

Davalasab Vs. the State of Karnataka

Davalasab Vs. the State of Karnataka

SooperKanoon Citation : sooperkanoon.com/375802

Court : Karnataka

Decided On : Nov-24-1976

Reported in : 1977CriLJ1255

Judge : D.B. Lal, J.

Appellant : Davalasab

Respondent : The State of Karnataka

Judgement :

D.B. Lal, J.

1. This appeal is brought from the judgment of the I Additional Sessions Judge. Dharwar in a case Under Sections 363 and 376 of the I. P. C., wherein sentencing the appellant Under Section 363, the learned Sessions Judge acquitted him for the offence Under Section 376. The prosecution case was, that Shafina Begum who is decidedly below 18 years is the daughter of Abdul Rehiman and Chandabi and they were living in the town of Dharwar. At about 9 P. M. on 25-3-1974 a boy is stated to have gone to Chandabi in the absence of her husband and he informed her that Abdul Rehiman was beaten. Upon getting that news, Chandabi is stated to have sent Shafina Begum to her uncle's place where Abdul Rehiman was supposed to be sitting. Accordingly Shafina Begaum went out and as stated by her the accused Davalsab met her, showed a knife and threatened her to accompany him. Thereafter the accused brought Shafina Begum in a truck and both came to

Hubli. After spending the night at Hubli bus stand, on the next morning both of them took food at Iqbal Hotel. For the next night they stayed at Ganesha Lodge. From Hubli, the accused brought Shafina Beguam to Dharwar and on 29-3-1974 at about 9 p. m. she was seen behind Milan Hotel by Abdul Rehiman, Chandabi, her nephew Ashfaq and a few others. On seeing them the accused carried the girl on his shoulder and he took a jump in a 5 deep gutter and thereafter he disappeared. On the next day i.e. on 30-3-1974 Shafina Beguam was found standing near Janatha College by Babusab who in turn informed Mohamed Ghouse, Secretary of the Jamaat. Mohamed Ghouse came and brought the girl and took her to the police station.

2. On 28-3-1974 a missing report Exhibit P-4 was instituted by Abdul Rehiman. Thereafter on 30-3-1974 another police complaint Ext. P-2 was instituted while the girl was produced at the police station. On the basis of that report the investigation followed. The medical examination of the girl was conducted and her age was found to be between 13 and 14 years. As a result of investigation, the offences Under Sections 363 and 376 of the Code were stated to be established and the police charge-sheet was submitted to the Court.

3. The prosecution produced 16 witnesses of whom Abdul Rehiman, P. W. 1 and Chandabi, P. W. 4 were the parents. Shafina Beguam, P. W. 2 was the main witness. Ashfaq, P. W. 5 also stated about the incident near Milan Hotel. Vasant, P. W. 6 stated about the stay of the accused at Ganesha Lodge. Mahadev, P. W. 7 tailor was produced, as it was contended that the accused gave some clothes to the girl. These clothes M. Os. 1 and 2 were subsequently recovered. Doctors Yellappa and K. Rudrappa P. Ws. 9 and 10 proved the medical examination of the girl. Babusab, P. W. 11 and Mohamed Ghous, P. W. 12 were produced to speak about the incident near Janatha College. The remaining witnesses included the investigating Officers as well as other police officials.

4. The evidence of the accused was one of denial. It was further stated that there was enmity between the accused and Abdul Rehiman inasmuch as certain dues were payable by the latter. Both of them were quarrelling with each other on that ground. It was therefore stated that the accused is implicated because of that

enmity. However, the accused did not produce any defence.

5. The learned Sessions Judge did not believe the prosecution evidence in so far as the offence Under Section 376 of the Code was concerned. As such the accused was acquitted on that count. However the learned Sessions Judge found that the offence of kidnapping from the lawful guardianship was proved and as such he convicted the accused Under Section 363 of the Code and sentenced him to undergo rigorous imprisonment for a period of six months. The accused has felt aggrieved by that decision and has preferred the present appeal.

