

Biseswar Misra Vs. the King

Biseswar Misra Vs. the King

SooperKanoon Citation : sooperkanoon.com/524124

Court : Orissa

Decided On : Dec-17-1948

Reported in : 1949CriLJ650

Judge : Jagannadhadas and ; Panigrahi, JJ.

Appellant : Biseswar Misra

Respondent : The King

Judgement :

Jagannadhadas, J.

1.The accused in this case who is the appellant before ua has been convicted of an offence under Section 366, Penal Code, and has been sentenced to 4 years rigorous imprisonment and a fine of Es. be O and in default to another six months rigorous imprisonment. The case against him is that he kidnapped a minor girl, Asli by name who was below 16 in age and who is the married wife of one Gulthu Singh with the in-tantion of seducing her for sexual intercourse. The prosecution case is as follows:

2. Asli, P. w. 13, is the married wife of one Gulthu Singh, p. w. I. She is below 16 years of age and was living with her husband at a place called Dhandatopa, There was a quarrel between them on a certain Friday, 17th January 1947 and as a result of that quarrel the girl left her husband's house on the morning of the next

day 18th January 1947, when her husband was away from the house'.having gone to his work. He found her missing when he returned back to his house at 12 noon. The girl herself boarded the service Bus operating between Athmallick Garh, and Beinda. She boarded the Bus that morning at a place called Similia near to her place of residence, Dhandatopa. It may be mentioned for clearer understanding of facts that this service Bus, as has been explained to us at the Bar, starts in the morning at Athmallick Garh, passes Via Dhandatopa and a place called Thakurgarh and goes to Beinda, and returns back from Beinda to Athmallick Garh by the same route at about evening time, The girl left her husband's house with a few belongings with the idea of seeking temporary shelter with her uncle at a place called Gurujang which is said to be about 12 miles from the bus terminus at Beinda. She reached Beinda terminus, but did not get down there. The accused is the conductor of the Bus who was in charge of the Bus for the to and fro journey on that date. When the girl did not get down at the Bus terminus, the accused is said to have got into touch with her and found out that she had come away on account of a quarrel with her husband and with a view to go to her uncle's place 12 miles away. He is said to have suggested to her that the uncle's place was far away and that it was difficult for her to reach that place and that she might return back by the same Bus and go back to her husband's place at Dhandatopa or to the place of her brother, in-law at Athmallick Garh, The girl fell in with the idea and came back with the return journey of the Bus, At Thakurgarh, the A. 8.1, of Police, P. W. who was also a relation of her husband, P. W. 1, and who had received information by phone from P. W. 1 that his wife was missing saw her and told her that her husband was anxiously searching for her and that she should go back to her husband's place and instructed the accused who was the Bus conductor to get her down at her husband's place, Dhandatopa. It is said that at Dhandatopa the bus was about to be stopped by the Bus driver, P. W. 11, but the accused told the driver not to stop but to drive away telling the driver that the girl would go to her mother at Athmallick Garh. It may be mentioned that her mother was living at Athmallick, but it is said that this mother had left the girl even when she was a small child of about three years and was living not a respectable life at Athmallick and it is also said that during her childhood the girl was actually brought up by her brother-in-law, P. W. 3, who was a Havildar in service at Athmallick and who had

