

In Re: N. Jaladu and anr.

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Court : Chennai

Decided On : Oct-24-1911

Reported in : AIR1914Mad49; (1913)ILR36Mad453

Judge : Sundara Ayyar and ;Spencer, JJ.

Appellant : In Re: N. Jaladu and anr.

Judgement :

1. In this case the appellants have been convicted under Section 366, Indian Penal Code of the offence of kidnapping a girl (prosecution witness No. 1) of about 10 years of age from the guardianship of her mother prosecution witness No. 2 with intent that she might be compelled to marry against her will. The facts found by the lower Court are that the second accused, a relation of prosecution witnesses Nos. 1 and 2, asked prosecution witness No. 2 and prosecution witness No. 3, her (prosecution witness No. 2's) grand-mother to send the girl for three days for Bogikolusu (or present gathering at a festival) but really with the intention of disposing of the girl in marriage to the first accused without the consent of the girl and prosecution witness No. 2 and prosecution witness No. 3. Prosecution witness No. 3, the girl's great grand-mother, let her go. More than a week after the second accused had taken the girl to her village she led her to another village on a false pretext. She then took her to a temple there, where the first accused was waiting, and there the girl was married to the first accused against her will.

2. The defence was that the girl was taken and married to the first accused with the consent of prosecution witness No. 2 and prosecution witness No. 3.

3. We agree with the Lower Court in holding that the evidence adduced on behalf of the defence is not worthy of credit and that no consent was given by either prosecution witness No. 2 or prosecution witness No. 3 to the marriage. The Sessions Judge convicted both the accused under Section 366, Indian Penal Code. He held that 'if, as alleged by the prosecution, prosecution witness No. 2 allowed second accused to take her only for Bogikolusu, and second accused took her and got her married in violation of her legal guardian's authority the offence of kidnapping is complete,' This statement of the law cannot be accepted as correct. The offence of kidnapping consists in taking or enticing a minor out of the keeping of the lawful guardian of such minor without the consent of such guardian. If a minor is taken with the consent of the guardian and subsequently married improperly without the consent of the guardian to any person, such improper marriage would not by itself amount to kidnapping. So far as the first accused is concerned it was not alleged by the prosecution that he was a party to the taking away of the girl from the guardianship of prosecution witness No. 2 nor was it alleged that he took her away from the custody of the second accused. The District Judge finds that he 'acted in concert with her and assisted in the kidnapping.' We do not find any evidence that he instigated or aided her in the taking of prosecution witness No. 1 nor is there any charge or proof of conspiracy as regards this part of the transaction. There is no evidence that prior to the time of the marriage the girl had been removed by the first accused from the custody of the second accused, who took her from prosecution witnesses Nos. 2 and 3. The offence charged has not been made out against the first accused. His conviction cannot, therefore, be sustained.

4. It remains to be considered whether the second accused is guilty under Section 366 or not. Prosecution witness No. 2 said that she refused to consent to the second accused taking the girl and that she had gone away from the house when she actually took her, but prosecution witness No. 3 does not corroborate her in this statement; and the girl prosecution witness No. 1 clearly says that her mother prosecution witness No. 2 sent her. We are of opinion on the evidence that

prosecution witness No. 2 also consented to the girl going with the second accused. But it appears that the second accused obtained the consent of the girl's guardian by falsely representing that the object of taking her was only to gather presents at a festival. The question is, whether in these circumstances it can be said that the guardian gave her consent to the taking of the girl within the meaning of Section 361, Indian Penal Code. Section 90, Indian Penal Code provides 'A consent is not such a consent as is intended by any section of this Code, if the consent is given by a person under fear of injury or under a misconception of fact, and if the person doing the act knows or has reason to believe that the consent was given in consequence of such fear or misconception.' We are of opinion that the expression 'under a misconception of fact' is broad enough to include all cases where the consent is obtained by misrepresentation; the misrepresentation should be regarded as leading to a misconception of the facts with reference to which the consent is given. In Section 3 of the Evidence Act illustration (d) that a person has a certain intention is treated as a fact. So, here the fact about which the second and third prosecution witnesses were made to entertain a misconception was the fact that the second accused intended to get the girl married. In considering a similar statute, it was held in England in *B. v. Hopkins* (1842) Car. and M., 254, that a consent obtained by fraud would not be sufficient to justify the taking of a minor. See also Halsbury's Laws of England, volume 9, page 623. In Stephen's Digest of the Criminal Law of England (sixth edition, page 217), the learned author says with reference to the law relating to 'Abduction of girls under sixteen' 'thus.... If the consent of the person from whose possession the girl is taken is obtained by fraud, the taking is deemed to be against the will of such a person.' And he gives the following illustration No. (5): 'A induces B to permit his daughter C to go away by falsely pretending that he (A) will find a place for C. A abducts C.' The illustration is founded on the case of *B. v. Hopkins* (1842) Car. and M., 254, already referred to. Although in cases of contracts a consent obtained by coercion or fraud is only voidable by the party affected by it, the effect of Section 90, Indian Penal Code, is that such consent; cannot, under the criminal law, be availed of to justify what would otherwise be an offence. The second accused must, therefore, be held to have removed the girl from the guardianship of prosecution witness No. 2 without her consent.

5. In the result, we confirm the conviction and sentence with respect to the second accused and reverse the conviction of the first accused and direct that he be set at liberty.

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