

Debaprosad Bose Vs. the King

Debaprosad Bose Vs. the King

SooperKanoon Citation : sooperkanoon.com/868712

Court : Kolkata

Decided On : Dec-21-1948

Reported in : AIR1950Cal406,54CWN329

Judge : R.P. Mookerjee and ; Das Gupta, JJ.

Acts : [Code of Criminal Procedure \(CrPC\) , 1898](#) - Sections 297 and 298; ; [Indian Penal Code \(IPC\), 1860](#) - Sections 361 and 366

Appeal No. : Criminal Appeal No. 144 of 1948

Appellant : Debaprosad Bose

Respondent : The King

Advocate for Def. : Nirmal Kr. Sen, Adv.

Advocate for Pet/Ap. : S.S. Mukherjee and ; Nalin Ch. Banerjee, Adv.

Disposition : Appeal allowed

Judgement :

R.P. Mookerjee, J.

1. This is an appeal by Debaprosad Bose who had been found by a majority of jury guilty Under Section 366, Penal Code, and accepting the said majority verdict, the Additional Sessions Judge, 24 Parganas, convicted him and sentenced to two

years rigorous imprisonment.

2. The prosecution case is that a certain family of Banerjees lived in the Park Circus area and subsequently shifted to Hazra Road, to a house belonging to a relation. The owner of the house occupied the second floor and the ground floor was occupied partly by Banerjee and another portion of the same floor by the accused Debaprosad Bose and his family. The two families occupying the ground floor were on friendly terms. It is alleged that taking advantage of the friendly relationship, the Accused Debaprosad had enticed the youngest daughter of Banerjee. It is stated that on 10th September 1947, the daughter had left the house on the plea of going to school but instead of going there, went to Deshapriya Park nearby in accordance with previous arrangements with the accused. From there she was taken to the Lakes and then to Kalighat and some form of marriage ceremony was alleged to have been gone through. Later on she was taken by the accused to Jogbani in the district of Pa men to the house of one Dr. Dhar, a brother-in-law of the accused. The accused and the girl were arrested by the police at Jogbani on 14th September 1947 and were brought down to Calcutta. After investigation Debaprosad was committed to the Court of Session, charged with offence Under Section 366, Penal Code, The accused pleaded not guilty but the defence as may be ascertained from the trend of the cross-examination of the prosecution witnesses was that the girl was above 16 years at the time of the occurrence and that further she had not been enticed away by the accused but she had voluntarily left her father's house and had married him.

3. On behalf of the appellant it is argued that there are serious mis-directions in the Judge's address to the Jury.

4. In the first place, the learned Judge while placing the evidence as to the age of the girl stated

'if the accused comes out with a positive version of his own it is for him to prove it. This does not necessarily mean that he himself lead the defence witnesses. The accused may prove his case from cross-examination of the prosecution witnesses or from the surrounding circumstances of the case and the failure to prove the version of his case will not relieve the prosecution of the burden of proving the guilt

of the accused and the prosecution will have to succeed on the strength of his own case.'

The conclusion arrived at in the first sentence quoted above that the onus is on the accused if he comes out with a positive version of his own is wholly misconceived. Though towards the end of that paragraph reference is made to the onus on the prosecution to prove the guilt, there was a clear misdirection as in the beginning as the learned Judge had rested the onus on the accused. In any view, this introduced a confusion which a lay Jury could not very well appreciate.

5. While referring to the elements necessary for attracting the provisions of Section 366, Penal Code, the learned Judge did not clearly indicate the effect of the girl leaving her father's place with the intent not to return again and thereafter meeting the accused at Dashapriya Park from where she was taken away by the accused. It is urged that the Jury was not given any indication of the legal position that to make out an offence Under Section 366, Penal Code, kidnapping must be from lawful guardianship and if the girl had already left the protection of her guardian it was for consideration whether the person taking her away subsequently from another place was sufficient to make out an offence of kidnapping.

6. There are other items in the charge which also had been commented upon but it is not necessary for our present purpose to enter into greater detail at this stage as in our opinion, the first two points made, are sufficient for holding that the Judge's charge to the Jury was bad for misdirection on material points which had affected the proper trial in the Court of Session.

7. We have therefore to consider whether on an examination of the legal position and the evidence in the case, the conviction can stand. Two points require careful consideration: (1) whether the essential conditions to prove kidnapping had been made out and (2) whether the prosecution has been able to prove that the age of the girl was less than 16 years.