6. In order to prove the offence of kidnapping from the lawful guardianship Under Section 361 of the Code, it was required of the prosecution to prove that the appellant had taken or enticed the minor out of the keeping of her lawful guardian. Merely because the minor girl was seen in the company of the accused was not sufficient unless some evidence was forthcoming as to the taking or enticing by the accused out of the keeping of her lawful guardianship. In *S. Varadarajan v. State of Madras* : 1965 CriLJ33 their Lordships noticed a distinction between 'taking' and allowing a minor to accompany a person. The two expressions are not synonymous though it cannot be laid down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of Section 361. Something more has to be shown in a case of this kind where the minor leaves her guardian and accompanies the accused and some kind of inducement held out by the accused has got to be proved so that it could be said that an active participation by him was taken in the formation of the intention of the minor to leave the house of the guardian. There may be a case where the accused played some part in that connection while he visited the house of the victim before the incident. He may have solicited or persuaded the minor to come out of the keeping of her guardian. If that evidence is lacking in a particular case, even then some inducement, blandishment or promise on the part of the accused will have to be proved. In the instant case, it appears this element is entirely absent and besides saying that the girl was seen in the company of the accused at one stage or the other no circumstance was proved so that an inference could be drawn that the appellant did anything to persuade the girl to form her intention to leave her guardian. The emphasis of the learned Counsel for the appellant, was, on this

aspect of the case. The learned Sessions Judge held that the statement of Shafina Begum, P. W. 2 could not be expressly relied upon. He disbelieved her version or at any rate cast a great doubt upon it, on most of the events narrated by her. To begin with, the learned Sessions Judge considered that the story of the knife being shown to her by way of threat was extremely doubtful. In that connection, in his own words his finding was :. In that case, it may as well be, that there was no occasion for the person to show any knife or to threaten the girl. The girl was there as a result of previous persuasion and promises. That appears more probable, because according to the girl, she was given good food in Iqbal Hotel and new dresses like M. Os. 1 and 2 which were purchased for her.

It was categorically stated by Shafina Begum that the knife was shown to her and due to fear she accompanied the accused. If that part of the story was considered doubtful, on what basis the learned Sessions Judge inferred, 'persuasion' and 'promise', all the more so, when the statement of the girl was that she never knew the accused from before and was totally unacquainted with him. It is thus clear that the inference regarding 'persuasion and promises' was drawn by the learned Sessions Judge practically on no evidence. As regards the good food given at Iqbal Hotel and the new dresses, M. Os. 1 and 2 again the learned Sessions Judge disbelieved that part of the case. He never held the evidence of the prosecution reliable so far as the stay of the girl at Ganesh Lodge was concerned. Therefore her going to Hubli was itself doubtful and Iqbal Hotel exists at Hubli and they are told to have taken their food in that Hotel. The tailor Mahadev, P. W. 7 was again disbelieved and that cast a great doubt on M. Os. 1 and 2 when obviously her parents never stated that they did not give those dresses to the girl. Therefore any persuasion or promises with reference to good food in Iqbal Hotel or with reference to the new dresses M. Os. 1 and 2 could not be proved. That being so we are left only with the circumstance that the girl may have been seen with the accused at one stage or the other. As I have stated before, that was not enough.

7. In fact the learned Sessions Judge disbelieved the statement of Shafina Begum on so many other details. It was also disbelieved that any boy came to Chandabi P. W. 4 and informed her about the beating of Abdul Rehiman. The

learned Sessions Judge seems to have inferred that Shafina Beguam went out of the house on her own accord and without any pretext of the boy having come and informed about the beating of her father. He disbelieved the statement of the girl about the Hubli visit and stay at Ganesha Lodge. He disbelieved the story about the tailor and giving of the clothes. He disbelieved the entire story as to the rape committed upon her. When three-fourth statement of the girl was disagreed in that manner, the learned Sessions Judge was left with the remaining statement which referred to two specific instances and believing those instances to be true he inferred persuasion and promises and as such enticement on the part of the accused.

