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In Re: Khalandar Saheb

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Court : Andhra Pradesh

Decided On : Oct-29-1954

Reported in : AIR1955AP59; 1955CriLJ581

Judge : Subba Rao, C.J.

Acts : Code of Criminal Procedure (CrPC) , 1898 - Sections 439; Indian Penal Code (IPC), 1860 - Sections 361 and 366

Appeal No. : Cri. Revn. No. 385 and Cri. Revn. Petn. No. 357 of 1954

Appellant : In Re: Khalandar Saheb

Advocate for Def. : Public Prosecutor

Advocate for Pet/Ap. : C. Kondiah and ;K. Venkataramaiah, Advs.

Judgement :

(1) The accused has been convicted by the Assistant Sessions Judge of Anantapur under S. 366, Penal Code, and sentenced to simple imprisonment for two years. On appeal, the Sessions Judge of Anantapur confirmed both the conviction and the sentence. The accused has preferred this Criminal Revision Petition against the judgment of the Sessions Judge.

(2) In a criminal revision, it is not permissible to canvass the findings of facts arrived at by the Courts below. The facts found may, therefore, be accepted and

breifly stated. The accused is a young Muslim. He was a country doctor and was treating the wife and daughter of one Venkayya, a resident of the village of Kanekal. During his visit to Venkayya's house, he had become intimate with his daughter Venkayamma aged 15 or 16. On, or about 7.8.1952, when she had gone out to answer cails of nature, by the side of the house of the accused, he caught hold of her and had a forced sexual intercourse with her. On 10.8.1952 when she again went by the side of his house for the same purpose, he persuaded her to go along with his and took her to Malyam village, and from there to Kowkuntia via Gollapuram, where he kept her in his uncle's house until she was restored back to the father through the good offices of that uncle on 12.8.1952. On those facts, both the courts found that the accused was guilty of an offence under S. 366, Penal Code.

(3) Mr. Kondaiah, the learned Advocate for the petitioner, contended that there is no clear or convincing evidence to establish that the girl is below 18 years and that, in and view, on the facts found, no case under S. 366, Penal Code, has been made out. The relevant provisions of Ss. 366 and 361, Penal Code, may be read :

'Section 366 : Whoever kidnaps or abducts any woman with intent that she may be compelled. or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine; and whoever, by means of criminal intimidation, as defined in this Code or of abuse of authority or any other method of compulsion, induce any woman to go from any place with intent that she may be or knowing that it is likely that she will be forced or seduced to illicit intercourse with another person, shall also be punishable as aforesaid'.

'Section 361 : Whoever takes or entices any minor under sixteen years of age, if a male, or under eighteen years of age, if a femal, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship'.

(4) The material parts of the provisions applicable to the facts found and stated above, laydown that a person, who kidnaps a femal under 18 years of age to seduce her to illicit intercourse commits an offence under S. 366, Penal Code. Under S. 361, kidnapping as defined is a substantial offence and the offence under S. 366 is an aggravated form of that offence. The aggravated offence consists of three ingredients (i) kidnapping. (ii) seducing, (iii) to illicit intercourse.

It is therefore necessary to appreciate the connotation of the three ingredients and to ascertain whether the facts of the case are covered by them. As I have already stated, the offence of kidnapping a minor is defined by S. 361, Penal Code. The three conditions for the application of that section are (i) the victim must be a minor girl under 18 years of age, (ii) taking her or enticting her by the accused and (iii) such taking or enticing is out of the keeping of the lawful guardian. The first question therefore is whether Venkamma was a minor under 18 years at the time of the alleged offence.

(5) P. W. 1, Venkayya, proves his daughter's age as 12 at the time of the offence. P. W. 2, the girl, spoke to the same effect. The Lady Doctor P. W. 8, testified that, at the time of her examination of the girl, she was aged about 14 years. Exhibit P. 4 is the medical certificate given by her. The Assistant Sessions Judge who examined her in court, was of the view that she was a bit undersized and that she would not be more than 16 or 17 years of age at the time she was examined. On that evidence, the learned Assistant Sessions Judge held that the girl could not have been more than 15 or 16 years old at the time of the alleged offence.

On appeal, the learned Sessions Judge accepted the evidence of the doctor and the father and held that she could not have been more than 14 years of age at the time of the medical examination in August 1952. The learned counsel argued that another opportunity should be given to him to prove the age of the girl on the ground that the accused has now obtained a birth extract of the girl. I do not think I am justified to give at this stage another opportunity to the accused. If he was sincere in his attempt he could have produced the necessary evidence in either of the two courts below. The finding of the courts below is one of fact and there are no grounds for interference in revision.

