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Lakshmidhar Misra Vs. State

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Court : Orissa

Decided On : Aug-01-1956

Reported in : AIR1957Ori29; 22(1956)CLT438; 1957CriLJ213

Judge : Narasimham, C.J. and ;Balakrishna Rao, J.

Acts : Indian Penal Code (IPC), 1860 - Sections 361, 363 and 366

Appeal No. : Criminal Revn. No. 344 of 1955

Appellant : Lakshmidhar Misra

Respondent : State

Advocate for Def. : Govt. Adv.

Advocate for Pet/Ap. : H. Mohapatra, Adv.

Disposition : Revision dismissed

Judgement :

Balakrishna Rao, J.

1. The petitioner Lakshmidhar Misra, a Brahmin, was convicted for an offence punishable under Section 366 of the Indian Penal Code for having kidnapped and abducted one Kanchan, a Pana minor girl, with the intention that she may be compelled to marry against her will, and was sentenced to 3 years' rigorous

imprisonment by the Assistant Sessions Judge of Keonjhar and on appeal, the said conviction and sentence were confirmed by the Additional Sessions Judge, Mayurbhanj.

2. The charge framed against the petitioner is to the effect

'that he on the 25th day of February, 1952 at Ghatgan kidnapped Budhi alias Kanchan a minor girl with intent that she may be compelled to marry against her will or in the alternative that he on the. same day abducted Budhi alias Kanchan a woman with intent that she may be compelled to marry against her will,'

Both the Courts found the accused guilty of kidnapping as well as abducting Kanchan with the intention that she may be compelled to marry against her will.

3. The prosecution case was that the petitioneron the pretext of marrying induced Kanchan (P. W.15); the unmarried daughter of one Dhania Patra (P.W. 5) to leave her father's protection at Ghatgan andtook her with him to Anandapur, then to his villageBalibaruan, then to Nuaragadi where he made herover to one Jogendra Panda (P. W. 1) on receipt ofconsideration of Rs. 450/-, but that the girl refusedto marry the said Jogendra whereupon the petitionermanaged to take her away with the ornaments givenby the said Jogendra, and thus committed the offencescharged against him. The accused denied the entirestory and alleged that he did not know either the girlor P. W. 1.

4. P. W. 15, the girl Kanchan, gave evidence on 7th January 1954, that she was the youngest daughter of her parents and that she attained puberty ayear ago. She also stated that she knew the accused who used to go to the house of Gangadhar of hervillage where she came to know of him; that he proposed that he would marry her whereupon she asked him as to how that could be possible as he was a Brahmin and she, a Patra girl (Pana girl).

The petitioner told her that he was determined to marry her and she agreed to his proposal. She also stated that Lakshmidhar brought her to Anandapur by bus from Ghatgan; that she left her house without the knowledge of her parents; that neither of them took the permission of her parents; that they spent the night at Anandapur

and the next day Lakshmidhar took her to his village Balibaruan on foot; that they stayed there for 2 or 3 days when Lakshmidhar took her by train to some place, the name of which she did not know; that afterwards they came to Nuaragudi and stayed there for 6 or 7 days in the house of Ram Mallik; and that there he told her that he wanted to take her to his Mausi's house in the Mahantipara village.

She also stated that one evening some people with a palanquin came there and the petitioner asked her to be ready to start. When she asked him why a palanquin had been brought, ho told her that it would not look well if she went on foot and at midnight she was made to sit in the palanquin and after going over some distance she searched for Lakshmidhar but was told that he remained behind. She was brought to and kept in the house of Jogendra Panda, where not finding the petitioner she became restless and was weeping whereupon Jogendra told her that he had purchased her to marry by paying consideration to Lakshmidhar.

She expressed her determination not to many and told him that she knew nothing about the transaction. Then Jogendra sent for Lagshmidhar and on the night of Pana Sankranti they two slipped away from the house of Jogendra and were detected in the midway near Inchol village and brought to Anandapur Police Station, where she was examined by the Police.

