

Sk. Yusuf Vs. the State

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Court : Kolkata

Decided On : Mar-02-1988

Reported in : (1988)2CALLT221(HC)

Judge : Jitendra Nath Chaudhuri and ;Amal Kumar Chatterjee, JJ.

Acts : [Indian Penal Code \(IPC\), 1860](#) - Sections 34, 361 and 363

Appeal No. : Criminal Appeal No. 237 of 1979

Appellant : Sk. Yusuf

Respondent : The State

Advocate for Def. : Pranay Adak, Adv.

Advocate for Pet/Ap. : C.F. Ali and ;Sk. Abu Sufian, Adv.

Disposition : Appeal allowed

Judgement :

Jitendra Nath Chaudhuri, J.

1. This appeal arises out of the Sessions Trial Case No. XIX of January 1978 held by the learned Sessions Judge, Midnapore. In the said Trial the present appellant Sk. Yusuf was charged alone under Section 368 I.P.C. as well as under Section 366/34 I.P.C. along with four other accused. All the other accused persons were

acquitted at the trial and the present appellant was also acquitted of the charge under Section 368 I.P.C. but was convicted alone of the lesser offence under Section 363 I.P.C. on the charge under Section 366/34 I.P.C. and was sentenced to 3 years rigorous imprisonment.

2. The prosecution case in short was that on or about 8.4.1977 the appellant along with the other accused persons kidnapped a minor girl Parvinnessa from the lawful guardianship of her father Abdul Rahaman-P.W. 1 from his residence at Calcutta. The prosecution examined 8 witnesses of whom P.Ws. 1 and 4 are the father and brother respectively of Parvinnessa. P.Ws. 2 and 3 are the doctor and the radiologist who examined the girl. P.Ws 5 and 6 are the witnesses who were present at the time of the recovery of the girl from the house of the appellant. P.Ws 7 and 8 are police personnel. P.W 7 is the officer who recovered the girl from the house of the appellant, while P.W 8 is the Investigating Officer of this case.

3. The defence is one of total denial. No witnesses were examined by the defence.

4. Learned advocate for the appellant has submitted that there is no evidence at all that the appellant in any way took or enticed Parvinnessa out of the keeping of P.W. 1. The fact the girl was a minor at the time when she was recovered has not been disputed in this case.

5. The learned advocate for the state has not been able to point out any evidence or any material in this case relating to the taking or the enticing of the minor in question by the appellant save and except that she was in fact found in the house of the appellant and recovered thereafter.

6. P.W. 1 the father of the girl has stated that she has since been married and has gone on tour with her husband and it is not known when she will return. He has deposed that he does not know her present whereabouts. He has stated that his daughter used to visit her relatives without his permission and that his daughter did not leave with his permission nor did anyway take his permission so far as the present incident is concerned. He has stated that he was not examined by the Investigating Officer. P.W. 4 -the brother of the girl has deposed that on 8.4.1977 on finding his sister missing from home he lodged the missing report on 9.4.1977

at the Narkeldanga Police Station. Thereafter on 10.4.1977 he lodged the F.I.R. in the present case. Later he was present at the time of the recovery by the police of his sister from the house of the appellant. He has identified the appellant in court. In cross-examination he has stated that 'my sister came to the house of Yusuf on tour on her own accord.' No permission was sought by the prosecution to cross-examine P.W. 4.

7. The evidence of P.Ws 2 and 3 is to the effect that on 11-4-1974 Parvinnessa was under the age of 18 years. In fact P.W. 2 has stated that her age on 11-4-1977 was 15 years and 5 months while P.W. 3 has stated that on 11-4-1977 when he radiologically examined Parvinnessa she was about 16 years of age. P.W.s 2 and 3 were not cross-examined by the defence. P.W.s 5 and 6 have deposed that they were present at the time when Parvinnessa was recovered by the police from the house of the appellant. No cross-examination was directed to these witnesses relating to this factum of recovery. P.W. 7 - the Assistant Sub- Inspector of Police recovered the girl from the house of the appellant. He has deposed that besides the appellant he also arrested three other accused persons in that house at that time (one accused subsequently surrendered in court). P.W. 7 handed over the victim girl along with the arrested persons to the Officer-in-Charge in the police station. In cross-examination he deposed that there were other occupants in the house of the appellant at the time of recovery. P.W. 8, the Investigating Officer of this case has deposed that he examined the victim girl on 10-4-1977.

8. The learned Trial Judge has convicted the accused- appellant under Section 363 I.P.C. having found that the girl in question was minor at the time of the incident (that is to say under 18 years of age) and that she was found in the house of the appellant. From the solitary circumstance that the girl was recovered from the appellant's house he has inferred that the appellant himself has enticed or taken the girl away from the lawful guardianship. In discussing the evidence of P.W. 4 that the girl of her own accord went to the appellant's house, he has held that this witness is not reliable.

9. We entirely agree with the finding of the learned Trial Judge that the girl concerned was a minor at the time of the incident. The evidence on record has not

been in any way challenged by the defence and there is no reason to doubt the same. There is, however, no evidence to show that it was the appellant and the appellant alone who either took or enticed the minor from lawful guardianship. It is true that the recovery of the girl from the house of the appellant may be construed as a circumstances but it cannot, by itself, prove without any other attending circumstance or circumstances that The appellant took or enticed the girl. Without either taking or enticing there can be no kidnapping from the lawful guardianship even if the girl is a minor. Before Section 363 I.P.C. can be invoked the ingredient of Section. 361 I.P.C. have to be satisfied. Moreover in this case the girl herself has not been called to depose and the learned advocate for the appellant has submitted that if called she would not have supported the prosecution case. P.W. 1 has given the explanation as to why he has not to come to depose but the same does not appear to be convincing. In any event the fact remains that even if no adverse inference was drawn for the non-calling of Parvinnessa and even if we believe that P.W. 4 has not spoken the truth when he said that his sister went to the appellant's house of her own accord, the fact remains that there is no evidence at all to show that the appellant took or enticed the girl from the lawful guardianship. The solitary circumstances of recovery of the girl from the appellant's house without anything more, as we have already observed, is not sufficient to clinch the issue.

10. We, therefore, hold that the prosecution has been unable to prove the case and we find the appellant not guilty of the offence under Section 363 I.P.C. and acquit him of the same. The judgment and the sentence of the learned trial court is set aside and the appellant is discharged from his bail bond.

11. This appeal, accordingly, is allowed. Let the records go down as early as possible.

A.K. Chatterjee, J.

12. I agree.