes, had not returned home even by 6:30 p.m.

On enquiry, Mary had learnt that her daughter had not attended tuition classes on that day. She had hence lodged the complaint of her daughter missing, with the jurisdictional police. It transpires that later the police registered an FIR, for offences punishable under Sections 363, 365 and 376 of the Indian Penal Code, 1860 (Hereinafter referred to as 'the IPC' for brevity) against the appellant. This is in the backdrop of the accused having contacted the complainant and having informed her that Soumya was with him and that she was going with him to Mysore to his uncle's house. On this information, the complainant is said to have rushed to Mysore, along with her relatives and had found her daughter and the appellant at his uncle's house and had brought her home. The appellant is said to have been arrested on 15.11.2005 and had been remanded to judicial custody.

Subsequently, a charge sheet is said to have been filed against the appellant for offences punishable under Sections 363, 365 and 376 of the IPC and Section 3(1)(xii) of the Scheduled Castes and Scheduled Tribes (Prevention of Atrocities) Act, 1989 (Hereinafter referred to as 'the SC and ST Act' for brevity).

The Sessions Judge had then framed charges only for the offences punishable under Section 363 IPC and Section 3(1)(xii) of the SC and ST Act. The accused having pleaded not guilty and having claimed to be tried, the prosecution is said to have tendered evidence of PW-1 to PW-15 and had marked several exhibits. After having recorded the statement of the accused under Section 313 of the Code of Criminal Procedure, 1973 and after having heard both the sides, had framed the following points for consideration:

"1. Whether the prosecution has proved beyond all reasonable doubt that the accused, on 11.11.2005 between 4:30 p.m., had kidnapped or abducted the victim aged about 14 years from the lawful guardianship of her parents and had wrongfully confined her at Mysore, and thereby had committed an offence punishable under Section 363 of I.P.C.?

2. Whether the prosecution has further proved beyond all reasonable doubt that on and after the above stated date, time and place, the accused not being a member of Scheduled Castes or Scheduled Tribes, kidnapped Soumya Mary, knowingly, that she belonged to Scheduled Caste and Scheduled Tribe community, and

intended to use his position to exploit her sexually to which she would not have otherwise agreed and thereby committed an offence punishable under Section 3(1)(xii) of the Scheduled Castes and the Scheduled Tribes (Prevention of Atrocities) Act, 1989?

3. What Order?"

The trial court had answered point no.1 in the affirmative and point no.2 in the negative and had convicted the accused for the offence punishable under Section 363 IPC and had acquitted the accused for the offence punishable under Section 3(1)(xii) of the SC and ST Act. The accused was sentenced to rigorous imprisonment for three years and was directed to pay a fine of Rs.5000/-. It is that which is under challenge in the present appeal.

2. Having heard the learned counsel for the appellant and the learned State Public Prosecutor, it is seen that the relevant witness examined by the prosecution to prove the ingredients of the offence punishable under Section 363 IPC, namely, - 'kidnapping from lawful guardianship' is PW-4, Mary, the mother of the alleged victim and Soumya, the victim herself, PW-9.

The age of the victim has not been disputed and she having been found in the house of the uncle of the appellant is also not disputed. It is however, contended that the crucial area of consideration with regard to the facts and circumstances of the case would be to decide whether the alleged victim was "enticed" or "taken" from the lawful guardianship, without the consent of such guardian. In this regard the following circumstances are relevant. PW-4, the mother of the victim has stated thus in her evidence :

"(The) accused telephoned and revealed that he has taken away my daughter and asked myself and my family members to come and meet him in a particular place. On the afternoon one accused contacted me over phone and told that he is taking my daughter to Mysore to the house of his uncle. When accused told that he is taking his daughter to Mysore to his uncle's house, I contacted his younger uncle and with his assistance on 13.11.2005, we had been to Mysore and accused and CW-2 my daughter was in the house of PW- 1 Izaz."

It is plain from the above that the accused had informed the mother of the alleged victim before leaving for Mysore of his intention and requested the witness to meet him. The witness has significantly not stated that she had protested or demanded that the accused return immediately with her daughter. The evidence would further indicate that PW-4 had then contacted the uncle of the accused and had later gone to his house. This would further indicate that the family of the accused and the alleged victim were acquainted. There is hence indication that the use of force or enticement of the alleged victim was not apparent. The daughter of the complainant travelling along with the accused was brought to the knowledge of the complainant. And she had not objected.

Further, the evidence of the alleged victim that she had been abducted is not readily believable. She is said to have been taken forcibly in an auto-rickshaw by the accused holding her hands and then they are said to have travelled 200 kms. by bus to reach Mysore at 11 p.m. The victim was 15 years old and sufficiently capable of raising an alarm if not immediately, atleast during the several hours that she must have moved in public places.

More significantly, there is no charge against the accused of any physical violation of the victim by the appellant. And she was staying along with the family of the uncle of the accused. This would demonstrate that the allegation of the victim having been abducted or the use of any force is clearly not present.

In the result, what emerges from the sequence of events is a possible misadventure in the victim having willfully accompanied the accused to Mysore and having stayed overnight at the residence of an uncle of the accused, along with his family and the complainant on learning of the whereabouts of the victim from the accused himself, having gone there and of having brought the victim home. For otherwise it is possible that the victim may have stayed there without demur. Except that a case is sought to be made out on a strict interpretation of the language of the relevant Section in making out a case of a minor having been taken from the custody of her guardian without the consent of the guardian, there is no serious crime that can be said to have been committed.

This is exactly a scenario that has been considered by the Apex court in the case of S.Varadharajan v. State of Madras, AIR 1965 SC 942, the relevant observations read thus :

"It must, however, be borne in mind that there is a distinction between 'taking' and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in non conceivable circumstances can the two be regarded as meaning the same thing for the purposes of Section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused persons. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian."

4. Therefore, in the opinion of this court, the prosecution has failed to establish that a serious crime has been committed by the accused which warrants the punishment of imprisonment, it would however, suffice if the accused is punished with a fine amount which has also been imposed by the court below, for the misdemeanour which may be said to have been committed by the accused in not having obtained the tacit consent of the complainant, before proceeding to Mysore along with the complainant's daughter.

Accordingly, the appeal is allowed in part. The punishment imposed by the trial court by way of rigorous imprisonment is set aside, the sentence in other respects is affirmed. The bail bond furnished by the appellant stands cancelled.

The appellant was the accused before the court below in the following circumstances.

According to the complaint by one Mary, dated 11.11.2005, her daughter, Soumya, aged about 15 years who had gone to school as usual and who should

have returned after her tuition classes, had not returned home even by 6:30 p.m. On enquiry, Mary had learnt that her daughter had not attended tuition classes on that day. She had hence lodged the complaint of her daughter missing, with the jurisdictional police. It transpires that later the police registered an FIR, for offences punishable under Sections 363, 365 and 376 of the Indian Penal Code, 1860 (Hereinafter referred to as 'the IPC' for brevity) against the appellant. This is in the backdrop of the accused having contacted the complainant and having informed her that Soumya was with him and that she was going with him to Mysore to his uncle's house. On this information, the complainant is said to have rushed to Mysore, along with her relatives and had found her daughter and the appellant at his uncle's house and had brought her home. The appellant is said to have been arrested on 15.11.2005 and had been remanded to judicial custody.

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