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Francis Hector Vs. Emperor

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Court : Allahabad

Decided On : Sep-28-1936

Reported in : AIR1937All182; 167Ind.Cas.676

Judge : Niamat Ullah, J.

Appellant : Francis Hector

Respondent : Emperor

Judgement :

Niamatullah, J.

1. This is an appeal by one Francis Hector, who has been convicted under Sections 376, 366-A, 368 and 363, I.P.C., by the learned Sessions Judge of Mirzapur. The girl concerned in the case is Mt. Atwaria, a Chamarin by caste. Her age, according to the prosecution, is less than 14, but that matter is highly controversial as will appear from the evidence to be discussed later on. For the rest the story for the prosecution is as follows:

2. Mt. Atwaria is the daughter of one Sarju by his 'sagai' wife, Mt. Gauri. She was born in Santhal Parganas, where her parents had migrated to earn their livelihood. They were residents of Mirzapur which they visited off and on. They lived in Muhalla Purana Line. Mt. Atwaria was married to one Jethu, who is the adopted son of Thakuri. The latter was in the service of a clergyman as motor driver.

Thakuri lived in his master's quarters in the Mission compound at Mirzapur. Sarju died over two years before the occurrence and Mt. Gauri, who was left to earn her own livelihood, went to Gondia in the Central Provinces with her daughter Atwaria and a son. A year before these proceedings began, Mt. Gauri brought her daughter to Mirzapur and left her with Jethu who was living with his adoptive father Thakuri. Mt. Gauri went back to Gondia, and was not apparently in touch with the affairs of her daughter. Thakuri was thrown out of employment and Mt. Atwaria was sent to his native village in the District of Jaunpur. She did not get on well with her husband's adoptive mother and sister. Thakuri brought her to Mirzapur, but Jethu did not care to allow his wife to live with him. The reason that he gives is that he had no accommodation for her. He took her to Purana Line; but as her mother was no longer there, he made her over to Bis Ram, who is her mother's maternal uncle or maternal cousin. Mt. Atwaria stayed with Bis Ram for only two days. The latter sent her away on the pretext, according to Mt. Atwaria, that he could not maintain her. He directed her to go to her 'nana' and 'nani' who lived in Mirzapur Khurd. The 'nana' was not her mother's own father, but one Earn Das, an uncle of some sort. Mt. Atwaria began to live with Earn Das but left him after a few days. She says that she did not get enough to eat at Earn Das's place, while Earn Das who has been examined for the defence, alleges that her character was bad and therefore he did not like her to live in his house. She then began to live in another muhalla called Ghaswali gali, in the house of Ghulam Dastgir, a contractor who was supervising the construction of a building. She was in receipt of wages at the rate of three annas a day. She slept at night in his house with his wife or daughter - at one place she mentions daughter and at another she refers to the woman as his wife. One Mt. Biranjia who lived at a little distance from the house of Ghulam Dastgir and was obviously known to Mt. Atwaria, persuaded her to live in her house. Atwaria continued work under the contractor, but lived with Mt. Biranjia. She once offered to introduce Mt. Atwaria to a man who would make her comfortable, but Atwaria indignantly refused the offer. Not long after words Mt. Atwaria fell ill and did not go to work.

3. When she got better, she went to the contractor's house to demand the arrears of her wages. The contractor was away and she was told by someone in the house that he would return in the evening when she should come for her wages.

Accordingly she went to the contractor in the evening, but did not find him even then. She was returning to Mt. Biranjia's place, and when she passed through a lane called Chiniahwan Inara, she noticed a car approaching her. She stepped aside, but to her surprise found that the car stopped and a man in the car, who subsequently proved to be Nisar, asked her as to -where she was going. She replied that she was going to her house. Thereupon he said that she had better go with him. She refused. Thereupon his companion who was subsequently found to be a man named Dr. Imtiza forcibly brought her into the car and gagged her. Nisar threatened to stab her with a knife. Nisar had also a gun with him. The car moved on and eventually brought her to Nisar's residence in Muhalla Sabri. Nisar occupied a set of rooms on the first floor of the gate and buildings adjoining thereto. She was taken upstairs, where she was detained for three months. It is said that she was kept in a small room which had a window, and the only exit used to be locked in the absence of Nisar and the doctor. Both of them are said to have committed rape on Mt. Atwaria. Not long after her arrival she met the present appellant Hector and Bishambhar Nath, who were friends of Nisar and used to visit his house frequently. One evening, while Nisar was downstairs, Hector came up and desired to have sexual intercourse with her. She resisted, but was overpowered by Hector, who threatened to stab her.