In cross-examination she stated that her father was absent from her village when she left home with Lakshmidhar and that she told her mother that she would be going to her Bhinei's house (sister's husband) as also to Gangadhar. P. W. 4 Gangadhar Sahu gave evidence that the petitioner was the son of a sister of his mother-in-law and was usually coming to his place at times and stayed with him for a day or two when he came. Kanchan was a Pana and was unmarried, and was coming to his place as neighbour.

He also stated that on 4-1-54 the age of Kanchan, according to him, would be about 19 or 20. P. W. 5, Dhania Patra, the father of Kanchan deposed that she was his youngest daughter and was born in 1936. He was not in the village on the day the girl left the place and coming to know of her leaving, he made a station-diary at Ghatgan Police-station. He stated that the petitioner used to come to their village and stay in Gangadhar's house and both the accused and the girl did not

take his or his wife's permission when he took away his daughter and that she attained puberty 2 or 2 1/2 years ago.

P. W. 9 Baikuntha Nath Mohapatra stated that he knew the petitioner who used to come to Ghatgan at times and would be staying with his Bhinei Gangadhar and that he also knew the girl Kanchan. He also stated that at 3 P. M. one day in Chaitra year before last while he was coming to Ghatgan, he saw Kanchan and the petitioner sitting together near the tank known as Asurbandh which was a mile off towards Anandapur from Ghatgan and that the girl told him that she was going for her Bhinei's house.

P. W. 1 is Jogendra Panda who stated that he had been to Rubidi and saw the petitioner there in the house of Ram Mallik and that a day previous to that, Ram Mallik had come to his house and told him that a Brahmin bride was staying in his house and if he (Jogendra) could pay her father Rs. 700/- to get the bride, he would do so. He went to Ram Mallik's house and found the petitioner who gave out his name to be Lakshmidhar Padhi and introduced himself to be the brother of the girl.

Ho gave out that he belonged to Sukinda and his father was Bhagaban Padhi, and that as they had become poor, they had to sell their girl. He demand-pd Rs. 700/-, but ultimately it was settled at Rs. 450/-. He decided to marry the girl after paying the accused whom he believed to be her brother, Rs. 450/-. He arranged money and with some villagers and a palanquin came to Ram Mallik's house and paid the amount of Rs. 450/- to the petitioner. The girl was brought to him and he brought her to his house.

The petitioner did not follow him and the girl became restive in his house and expressed her dislike to marry him. He sent for Ram Mallik and told him whereupon Ram Mallik said that he would bring the Petitioner to his house soon. He gave the girl some ornaments and the next day at night the petitioner and the girl slipped away from his house.

5. The girl was examined twice by lady Doctors. Ext. 2 is a certificate by Dr. S. Parija, Lady Assistant Surgeon in which she opined that the age of the girl was

approximately below 17 years but above 15 years, and that she had 28 teeth, breasts developed, exillary & pubic hairs sparse & general body build good. Ext. 5 is by Dr. E. Mohanty, Lady Assistant Surgeon, Keonjhar who examined the girl on 6-1-54. According to her opinion, the age of the girl was about 17 years.

The girl was physically well developed, had 28 teeth but there was space behind the second molar tooth, breasts were well developed, pubic and axillary hairs were thick and dark. The learned Assistant Sessions Judge who examined Kanchan on 7th day of January, 1954, noted her age in the deposition in his own hand as 19 years, but also noted that the assessors said that she would be aged 17. The Hatchita Ext. 3 shows that a daughter was born to Dhania Patra (P. W. 5) of Ghatgan on 30-3-36. The petitioner was also prosecuted under Section 420, Indian Penal Code for cheating but he was acquitted of that charge,

6. Mr. H. Mohapatra, the learned counsel for the petitioner contends that the charge, as framed against the petitioner, was not made out and consequently the conviction ought to be set aside. He contends that there was absolutely no evidence that Kanchan was kidnapped or abducted with the intention of compelling her to marry, against her will: He also contends that Kanchan was not below 18 years of age at the time she left the house and that there was no taking or enticing by the petitioner from lawful guardianship and consequently the petitioner cannot be held to be guilty of kidnapping the minor girl. Both the lower Courts on the evidence stated above held that Kanchan was below 18 years and I agree withthe same.

