

isu Sheikh Vs. King-emperor

isu Sheikh Vs. King-emperor

SooperKanoon Citation : sooperkanoon.com/860594

Court : Kolkata

Decided On : Aug-17-1926

Reported in : AIR1927Cal200

Appellant : isu Sheikh

Respondent : King-emperor

Judgement :

Rankin, J.

1. In this case the accused who goes by the name Yusuf has been found guilty under Section 366, Indian Penal Code, of having on the 26th February 1925 taken part in an occurrence with reference to a girl called Pipuljan who seems to have been about 14 years of age and who had been married for some two years. There was also a charge under Section 323, Indian Penal Code. The prosecution story is that the girl with her husband's permission had gone to pay a visit to her mother and brothers who were living in the house that had been her father's. The girl's husband lived in the same village, and it is said that as the mother of the girl and the younger brother were all sleeping in the same room at midnight, the accused with other persons came in, seized the girl, took her outside in the yard and made off with her; that she was taken from one place to another and was ravished and that she came back on the 8th March, the elder brother Daga having on the 3rd March in the meantime filed a complaint as to the incident. It appears that the

prosecution was at first a private prosecution, but the Magistrate on the 17th March ordered the police to make an investigation and the prosecution was a police prosecution afterwards. It may be said that the girl was examined by a doctor on the 23rd March. He discovered certain scratches on her person and he estimated them to be some 10 or 12 days old.

2. Now the charge on which the accused was tried was a charge of kidnapping. It was brought against Yusuf and two others, reliance being placed on Section 34 of the Code. It ran thus : That you in furtherance of the common intention of all kidnapped Pipuljan Bibi for her defilment. An objection to the charge has been taken that it did not specifically mention the name of the guardian from whose keeping she was taken. It is not necessary for me to make any pronouncement as to that matter, but there are three objections taken to this trial, all of which appear to me to be good.

3. The first is that although the accused was charged with the offence of kidnapping only, the learned Judge left it to the jury to convict the accused of the offence of abduction under the same section, namely, 366 Indian Penal Code. When the matter is looked at carefully it appears that in order to prove the offence of kidnapping the prosecution have to show that the girl was taken away or enticed and in that case it might well be that the accused person would rely upon the fact that the guardianship could not be made out against him. As regards the charge of abduction, however, that is, the charge of taking the girl by force or by deceitful means it seems to me that notice of the charge of kidnapping is not a fair, proper or sufficient notice of the charge of abduction. That it has in the present case prejudiced the accused is a matter as to which there may be some room for difference of opinion. But I find it very difficult to hold that the learned Judge should, without taking proper steps to add an additional charge and taking the usual course consequent upon such action, leave to the jury, as he has done, the question of abduction as distinct from kidnapping.

4. The second matter which impresses me as a valid objection to the trial is that the learned Judge put before the jury matters which are not on the record and matters prejudicial, at all events, on a certain view, to the accused. The learned

Judge put it to the jury that there was evidence that after the girl returned she was taken by her husband and made over to the accused at the accused's house and the husband had received from the accused presents in consideration thereof. Mr. Khondkar for the Crown does not contest that what the learned Judge put to the jury is not borne out by the record as we find it. But he suggests that in view of the fact that the defence set up, among other things, that the accused might have done the acts alleged with the husband's consent, the Judge's action in putting these statements to the jury could not have prejudiced the accused. I am entirely against that contention. In this case the outstanding fact was that the prosecution was not by the husband *prima facie* that was an important point for the defence, because unless the husband was satisfied that the accused was guilty the prosecution case would be distinctly weakened the accused being able to say that this is a charge brought against me by the mother and the brothers and the husband does not even take part in bringing it. The way in which the learned Judge has put it to the jury is that the husband has been won over to the side of the accused. That may very well be true in this case. I express no opinion whatever as to that. But it ought to have been left properly and fairly to the jury and for the learned Judge to put before the jury on that point that there was evidence of the girl being made over by the husband to the accused and of the husband getting presents from the accused is a most material misdirection.

5. The last ground of objection to the trial with which I shall deal is one which has to be expressed somewhat more generally. But the objection broadly comes to this : that the charge is not really a fair charge. It puts various matters which might quite well have been put fairly in a fashion which leaves to the jury at all events broad hints that the case for the defence as regards these particular matters requires but little, consideration. The passages in which the learned Judge drives much too hard in favour of the prosecution are fairly numerous. It is quite true that he told the jury at the commencement of the charge; 'You are the sole judge of fact and not bound by any opinion I might express,' but that statement at the commencement is entirely overshadowed by the character of the charge which the learned Judge proceeded to deliver. He says:

This much in any case may be accepted, that there was a hue-and-cry on the night of occurrence drawing these persons to Daga's house.

6. He says with regard to the husband:

Curiously however, the husband is as indifferent as anything. This is very suspicious. Is not this situation consistent with the suggestion that he had been gained over by the accused?

7. He says again:

Any reasonable suggestion of any ill-will on her part or on the part of her mother and; brothers? Is not the accused a relation of these people and does not the statement of the woman that her husband had afterwards even kept her in the accused's house after accepting presents from him speak volumes?

8. Again:

Do you not think that the girl's story is corroborated in broad particulars? The evidence of the medical officer has been read to you and I need not tell you what it shows. The defence made much of the fact that no complaint was made by the brothers. The sister had been carried away and kept concealed from place to place till many days afterwards and as such was not responsible for her brothers acts and omissions.

9. The learned Judge in that passage failed to notice that the question was not whether the girl was responsible for her brothers acts, but whether the conduct of the brothers tended to show that the story of the brothers and of the prosecution was improbable or untrue. He says again that there is no iota of evidence to indicate malice of the family against the accused. He states with reference to one matter that the girl was under a wrong impression in the circumstance that it was the younger brother who followed. He should have, left it to the jury to say what the truth was and who it was that they thought followed. He described the mother and the brother as discrepant in trifling matters. The question to the jury ought fairly to have been put as to what was the discrepancy and whether it was trifling or not. Speaking generally, it cannot be said on this charge as was once said of

the summing up of a learned Judge in England that he found the facts for himself and left the law to the jury. The learned Judge in this case has directed the jury on matters of law with great care, but he has to an extent, which is very noticeable, found the facts for himself and put the contested matters. of fact to the jury in a manner which is not at all appropriate in the summing up of a Judge to the jury in trying an accused.

10. For these reasons it seems to me that the conviction and the sentence cannot be allowed to stand and we must set them aside. It remains now to consider whether it is proper to order the accused to be re-tried. Having regard to the circumstanced of the case it seems to be necessary in this case that the matter should not be allowed to stop where it is. In my judgment the correct course is to direct a re-trial. The trial will take place before the Sessions Judge or the Additional Sessions Judge. The fine, if paid, will be refunded. The accused will continue on bail to the satisfaction of the District Magistrate unless the Sessions Judge thinks fit to order otherwise.

Duval, J.

11. I agree.

SooperKanoon - India's Premier Online Legal Search - sooperkanoon.com