(6) That the girl's father is her lawful guardian admits of no doubt. Can it be said that she was not in his keeping when the accused took her with him It is argued that, at the point of time she was taken by the accused, she was not in the keeping of her father inasmuch as she left his house. The word 'keeping' cannot be interpreted in such a narrow sense, for such an interpretation would frustrate the object of the section itself. It is not the physical presence in the precincts of the father's house that matters. but whether she was in fact under his guardian-ship. Whether she left the house as the result of a pre-arranged plan between her and the accused, or, whether she want to answer calls of nature, it cannot make any difference, for, in the former case, the accused by being a party to the argument took her from her father's custody, and in the latter case, her leaving her father's house for answering calls of nature cannot obviously make her any the less under the keeping of her father.

(7) Reliance is placed upon the decision of -- Mushataq Ahmad J. in -- 'Nura v. Rex', AIR 1949 All 710 (A) wherein the learned Judge observed that where a minor girl volutarilly leaves the roof of her guardian and when out of his house, comes across another, who treats her with kindness, he cannot be held guilty under Section 361, Penal Code. This decision cannot help the accused for, on the facts of that case, it wa found that the girl went out of the protection of her parents of her own accord and thereafter went with the accused. In -- Deba Prosad Bose v. The King' : AIR1950 Cal406 (B) the learned Judges held that, where a girl left her house on account of the previous arrangement with the accused and met him in a garden from where he took her, the accused's action amounted to taking her away from the keeping of her lawful guardian. At p. 408, the learned Judges observed :

'The mere fact that a minor leaves the protection of her guardian does not put her out of the guardian's keeping. If, however, it is proved that a minor had abandoned her guardian with no intention of returning back, she cannot, therefore, be deemed to continue in the keeping of the guardian. What will be deemed to be sufficient to constitute an abandonment of a guardian by a minor girl depends on the facts of each particular case ....

When under this arrangement she was leaving the protection of her father, even if it be with the intention of not returning again, that will not be sufficient to put an end to the ties of guardianship. The importance and significance of the previous arrangement between the girl and the accused must be overlooked. We have to consider the surrounding circumstances under which the incident took place and then come to a conclusion whether the girl would have left the father's house had it not been for the previous arrangement with and the readiness of the accused to take her away, though not from the doorsteps of the father's house, but from some distance'.

(8) In the present case it is not possible to hold that she is not under the guardianship of her father. In either contingency namely whether she went out to answer calls of nature, or whether she went to the house of the accused pursuant to a previous arrangement, she continued to be under the guardianship of her father. On the evidence, it is not possible to hold that she abandoned the guardianship of her father and thereafter, the accused took her with him.

(9) It is next to be considered whether the accused took the minor or enticed her to go with him. It is contended that the accused did not take her or entice her, but she voluntarily went with him. There is an essential distinction between the two words 'take and 'entice'. The mental attitude of the minor is not of relevance in the case of taking. The word 'take' means to cause to go to escort or to get into possession. When the accused took the minor with him, whether she was willing or not, the act of taking was complete and the condition was satisfied. The word 'entice' involves an idea of inducement by exciting hope or desire in the other. One does not entice another unless the latter attempted to do a thing which she or he would not otherwise do. The juxtaposition of these two words makes it clear that the act of taking is complete when the accused takes her with him or accompanies her in the oridinary sense of the term, irrespective of her mental attitude. So, it is clear that, when the accused took the girl along with him, he was 'taking' her out of the father's custody within the meaning of the section.

(10) Coming to the aggravated form of the offence, the question is whether the minor was kidnapped in order that she may be seduced to illicit intercourse. That

the object of taking the girl was for illicit intercourse cannot be doubted. Illicit intercourse is intercourse between a man and a woman who are not married. But, it is argued that the word 'seduce' in the section is used in the sense of enticing a girl to part with her virtue for the first time and that, as the girl admitted that the accussed had carnal knowledge of her even earlier, he could not thereafter seduce her to illicit intercourse.

There is a conflict of view on the interpretation of the word 'seduced' in the section. The Dictionary meaning of the word 'seduce' is to lead astray, to entice, to corrupt or to induce a woman to perform an act of unchastity with oneself. The word can be used in two senses, one wider and the other narrower. In the narrower sense, it may connote the first lapse from the path of virtue. In the wider sense, it includes every device or persuasion, every word or act. which induced a girl to submit to illicit intercourse. Indeed, every illicit inercourse must be preceded by some overture on the part of the male.

After the surrender of chastity for the first time, a girl may lead a life of rectitude. Can it be said that further acts of device or inducement to draw her from the path of rectitude are not acts of seduction If such a narrow meaning is given, the salutary provisions of Section 361 should be confined only to the first lapse on the part of an inncoent girl from the conditions of purity and leave her to the mercy of unscrupulous persons. Therefore, though the words 'seduction' and 'illicit intercourse' are distinct, more emphasis should be laid on the words 'illicit intercourse' rather than on the word 'seduction'.

