

Biswanath Ghosh Vs. the State

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Court : Kolkata

Decided On : Jun-27-1957

Reported in : AIR1957Cal589,1957CriLJ1114

Judge : Chakravartti, C.J. and ;Das Gupta, J.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 361 and 366

Appeal No. : Criminal Revn. No. 708 of 1956

Appellant : Biswanath Ghosh

Respondent : The State

Advocate for Def. : Surathi Mohan Sanyal, Adv.

Advocate for Pet/Ap. : Nalin Chandra Banerjee and ;Ramendra Nath Basu, Adv.

Judgement :

Chakravartti, C.J.

1. This Rule is directed against an order of the learned Additional Sessions Judge of 24 Paragons by which he directed a further enquiry into a complaint by one Pramatha Nath Mandal of an offence tinder Section 366 of the Indian Penal Code against the petitioner before us. The trying Magistrate held that there was no sufficient ground for committing the petitioner to the court of Session and in that view discharged him under Section 209 of the Code of Criminal Procedure. Upon

an application under Sections 435 and 437 of the Code of Criminal Procedure, the learned Additional Sessions Judge directed a further enquiry which is challenged in the Rule before us.

2. The facts are simple, Pramatha Nath Mandal the father of a girl named Champarani, resides at 117 Gopal Lal Thakur Road, Baranagore. On the 1st of May, 1955, at about 1-30 P.M. he awoke from his midday siesta and found that his daughter, aged according to him about 16 or 17 years, was missing and that she had taken a sum of Rs. 120/-with her. He suspected that the girl had been taken away by the petitioner before us, because sometime back he had expressed a desire to marry the girl. On the same day at about 7-30 P.M. Pramatha Nath Mandal lodged an information at the Baranagore police station. On the 5th of May following, the petitioner and the girl were produced at the Chitpur police station by one Kanai Lal Mukherjee, living at 8/1 Sarbamangala Lane, Baranagore, Thereafter the girl was produced in the court of the Sub-divisional Magistrate of Barrackpore who handed her over to her father upon his executing a bond. The petitioner was placed on his trial on a charge under Section 366 of the Indian Penal Code.

3. It appears that after the case had made some progress something happened and the father informed the learned Magistrate that he would be prepared to give his daughter in marriage to the petitioner and was not desirous of proceeding with the case. The police was willing to help him and the Court Inspector recommended withdrawal of the case. The Sub-divisional Police Officer, Barack-pore concurred and the Additional Superintendent of Police, North, 24 Parganas, actually ordered withdrawal of the case. The learned trying Magistrate, however, did not permit a withdrawal and proceeded with the trial. At the end of it, however, he held that there was no reliable evidence that the girl was below 18 years of age on the date of the occurrence, nor any reliable evidence that the petitioner had kidnapped her with the intention of marrying her or having sexual intercourse with her. In that view, he discharged the petitioner, as I have already stated.

4. If the learned Magistrate thought that in order to constitute an offence under Section 366 of the Indian Penal Code it was necessary that the accused should

have kidnapped the girl concerned with the intention of marrying her himself or of having sexual intercourse with her personally, he was undoubtedly in error. The learned Additional Sessions Judge, however, did not reverse the order of the learned trial Magistrate on that ground, but he held that the evidence regarding the age of the girl was confused and the learned trial Magistrate should have given the prosecution an opportunity for clearing it up as they had prayed to be allowed to do. If the only ground upon which the learned trial Magistrate proceeded had been want of evidence regarding the age of the girl, I would not have felt disposed to interfere with the order of the learned Additional Sessions Judge. It appears to me that all the discussion which the learned Additional Sessions Judge undertook as regards the two Birth Registers produced in the case was really unnecessary because there was the evidence of the doctor that the girl would be between '16 or 17 years of age. Mr. Banerjee who appears for the petitioner contended that the doctor's evidence was really based upon his observation of the ossification of the bones of the girl and that opinion, based on such material, could not be accepted as final or decisive, since the medical science in that regard had not yet become an exact science. All that I need say as regards that argument is that in the present state of the development of the medical science and the present state of our knowledge, we must proceed on evidence of age as furnished by the ossification test, and I am not prepared to accede to Mr. Banerjee's suggestion that no finding can be based on evidence regarding the state of ossification. If, therefore, there was proper evidence about the age of the girl and that evidence was that she was between 16 and 17 years of age, there was obviously sufficient evidence of her minority upon which the petitioner could be committed to take his trial before the Court of Session, provided there was evidence in the case regarding the other elements of the offence of kidnapping.

