

Abdul Khaleque Vs. Emperor

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Court : Kolkata

Decided On : Feb-01-1933

Reported in : AIR1933Cal606

Appellant : Abdul Khaleque

Respondent : Emperor

Judgement :

Rankin, C.J.

1. In my opinion this appeal succeeds. The case was that the accused caught hold of and committed rape on a girl who, according to the medical evidence, would appear to have had sexual intercourse before. The medical evidence is somewhat indeterminate and the learned Judge himself says on the question of the age of the girl that it was in no way proved that the girl was under 14 years of age, that her age is a matter of guess and the view taken by the jury at one stage had been that at any rate she was not more than 14 years. The learned Judge under the circumstances merely because the accused denied the whole story directs the jury that because the plea of consent has not been taken by the accused they need not determine whether the girl was below 14 or above 14 and they need not determine whether she consented or not. The learned Judge was entirely mistaken in his position. He ought to have told the jury that the burden was on the prosecution to prove, in addition to the factum of sexual intercourse, that the girl was below 14 or else that the accused committed that act against her will or without her consent.

That being the whole gist of the offence, unless there is evidence sufficient to satisfy the jury of the circumstances that the girl was not consenting, the jury were not entitled to convict him at all. It appears to me that the charge as given to the jury is erroneous on fundamental points of law. The man has been given 5 years' rigorous imprisonment upon that charge. It is, not possible for us to allow the conviction to stand.

2. The appeal is allowed and the conviction and sentence are set aside and we direct that the accused be retried. He may remain on the same bail as before subject to any order of the Sessions Judge.

Ameer Ali, J.

3. I agree.

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