also got the girl married to P. W. 1. When the Bus reached at Athmallick Bus terminus, which is near a Hotel, it is said that the girl was thinking of getting down in order to come away to her brother-in-law's place. But the accused suggested that if she came up to the Bus garage, he would arrange to escort her to her brother-in-law's house. It is further said that the girl accordingly went up to the garage in the Bus and alighted there and the accused is said to have suggested to her there that she might go to his house which is near-by and stay there so that he might meanwhile explain her situation to her brother-in-law and take her to him so that she may not be scolded by the brother-in-law for having run away from her husband's house. The accused is said to have asked the cleaner of the Bus, F. W. 12, to take her to his house and he himself also accompanied them. The girl was thus taken to the house of the accused on the evening of the 18th. She was kept there until about 20th evening when she was taken from his house by her husband, p. w. 1, on a search warrant, Ex. i, issued by the local Magistrate on the application of the husband. It is also a part of the prosecution case that during the stay of the girl in the accused's house from the evening of the 18th to the evening of 20th, he made an attempt on the night of the 19th to seduce the girl by immoral overtures, but that the girl did not agree. It may be mentioned at the outset that the accused was also charged under Section 343, Penal Code, for wrongful confinement for three days or more, but he has been acquitted on that charge. With reference to the charge under Section 366, the prosecution case as above set out, has been spoken to in full by the girl herself as P. w. 13 and has been fully supported by various witnesses at every stage, (His Lordship reviewed the evidence and continued:) On this evidence which there is no reason to doubt, the guilt of the accused appears to be reasonably clear. The learned Counsel for the appellant has, however, urged a number of arguments to the effect that even accepting this evidence, the accused cannot be found to be guilty under Section 363 or Section 366, Penal Code. Before noticing these arguments, it would be convenient to dispose of two other preliminary matters.

3. - In the Courts below, some argument was raised that the girl was not the lawfully married wife of P. W. 1 and that, therefore, he was not her legal guardian. The Court below has found on the evidence that she was the married wife of p. w. 1 and this is supported by the evidence of p. w. 1, the husband, p. W. 3, the

brother-in-law and p. w, i, the father of the girl and this point has not been pressed before us. The other question that has been raised is about the age of the girl. It is said that there is no clear and definite evidence of the girl below 16 years of age. The birth certificate, Ex. 2, has been produced and the entry, ex, 2A, has been marked therein and is spoken to by p. w. 14, but it is urged that this birth certificate is not evidence of the age of the girl since there is no evidence connecting the entry therein with this particular girl. This no doubt is so. The birth certificate does not prove itself and is no proof of age of any particular person unless the person connected with that entry either by making the entry or giving information comes forward and speaks to the entry and connects the entry with the individual concerned. There ia, however, ample other evidence in the case about the age of the girl. (Reviewing the evidence in this respect, his Lordship continued ;)

4. Coming to the main arguments addressed in the case, the two questions that are urged on behalf of the appellant, are (1) that on the evidence in the case, the girl could not be said to be in the keeping of her guardian, the husband, till the time when the offence is said to have been committed, and (2) in any case the accused cannot be said to have done anything which amounts to his taking or enticing the girl away from that keeping within the meaning of Section 361, Penal Code. It is argued that admittedly the girl had run away from her husband's house and with the intention, according to her own evidence, of staying with some other relation like the uncle at Gurujang. It is, therefore, said that She cannot be said to be in the keeping of her husband at the time when she was found by the accused in the bus. The question as to whether a minor who at the time of the alleged kidnapping is physically away from the house of the guardian ceases to be in the keeping of the guardian has been discussed in quite a number of cases. It has been pointed out that the word 'keeping' is a term of wider import than the word 'possession' and it has been laid down that 'keeping connotes not the mere physical custody of the guardian, but a fact which is compatible with the independence of action of the object kept.' It has been laid down further that it implies neither prevention nor detention, but rather maintenance, protection and control manifested not by continual action, but as available on necessity arising: *Emperor v. Jetha Nathoo*, 1 Cr. L. J. 931 : (6 be m. L. Rule 785). Accordingly a minor who is temporarily away from the house of her guardian does not cease to be in the keeping of the