4. The threat was carried out so far as to cause an injury on her chest. According to her story, she was kept confined in the house to such an extent that she was not allowed to leave her room for the calls of nature. Arrangement was made in one of the corners of her room, where she could go to case herself. According to the case for the prosecution, she was allowed to go to a square room, which was occupied by Nisar and which adjoined the small room in which she was kept, but this liberty was given to her only in the presence of Nisar and others. One day, when Nisar was absent, she heard music playing with a procession which was passing along the road. She peeped through the window and saw her mother and Chhatri, a caste fellow of hers, sitting on the platform opposite the gate. Nisar also noticed her mother and Chhatri and dragged her away from the window saying that if they were found out they would both be arrested. Nisar became apprehensive, and he devised means of more effectively concealing Mt. Atwaria. Accordingly he clipped her hair and gave her male attire to put on. She was

removed at night to a house belonging to Bishambhar, known as Chakki Ghar, in a neigh, bouring 'muhalla.' She was lodged in a room occupied by Hector. It is said that Hector, whose father has a bungalow not far away from Bishambhar's place, had quarrelled with his father and was living in one of the rooms of Chakki Ghar, in which there was a flour mill from which the house derives its name. She remained there for about five days, during which Bishambhar also raped her. It was later considered desirable to transfer her to some other place. Accordingly she was taken by Hector on his bicycle to Muhalla Narghat. Nisar accompanied them ort another bicycle. They lodged her in the house of Nur Muhammad, where she lived for six days disguised as a boy. After that she was taken one night to the house of Karimullah Jarrah near Ghanta Ghar. She lived in Karimullah's house in the same disguise for five days. Thereafter she was brought by Nisar on an 'ekka' to his own house, where she lived for another seven days.

5. In the meantime her mother was in search of her daughter and the Arya Samajists had started an agitation against Nisar keeping Mt. Atwaria, a Hindis girl. Nisar and his companions then conspired to take her over to a person named Maqbul Husain, who resided in village Khamaria, half of which is in Benares State, the other half being part of British India. Accordingly she was put in an 'ekka' which was covered. Babu Khan, a servant of Nisar and Mt. Mariam, his mistress, were seated on either side of Mt. Atwaria. Nisar and Hector led the way on their bicycles and took the 'ekka' across the Ganges bridge to Khamaria. The 'ekka' stopped at a certain place where Mt. Atwaria was made to alight and thence walk to the house of Maqbul Husain. Babu and Mariam returned on the 'ekka' and so did Nisar and Hector on their bicycles. Maqbul Husain lodged Mt. Atwaria in a certain room. She expected that Nisar and Hector would return after sometime and when they did not, she enquired of Maqbul as to when the 'Saheb' (meaning Nisar) would return. Maqbul scolded her, saying that sha should not talk of the 'Saheb,' as she had been sold to him (Maqbul) and he would take her to the Punjab. She stayed in her new lodging during the night. Next morning, when Maqbul was leaving his house, she asked him as to where and how she would go to answer the call of nature. Maq-bul pointed out a window, through which she should go out. Maqbul left her, locking the outer door of his house. Mt. Atwaria found a suitable opportunity and left the house through the window. She concealed herself in a sugarcane field,

where she remained the whole day. Towards the evening she ran to Chaitganj Bazar, which is at a distance of one mile from Khamaria. There she noticed an 'ekka' standing near a shop. She went up to the 'ekka' driver and asked him to take her to Mirzapur. The 'ekka' driver demanded one rupee, and she agreed to pay it. In the meantime police constables Ram Sakal Singh and Ram Lakhan Singh noticed her movements and came to her. They put certain questions to her, but she refused to tell them anything about herself. They said they were police constables, but she demanded proof of that fact. They were in plain clothes, but had their uniforms with them. They showed them to her to convince her that they were police constables. When she was assured that they were police constables and not likely to betray her, she narrated her story from beginning to end. The police constables were going on their round. They lodged her in the house of a Bhujain and went away on their duty. They returned next morning and took her to the police station Chilh to which they were attached.

6. There she lodged a report, which is dated 11-11-1935, 8 a.m. In that report she charged nine persons with a number of offences. They were Nisar, Mt. Mariam, Babu Khan, Hector, Bishambhar and four others not named. One of the four, whose name is not mentioned, was doubtless Imtiza, who is referred to in the report as a doctor.' Her mother was sent for, and arrived by the evening. The two were sent to the Kotwali at Mirzapur, and the officer in charge of the Kotwali started the investigation. Hector was arrested on 14th November 1935. Bishambhar was also arrested. Nisar and Dr. Imtiza were not found and are said to be absconding; Maqbul Husain was also one of the accused and was not arrested. He is also said to be absconding. Babu and Mariam, though named as accused, were not proceeded against by the police. They were examined under Section 164, Criminal P.C., as witnesses. Thus the only two persons who were actually prosecuted were Hector and Bishambhar. In the Court of the committing Magistrate to-wards the conclusion of proceedings a pardon was tendered to Bishambhar, and Hector alone was committed to the Court of Session. Hector has been convicted of all the offences with which he was charged and sentenced to various terms-of imprisonment the longest being five years' rigorous imprisonment.