8. Under Section 361, Penal Code : 'whoever takes or entices any minor . . . under 16 years of age if a female out of the keeping of the lawful guardian of such minor ... without the consent of such guardian it said to kidnap such minor or

person from lawful guardianship.'

9. To attract the provisions of Section 361, there must be a positive act of the person taking away the minor from and out of the keeping of the lawful guardian. It is urged that if the girl voluntarily goes away with a man or if she leaves the protection of her guardian and then is subsequently taken away by a person from another place that person does not commit an offence of kidnapping the girl.

10. In order to support a conviction for kidnapping a girl from lawful guardianship the ingredients to be satisfied are : (1) That the girl was under 16 years of age. (2) Such minor was in the keeping of a lawful guardian. (3) The accused took or enticed such person out of such keeping and such taking was done without the consent of the lawful guardian.

11. We shall consider later on the question whether the prosecution has been able to prove that the girl was under 16 years of age. It is admitted that while the girl was staying with her father she was in the keeping of a lawful guardian. The question which we have to decide is whether on the evidence the accused had taken or enticed the person out of such keeping and if so, whether the evidence is clear that that was so done without the consent of the lawful guardian.

12. About the question whether the accused took the girl out of the keeping of a lawful guardian may now be considered. The word 'taking' as used in this section does not mean a continuing or continuous act. The 'taking' which constitutes an offence is completed as soon as the girl is removed from the keeping of the lawful guardian. (Nemai Chattoraj v. Queen-Empress, 27 Cal. 1041 at p. 1017 : (4 C. W. N. 645 F. B.), Rekha Rai v. King Emperor, 6 Pat. 471 : (A. I. R. (15) 1928 Pat. 159 : 28 Cr. L. J. 820) and Emperor v. Tika, 26 ALL. 197: (I Cr. L. J. 561)). The mere fact that a minor leaves the protection of her guardian does not put her out of the guardian's keeping. If, however, it is proved that a minor had abandoned her guardian with no intention of returning back she cannot, thereafter, be deemed to continue in the keeping of the guardian. What will be deemed to be sufficient to constitute an abandonment of a guardian by a minor girl depends on the facts of each particular case. It cannot be that whenever a child, being taken to task by the guardian, leaves the guardian's house with the mental reservation that he or she

will not be returning back to be under that guardian it must in the eye of law be taken to put an end to the protection of the guardian at the sweet will of the minor. If it is shown that such conduct is due to a mere petulant outburst in consequence either of a quarrel with her relations or because of the guardian reprimanding her for her conduct that will be a relevant question to be considered for deciding whether her conduct was sufficient to put an end to the ties of guardianship. Vallient v. Eleazar, 30 C. W. N. 215 : (A. I. R. (13) 1926 Cal. 467 : 26 Cr. L. J. 977).

13. Even where there is some evidence that the girl, at the time when she left the protection of her guardian, did not intend to come back to her father's place but the evidence further discloses that but for something which the accused consented to do and did ultimately do the minor would not have, in the natural course of events, left the house of her father then there would be a sufficient taking by the accused in the eye of law for attracting the provisions of Section 363, Penal Code: Abdul Sathar v. Emperor, 54 M. L. J. 456 : (A. I. R. (15) 1928 Mad 585 : 29 Cr. L. J. 635).

14. We have now to apply the principles stated above as applicable to the facts of the present case. The evidence as led shows that there was between the girl and the accused an arrangement from before that she would leave her father's house to meet the accused in the Park from where she would be taken away. When under this arrangement she was leaving the protection of her father, even if it be with the intention of not returning again, that will not be sufficient to put an end to the ties of guardianship. The importance and significance of the previous arrangement between the girl and the accused must not be overlooked. We have to consider the surrounding circumstances under which the incident took place and then come to a conclusion whether the girl would have left the father's house had it not been for the previous arrangement with and the readiness of the accused to take her away, though not from the doorsteps of the father's house but from some distance. On the facts of this present case, we must hold that the previous arrangement with and the promise by the accused made it possible for the girl to leave her father's place. The expression of the intention of not returning to her father's place was due to the 'enticing' by the accused and she must be held to have been taken away by the accused from the keeping of a lawful guardian,

and if it be found that she was below 16 on the date when she was taken the accused would be guilty of the offence charged.

