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Court : Kerala

Decided On : Jul-20-1965

Reported in : 1966CriLJ210

Judge : P. Govinda Menon, J.

Appellant : Arathan Sadasivan

Respondent : State of Kerala

Judgement :

P. Govinda Menon, J.

1. The appellant stands convicted by the second Additional Sessions Judge of Trivandrum for offences punishable under Sections 363 and 376 I, P. C, and he has been sentenced to undergo rigorous imprisonment for two years under each of the counts the sentences to run concurrently. His appeal is Criminal Appeal 270 of 1964. When the appeal was admitted notice was issued to him to show cause why the sentence awarded should not be enhanced and this is calendar revision 16 of 1964. The State has also filed criminal appeal 50 of 1965 against the acquittal of the accused under Section 366 I. P. C.

2. Pw 2, Iromie is the daughter of Pw I James Amael. He was employed in Ceylon for a pretty long period, but in January 1961 returned to India and settled down in Avanakuzhi in Neoyattinkara taluk. His wife Jennette died about 12 years ago and

he was living with his two daughters Pws. 2 and 3. His son Leslie is away for his studies at Nagercoil. Pw 1 was running a rice mill in the same compound about 15 or 20 feet to the north-east of his house. The accused was employed as the machine operator in the mill. Pw 8 is another employee. Some time before the occurrence, the accused became friendly with Pw 2. They used to carry on conversation, pass letters and soon it developed into an intimacy. According to Pw 1 she was having sexual intercourse with him. Pws. 2 and 3 used to sleep together in one room and the father was occupying another room. There were no servants or any others in the house.

On the night of 5-4-1964 as usual Pws. 2 and 3 went to sleep. Next morning Pw2 was found missing. Pw 1 made enquiries and promptly went to Vizhin-jam police station and lodged the complaint Ex-P 1. A case was registered and the Sub-Inspector proceeded to the house of the accused and found the accused and Pw 2 there. The accused was arrested and Pw 2 was produced before the District Magistrate who ordered her detention in the rescue home as she was unwilling to go and live with her father.

On 6-4-1965 the accused got a marriage udampady (agreement) prepared by Pw 10 a document writer and Pw 7 the Sub-Registrar came to the accused's house and had the document registered.

P W 12 an assistant surgeon attached to the Avittom Thirunal Hospital, Trivandrum examined PW 2 on 8-4-1964. She found the girl pregnant. She was also examined by PW 13 the Radiologist. Both Pws. 12 and 13 have given their opinion that the girl was below 16 years of age. Other witnesses were also examined in proof of her age. After completing the investigation the accused was charge-sheeted.

3. The accused admitted that he was employed under P. W. 1. According to him he did not kidnap the girl, but she came voluntarily of her own accord to his house and they decided to marry and had a document registered. He would have it that she had come to the house prior to 5-4-64. He denied that the girl was aged only 15-1/2 years. No witnesses were examined in his defence.

4. The first question for decision is whether the accused could be said to have 'taken' or 'enticed away the girl' out of the keeping of her lawful guardian. There is no dispute that P. W. 2 was under the care, custody and protection of P. W. 1 who is her father and legal guardian. An offence of kidnapping would be made out if any girl below the age of 18 is taken out of the keeping of the lawful guardian. So the age of the girl has first to be determined. The main evidence is that of P. W. 1. He has deposed that he had married Jennette and that four children were born to them. The first was a still-born male child, the second child P. W. 3 was born on 5-8-1118 (M. E.), next is a son Leslie by name and he was born 27-10-1944 and P. W. 2 is the last child born on 5-10-1948. Ex.D 1 is the still birth certificate issued by the Registrar of Births and Death, relating to the first child. Ex. D 2 is the birth certificate relating to P. W. 3. The certificate relating to P. W. 2 has not been produced by the prosecution and it is stated that they could not get it from the Registrar of Births and Deaths. The omission to produce the certificate would have been an important circumstance if there had not been any other reliable evidence in proof of her age.

P. W. 1 has produced the certificate in regard to the baptism of P. W. 2 which took place in Colombo when P. W. 1 was there. That was in the year 1950 and Ex.P 2 is the document. It shows the names of the parents of the girl, viz., P. W. 1 and his wife Jennette, that they were married on 26th October) 1938 in the L. M. S. Church, Colachel Travancore, that the child's name was Iromie Suganthalatha Pearlyn and that she was born on 5th October 1948 and baptised on 14th May 1950, Comment was made that the original register has not been produced, but there is no reason to doubt the genuineness of Ex-P. 2. After P. W. 2's mother died P. W. 2 was living with her grand-mother and it was she who put her into the Government Girls' Lower Primary School, Colachel. P. W. 5 is the Headmaster of that school. Ex-P. 4 is the true extract from the admission register maintained in that school showing that P. W. 2 was admitted on 23-10-1953. Her date of birth is shown therein as 5-10-1948. Admission register is maintained as per Government Sections in the usual course of business and Ex-P. 4 is the true copy of the entry therein signed and issued by him after verification with the original. Since Ex-P. 4 relates to an entry made in the register kept by a public servant in the discharge of his official duty in a Government Institution it is relevant and admissible under

