

The Empress Vs. Pemantle

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Court : Kolkata

Decided On : Jul-09-1882

Reported in : (1882)ILR8Cal971

Judge : Richard Garth, C.J., ;Cunningham and ;Maclean, JJ.

Appellant : The Empress

Respondent : Pemantle

Judgement :

Richard Garth, C.J.

1. The prisoner was tried and convicted on the 30th day of March last, upon a charge framed under Section 366 of the Penal Code, for having kidnapped one Eva Fleury in order that she might be seduced to illicit intercourse.

2. Eva Fleury was the illegitimate child of a Mrs. Fleury, long since deceased, and was, when the offence was committed, living in the house and under the care and custody of a Mrs. Lorenztsen, who claimed to be her lawful guardian within the meaning of Section 361 of the Penal Code. Eva Fleury was, at the time when the offence was committed, a minor under the age of sixteen years, and Mrs. Lorenztsen's claim to be considered her legal guardian was based upon the fact that Mrs. Fleury, on her death-bed, confided Eva and another child to her keeping; this was some twelve years ago. Mrs. Lorenztsen accepted the trust, and has ever since had the charge of and maintained the child at her own expense.

3. At the trial the counsel for the prisoner raised the point that Mrs. Lorenztsen was not, at the time when the alleged offence was committed, the lawful guardian of Eva Fleury within the meaning of Section 361 of the Penal Code. This point was reserved by the learned Judge who tried the case, and the prisoner having been convicted and sentenced under Section 366, this Court has now to determine whether that conviction can be maintained.

4. It was argued for the prisoner that Mrs. Lorenztsen was not the lawful guardian of Eva Fleury within the meaning of Section 361, that Mrs. Fleury herself was not the child's legal guardian at the time of her death, and therefore had no right to constitute Mrs. Lorenztsen, or any one else, the child's legal guardian; and lastly that Section 361 was intended rather to protect the rights of guardians than of minors; and unless the alleged guardian could be recognized by law as such, she would not come within the meaning of the section.

5. We think, however, that the object of that and the cognate sections of the Code is at least as much to protect children of tender age from being abducted or seduced for improper purposes, as for the protection of the rights of parents and guardians; and we also think that the somewhat liberal explanation of the words 'lawful guardian' under Section 361 is intended to obviate the difficulty which would otherwise arise, if the prosecution were required to prove strictly in cases of this kind that the person from whose care or custody a minor had been abducted or kidnapped came strictly within the meaning of a guardian according to the legal acceptation of that word.

6. We cannot doubt for a moment that the mother of an illegitimate child is its proper and natural guardian during the period of nurture; and if, during that period, the mother dies, and commits the child, as she did in this instance to the care of a faithful friend, who accepts the trust, and maintains the child in her own house, and at her own expense, we think it clear that such a person is 'lawfully entrusted' with the care and custody of the minor within the meaning of the explanation in Section 361.

7. It too frequently happens that illegitimate orphan children, such as Eva Fleury in the present instance, are those who most require the protection of the law; and if

persons in the position of Mrs. Lorenztsen who, so far as it appears, was the child's sole protector, are not to be considered lawful guardians within the meaning of the explanation, the law would become practically useless in a large class of cases in which its intervention is more especially needed.

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