8. The other two circumstances relied upon by the learned Sessions Judge were, the incident of 29-3-1974 when the accused was found in the company of the girl and was seen as such by Abdul Rehiman P. W. 1, his wife Chandabi P. W. 4 and Ashfaq P. W. 5, besides others. It was stated that the accused lifted the girl and placing her on his shoulder took a jump inside a gutter behind Milan Hotel. Thereafter, the accused as well as the girl escaped. The other incident is of 30-3-1974 when the accused in the company of the girl was seen by Babusab P. W. 11 and subsequently the girl was brought to the police station by Mohd. Ghous P. W. 12. As to the second incident of 30-3-1974 that was only evidence to indicate that the accused was seen in the company of the girl and that alone was insufficient to prove taking or enticing within the meaning of Section 361. The incident of 29-3-1974 no doubt assumed importance, because Shafina Beguam P. W. 2 stated that she wanted to go to her parents but she was dragged by the accused, lifted up and both of them made good their escape. But the incident of 29-3-1974 in the manner in which it took place is so unconvincing and the evidence by which it is proved is so weak that hardly any reliance can be placed upon it is highly incredible that the accused could have lifted a girl of 13 or 14 years on his shoulder and would take a safe jump inside the gutter which according to P. W. 1 Abdul Rehiman was 5 Ft. deep and thereafter could run away along with her. According to Abdul Rehiman P. W. 1 dirt and filth used to flow inside that gutter. That apart besides Abdul Rehiman P. W. 1 and his family members who were 7 or 8, several others were present as they were going on the road. Even then, none could chase and apprehend the accused. Ashfaq P. W. 5 stated that he did not

attempt to chase them. He did not even shout for others to come to their help. The conduct is so uncommon that it can hardly be believed. About the placing of the girl on the shoulder and jumping of the accused in the gutter, both Chandabi P. W. 4 and Shafina Beguem P. W. 2 have given evidence. According to Chandabi P. W. 4 they had shouted and cried for help. Both according to her and Shafina Beguam P. W. 2 people were moving about on the road. According to Shafina Beguam the family members who were present by themselves constituted 7 or 8 in number. But Abdul Rehiman P. W. 1 above all stated that although he was present at that time, he did not see the accused along with the girl. According to Chandabi P. W. 4 however Abdul Rehiman P. W. 1 went and lodged the police report then and there. But such a report is not forthcoming. Had Abdul Rehiman P. W. 1 or any body else gone to the police station and lodged the report, the daily diary kept at the police station must have shown that report. It is a different matter that subsequently the incident of 29-3-1974 was narrated by these witnesses before the police. All this makes the incident of 29-3-1974 highly incredible.

9. As to the incident of 30-3-1974 Shafina Beguam P. W. 2 significantly stated that although Babusab P. W. 11 saw them standing near Janata College and even talked to the girl, he permitted the accused to slip away. He asked the girl to go to Mohd Ghous P. W. 12. Thereafter, the girl was brought to the police station. The very conduct of Babusab P. W. 11 as stated by Shafina Beguam P. W. 2 of letting the accused go from the spot is highly improbable. The girl was missing right from 25-3-1974 and all the relations as well as friends must have been made aware of that. In that contingency Babusab P. W. 11 must not have allowed the accused to escape while he was seen standing with the girl near Janata College. P. W. 11 himself did not support the prosecution version inasmuch as he never stated that the accused was found at that time with the girl.

10. If we discard the incidents of 29-3-1974 and 30-3-1974, nothing is left to corroborate the statement of Shafina Beguem P. W. 2 on the point of taking or enticing by the accused. The essence of the offence of kidnapping, as I have stated before was the active part by the accused in the abandonment of her home and in order to hold that the offence of the kidnapping was committed, it was quite insufficient for the prosecution to establish merely that the two persons were found

in the company of one another at some point of time. In the absence of any evidence as to taking or enticing on the part of the accused, in my opinion, it was extremely doubtful if the offence of kidnapping Under Section 361 was made out. There was no corroboration of the statement of Shafina Begum P. W. 2 and the same could not be relied upon, more so, when she already concocted so many details which were not proved to be true. P. W. 8 Basappa very much stated that the accused and the complainant used to quarrel prior to the incident in the matter of dues. This circumstance could be availed, of to say that the probability was there to implicate the accused falsely in a case. In the circumstance, the accused should not have been convicted for the offence Under Section 361 of the I. P. C. and he should have been acquitted of that charge.

11. The appeal is therefore allowed and the conviction and sentence of the appellant-accused Under Section 361 read with 363 of the I. P. C. are set aside. The appellant is on bail and his bonds are cancelled.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com