Section 35 of the Evidence Act. The prosecution has further produced an extract of the admission register maintained in the girl's High School, Colachel where she was later admitted. Ex-P. 3 is the true extract. There also her date of birth is shown as 5-10-1948. Ex-P. 11 is her transfer certificate. Then we have Ex-P. 12 the application for admission made by P. W. 1 at the St. Chrysostem's High School, Nellim-mood. Consistent with the other records the date of birth shown therein is also 5-10-1948.

P, W. 1 has further deposed that while he was in Ceylon he had obtained a passport from the Govt. of India to enable him and the members of his family to travel to India and return to Ceylon. Ex-P. 5 is the passport issued to him on 23-5-1952. It contains his photograph with the signature beneath it. His family is described therein as consisting of 3 children, Yvonne Ameal P. W. 3, Leslie and, Iromie P. W. 2. The date of birth of P. W. 3 is shown as 8-3-1943 corresponding to 5 8-1118 (M. E.) mention-ed in Ex-D2 and that of P. W. 2 as 5-10-1948. P. W. 2 had gone to Ceylon in 1960 to spend her holidays and for that purpose had obtained a pass. port. It is Ex. P-6, Ex-P. 6 contains the photograph of P. W. 2 with her signature and her date of birth is mentioned as 5-10-1948. All these documents had come into existence long prior to the controversy and it shows beyond a shadow of doubt that the date of birth of P. W. 2 is 5-10-1948.

Added to all these there is the evidence of P. W. 12 the Assistant Surgeon that from the external features noticed by her including the teeth of P. W. 2 she was of opinion that P. W. 2 was below 17 years of age. P. W. 2 was then examined by P. W. 13 the radiologist who has also given evidence that from the extent of ossification and the union of epiphysis in bones he was of opinion that the girl was above 14 years of age, but a little below 16 years of age. As against this the defence wanted to rely on the fact that before P. W. 7 the Sub-Registrar P. W. 2 mentioned that she was 20 years of age and in Ex-D. 3 also she mentioned that she was a major having completed 19 years. But it must be remembered that they are statements made by her when she was under the influence of the accused. On a careful scrutiny of the unimpeachable documentary evidence and the evidence of the father I have no hesitation in agreeing with the conclusions of the learned sessions Judge that the girl was only 15-1/2 years in April 1964.

5. Having found that the girl was below 18 years of age, the next question is whether there is proof of 'taking'. It was contended by the learned Counsel for the accused that P. W. 2 had, in fact, abandoned the guardianship of her father and that on the probabilities PW2 having become pregnant would have been anxious to go with the accused and marry him rather than the accused wanting to take her away and it is argued that what the accused did, would not in law amount to 'taking' of a minor girl from out of the keeping of her lawful guardian.

Branwell, B stated the law in *Reg. v. Christian Olifir* 1866 10 Cox C. C. 402, 404:

I am of opinion that if a young woman leaves her father's house without any persuasion, inducement, or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him although it may be his moral duty to re-turn her to her parent's custody, yet, his not doing so is no infringement of this Act of Parliament, for the Act does not say he shall restore her, but only that he shall not take her away. It, is however, equally clear that if the girl, acting, under his persuasion, leave her father's house, although he is not present at the moment, yet if he avails himself of that leaving which took place at his persuasion that would be taking her out of her father's possession, because the persuasion would be the motive cause of her leaving. Again, although she may not leave at the appointed time, and although he may not wish that she should have left at that particular time, yet if finding she has left, he avails himself of that to induce her to continue away from her father's custody, in my judgment, he is also guilty, if his persuasion operated on her mind, so as to induce her to leave.

In *Rex v. Jarvis* (1903) 20 Cox C. C. 249, self, J., stated the law thus to the jury:

Although there must be a taking, yet it is quite clear that an actual physical taking away of the girl is not necessary to render the prisoner liable to conviction; it is sufficient if he persuaded her to leave her home or go away with him by persuasion or blandishments. The question for you is whether the active part in the going away together was the act of the prisoner or of the girl; unless it was that of the prisoner, he is entitled to your verdict. And, even if you do not believe that he did what he was morally bound to do -- namely, tell her to return home that fact is not by itself sufficient to warrant a conviction; for if she was determined to leave

her home, and showed prisoner that that was her determination, and insisted on leaving with him -- or even if she was so forward as to write and suggest to the prisoner that he should go away with her, and he yields to her suggestion, taking no active part in the matter, you must acquit him. If, however, prisoner's conduct was such as to persuade the girl, by blandishments or otherwise, to leave her home either then or some future time, he ought to be found guilty of the offence of abduction.