15. With regard to the question whether the girl was under 16 on the date she was taken away the evidence stands as follows: According to the mother of the girl she was about 13 and is alleged to have attained puberty, the January previous. This is supported by the father of the girl. The age mentioned in the admission form Ex. 9 when she was admitted in the Lake School for girls makes her at the time of the occurrence a little over 13 years. The mother cannot give the dates of birth of any one of her other children and the statement that this daughter had attained puberty only in January previous is falsified by the letter Ex. A which shows that she had attained puberty much earlier and while the family was living in Linton Street in the Park Circus area and before they had removed to the place of occurrence. It is not possible to come to a definite conclusion about her age on the evidence of the parents themselves as there pre contradictions and there was a deliberate attempt by the parents to under-State the age. The statement of the age in the admission form EX. 9 was filled up by Ramola, a cousin of the girl, and that cousin was not a competent person to state the age; the statement by the mother that she was present at the time of her admission cannot be accepted as correct, as had she been present it would not have been Ramola but the mother who would have been required to sign the declaration form.

16. The father of the girl stated that a Post Office Savings Bank Account had been opened in the name of this daughter and had that Pass Book been produced in Court it could have been ascertained as to what date had been given by the father in the Post Office. Such a statement for opening an account in the Post Office is required under the Post Office Rules to be made by the guardian himself and that would have been a very important piece of evidence but that has not been produced. The birth certificates of this girl or of the other children were also either not available or not produced. The oral evidence as given by the parents is not in our opinion sufficient to prove the age of the girl being less than 16.

17. We are, therefore, left with the evidence of the Radiologist Dr. Brojeswar P. W. 6 who took a number of skiagrams of the girl. His opinion is that the girl is between

15 and 16 and below 16. This evidence does not support the case as made by the parents that the age was near about 13. As found in the various books of medical jurisprudence Hindu girls in Bengal generally attain puberty between the ages of 12 and 14 and taking the attainment of puberty as and when Ex. A was written her age at the relevant time will be between 15 and 17.

18. The ossification test for determining the age of a girl has been applied in different parts of the world and various charts have been published by different authorities giving the result of the examination of a large number of cases. Ossification is a sign for determining age as is found in particular subjects when the ossification is completed. It must, however, be stated that owing to variation in climatic, dietetic, hereditary and other factors of the people of different places it is not possible to formulate & uniform standard for determination of age of the union of epiphyses for the whole of the sub-continent of India. The result of investigations in Europe, America and Australia would not be of much assistance as in the case of Indians the union of epiphyses takes place 2 to 3 years in advance of the age-incidence in Europe and in the case of females it is stated to be even earlier than in males.

19. Even in India we have different tables prepared by the authorities in different provinces and even in Bengal there are at least 2 if not 3 different tables giving different results. The ossification of particular bones which takes place-before 14 will not be of material assistance in determining the age of a girl who is nearer 16 and even in the case of the bones of which the appearance and fusion take place near about 16 are not of much assistance as there is a variation between tables given by Dr. Galetaun and Dr. Basu. Different results are reported to have been obtained by the experts and we have not been told to what extent the data used by them were responsible for the different results. The tables appearing from pp. 30 to 33 in-Modi's Medical Jurisprudence and Toxicology 9th Edn. indicate the risk of fixing age in the present case only on the ossification result particularly when the age is found to be near about 16. It becomes impossible to be dogmatic that the age will be a few months below 16 or few months above 16.

20. In a criminal trial the accused must get the benefit of doubt and there can be no conviction unless it can be clearly and unequivocally stated that the age of the girl was below 16. In view of the expert evidence in this case and particularly of the absence of any authoritative table applicable to Bengali girls we must hold that the accused would have the benefit of doubt and be acquitted. We may indicate in passing that the factum of any marriage ceremony having been at all gone through, far less being legal or sufficient in law, has not been proved.

21. We cannot leave this case without certain observations about the provisions contained in Sections 361 to 363, Penal Code. It is up to this Provincial Government to take up immediately the duty of carrying on investigation about appearance and fusion of the epiphytes of Bengali boys and girls so that there may be one authoritative table on which experts may depend and the Court may rely upon such tables. The question whether an offence under these provisions had been committed or not depends upon the determination of the age and sufficient data should be made available to assist the Court to -administer justice.

22. The result is that the appeal is allowed. The conviction and the sentence of the appellant are set aside and he is acquitted of the charge made against him. The appellant will be dig-charged from his bail bond.

Das Gupta J.

I agree.