7. Hector, accused, has denied all the allegations against him, except so far that he has admitted having had illicit connexion with Mt. Atwaria. His case is that she was a woman of loose character, that she had been turned out by her husband and was earning her livelihood by working as a labourer and that she had illicit connexion with several persons, including Nisar and himself, whom she visited off and on.

8. There are two cardinal points in the case on which both sides have concentrated their efforts. According to the prosecution Mt. Atwaria is below 14 years of age and, at all events, less than 16; while according to the defence her age is about 18. The importance of her age lies, in the main, in the attempt on the part of the prosecution to establish the charge of rape. If she is less than 14, no question of her consent can arise. If her age is above 14 but less than 16, the charge of kidnapping from lawful guardianship will be made out in case she is found to have been taken out of the keeping of her lawful guardian. The second point, on which stress is laid by the prosecution is the use of force in her being taken to the house of Nisar and in detaining her thereafter. If this allegation is found to be proved, the question of age becomes comparatively immaterial. (His Lordship then examined the evidence of Mt. Atwaria and her mother regarding her age and found that no reliance could be placed on it. His Lordship then considered the medical evidence on the side of both the prosecution and defence and proceeded.) The learned Sessions Judge has discarded the evidence of Col. Mac Gilchrist and Major Quraishi on the ground that they are partial to the defence. It appears that Khan Bahadur Tasadduq Husain, the father of Nisar accused, was for sometime the Civil Surgeon of Mirzapur and in the course of his career as a medical man he got acquainted with Col. Mac Gilchrist, who admitted in his evidence that K.B. Tasadduq Husain had seen him sometime before he gave evidence in the case. The cross-examination was not pressed further and I find no justification for questioning the impartiality of a man in the position of Col. Mac Gilchrist. The learned Judge has also considered the evidence of Major Quraishi as based on the ground that Major Quraishi was not a stranger to the family of K.B. Tasadduq Husain.

9. I do not agree with the learned Sessions Judge even if it be the case that Major Quraishi is related to K.B. Tasadduq Husain. These witnesses gave their opinions and also the grounds on which they are based. Unless there is something in their evidence which creates a suspicion that they have misstated the grounds or have manifestly formed an untenable opinion, it will not be right to characterise their evidence as partial. It may be said generally that expert evidence produced by an interested party may have a certain amount of unconscious bias in favour of that party; but on a question like this it is easy for the Court to see that the difference of opinion between Col. Town-send on the one hand and Col. Mac Gilchrist and Major Quraishi on the other is purely of a scientific character. The Court has before it the ground upon which each expert bases his opinion, and it is for the Court to accept one opinion or the other, without characterising the opposite opinion as partial. I am bound to say that there is a good deal to be said in favour of the opinion expressed by Col. Mac Gilchrist and Major Quraishi. At the same time, the opinion expressed by Col. Townsend, who is also an expert of distinction, is based after a careful examination on scientific lines. He had an advantage which the other medical witnesses had not, viz., that he examined Mt. Atwaria's person. If the result of the case had rested entirely on the finding as regards the age of Mt. Atwaria, I would have held it to be so doubtful that the case for the prosecution must fall to the ground; but I am prepared to accept, for the purposes of this case, that Mt. Atwaria's age is between 14 and 16, as declared by Col. Townsend.

10. The more important question is whether Mt. Atwaria was forcibly carried to the house of Nisar, where she was detained against her will. (His Lordship examined the evidence of Mt. Atwaria on this point and proceeded.) Mt. Atwaria's evidence is not corroborated by the evidence of any other witnesses. It cannot be maintained that corroboration is not possible. The prosecution themselves secured the evidence of at least four persons whom they examined under Section 164, Criminal P.C. One of them was Narbada Prasad. His statement under Section 164 is on the record, and one can see at a glance why he was not examined at the trial. If he had stuck to his statement made under Section 164, Criminal P.C. his evidence would have shown that Mt. Atwaria lived in the house of Nisar as a regular mistress, that she used to come downstairs in a big enclosure behind the gate, in which there was a latrine and a public watertap, that she was frequently