Relying upon these decisions the law in England is stated thus in Halsbury's Laws of England, third edition, Vol. 10 at p. 758:

The defendant may be convicted, although he took no part in the actual removal of the girl, if he previously solicited her to leave her father, and after-wards received and harboured her when she did so. If a girl leaves her father of her own accord, the defendant taking no active part in the matter and not persuading or advising her to leave, he cannot be convicted of this offence, even though he failed to advise her not to come, or to return, and afterwards harboured her.

In construing the meaning of the word 'take', Ramaswamy, J., In re, Abdul Azeez, : AIR1954 Mad62, following the decision in R. v. Manktelow (1853) 22 L J M C 115 and R. v. Timmins (1861) 30 L J M C 45, stated that

While it did not imply force, actual or constructive, it meant being a party to the father, etc., being deprived of the possession of the girl, her willingness being immaterial.

I may in this connection refer to the decision in Abdul Sathar v. Emperor AIR 1928 Mad 585, where Srinivasa Ayyangar, J., stated thus:

Then, as regards 'taking', it has been conceded by the learned Counsel for the petitioner that that expression in the section is not confined to mere physical taking. There is such a taking as is indicated in the common expression 'If you will come along, I shall take you'. The expression 'taking out of the keeping of the lawful guardian' must therefore signify some act done by the accused which may be regarded as the proximate cause of the person going out of the keeping of the

guardian, or in other words, an act but for which the person would not have gone out of the keeping of the guardian as he or she did

Even the fact that the girl deceived the accused by overstating her age would be no defence, for as Erle, C. J., said in *Timmins*, (1861) 18 Bell C. C. 276:

The statute was passed for the protection of the parents, and for preventing unmarried girls from being taken; out of the possession of their parents against their will; and it is clear that no deception or forwardness on the part of the girl in such cases can prevent the person taking her away from being guilty of the offence created by this section.

6. Learned Counsel for the appellant referred to the recent decision of the Supreme Court in *Varadarajan v. State of Madras* : 1965 CriLJ33 . There the charge against the accused was for having taken a college going girl from out of the keeping of her father. The girl who though minor had attained the age of discretion and was on the verge of attaining majority and was a senior college Student, She was in the house of the relative of her father and from there she herself telephoned to the accused to meet her at a certain place, went there to meet him and finding him waiting with his car got into the car of her own accord and the accused took her to various places and ultimately to the Sub-Registrar's office; there they had a marriage agreement registered. There was no suggestion in the case that all this was done by force or blandishment or anything like that on the part of the accused and on the evidence it appeared to be very clear that the insistence of marriage came from her side and on the facts of the case their Lordships held that the accused by complying with her wishes can by no stretch of imagination be said to have 'taken' her out of the keeping of her lawful guardianship. It was stated in the decision that it would have been sufficient if the prosecution had established that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so, and that it only if these things are lacking that it would not be legitimate to infer that the accused is guilty of having taken the minor. This decision cannot therefore, help the accused.

It is, therefore, clear that there must be some proof of the accused having done something which led to the girl going out of the keeping of her guardian.

7. In the light of the principles laid down in : his decisions we will see whether the accused had done anything which led to the girl leaving her father's house and agreeing to go with the accused, Vouch reliance cannot be placed on the oral evidence Pw. 1. She would have it that she became friendly with the accused since about 2-1/2 years prior to the occurrence, that they were exchanging love letters and she was admitting him inside her house and permitting him to have illicit intercourse with her and she has stated that through him she became pregnant. She would say that on that day the accused came and told her that he would go over that night and that she should be ready, but she did not give any reply. Then she stated that on that night the accused got inside the room. The doors are usually bolted and if the accused had got inside necessarily she must have given him access by stealthily un-bolting the latch fastening the doors. She would have it that she told him that she was not prepared to go out at that part of the night, but the accused said that he had already brought a car and that they could go and live together in a rented house and that the accused compelled her to go and even dragged her by the hand. When questioned by the police her case was that she stealthily opened the door, went out of her own accord and it was out of her own free will that she got the document registered. Before the Sub-Registrar also she stated that she was a major and that she had willingly signed the document. In Court she wanted to wriggle out by saying that all those statements had been made at the instance of the accused. She has admitted that she felt shame when she became pregnant and had told the accused that there is no use of her living. So the probabilities are that when the accused offered to take her she willingly went with him. Her case that she was dragged and forcibly taken, I have no doubt, is false. Her evidence that when the appellant came she opened the door and slipped away unnoticed by anybody gives the lie direct to her present case, It is, therefore, a clear case of elopement with her consent rather than a case of abduction.

