

Damodar and anr. Vs. State

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Court : Rajasthan

Decided On : Apr-23-1952

Reported in : AIR1953Raj127

Judge : Ranawat and; Sharma, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 361 and 366; [Code of Criminal Procedure \(CrPC\), 1898](#) - Sections 223, 225 and 537

Appeal No. : Criminal Appeal Nos. 87 and 92 of 1951

Appellant : Damodar and anr.

Respondent : State

Advocate for Def. : C.B. Bhargava, Dy. Govt. Adv.

Advocate for Pet/Ap. : H.M. Mukherjee, Adv. (in No. 87) and; S.M. Sanghi, Adv. (in No. 92)

Judgement :

Sharma, J.

1. These are two appeals, one by Damodar and the other by Sheonath accused, against their conviction under Section 366 of the Indian Penal Code. Damodar has been sentenced to five years' and Sheonath to four years' rigorous imprisonment.

2. The case for the prosecution was that on or about 18th July, 1950, Damodar accused kidnapped Mst. Bachi, a girl about 10 years old on the allurement that if she accompanied the accused to his village, she would be given 'laddoos' and 'puris' to eat. Eachi often visited the house of the accused Damodar for playing with Mst. Munni. Damodar's daughter. At first Damodar kept Mst. Bachi confined in his house at Jaipur for two or three days, and thereafter he took Bachi and his daughter Munni to Chandera and offered her in marriage at first to Balu and then to Todia at village Chandera provided that they paid him a substantial amount of money, taut both refused. Sheonath accused was also called to Chandera. An attempt was made to give the girl Bachi in marriage to Ganga Sahai, brother of Mangilal of village Kankroli, but Man-gilal, with whom the accused had a talk, said that he would firstly satisfy himself about the parentage of the girl, and would then reply. Rs. 200/-however, were taken from him in advance for expenses to be set oS against any sum that might be settled for the marriage of Bachi with Ganga Sahai ultimately. Ultimately, however, Mangilal also refused to have Mst. Bachi in marriage for his brother Ganga Sahai. Rs. 200/- were, therefore, returned by Damodar to Balu, and a receipt was obtained, and the two girls, who were in the possession of Balu, were taken over by Damodar accused, and a receipt therefore was delivered to Balu.

3. Chhotey Lal, the father of Mst. Bachi, lodged a report about 20 days after the alleged occurrence at the police station Ramganj, and Mst. Bachi was recovered by the police on 7th September 1950. Both the accused were challaned in the Court of the City Magistrate Jaipur and the Assistant City Magistrate, Jaipur city, to whose Court the case was later on transferred, committed both of them to take their trial under Section 386, I. P. C. before the Court of Session, Jaipur City.

4. Both the accused denied the charge. Damodar stated that the case had been brought against him falsely, because one Bhonria had taken away his daughter Munni to village Chandera under a pretence that he was taking her for participation in some 'nukta' but later on negotiated for the marriage of Mst. Munni. Bhonria absconded, and when the accused (Damodar) went to Chandera in search of his daughter, he found her in possession of Balu.

5. The learned Sessions Judge found both the accused guilty of kidnapping Mst. Bachi with intent that she might be compelled to marry against her will, and consequently convicted them under Section 366, I. P. C., and sentenced them as noted above. Both the accused have filed two separate appeals, but they are being disposed of by a single judgment.

6. It has been argued on behalf of Sheonath accused that there is nothing to show that Sheonath kidnapped Mst. Bachi. Even supposing that the girl was kidnapped, kidnapping is not a continuing offence and Sheonath could not be convicted of kidnapping, even if he joined Damodar later on.

7. On a consideration of the evidence on record, we are of opinion that it is not at all proved that Sheonath kidnapped the girl from Jaipur where she was living under the protection of her guardian Chhotey Lal. It is said that he joined Damodar at Chandera, where he was called by the latter. Kidnapping is not, however, a continuing offence, and Sheonath could not be convicted for kidnapping the girl from Jaipur even if he joined Damodar after the girl had been kidnapped. Sheonath's conviction cannot, therefore, be maintained, and he is entitled to acquittal.

8. As regards Damodar, it has been argued by his learned counsel that the evidence for the prosecution was unreliable. Mst. Eachi had stated that after having been taken to Chandera, it was proposed to give her in marriage in consideration of a certain sum. In cross-examination she, however, admitted that no talk of her marriage was made in her presence, nor was any money settled or paid in her presence. It was also argued that the statement of Bachi shows that she was taken to Kanota from village Chandera, whereas according to Balu, she was taken from Chandera to village Kundal, and then to Chopdiwala. Thus Mst. Bachi's statement does not show that she was ever taken to Kundal or Chopdiwaia, and the statement of Balu does not show that she was ever taken to Kanota. It was also argued that even if it is supposed that there was any talk of Mst. Bachi's marriage with some person, it is not proved by the prosecution that Mst. Bachi was being compelled to marry against her will. It was argued that will and consent are not the same thing, and the minor, though she may have no

consent of her own has her will all the same. It was further argued that the case was the outcome of Bhonrilal's kidnapping Damodar's daughter, Munni, and leaving her in possession of Balu from whose possession she was recovered by Damodar.

