

Mt. Wasima and ors. Vs. Emperor

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Court : Allahabad

Decided On : Feb-14-1935

Reported in : AIR1935All566

Appellant : Mt. Wasima and ors.

Respondent : Emperor

Judgement :

Kendall, J.

1. The four appellants, Mt. Wasima, Juned, Shujat Ali and Hafiz Abdul Samad, have been convicted of offences as follows: Mt. Wasima under Section 366, Penal Code, and sentenced to three years' rigorous imprisonment, Juned under Section 368 and sentenced to five years' rigorous imprisonment, Shujat Ali under Section 419/109, and sentenced to 18 months' rigorous imprisonment and Abdul Samad under Section 420, Penal Code, and sentenced to five years' rigorous imprisonment and under Section 419, Penal Code, to two years' rigorous imprisonment. They have all appealed, and have been represented by counsel in this Court.

2. The story for the prosecution, a large part of which is admitted to be true, is that Mt. Badarul Nissa came with her widowed mother, Mt. Miraim, some time after 1920 to the village of Bamhaur where the mother married Najib Khan. About 1930 when Mt. Badarul Nissa was about 12 years of age, one of the residents of the

village, Siddiq, wished to marry his son Haidar to her, and according to the story for the prosecution, but not for the defence, a nika ceremony was performed. The girl continued to live after it with, her mother, but in November 1932, she was forcibly taken away to the house of Siddiq and Haidar, and she lived there under some constraint at any rate for about a year. At the end of this time the incidents occurred which led to the institution of the present proceedings. It is the case for the prosecution that Mt. Wasima, appellant 1, enticed Mt. Badarul Nissa away from the house of Siddiq and Haidar, and took her to the house of Juned, appellant 2, which is adjacent to Siddiq's. There she stayed for about nine days, and then Wasima again took her out, and they met Juned with, the fourth appellant, Hafiz Abdul Samad. She was taken across the river where they were joined by Shujat Ali, appellant 3. The party then went to Azamgarh railway station where Shujat left then, and the others went on to Saraimir station and so on to the house of Abdul Samad, in Sikraur, where the girl stayed for three months, while arrangements were being made for her marriage to Aziz of Mubarakpur. In the course of these proceedings it is said a sum of Rs. 125 was paid to Abdul Samad on behalf of the bride groom. It is the case for the prosecution that this was the price of the girl. About ten days after this marriage the Sub-Inspector of Police, who was making enquiries about the abduction of a totally different girl, found that Mt. Badarul Nissa was in Aziz's house and learnt from her that she came from Bamhaur and on inquiry he unravelled the story which is now made the case for the prosecution against the four appellants.

3. It should be remarked that no report appears to have been made by Siddiq or Haidar about the disappearance of the girl from their house, nor do they appear to have complained to anyone about it, until the Sub-Inspector of Police found the girl and brought her back four months later. The learned Sessions Judge has accepted the story for the prosecution. He has found that the nika or marriage between Haidar and Mt. Badarul Nissa has been proved at any rate sufficiently for the purposes of the present case, and that if there was anything irregular in the ceremony, it has been cured by the conduct of the girl in living in Haidar's house as his wife after she had attained the age of 15 years. He has also found it proved that Mt. Wasima enticed the girl away in the manner stated on behalf of the prosecution, and that the rest of the events followed very much as they are

described above. The defence is that there was no marriage between Haidar and Mt. Badarul Nissa, that Mt. Badarul Nissa was forcibly taken to Haidar's house, that she escaped of her own accord and went back to her mother's house, that her mother was all along with her in the arrangements about the marriage with Aziz, and that the money paid to Abdul Samad by the bridegroom was merely to help Mt. Miriam with the expenses of the wedding.

4. So far as the facts of the case are concerned, it must be stated that Mt. Badarul Nissa has testified to the fact that Mt. Wasima did entice her away, and she has also stated that her first marriage with Haidar actually took place. She has further stated that she agreed to the second marriage with Aziz. Her mother gave evidence for the defence and entirely supports the story for the defence, and she also admits having received the money which was paid by the bridegroom. It is clear moreover that Mt. Miriam has always refused to recognize the alleged marriage with Haidar in 1930 and complained to the police in 1932 when the girl was forcibly taken from her house though she afterwards had to acquiesce in the accomplished fact.