That however does not mean that the appellant did not 'take' her out of the keeping of her lawful guardian. What appears to have really happened is that the

appellant must have met her earlier and in pursuance of the arrangement between them she must have left with him for the purpose of getting married and living together as husband and wife, The meeting and going together must have been, by prior consent and cannot be a unilateral act of Pw. 2 as contended for by the appellant. It is most unlikely that without the consent and encouragement of the appellant, Pw. 2 would have left the protection of her father and eloped with the appellant. There is nothing to show that Pw. 2 had left her house with the intention of abandoning her home or her father and with the intention never to return. The intention could only have been to go with the appellant if he would take her and but for his taking her there can be little doubt that she would have left her father. He knew full well that Pw. 2 was living with her father and even if he was under no legal obligation to take her back home he was certainly under a legal obligation not to run away with her.

I may in this connection refer to Ex. P. 9 letter sent by the accused to Pw. 2. In that letter he has clearly asked her to leave her father's house and encouraged her to go and stay with him. This letter which has been proved to be in the accused's hand-writing by Pws. 1 and 2 is a clinching piece of evidence to show that he had taken an active part in taking her away from her lawful guardian. His conviction under Section 363, Penal Code is therefore well justified.

I agree with the learned Sessions Judge that, the offence under Section 386, Penal Code is not made out. Evidence shows that P. W. 2 was not unwilling to marry him and willingly yielded to his proposal to marry and got the document registered. Unless the intent of the accused is to compel the woman, whatever her age may be to marry against her will, that is in spite of her opposition to the marriage, an offence under Section 366, Penal Code, will not be made out. The appeal filed by the State has only to be dismissed.

8. Coming next to the offence under Section 376, I. P. C, the charge framed in this case shows that the rape alleged to have been committed was between November and December, 1963. learned Counsel, therefore, argued that the trial is vitiated by misjoinder of charges and as they do not form part of the same transaction, charge of rape could not have been clubbed with the offence of

kidnapping. This point is not seen to have been taken up either in the court below or in the memorandum of criminal appeal filed in this Court. Even otherwise under Section 537, Criminal P. C., no finding, sentence or order passed by a Court of competent Jurisdiction shall be reversed or altered under Chap. XXVII or on appeal or revision on account of. any error, omission or irregularity in the charge including any misjoinder of charges unless such error etc., has in fact occasioned a failure of justice and the explanation to the section says that in determining whether any error, omission or irregularity in any proceedings under this Code has occasioned a failure of justice the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. The accused who had competent legal advice knew what charge he had to meet and there could possibly be no prejudice to the accused.

There cannot be any serious dispute that the accused did have sexual intercourse with P. W. 2. of course with her consent and that she became pregnant. But consent in this case would be immaterial because under clause Fifth to S, 375, I. P. C, any man who has sexual intercourse with a girl with or without her consent when she is under the age of 16 years of age will amount to the offence of rape. So the consent of P. W. 2 in this case is immaterial as it has been found that she was at the relevant time, less than 16 years, An exception is provided that if the sexual intercourse is by a man with his own wife, the wife not being under fifteen years of age will not amount to rape. learned Counsel would contend that this exception would apply because P. W. 2 and the accused were husband and wife at the time when the intercourse could have taken place and admittedly even according to the prosecution P. W. 2 was then not under 15 years of age. This argument cannot be accepted for the simple reason that P. W. 2 was not then the wife of the accused. Though there is an averment in Ex.P 13, the agreement of marriage, that they were living as husband and wife even prior to the execution of the document they had, in fact, not married at that time and she had not become his wife at that time. The accused must, therefore, be found guilty of having committed rape under clause fifth of Section 375, I. P. C, an offence punishable under Section 376 I. P. C.

9. Coming to the question of sentence the accused has been sentenced to undergo rigorous imprisonment for two years under each of the counts, the sentences to run concurrently. Notice has been issued by this Court to show cause why the sentence awarded should not be enhanced. It may be that the sentence awarded is lenient, but under the peculiar circumstances of this case learned Judge thought a more severe sentence was not called for. Sentence is a matter of discretion with the trial Court. Unless the sentence awarded is so grossly inadequate, this Court normally will not interfere and particularly so in this case where the State has not chosen to apply for enhancement of the sentence.

In the result, the conviction and sentence passed on the accused are confirmed and the appeals--the one filed by the appellant--accused and the other by the State--are both dismissed. The Section Issued by this Court is discharged.

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