5. As I have already pointed out, the learned trial Magistrate also found that there was no reliable evidence that the accused had kidnapped the girl. The object which he appears to have considered essential in order to constitute an offence of kidnapping is certainly not one of the objects which the Code requires, but if we confine ourselves to the other part of the learned Magistrate's finding, namely, that there was no evidence of kidnapping in the sense of the petitioner having taken the girl, I think it must be said that the learned Magistrate was right. No witness

said that he had seen the petitioner taking the girl away from her father's house, nor had any one said that they had seen the two coming out from that house together. The girl's own evidence was that she had left her father's house alone and of her own accord, because she wanted to escape a disagreeable marriage which her father was arranging for her.

6. Mr. Sanyal, who appears for the State, contended that the girl was a minor, but it seems to be immaterial whether she was a minor or not, in so far as her leaving the house of her own accord was concerned. A minor may not be competent to give her consent to her taking, but a minor is certainly competent to leave the protection of her guardian of his or her own accord. The only other evidence which may be said to have some remote bearing on the taking of the girl by the petitioner is the evidence of P. W. 4, one Kanai Lal Mukherjee, the man who produced the petitioner and the girl at the police station on the 5th of May. He, I may observe in passing, is the owner of a bus in which the petitioner serves as a conductor. He began his deposition by saying that on the 1st of May, 'Thursday', at about 5-30 P.M., the petitioner and the girl had gone to his house at 8/1 Sarbamangala Lane. If the petitioner and the girl had really gone to the house of this witness at 5-30 P.M. on the 1st of May, 1955, it might be a matter for consideration as to whether such association between the two so soon after her disappearance from her father's house might not be taken as constituting some evidence of the petitioner having taken her from the protection of her guardian. It seems, however, that the date the 1st May was a mistake. As I have already pointed out, this witness (P. W. 4) particularised the 1st of May by adding what day of the week it was and he said that was a Thursday. The 1st of May was, however, not a Thursday, but the 5th of May was. That the witness was really thinking of the 5th of May is made clear by what he said shortly afterwards. He said that

'on that very night some people of the locality went to my house in search of the accused and Champarani and I produced them to Chitpur P.S.' It will be recalled that Kanai Lal Mukherjee produced the petitioner and the girl at the Chitpur Police station on the 5th of May. 'On that very night' must, therefore, mean on the night in which he produced the petitioner and the girl before the police station and if the two had come to his house on that very day, they must have come on the 5th May

and not on the 1st. The learned Magistrate was, therefore, right in saying that there was no evidence as to where and with whom the girl had been staying from the 1st of May to the 5th of that month. He might have gone a little further and said that there was no evidence either, ' and that would be the crucial evidence in the case, as to with whom she had left her father's house or, to be more precise, no evidence that she had left her father's house with the petitioner or that she had left it on being enticed by him or on being taken by him. It Was the prosecution's own case that the petitioner was known to the girl and that probably some kind of a love affair was going on between the two. If so, it is not impossible that the girl left her father's house voluntarily in order to escape an unwelcome marriage and then went to the petitioner who offered to befriend her.

7. It thus follows that although there was evidence in the case regarding the minority of the girl which was proper evidence to go to a jury, there was complete absence of evidence regarding another essential ingredient of the offence, namely, the taking of the girl by the petitioner. The learned Additional Sessions Judge has said that if the petitioner was an active participator in the girl's leaving her father's guardianship, he would be guilty of taking the girl out of the protection of her father. That proposition is undoubtedly right, if by 'active participator' the learned Judge had meant that the petitioner had taken the girl or had enticed her. The factual basis of that observation, however, is not correct, since the learned Judge assumes that the petitioner and the girl had gone to the house of Kanai Lal Mukherjee in the evening of the 1st of May, 1955. That being so, the basis upon which the learned Judge found active participation of the petitioner in the taking of the girl was really non-existent.

8. In the above state of the evidence, it is impossible to hold that the order of the learned Judge directing a further enquiry into the matter was justified, either in law or on the facts. His order must accordingly be set aside.

9. In the result, this Rule is made absolute. The order of the learned Additional Sessions Judge, dated the 23rd of March, 1956, directing a further enquiry into the matter is set aside and the order of the learned Magistrate, dated the 19th December, 1955 discharging the petitioner, is restored.

Das Gupta, J.

10. I agree.

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