7. According to the learned counsel's contention, the father being absent from the village, the girl having left the village telling her mother that she would be going to her Bhieni's house and there being no evidence that the girl was taken away from the house of her parents by the petitioner, there is no proof of any taking. He also contends that there is no evidence that the girl was enticed to leave the protection of her guardian 011 the day she left the house.

8. In support of his contention that the offence of kidnapping is not made out, he relies upon a decision in the case of Nura v. Rex, reported in AIR 1949 All 710 (A). It was held by Mushtaq, J., in that case that the most essential ingredient of the

offence defined in Section 361 is that the minor should have been taken by the accused out of the keeping of her lawful guardian and that where the minor girl voluntarily leaves the roof of her guardian and when out of her house, comes across another, who treats her with kindness, or at least without employing any force or practising any fraud on her, he cannot be held guilty under Section 361.

He also relied upon a decision of the Calcutta High Court in the case of Queen v. Neela Bebee, reported in 10 Suth WR (Cr.) 33 (B) in which it was held that to support a conviction for kidnapping under Sections 361 and 366 of the Penal Code, it must be shown that the accused took or enticed away from lawful guardianship, the person kidnapped. In that case, as was observed in the judgment by Justice Glover,:

'There is nothing in the other recorded evidence to disprove the fact that the girl Chundun accompanied the prisoners otherwise than of her own free will. It may be that she was induced to present a petition against her husband in the Magistrate's Court for some ulterior purpose of the prisoners, but it is clear that she acted throughout like a free agent, and it is in evidence that, after the meeting with her husband in Sylhet, she still persisted in presenting her petition to the Magistrate.

So that, it it be admitted that the witnesses for the Crown are credible witnesses, their evidence does not prove more than that the girl accompanied the prisoners to Sylhet, and there presented a petition against her husband; whilst the presumption, that she, being a minor of some 13 years of age, was enticed away by those who had influence over her, is rebutted by the girl's own deposition.'

Mr. Mohapatra also relied upon another case in the case of Queen v. Gunder Singh, reported in 4 Suth WR (Cr.) 6 (C) where it was held that to bring a case under Section 361 of the Penal Code, there must be a taking of enticing of a child out of the keeping of the lawful guardian without his consent. In that case the girl, according to her own statement, had run away from her father's house in consequence of ill treatment on the part of her mother, and meeting the prisoner on the road had agreed to take service as a coolie.

The place where the prisoner lived and to which the girl was taken was a populous suburb, where there were many houses, and where she could easily have called for and obtained assistance, had she been unwilling to remain. Under these circumstances, the same learned Judge Glover, J., observed:

'Was the girl, then, under her father's guardianship, when she fell in with the prisoner? I think, not; she had voluntarily abandoned her house, and was running away. She was 14 years old, and not, therefore, of such tender age as to lead to the supposition that she had strayed from home, and was to all appearance a free agent. She, when taken before the Magistrate, asserted that her parents were dead, and that she was going with her mother-in-law to Sylhet and Cachar; she now states that the prisoner, made 'eyes' at her, and frightened her into saying what she did; but this is an unsupported statement, and the girl's manner before the Magistrate must, as that official observes, have been satisfactory or he would not have signed her registry ticket.'

On these facts, the learned Judge held that such a taking is not kidnapping.

9. But, in the instant case there is evidence which both the Courts accepted that prior to the girl leaving her Perents' house, the petitioner was going to the house of Gangadhar off and on, where the girl also was meeting him; and that he being a Brahmin proposed to marry the Pana girl and assured her to take her in marriage even though she doubted the bona fide. There is also evidence that on the day the girl left her parents' house, they were seen together near the bus stand.