9-10. Looking to the evidence on the record, we are satisfied that Bachi who used to visit Damodar's house in Jaipur for playing with Munni, was first kept confined in Damodar's house for three days, and was thereafter taken to village Chandra under a pretext that the girl would be given 'laddoos' and 'puris'. We have read the evidence of Mst. Bachi, and we are perfectly satisfied that this statement of hers is true. (His Lordship reviewed the evidence and continued.) There is, therefore, no doubt that Damodar took away Mst. Bachi from Jaipur intending that she might be given in marriage to some person. The only question that remains is whether she can be said to have been kidnapped from legal guardianship and whether it is proved that she was kidnapped with intent that she might be compelled to marry against her will. It was argued by the learned counsel that in the charge-sheet nothing has been said about her being kidnapped from legal guardianship. It is true that it has not been clearly stated there. The charge-sheet can, therefore, be said to be somewhat defective, but the accused clearly knew what was the case against him. The prosecution case was that the girl was taken away by Damodar from his house, which she used to visit for playing purposes. When Mst. Bachi visited Damodar's house for that purpose, it cannot be said that she went out of the lawful guardianship of her father Choteylal. The father retained his lawful guardianship even when the girl visited the house of her playmate for playing purposes. It is only when she was taken away by Damodar from his house to another village that it can be said that she was taken out of the lawful guardianship of her father. Even though, therefore, it is not given in the charge sheet that she was taken out of the lawful guardianship of her father, no prejudice was caused to the accused by the omission of the words. The learned counsel for Damodar has not been able to show what prejudice was caused to his client by the omission of these words from the charge-sheet. Under Section 537, Criminal P. C. no finding, sentence or order passed by a Court of competent jurisdiction shall be reversed or altered on appeal or revision on account of any error, omission or irregularity in the complaint, summons, warrant, charge, etc. Thus the mere omission of the words

'from lawful guardianship of Chhoteylal' would not be sufficient for the reversal of the conviction and sentence of Damodar. Of course, it could be done if the misdirection had, in fact, occasioned a failure of justice. This has not been shown by the learned counsel appearing on behalf of Damodar. We are satisfied that in spite of this omission, the accused knew what case he had to meet and no prejudice has been caused to him.

The only question that remains is whether Mst. Bachi was kidnapped from Jaipur with intent that she might be compelled to marry against her will. It is not disputed that the girl was less than 16 years when she was kidnapped. Her age has been shown to be 10 or 11 years at the time. It was argued that even a girl of 10 or 11 years had a will of her own, although her consent might not be effective for certain purposes as laid down in Section 90, Penal Code. Of course, there is difference between consent and will, and if it is shown that there was no evidence to show that the girl was being kidnapped with intent to compel her to marry against her will, the offence under Section 336, Penal Code might not be made out. But it is not necessary that the prosecution witnesses should say in so many words that the girl was kidnapped with intent to compel her to marry against her will. Every case depends upon its own facts, & the circumstances proved in a particular case might show that the girl was kidnapped with intent to compel her to marry against her will. In the present case, Mst. Bachi is a girl of very tender years, that is only about 10 years. It is proved that she was kept confined in his house by Damodar for about three days before she was transported from Jaipur to Chandera. No circumstances appear on the record from which it could be inferred that the talk of her being, given in marriage was being held with the will of Mst. Bachi. In such a case it can be safely found that Mst. Bachi was kidnapped with intent to compel her to marry against her will. The fact that Mst. Bachi was confined in his house for about 3 days by Damodar, and thereafter taken, to Chandera under an inducement, and the fact, that she is a girl of very tender age, and there is no evidence to show that the marriage was being negotiated in accordance with her will, are quite sufficient to show that she was kidnapped with intent to compel her to marry against her will.

Reliance has been placed upon a Full Bench ruling of the Rangoon High Court in -- 'Khalilur Rahman v. Emperor', AIR 1933 Rang 98. In that case, however, all that was laid down is that simply because the accused had kidnapped a little girl under 12 years of age with intent to give her in marriage a 'presumptio juris et de jure' does not arise that the accused kidnapped the child with intent to compel her, or knowing it to be likely that she will be compelled to marry 'against her will'. This ruling however, does not lay down that, unless the intention of the accused is proved by direct evidence, it would not be taken to have been established. According to Section 366, it is the intention with which the accused kidnapped the girl to marry her against her will which has got to be established, and it can be gathered from the circumstances of the case and the conduct of the accused. As has been said above, the circumstances of this case clearly show that the accused had the requisite intent. Even in the ruling relied on by the learned counsel for Damodar, the following observations of Page C. J., at page 102, find place:

'I take it that normally where a little girl under twelve years of age is taken out of the keeping of her guardian without the guardian's consent the act of the accused would arouse suspicion, and where, as in the present case, it also transpires that the child within two months of being kidnapped is given in marriage by the accused, it would not require a great stretch of imagination for the jury to conclude that the accused when he kidnapped the little girl intended to compel her to marry wilfully and in spite of her opposition'.

Thus the circumstances of a particular case can prove the intent of the accused, and we are perfectly satisfied that the circumstances, which have been shown in the present case, fully prove the requisite intent of Damodar. We agree with the learned Sessions Judge that the offence under Section 366 was brought home to the accused Damodar without any reasonable shadow of doubt.

11. Sheonath's appeal is allowed, his conviction and sentence are set aside and he is acquitted. Order for his release has already been made, and if not released already, he shall be released at once, unless required in connection with some other case. The appeal of Damodar is dismissed.

