

Ebadi Khan and ors. Vs. Emperor

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Court : Kolkata

Decided On : Feb-21-1938

Reported in : AIR1938Cal460

Appellant : Ebadi Khan and ors.

Respondent : Emperor

Judgement :

M.C. Ghose, J.

1. This is an appeal by three men who have been convicted under Sections 366, 342 and 457, I.P.C. and sentenced in all to rigorous imprisonment for four years and three months each. The prosecution case is that in the night of 26th March 1937, Lakmi Moni Dasi, a young woman, P. W. 5, was sleeping in a hut in her father's house. Her brother Nilmony Roy, P. W. 1, a youth of 18 was sleeping on the outer verandah. The door of the hut in which the young woman slept was locked from outside. Her parents had gone away to attend a feast in another place. At about 1 A. M., she woke up when some body was tying her mouth. She raised an alarm and cried out but the three appellants took her out of a window, 18' x 18', which they had opened out. They dragged her out of the room, took her to a field and there they ravished her one after the other, and they took her to a house where a niece of one of the appellants guarded her. She was there till 4 P. M. the next afternoon when the police came and recovered her.

2. The story of her father is that on returning home in course of the night he found the girl missing and heard the story from his son and told the village chowkidar and made a search for the girl during the night and in the morning he and the chowkidar went to the police station which is about a mile distant and was quickly followed by the son Nilmony. The police took the first information as stated by Nilmony and made an investigation and sent up the three accused.

3. The defence of the accused men was that they did not commit any of the alleged acts, and that they were made accused by the enmity of the police officer. In cross-examination, it was brought out that the girl was not quite pure; that she did not live with her husband but chose to live with her parents and that she had been seduced by a man named Sattar of the village, and that on the evening in question, her parents while going out put her into a room and locked the door from outside. Apparently, her parents feared that she might elope with somebody. It was also brought out that she was carried out not through the door but through a small window of about 18' x 18' and that when rescued she was found with a girl and not with any man who guarded her.

4. The case was tried in the Court of the Second Assistant Sessions Judge of Howrah by a jury of five. The accused men were charged with binding the young man Nilmony on the verandah. Upon that they were charged under Section 342, I.P.C. The jury unanimously found the three accused guilty under Section 342 of the Code. As regards their offence against the young woman, they were charged in the alternative with kidnapping and abduction with intent to force or seduce her to illicit intercourse. The jury by a majority of four to one found the accused men not guilty of kidnapping and by a majority of four to one found them guilty of abduction under Section 366, I.P.C. The jury by a verdict of 3 to 2 found the accused men not guilty under Section 376, I.P.C.

5. The learned Counsel appearing in the case has taken us carefully through the charge. The first point taken is that the learned Judge committed a misdirection in explaining the admissibility of the first information report Ex. 2 in the evidence. This document was recorded by the police officer as given by Nilmony. The defence case was that this was not the earliest information given to the police; that

an earlier information had been given by the father of the girl which, according to the evidence of two witnesses, had been taken by the Police Sub-Inspector. But, the police officer said that he heard the father but did not take down any statement from him, and that soon after the father the young man appeared and he took the information from him. When Ex. 2 was offered as evidence by the prosecution the admissibility was opposed by the defence. The trial Judge accepted it in evidence. In this he committed no error. It was his duty to decide on the argument of the two sides and decide in the way he thought best. But having admitted it, it was his duty to leave the matter entirely free to the jury as to what weight they would allow to the evidence. It is urged that in this the learned Judge committed an error in saying:

I reject the defence prayer as I consider the evidence of the police officer should be preferred to the evidence of witness Nos. 2 and 6.

and in saying

In the first instance you should proceed to decide the case on the footing that Ex. 2 is the first information report as I have admitted it in evidence.

6. In our opinion the learned Judge was not wise in giving his reasons for admitting the document in evidence. He should have merely stated that he admitted the document in evidence and laid it to the jury. His direction to the jury however is quite explicit. He says:

If after considering the entire evidence and the circumstances you are satisfied that the first information report Ex. 2 is not the real F.I.R. and that there was another F. I. R. which has been concealed by the prosecution you, will be perfectly entitled not to place any reliance on the Ex. 2.

7. In our opinion, inspite of certain matters which the Judge need not have said the jury fully understood their duty in the matter.

8. The next point urged by the learned Counsel is that the charge in this case was defective inasmuch as the charges of abduction and kidnapping were framed on one head, instead of on two heads. The charge was in this form : 'that you, on or

about 26th March 1937....kidnapped (or abducted) a woman . . . Laksmi Mani Dassi with intent ...' etc. Now it would have been much better for the Judge to have made two separate charges : (1) 'that you on or about 26th March 1937 kidnapped Laksmi Mani Dassi with intent . . .' etc. and (2) 'that you on or about the same day and place abducted Laksmi Mani Dassi with intent' etc. It is always wise where a charge is made in respect of the same occurrence both of kidnapping and abducting that two heads should be made. But we do not go so far as to agree with the observation quoted by the learned Counsel in *Mafizaddi v. Emperor* : AIR1927 Cal644 that it is illegal to make the two charges under one head as in the present case. The point to be seen in each individual case is whether the accused person was prejudiced thereby. Now in this case the learned Judge has carefully explained the difference between abduction and kidnapping and as stated above the jury fully understood the position and have acquitted the accused men of the charge of kidnapping under Section 366 of the Code but convicted them of abduction under Section 366 of the Code. In other words, the jurymen were not satisfied that the girl was 16 or under. But they were satisfied that she was taken away by force. The defect of the charge in this case, in our opinion, did not prejudice the accused men.

9. The next point urged was that the jury having acquitted the accused men of the main charge of rape, it was inconsistent of them to have convicted these men of abduction under Section 366 of the Code. In our opinion there is no necessary inconsistency in such a finding. The offence of abduction under Section 366 of the Code is made out as soon as the accused person takes away a woman from one place to another with intent to force or to seduce her to illicit intercourse. But, when he has committed the offence of abduction under Section 366 of the Code, the further question to be decided is whether, when he has had illicit intercourse with the woman, that fact amounts to rape as denned by Section 375, I.P.C. Where a man has illicit inter-course with an adult woman with her consent it is not rape, under the law. In such a case the accused person will be held guilty under Section 366 of the Code, but not guilty under Section 376 of the Code. In this case the learned Judge properly directed the jury that on the charge of rape there was no corroboration of the story of the young woman and that it is not prudent to convict an accused person of such an offence on the uncorroborated testimony of the

woman. As to the charge of abduction however, there was a corroboration by her brother who was sleeping on the verandah. He gives evidence that the accused men came and bound him up and then one of them said to the others 'break the window and drag out the woman'. He also says that his sister cried out when they entered. It was for the jury to accept the evidence of the woman corroborated as it was by the evidence of her brother.

10. It has been strenuously urged by the learned Counsel that the evidence such as it is of the young woman and her brother, is not sufficient in the circumstances of this case to bring home the guilt to the accused men. As to this, we would observe that it is not for us to adjudicate on the merits of the verdict of the jury. Unless we can find a misdirection or a material non-direction which has vitiated the trial, the jury's verdict ought not to be disturbed. In this case, as stated above, we find no misdirection or material non-direction. The verdict of the jury must therefore stand.

11. On the point of sentence Mr. Noad has urged that in this case the girl herself had already been seduced by somebody and she was living apart from her husband. She was taken only from her father's house to another house in the village and recovered in less than 24 hours. In the circumstances we reduce the sentence of the three accused to rigorous imprisonment for one year each. With this modification the appeal is dismissed.

Bartley, J.

12. I agree.