seen by him in that enclosure when she went into the latrine and that he saw her in a bed in the varandah occupied by Nisar upstairs. There is no evidence to suggest that Narbada Prasad was in collusion with the accused. The investigating officer who gave evidence did not even allege that Narbada Prasad was in collusion and was not for that reason examined as a witness. This explanation was given to me in the course of arguments by the learned Government Pleader. This is however no explanation. It is only a bare assertion. Similarly Mt. Nanki, a sweeper woman, was examined under Section 164. She used to go into the house and clean it and frequently saw the girl sitting on a cot in the square room playing cards with Nisar and others. Both Narbada Prasad and Mt. Nanki said that she was in female attire having a clean 'dhoti' on. Babu Khan and his mistress Mariam, who always resided in the house and looked after Mt. Atwaria, were also examined under Section 164, and their statements also do not support the prosecution. I cannot treat these statements recorded under Section 164, Criminal P.C. as evidence in the case; but I am referring to them merely to show that there were witnesses who were in a position to give relevant evidence, but the prosecution deliberately withheld their evidence without establishing the slightest reason for the suggestion that they had been won over by the defence.

11. In these circumstances, the prosecution must face the inference arising from their conduct in withholding evidence. Their plain duty was to produce these witnesses; and it was for the Court to believe or disbelieve them. At any rate some foundation should have been laid for the suggestion that they were hostile. The mere fact that their evidence was expected to be inconsistent with that of Mt. Atwaria in some respects was no justification for refusing to examine them as witnesses. In this connexion the Sessions Judge showed a regrettable disregard of the provisions of Section 540, Criminal P.C. It is the duty of the trial Judge to examine all such witnesses as appear to be in a position to give important evidence. The learned Judge could have seen at a glance that some, if not all, of those examined under Section 164, Criminal P.C., were not under the influence of the defence and the wholesale charge of partiality was groundless. I would have had these witnesses examined even at this late stage, were it snot for the belief that their evidence would further weaken the evidence of Mt. Atwaria whom I disbelieve. (His Lordship then examined the evidence of the approver and the

other witnesses and holding that the prosecution story was not borne out by any reliable evidence, proceeded.) The last question is whether the accused can be considered to have committed any offence on the findings which I have arrived at, namely, that Mt. Atwaria willingly came to the house of Nisar and lived there and possibly at some other place but that the allegations of force and fraud are not true. The appellant has been convicted under Sections 376, 363, 366-A and 368, I.P.C., I proceed to consider each charge separately. If Mt. Atwaria had been below the age of 14, the appellant would have been guilty under Section 376, as he admits having had sexual intercourse with her. But, on the evidence of Col. Townsend and according to my finding, she was much above 14. He cannot, therefore, be held guilty under Section 376, having regard to my finding that she was a consenting party to the sexual intercourse with the appellant or anyone else of the group of persons whose names have been mentioned by her in that connexion.

12. Section 363, I.P.C., refers to kidnapping from lawful guardianship or from British India. Kidnapping from lawful guardianship is defined in Section 361 as taking or enticing a minor under 16 years of age, if a female, out of the keeping of the lawful guardian of such minor. Assuming that Mt. Atwaria was below 16 years of age, there was no taking out of the keeping of the lawful guardian, as she had no lawful guardian at the time when she came to the house of Nisar or when she lived in the room of Hector, appellant, assuming this part of the case for the prosecution to be true. She had been turned out by her husband and was free to go anywhere she liked. It was argued before me that she was in the 'constructive guardianship' of her husband. I do not think this contention can be upheld. Where a minor is living with a lawful guardian, but is taken or enticed away from a street or some other place of resort, the position is entirely different. The guardian retains the care and custody of the minor, even though the latter is not actually in the house. But, where the guardian abandons the care and custody of the minor and allows her to go anywhere she likes, she cannot be considered to be in his care or custody. The case in Emperor v. Ewaz Ali A.I.R. 1915 All. 390 is in point. So far as the allegation that she was kidnapped out of British India is concerned, the charge must fail in the; absence of a finding that Mt. Atwaria was conveyed to village Khamaria without her consent. I have already held that it has not been established

that she was not a consenting party to anything which Nisar or the appellant did. No question of want of consent of the person authorized to consent on her behalf can arise, as she was above 12 (Section 90, I.P.C).

13. Section 366-A, I.P.C., also does not apply as, assuming the age of Mt. Atwaria to be below 18, there is no reliable evidence that she was taken by the appellant from one place to another with the intention that she be seduced or forced to illicit intercourse with another person. On the own showing of the prosecution, she was taken from one place to another, assuming this part of the story to be true, with the intention of keeping her out of the way of her mother. Lastly, Section 368, I.P.C., pre-supposes that the offence of kidnapping or abduction has taken place, so that anyone wrongfully concealing or confining the person kidnapped or abducted is guilty of an offence under Section 368, I.P.C., On the above findings no offence of kidnapping or abduction has been made out. The charge under this section, therefore, fails. The result is that the appeal is allowed, the conviction and sentences passed by the lower Court are set aside and the appellant Francis Hector is acquitted. He need not surrender to his bail.

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