

**Emperor Vs. Isap Mahmad**

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**Court :** Mumbai

**Decided On :** Dec-07-1906

**Reported in :** (1907)9BOMLR148

**Judge :** Batty and ;Heaton, JJ.

**Appeal No. :** Criminal Appeal No. 426 of 1906

**Appellant :** Emperor

**Respondent :** isap Mahmad

**Judgement :**

**Batty, J.**

1. The accused in this case was committed to the Sessions on two charges, neither of which involved any question as to the marriage of the person whom he was said to have kidnapped or abducted. At the conclusion of the evidence to establish those charges and after the evidence for the defence had been recorded, the Court added a charge under Section 498, Indian Penal Code, which involved the question of the marriage of Rewa, the woman said to have been kidnapped or abducted. Objection has been taken in this appeal that this procedure was contrary to the provisions of Section 199, Criminal Procedure Code and to the spirit of Section 238, Criminal Procedure Code. It appears from the proceedings that the accused's Counsel Mr. Dehlvi, objected to that charge being framed at

that stage.

2. We think he had good grounds for objecting. He could not be expected to examine and cross-examine witnesses on a point which was not in issue or raised by the charges originally framed. It is also contended in this appeal, that the marriage of Rewa, under the rulings of *Queen-Empress v. Pitambar Singh* ILR (1879) 5 Cal. 566.; *Queen-Empress v. Dal Singh* ILR (1896) 20 All. 166; and *Queen-Empress v. Santok Singh* (1898) 18 A. W. N. 186 should have been strictly proved. We are unable to say whether the accused could or could not have challenged the formal evidence as to her marriage, because he had no opportunity given him of doing so, either by cross-examination or adducing rebutting evidence. There is also objection taken that the charge under Section 498, Indian Penal Code, was framed in contravention of the provisions of Section 199, Criminal Procedure Code, and, having regard to the ruling of *Bangaru Asari v. Emperor* ILR (1903) Mad. 61 which follows *Empress v. Kalu* ILR (1882) All. 233, we are not prepared to say that the procedure in this case was regular. Certainly we think that the additional charge framed at so late a stage, notwithstanding objection by the accused's Counsel, was prejudicial to the accused. Lastly, the evidence as to the age of Rewa was of the greatest importance: neither Section 363 nor 366 would apply unless she was shown to be under 16 years of age at the date of the offence. The mother has certainly given evidence to the birth of Rewa as being 14 or 15 years ago, but it is clear that she cannot be relied upon for great exactitude and she is practically unconfirmed by anybody professing to have personal knowledge on the subject. The entry in the Municipal register produced, no doubt might afford some corroboration, if the person referred to in the entry could be identified with reasonable certainty with the person now in question. But the entry in Ex. G, as appears in the record of this case, seems to be strangely incomplete if not possibly misleading. The caste of the father is given as 'Thakore Bhatia,' which does not exactly correspond with the description of the caste given by the members of the complainant's family: and then the subsequent columns are left unfilled in. We think that it is very desirable indeed that before the entry is accepted, there should be very searching enquiry to ascertain the reason for those columns being left vacant, as well as on the question of the correct description of the complainant's caste. Seeing that the mother's evidence did not pretend to

great accuracy and had barely any confirmation apart from this entry, the accused was certainly entitled to every means that he could possibly avail himself of, for shaking or rebutting the probative force of that evidence. We find from Ex. 21 that he did apply for the medical examination of the girl Rewa. As to the evidentiary value of such examination it was not for the Sessions Judge or for us to speculate. Accused had a right to claim that examination and we regret to say that the ground on which his claims were refused appear to us to fall very short of justifying the refusal. We think he must have that opportunity given to him and we also think that the conviction under Section 498, Indian Penal Code, must be set aside on the grounds stated above.

3. The case must now be returned to the Sessions Court in order that the evidence tendered and improperly excluded and such other evidence as the Sessions Judge may admit and as maybe relevant to the points for decision, may now be taken and submitted to this Court with the views of the Sessions Court thereon.

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