The girl was in the keeping of her guardian on the day of occurrence though the father was away from the village, and his lawful guardianship continues as the girl was living with the mother in his house. It is not necessary that the girl should be in the physical possession of the guardian. It is enough if it is under a continuous control which is for the first time terminated by the act complained of. If a girl goes out into the street or into a field by herself, or goes on a visit either with or without the knowledge of the guardian, she is still said to be in the legal possession of her parents.

She can be said to be no longer in the keeping or control of the lawful guardian when the facts disclose that she was either driven away from her parental roof as was the case in Pandyaram Sastrulu v. Emperor, 16 Ind Cas 166 (Mad) (D), or voluntarily abandoned the control of the guardian on account of the ill-treatment as was the case in 4 Suth WR (Cr) 6 (C). The Legislature has advisedly preferred the expression 'the keeping of the lawful guardian' to the word 'possession'.

The word 'keeping' is compatible with the independence of action and movement in the object kept. In the case of King Emperor v. Lasaing reported in 7 Cri LJ 212 (UB) (E), it was held that where a female minor met the prisoner in the street and went away voluntarily with that prisoner, she was as much in the possession of her legal guardian when she was walking in the street unless she had given up the intention of returning home as if she had actually been in the guardian's house when taken off. In the case of Jetha reported in Emperor v. Jetha Nathoo, 6 Bom LR 785 (F) it was held:

'The Legislature has advisedly preferred this phrase to the word 'possession' which frequently recurs in the Code in connection with the inanimate objects. The word 'keeping' connotes the fact that it is 'compatible with independence of action and movement in the object kept. It implies neither prehension nor detention but rather maintenance, protection and control, manifested not by continual action but as available on necessity arising, and this relation betweenthe minor and the guardian is certainly not dissolved so long as the minor can at will take advantage of it & place herself within the sphere of its operation'.

In the case of Reg v. Manktelow, (1853) 6 Cox CO 143 (G), it was held that where a girl under the age of 16 years having, by persuasion, been induced bythe accused to leave her father's house & go away with him without the consent of the father, left her home alone by a preconcerted arrangement Between them & went to a place appointed, where she was met by the accused, & then went away together some distance, without the intention of returning, it was held that there was a taking of the girl out of the father's possession when he met the girl & went away with her at the appointed place, as up to that moment she had not absolutely renounced her father's protection.

Mr. Mohapatra contends that there is no evidence of a preconcerted arrangement in the instant case. But the evidence, as already stated above, does lead to the inference that there was a prior enticement anda preconcerted arrangement, in consequence of which the girl left the protection of her lawful guardian.

10. I am, therefore, of opinion that the petitioner kidnapped Kanchan by taking her away and enticing her away from the keeping of her lawful guardian and as such committed an offence punishable under Section 363 I. P. C. The punishment provided in Section 363 is rigorous imprisonment for 7 years. The sentence passed upon the accused is 3 years. The offence under Section 363 is a minor offence to that with which he was charged, namely, Section 366 I. P. C.

11. In view of my finding that the petitioner is guilty under Section 363 I. P. C. it is not necessary to go into the question whether on the charge framed under Section 366, the conviction can be sustained. Kidnapping is an offence against guardianship and the moment the minor is taken or enticed away out of the keeping of her lawful guardian, the offence is complete and is per se punishable unlike abduction where a particular purpose is necessary irrespective of the fact whether, there is evidence that the kidnapping was with the intention of compelling her to marry against her will.

The conviction under Section 363, I. P. C. is valid, once it is held that she was taken away or enticed away from the keeping of her lawful guardian. In this view of the case, it is not necessary to go into thequestion whether on the charge as framed the conviction can be sustained. I therefore set aside the conviction under Section 366 I. P. C. and alter the conviction to one under Section 363 I. P. C. and maintain the same sentence. The revision petition thus fails and is dismissed.

Narasimham, C.J.

12. I agree.

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