guardian, and it has been held that a married girl under 16 years of age who leaves her husband's house of her own accord and is proceeding to the house of her maternal uncle does not cease to be in the keeping of her lawful guardian and that a person who induces her at the time to go with him is guilty of kidnapping: vide *Karam Singh v. Emperor*, 17 Cr. L. J. 632 : (A.I.R. (3) 1916 ALL. 272). The minor does not cease to be in the keeping of the guardian unless the guardian himself abandons the minor or the minor having attained years of discretion voluntarily and definitely abandons the protection of the guardian. In *Pandya Bam Sastrulu v. Emperor*, 19 Or. L. J. 598 : (16 I. O. 166 Mad.) and in *Francis Hector v. Emperor* A.I.R. (24) 1937 all. 182 : (38 Or. L. J. 401), the guardian had abandoned the minor and had turned her out and it was held that the minor ceased to be in the keeping of the guardian. Cases also recognise that there may be circumstances in which the minor herself may be said to have voluntarily abandoned the keeping of the guardian. See, *Queen v. Gander Singh*, 4 W. E. Cr. 6; *Jagannatha Rao v. Kamaraju*, 24 Mad. 284 : (10 M. L. J. 405); *Emperor v. Bamchander*, 15 Cr. L. J. 265 : (A.I.R. (1) 1914 ALL. 376); *Ottapurakkal Tha-zath Suppi v. Koyannakoya Kunhihoya*, 27 I. O. 131 : (A.I.R. (3) 1916 Mad. 446); *Emperor v. Abdur Bahman*, 38 all. 664 : (A. I. a. (3) 1916 all. 210: 17 Cr. L. J. 498); *Lachhi Bam v. Emperor*, a. i. b. (10) 1923 Lab.. 330 : (24 Cr. L. J. 564). All these cases recognise that the minor of her own accord may leave the keeping of the guardian but such inference is not to be ordinarily drawn unless evidence quite clearly establishes that the minor had formed a definite intention and had abandoned the protection of the guardian either permanently or for a substantial temporary period by setting up her own independent life or seeking and obtaining protection in the de facto guardianship of some other person. In the present case, on the evidence of the girl, she had started from her husband's house on the 18th morning with a view to go to her uncle's house at Gurujang and she had left the husband's house only with a few belongings, snga but not with her entire articles. She also says that when she left her husband's house, she left temporarily on account of her anger and that she did not intend to leave it for good. This evidence of her is substantiated by the fact that though she started to go to Gurujang, she very readily gave up the idea at the suggestion of the accused. It would also appear from the evidence of P. W. 8, A. S. I. that when he advised her at Thakurgarh to

return back to her husband, she readily agreed to do so. It is therefore dear that the girl, p. w. 13 had formed no definite intention of abandoning the protection of her husband and that at the most she can be said to have been in a hesitant and uncertain mood and not to have made up her mind about anything, but only to have run away from the husband's house out of anger and a sense of ill-treatment. It would no doubt appear that when she was ultimately recovered from the house of the accused, she preferred to go to the house of the brother-in-law, p. w. 3, and not to the house of the accused. According to the evidence of the husband, P. w. 1, she had been remaining with the brother-in-law, p. w. 3, from that time until the date of the trial of the case, but according to her own evidence she had gone back to her husband and stayed there for 15 days and come again to the brother-in-law's house for the case. This was pointed out on behalf of the accused to show that this evidence indicates that she had definitely given up the protection and guardianship of her husband and had sought the protection of her brother-in-law at a later date and that in between she was not in the keeping of any guardian. This, however, cannot be maintained in the face of her specific evidence that she intended to leave her husband only temporarily and that she did not give up the idea of going back to her husband. Her seeking protection with a near relation, either the uncle at Gurujanga or the brother-in-law at Athmallick, is not at all inconsistent with the continuity of her being in the keeping of the guardianship of her husband, p. w. 1. We have, therefore, no doubt that in spite of the fact that she voluntarily came out of her husband's house, she continued to be in the keeping of her husband all along and that the keeping has not been terminated by any definite and formed intention on her part to abandon the husband's protection.