(11) Any act on the part of a person to lead a woman astray from the path of rectitude is seduction and if it is followed by intercourse, it will be seduction for illicit intercourse. The Court of Criminal Appeal in -- 'Rex v. Frederick Moon', (1910) 1 KB 818 (C) defined the word 'seduction' found in Section 17 of the Children Act, 1908. Under that section, it is provided that if any person having the custody, charge or care of a girl under the age of sixteen years causes or encourages the seduction or prostitution of that girl, he should be guilty of misdemeanour. Seduction under that section is a substantial offence and seduction for illicit intercourse is an aggravated from of it.

Lawrence J. held having regard to the scope of the section and the purpose behind it, that seduction in that Act has its ordinary sense of inducing a girl to part with her virtue for the first time. The learned Judge himself realised that the word has two meanings and that, in the wider sense, it also means inducing a girl to have carnal connection at any time or/on any occasion. I do not think that the meaning attributed to the word, having regard to the scope of that Act, can be applied to a case under S. 361, I.P.C.

(12) Boys and Young JJ. in -- 'Baijnath v. Emperor', AIR 1932 All 409 (D) confirmed the scope of that word to its narrower meaning. The reason for their conclusion is found in the following observation:

'The important question is whether the term 'seduced to' can properly be applied only to that which leads to the first act of illicit intercourse, or whether it can be properly applied to that which precedes each subsequent acts of illicit intercourse. The Oxford Dictionary defines 'seduction' is this connection as 'to induce a woman to surrender her chastity' which suggests at the outset that the term 'seduction' can only apply properly to the first act of illicit intercourse, for once that act has been completed, the girl has surrendered her chastity. We would, therefore, hold that the term 'seduction' can only properly be held applicable to the first act of illicit intercourse, unless there be proof of a return to chastity on the part of the girl meanwhile or unless possibly there is an intention on the accused's part that the girl should be seduced by some different man.'

(13) For the reasons already given by me, I regard my inability to confine the word to its narrow meanings. Instead the Oxford Dictionary itself gives meanings which are wide enough to take in the larger connotation. Divatia J. in -- 'Lakshman Bala v. Emperor'. AIR 1935 Bom 189 (E) rejects this narrow interpretation. After pointing out the conflict of decisions, the learned Judge observed at p. 190:

'In my opinion, the term 'seduce' is used in this section in the general sense of enticing or tempting, not in the limited sense of committing the first act of illicit intercourse. The substantial offence in the section is the act of kidnapping or abduction and the intention or knowledge that the girl may be forced or seduced to illicit intercourse raises it to an aggravated form of the main offence of kidnapping

or abduction and punishable with greater severity.

I do not think that the Legislature had in mind while enacting this section that it was only when a girl was kidnapped with the intention or knowledge that she should surrender her chastity for the first time, that kidnapping would become a more serious offence, while an act of kidnapping a girl even though avowedly for the purpose of having illicit intercourse with her would only amount to the simple offence of kidnapping, if there was previous intimacy with the girl. I think the material words in the section are 'illicit intercourse' rather than 'forced or seduced'. It is the illicit nature of the intercourse for which the kidnapping or abduction takes place that constitutes the aggravation of the offence and not the priority in point of time of such intercourse'.

With great respect I agree with the aforesaid observations. The same High Court in -- Emperor v. Ayubkhan Mirsultan', AIR 1944 Bom 159 (F) expressed a similar view. The learned Judge stated at p. 159:

'The girl's consent might always be revoked, and if it were revoked, force or a further seduction would be essential before an act of illicit intercourse could take place, and even if it were not revoked, it is difficult to see how the act of illicit intercourse could take place without at least some overture, however slight, being made by the male person, which overture, however, slight could properly be called a seduction to illicit intercourse'.

I express my full accord with this view.

(14) Much to the same effect is the decision of the Madras High Court in -- Suppiah v. Emperor', AIR 1930 Mad 980 (G). When the decision of -- 'Rex v. Frederick Moon (C)', was cited, the learned Judge Pandalai J. distinguished that decision on the ground that in that case, the substantial offence was kidnapping or abduction. It is not necessary to multiply cases. But it may be stated that the majority view is inclined to give a wider connotation, to the word 'seduced'. I would, therefore, hold on a consideration of the wording of Section 361 and in the light of the decisions cited, that the word 'seduced' should be understood in a wider sense of inducing a girl to carnal connection at any time or any occasion. If so

understood, it will follow taht the accused in the instant case, took her from lawful custody in order to seduce her to illicit intercourse and therefore committed an offence under S. 361, I. P. C.

(15) I cannot leave this case without observing that on the facts found, the punishment meted out to the accused is very lenient. When a person leads astray an innocent girl who is a minor, and takes her away from lawful custody and thereby ruins the life of that girl, and brings infamy into the family, he deserves a more deterrent punishment. But both the Courts gave lenient punishment and as the prosecution did not ask for enhancement of sentence, I do not think this is a fit case for interference, 'suo motu' by me.

(16) The Criminal Revision Petition is dismissed.

V. R. B.

(17) Revision dismissed.

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