

Mst. Asma and ors. Vs. the State

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Court : Allahabad

Decided On : Mar-10-1965

Reported in : AIR1967All158; 1967CriLJ311

Judge : M.H. Beg, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 361 and 363

Appeal No. : Criminal Appeal No. 2167 of 1963

Appellant : Mst. Asma and ors.

Respondent : The State

Advocate for Def. : Addl. G.A.

Advocate for Pet/Ap. : S.S. Tewari, Adv.

Disposition : Appeal allowed

Judgement :

M.H. Beg, J.

1. The appellants have been convicted under Sections 363 and 366 I. P. C. by a Civil and Sessions Judge of Kanpur and sentenced to 3 years' R. I. and 4 years' R. I. It is alleged that a girl named Shubratana, under 18 years in age, had been kidnapped by the appellants from the lawful guardianship of her father Maqdoom.

The father died before the trial but his statement before the Committing Magistrate was admitted at the trial under Section 33 of the Indian Evidence Act.

2. The girl had given out her age. In the witness box, as 20 years on 6-8-1963, but her statement has been rightly disbelieved by the learned Sessions' Judge in view of the opinions of Dr. G. C. Agarwal and lady Dr. C. Mitra, given after examination of X-ray plates of the joints of the girl's limbs, and the unchallenged statement of the father in the committing Magistrate's court. At the time of the alleged occurrence, round about 18th of June, 1962, the girl must have been between 14 and 15 years. The girl was living before her alleged kidnapping, under the lawful guardianship of her father Maqdoom in Mohalla Baqarganj in the city of Kanpur.

3. The prosecution case was that on 18-6-1962, when the father of the girl went out to purchase some vegetables, the girl was fetched from the house of Smt. Asma, appellant, the wife of Ramzani appellant, who also lives nearby in the same Mohalla. The father did not find Km. Shubratn when he returned home from the vegetable market, but, when he called out, the girl came out from the nearby house of Ramzani and Sm. Asma. According to the prosecution case, Sm. Asma, appellant, took the girl again to her house at about noon. And then her husband Ramzani, according to the prosecution case, tried to persuade the girl to marry the appellant Ayub.

4. As the father could not find the girl after a search all over, he lodged a F. I. R. six days later, on 24-6-1962, at 7 A.M., at police station Babu Purwa. In this F. I. R., Maqdoom, the father, expressed his belief that Ramzani and Ayub, who had their shops near the house of Maqdoom, must have enticed the girl as they used to come frequently to his house. He also stated that he had, on the suggestion of Ramzani appellant, gone to look for the girl at the houses of relations but could not find her. He also stated that the girl had left on the evening of 18th June, 1962 after telling her blind mother that she was going to the market. no fact, apart from the friendship of the family with Ramzani and Ayub appellants and that th' girl had come out from the house of Ramzani on the morning of 18th of June, 1962, on being called by the father, was given in the F. I. R. to suggest that the girl had been kidnapped by the appellants. The girl was alleged to have been found at 10-

15 A.M., on 24-6-1962, shortly after the lodging of the F. I. R., at the house of Ramzani as a result of the information said to have been given by an informant. It was alleged that Km. Shubratán herself opened the door of the house and the appellants Ramzani and Ayub were also found inside the house.

5. The appellants denied that the girl was recovered from the house of Ramzani. The appellants Ramzani and Ayub stated that the Station Officer had taken them from their shops in the meat market and Sm. Asma denied any connection with the whole affair. The appellant Ayub stated that Maqdoom, the father of the girl, wanted to marry her to an old man and that the girl herself was not agreeable to this and had come to his shop, of her own accord, and had asked him to marry her after representing her age to be 19 years. He stated that he told the girl that he would be willing to marry her if she would make a statement before a Court and obtain the consent of her father. He alleged that the girl was beaten and turned out of the house by the father himself when she told him what she wanted. Ayub alleged that the father had brought the girl along with him from her maternal grandfather's house and had got the appellants implicated after winning over the police.

6. Apart from the evidence of the recovery of the girl from a house in which the appellants Ramzani and Ayub were said to have been present, the only evidence in support of the prosecution case consisted of the statement of the girl and of her deceased father. The father had no direct knowledge of what had taken place and is said to have gathered it from the girl. So far as the statements of the girl herself are concerned, it is clear from the judgment of the trial court that the court did not believe her statement at the trial because she supported the version of the accused, which was corroborated by an application (Ext. Kha-1) of the girl, dated 10-5-1963, wherein the girl had stated that the Mohalla people had taken her to Ayub and asked him to marry her. The state of feelings between the father Maqdoom, a vegetable vendor, and the daughter, Shubratán, is evident from the fact that the father refused to have the custody of the girl after she was recovered by the police and wanted her to be kept at an orphanage. It is apparent, after going through the facts revealed by the statements of the girl and the attitude of the father towards her, that she did not herself care to live under the guardianship of her father and had left the parental home of her own accord. The reason why

she left the parental home is not clear. It could very well be, as the appellant Ayub suggested, that the father wanted the girl to marry somebody against the wishes of the girl herself and that he had got annoyed with her when she refused. It was even possible that he had turned her out. The delay in lodging the F. I, R. Indicates his indifference towards her and his refusal to keep her under his roof and guardianship on her recovery reveals his displeasure with her.

