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Emperor Vs. Haribhai Dada

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Court : Mumbai

Decided On : Jan-11-1918

Reported in : (1918)20BOMLR372

Judge : Shah and ;Marten, JJ.

Appeal No. : Criminal Appeal No. 489 of 1917

Appellant : Emperor

Respondent : Haribhai Dada

Disposition : Appeal allowed

Judgement :

Shah, J.

1. The appellant, accused No. 3, along with the other accused, was charged in the lower Court with having conspired and kidnapped the girl Pashi, a minor under sixteen years of age, from the guardianship of her father into the Baroda territory in order that she might be seduced to illicit intercourse, under Section 366 of the Indian Penal Code. With the other charge we are no longer concerned. All the accused except the appellant were acquitted, and it was definitely found by the trial Judge that Hari had nothing to do with the kidnapping, that is, kidnapping from lawful guardianship. It is clear from the evidence relating to the movements of this

girl that she first left her father's house on the 25th of January and that she was taken to different places at Napa and Vadtal. She was taken to Asodar by Shankar to Hari's house on the 6th February. Shankar, Haribhai and the girl left Asodar for Baroda and they were arrested in the Baroda territory on the 7th of February. It is not suggested that Hari had anything to do with, and had any knowledge of the movements of, the girl before she was brought to him on the Oth February.

2. The learned Sessions Judge has convicted the present appellant on the charge of kidnapping Pashi from British India. This girl is found to have been nearly fifteen years old at the date of the offence charged. In order to establish the charge of kidnapping from British India, it is essential for the prosecution to prove that she was conveyed by the appellant beyond the limits of British India without her consent. Having regard to the provisions of Section 90 of the Indian Penal Code and to the fact that Pashi was more than twelve years old at the time she would be competent to give her consent. It is clear from the judgment of the lower Court that under the circumstances it cannot be said that she was conveyed without her consent. All along in her movements from place to place she seems to have been a consenting party and there is absolutely nothing to show that when the party loft Asodar the girl was in the slightest degree unwilling to go to Baroda, i.e., out of British India. The girl is described by the Judge as 'obviously a loose girl, discontented with and not inclined to live with hor husband and anxious to find a well-to-do husband of a superior class'. Further on, the learned Judge observes that ' Pashi may have ' walked straight over to the house of Shankar or Soma and asked them to fix matters up for her'. That is, even as regards her having been taken out of the custody of her father the Judge is not satisfied that the girl was not a consenting party. The consent of Pashi as regards kidnapping from lawful guardianship would not be material, but on the question of kidnapping from British India, her consent would be very material. I am quite satisfied that on the findings of the learned Sessions Judge the charge of kidnapping from British India cannot be sustained.

3. I, therefore, allow the appeal, sot aside the conviction and sentence and direct the accused to be acquittod and discharged.

Marten, J.

4. As we are differing from the learned Sessions Judge, I should like to add this. He says at p. 59 as follows :-'The case therefore splits up into separate parts. First the kidnapping from lawful guardianship, and secondly, the kidnapping from British India, and that being so, there really should have been separate trials of the various offenders as they were connected with distinct offences.' Stopping there, I think, it is a great pity that the learned Sessions Judge did not take that course, for the conviction of the present accused may well be due to a confusion as to the effect of the Indian Penal Code, arising from the single trial of the various offenders for separate offences, Then at p. 62 he goes on : ' The next question is as to Haribhai (accused No. 3). There is no question that he had nothing to do with the kidnapping'. And then finally the learned Judge at p. 63 says : ' Disagreeing with the assessors I find Haribhai Dada guilty of the offence charged, viz., of kidnapping Pashi from British India.

5. Now the offence with which he was charged was what I may call a double-barrelled offence. It was that of kidnapping this girl ' from the guardianship of her father into Baroda territory'. That included both kinds of kidnapping defined in Section 359, viz., kidnapping from British India and kidnapping from lawful guardianship. In the view I take, I think the learned Judge only meant to convict this particular accused of the crime of kidnapping from British India, namely, under Section 360, Indian Penal Code. That must be without the consent of the person alleged to be kidnapped. But if one looks at the earlier sections of the Indian Penal Code, namely, a. 90, it appears that the consent of a child is only invalidated if the child be under twelve years of age. In the present case the child is over twelve and it is not shown that she was taken out of British India without her consent. The evidence indeed is all the other way, viz., that she consented. The learned Sessions Judge has not dealt with this point in his judgment and I am satisfied that it is fatal to the conviction.

6. If on the other hand the learned Judge intended to rely on the other kind of kidnapping, viz., kidnapping from legal guardianship under Section 361 there are other legal difficulties involved there, and I think that on the facts of the case and

on his own finding, the conviction would be improper under that section too. But I am satisfied that he did not intend to convict under Section 361.

7. Under these circumstances I agree with my learned brother that the appeal should be allowed and the conviction set aside.

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