5. The story for the prosecution must clearly fall to the ground if it is found that no marriage with Haidar took place. According to the defence, there was no ceremony at all, but if there was a ceremony, it did not amount to a legal marriage. In order that a marriage may be legally celebrated under the Mahomedan law, it is necessary that the contract should be witnessed by two adult witnesses. The prosecution tried to prove that the ceremony took place, but of the witnesses to the marriage, one was not summoned and the other denied that it took place. The Kazi who was alleged to have officiated was also summoned as a witness but he did not remember anything about it, and had no record of it in writing. The only evidence of any ceremony having taken place at all is that of the interested parties, Siddiq, Haidar and Siddiq's brother, Osman. It is true that the girl herself said that there was such a ceremony, but she was only 12 years old at the time and probably did not understand much about it. It was certainly for the prosecution in a criminal case to prove that there was a marriage, because if there was no marriage, Haidar had no authority whatever over Mt. Badarul Nissa, and she could not be said to be in his lawful custody. The most important point that has been

made against this marriage by the defence is, that nobody consented to it on behalf of the bride. The bride was undoubtedly minor, being only 12 years old. She had a brother living who was her natural guardian for purposes of marriage, and he was not disqualified in any way and it has not been proved that he was disqualified by age from being her guardian and the person who is alleged to have given his consent on her behalf is her uncle, Hawaldar, who gave evidence which certainly does not amount to clear proof that he consented. What he said was that while Haji Najib went to him and informed him that there was a talk of marriage of Mt. Bunia (Mt. Badarul Nissa):

He asked me to come along with him, but I said that he was to find out a suitable match Hind marry Mt. Bunia... He had given out the name of the person with whom the marriage had been settled, but I do not remember it.

6. It appears therefore that even if Hawaldar was the legal guardian of the girl for purposes of marriage, he did not in terms give his consent to this particular marriage, and a contract of marriage must be at least as definite as any other contract. The learned Judge was evidently of opinion that there was something irregular in this nika ceremony, but he held that:

the invalidity was removed when Mt. Badarul Nissa ratified the marriage by living with Haidar after she had attained the age of 15 years before she was kidnapped.

7. But the fact is that Badarul Nissa was forcibly taken from her mother's house by Haidar and Siddiq and was kept there under some restraint for about a year. She may have been persuaded that there had been a legal ceremony of nika, and she may have been persuaded to allow the alleged marriage to be consummated, but it would be hard to believe that these circumstances are sufficient to show that she ratified the marriage by living with Haidar and when she disappeared Haidar himself suspected that her mother must be concealing her as she had been brought forcibly. This admission was made by him in the course of his statement in the committing Magistrate's Court, and he further admitted that after her disappearance he made no complaint and did not ask the police to restore 'his wife' to him.

8. Now, if there was no legal marriage and I am certainly of opinion that although some ceremony may have taken place, a binding and legal marriage has not been proved it follows that Haider was not the lawful guardian of Mt. Badarul Nissa, and that Mt. Wasima was not committing any offence if she really did entice her away. Even this part of the case however is very unsatisfactory, because the evidence against Mt. Wasima is solely that of Mt. Badarul Nissa herself, and she, if the prosecution story is true and if she believed that she was married, was conniving with Mt. Wasima in an act of bigamy, so that her statement against the appellant must be held to be that of an accomplice and it is open to grave suspicion. If there was no marriage and no enticement from her lawful guardian, none of the other appellants committed any offence at all under Section 366 or 368, Penal Code. As regards the charges under Section 419, Abdul Samad has been convicted of cheating by personation because he pretended to Rafiq and Aziz that he was the ; brother-in-law of Abdulla, the father of Mt. Badarul Nissa, in order to explain the interest that he was taking in this; marriage of the girl to Aziz Abdul' Samad maintains that this relationship is correct, and he is supported in this by the mother of the girl, and no 'evidence has been brought to show that the statement is untrue. The Judge-however very light-heartedly convicted' Abdul Samad and sentenced him to two years' rigorous imprisonment for cheating by personation without having: any evidence or recording any finding; that there was any cheating or any false personation. Equally unjustified was the conviction of Shujat, against whom it was only alleged that, after the girl had been recovered by the police and brought home, he made a false statement that he was her cousin in order to support Abdul Samad's statement that he was related to the girl. Even if Shujat's statement about being a cousin was false, it was made long after the offence alleged by the prosecution to have been committed by Abdul Samad, and it was clearly not made in furtherance of a design to cause Rafiq or Aziz to pay money to Abdul Samad. The money paid to Abdul Samad, according to Mt. Miriam., was paid over to her for the expenses of his marriage between Badarul Nissa. and Aziz, which undoubtedly did take place, so that the charge under Section 420' also falls to the ground.

9. For these reasons I accept all the appeals, set aside the orders of conviction and sentences passed by the learned Sessions Judge against the appellants, and

direct that they be acquitted, and as they are on bail their sureties-may be released.

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