7. The learned Sessions Judge disbelieved the statement of the girl given at the trial and preferred to rely upon the previous statement given by her in the Committing Magistrate's Court. The girl explained that her previous statement was due to the pressure of the police. The learned Sessions Judge held that the story of police pressure was incredible and that her statement before the Committing Magistrate was preferable to her statement at the trial. Nevertheless the fact remains that the learned Sessions Judge found that the girl had made a statement at the trial supporting the accused, and she had been declared hostile by the prosecution. The learned Judge also believed that the girl had made an application (Ext. Kha-1) on 11-5-1963, although he held that the application seems to have been made under the influence of the accused.

8. The learned Judge also held that the consent of the girl was immaterial as she was a minor. He relied upon: Bhagwati Prasad v. Emperor : AIR1929 All709 and Sultan v. Emperor : AIR1930 All19 . In the course of arguments before me, reliance was placed on behalf of the State particularly on Sultan's case : AIR1930 All19 (supra) in which a Division Bench of this Court laid down:

'It may be observed here that Section 366 I. P. C. Is an aggravated form of Section 363 I. P. C. The consent of the girl does not exonerate the seducer. The underlying policy of the section is (1) to uphold the lawful authority of parents or guardians over their minor wards; (2) to throw a ring of protection round the girls themselves & (3) to penalise the sexual commerce on the part of persons who corrupt or attempt to corrupt, the morals of minor girls by taking improper advantage of their youth and inexperience.'

9. Reliance was also placed, on behalf of the State, on Rashid v. State, : AIR1953 All412 where it was held, by Harish Chandra, J., that even if a girl leaves her

guardian voluntarily this cannot amount to an 'abandonment' of her guardian by her.

10. On the other hand, reliance was placed on behalf of the accused on: Emperor v Ram Chandra, AIR 1914 All 376(1) and on Ewaz Ali v Emperor, AIR 1915 All 390. The facts of both these cases were distinguished by Harish Chandra, J. In Rashid's case : AIR1953 All412 (Supra) on the ground that those were cases of 'abandonment' of the guardian by the minor herself. Absence of the girl's 'animus revertendi' was held to constitute 'abandonment' of her guardian by her.

11. Another case cited before me was Nura v. Rex, : AIR1949 All710 in which it was held, relying on the two earlier cases of Ram Chandra, AIR 1914 All 376(1) (supra) and Ewaz Ali, AIR 1915 All 390 (supra), that a person who treats a minor girl, who had voluntarily left the roof of her guardian, with kindness, does not thereby commit a criminal offence. This case was also discussed by Harish Chandra, J. In Rashid's case : AIR1953 All412 (supra) with an indication of dissent from the view taken there.

12. It appears to me that the acts and intentions of those charged with 'taking' the minor out of lawful guardianship matter more than the acts and intentions of the minor. Even without 'animus revertendi' (or intention of returning) the minor may continue to be in the lawful guardianship of a parent. But, the fact that the minor leaves the guardian of her own accord and the fact that she seeks the aid and shelter of others against unkindness of a guardian are relevant and useful in judging the meaning of the actions of the accused in relation to the minor. The actions and attitude of the guardian are also important facts to be considered in determining whether the guardian himself had not, for the time being, abandoned the minor or driven her out due to his unkindness.

13. On the facts of the case, before me, it is certainly doubtful whether the girl had not actually 'abandoned' the parental roof for the time being due to parental neglect and unkindness and sought shelter from others who, out of good will towards her, had given her advice and protection. No doubt, a person giving advice or protection to a minor girl in such circumstances runs grave risks of criminal prosecution. But, where the facts of a case raise a reasonable doubt whether the

girl had not actually left her parent and guardian (perhaps 'abandonment' is too strong a word) of her own accord and sought the protection of strangers against an unkind parent, who was trying to thrust an unwanted husband upon her, the accused are entitled to get the benefit of doubt on the question whether there was really any 'taking' by them and not an attempt just to help a runaway and abandoned minor. The line may be difficult to draw sometimes, but it is there.

14. In the present case, the girl was certainly not taken away by any force or fraud. It is apparent from the F. I. R. itself that she left her father's house voluntarily. It is also apparent from her declarations and subsequent conduct that she wanted to marry the appellant Ayub, whose wife she is now said to be. Sm. Asma was not even present when the girl was said to have opened the door for the police officer who recovered her. It is rather unlikely that the two appellants, Ramzani and Ayub, would have left their meat shops in the market and gone to Ramzani's house at 10-15 A.M. unless the girl had called them there to listen to her tale of sorrow and distress. It is not established satisfactorily at all that the appellants made any attempt to take the girl out of lawful guardianship. It is also not proved that the girl was actually kept by any of the appellants at any place during the period for which she was missing and that she had not gone to one of her several relations. In these circumstances, I hold that the appellants are entitled to get the benefit of doubt.

15. In the result, I allow this appeal and set aside the convictions and sentences of the appellants who are on bail. They need not surrender. Their bail bonds are cancelled.

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