5. The next question that is argued is that there is no act or conduct on the part of the accused which amounts to his taking the girl from the keeping of her husband or his enticing the girl to leave the husband's keeping. It is urged that all that appears is that the girl herself has voluntarily gone to the house of the accused and that he did nothing more - than offering his advice in the situation and permitting her to stay with him and that such mere passive conduct on his part cannot amount to either taking or enticing. We are quite clear, however, that this cannot be maintained. While no doubt it is true that mere passive consent on the part of a person in giving shelter to the minor does not amount to taking or enticing

of the minor, the facts of the case go far beyond that. The accused gets into touch with the girl at Beinda and offers her the suggestion that she need not go to Gurujang, but might return back on the bus either to her husband's house or to her brother-in-law's house at Athmaliek. Even assuming that this portion of the conduct might be in the nature of advice and not any active inducing, his subsequent conduct cannot be construed in that light. At Thakurgarh, he was asked by the A. S. I., p. W. 8, to leave her with her husband at Dhandatopa, and it is in evidence of P, w. 8 as already stated that the girl had agreed to get down at Dhandatopa. He, however, would not allow the bus to be stopped there, but asked the driver to proceed without stopping and telling him that nobody was going to get down- at that place. His explanation in his statement before the Court is that when the A. S. I. asked him to drop the girl at Dhandatopa, he replied that the girl herself wanted to go to Athmalick to her mother and that he being a conductor cannot drop the passenger wherever he wants to do so. That any such reply was given to p. w. 8 is not suggested to him in his cross-examination and is obviously an untenable and idle explanation because it is admitted that the girl was going on the return journey without paying any fare and there is no meaning in the conductor saying that he could not get her down at Dhandatopa. The girl herself says in her evidence that she would have got down at Dhandatopa and gone directly to her husband's house and felt sorry that the bus did not stop at Dhandatopa. All that can be said is that she did not assert herself and insist on getting down at Dhandatopa. But it is quite consistent with her obvious hesitant and uncertain mood that when the accused managed to get the bus driven away she submitted herself to it. There can be no doubt that the accused was directly responsible for her being taken in the bus on the return journey beyond Dhandatopa. The conduct of the accused, however, at Athmalick itself is much more definite and clear. When the bus reaches the terminus at Athmalick, the witness, p. W. 9 meets them and it is in his evidence that he suggested that she should be sent away to her mother's house or to her brother-in-law's house. But as already stated, it appears from the evidence of p. w. 12 that it was at the bidding of the accused that the girl was taken to his house. The defence of the accused is that it was the desire of the girl that she should go to her mother's house and that he took her to his house in order to send her away to her mother, but that the mother herself

asked him to keep her for some time until she can make arrangements for taking her in. Her mother was working as maid-servant in a house near-by and she has come forward to give evidence on behalf of the accused as P. W, 2. A perusal of her evidence leaves no doubt in one's mind that her evidence is totally false. Admittedly, she had left the girl while she was very young and it is much more likely that the girl would have wished as she says to go to her brother-in-law's place and not to her mother's place who was working as a maid-servant in some other house, The most telling evidence against the accused, however, is his conduct during the girl's stay in his house from the evening of the 13th to the evening of 20th, The evidence of the girl is to the effect that on the 18th evening she felt' disconsolate when she was taken to the house of the accused, but that the accused consoled her in that night not to worry and that he would explain matters to her brother-in-law the next morning, and that she might then go. When asked next morning, the accused, according to her, stated that it was bus time for him and that he would see to it after he had returned. When reminded about this again in the evening, he said that he felt tired and would see to it the next morning and she also says that he said to her at the time 'Your husband has come to Garh, so if you get out, you may be beaten.' This evidence, if believed, makes it clear that the accused was evading the girl with some lame excuse in order to keep her in his house for some time. The accused totally denies all these and his only explanation is that he kept the girl at his house at the request of the mother. But as already pointed out above, that Story appears to be clearly false and it would follow, therefore, that the conduct of the accused in putting off the girl from time to time makes it reasonably clear that he had intentionally managed to bring this young girl into his house with some ulterior object which he must have conceived either at the time of her departure from her home or in the course of the return journey of the Bus, as appears from the evidence. Taking therefore the attitude of the accused as evidenced by what all he did from the time when he made the suggestion to the girl not to go to Gurujang till the time when the girl was recovered by the Police, there can be no reasonable doubt that his part was not that of passively giving shelter to a girl voluntarily seeking asylum with him, but it was one of actively bringing about her stay in the house by playing upon her weak and hesitating mind and there can be no doubt that this amounts to his taking the girl within the meaning of 8. 361, Penal

Code. It is argued by the learned Counsel for the appellant that kidnapping is not a continuing offence and that it must have occurred at some definite place and that if no definite place could be pointed as the place where-from the girl is said to have been taken, the accused must be given the benefit of doubt. It has also been pointed out to us that the charge in this case is vague inasmuch as it says that 'the kidnapping was at Beinda, Nizgarh or at Be to or at any of these places.' The question whether kidnapping is a continuing offence or not is beside the point. It cannot, however, be maintained that taking which is requisite to kidnapping must be constituted by a single act. A whole series of acts might together constitute the process of taking and when actually the taking is complete and in that sense kidnapping has been committed is a question of fact. The case in *Nanhak Sao v. Emperor*, 5 Pat. 586 : (a. l. B. (13) 1926 Pat. 493: 27 Or. L. J. 792), may be referred to in support of this and it appears to us that it is unnecessary to specify when the taking started and where it was completed provided we are satisfied that on the evidence in this case there has been taking of the girl by the accused from the keeping of her guardian the husband and on that we feel absolutely no doubt and we do not see anything wrong in the form of the charge and in any case no prejudice to the accused has been made out as a result of the alleged defect in it. It follows therefore that the offence of kidnapping has been fully brought home to the accused on the facts and the evidence in this case. The further question is whether the accused is guilty under Section 363 or Section 366, Penal Code. The girl as P. w. 13 gives evidence that on the night of the 19th which was a Sunday, the accused came to her side while she was sleeping and laid his hand on her body at which she got up and protested and threw away his hands and that the accused is said to have said 'Why do you throw my hands, you can live with me here as my wife.' This, if believed, clearly makes out that the accused had the intention required under Section 366. It is argued that the uncorroborated testimony of the girl in a case like this is not to be accepted and that in any case this cannot prove that the accused had this intention at the time when he brought her to the house. There is no reason, however, not to accept the evidence of the girl who has impressed the learned Sessions Judge by her frank demeanour and straightforwardness in the case. It is argued that since admittedly this girl and the accused's wife were all sleeping together in one single room, the alleged incident

was absolutely unlikely. It may equally be pointed out that if what the girl says in this respect is false, the accused might have examined his wife as his defence witness to deny the same. The evasive conduct of the accused during the two days of the girl's stay in his house as spoken to by the girl and the fact that the accused is himself a young man makes it reasonably clear that what happened that night was not the result of sudden impulse at the time, but that the kidnapping itself was with the intention and object of obtaining a chance for immoral overtures to the girl. We are therefore satisfied that the accused is guilty under Section 366, Penal Code.

6. As regards the sentence in the case, the lower Court has sentenced the accused to rigorous imprisonment of four years and to a fine of Bs. 500. It is argued that the sentence is unduly severe. We are prepared to agree that this is so. While no doubt we have held that as a matter of law, the girl continued to be in the keeping of the husband and that as a fact the girl was below the age of 16 years, the fact that the girl was actually at the time a runaway and that her age was on; the borderline, are circumstances which might legitimately be considered with reference to the appropriateness of the sentence. We consider that the sentence of one year's rigorous imprisonment will be adequate in the circumstances of the case. The result will be that the conviction of the accused under Section 366, Penal Code is confirmed, but the sentence is reduced to one year's rigorous imprisonment. The sentence of fine with the imprisonment in default will stand. With the above modification the appeal is dismissed.

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