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Court : Kolkata

Decided On : Jan-14-1932

Reported in : 145Ind.Cas.925

Judge : Panckridge and ;M.C. Ghose, JJ.

Appellant : Muhammad Ali and ors.

Respondent : Emperor

Judgement :

Panckridge, J.

1. This is an appeal by five persons who were charged of offences punishable under Sections 366, 366-A and 368, Indian Penal Code. They were convicted of the charge under Section 366, but acquitted on the charges under Sections 366-A and 368. Another man was charged under Sections 366-A. and 368, but was acquitted on both those charges. In respect of offences punishable under Sections 366 the present appellants have been sentenced to various terms of imprisonment.

2. The case for the prosecution appears to have been that a certain young girl who was living in the, same bari with her father was forcibly seized by a party of whom some of the accused persons are members and was taken to the house of accused No. 1. While she was there an attempt was made to force her into

marriage with accused No 3. She did not consent and she was thereafter taken from place to place and she was finally discovered in the house of a woman who is said to be a woman of the town. The charge under Section 366 is concerned with the original forcible seizure of the girl. The other charges were based upon incidents subsequent to that seizure. The accused have been acquitted of the charges under Sections 366-A and 368 and I need not deal with them further. But I am by no means convinced that it was convenient or proper to try the accused on those charges at the same time as they were being tried on the charges under Section 366. I now turn to the actual charge under Section 366. It runs as follows:

That you on or about August 31, 1930, at Nijkuranshi kidnapped Mastura Bibi from the lawful guardianship of her father Majidulla or abducted her with intent that she might be compelled to marry Husmutulla against her will or knowing it to be likely that she would be forced or seduced to illicit intercourse.

3. This is the charge upon which the accused were tried and upon which they have been found guilty and in respect of which they have been sentenced. To my mind the charge in this form offends against all the principles of criminal pleading. It seems to me elementary that it should appear plain whether the accused persons are being charged with kidnapping or are being charged with abduction and similarly it should appear clearly whether the intent alleged was an intent to compel the a victim to man y against her will or whether t the kidnapping-or abduction was with the 1 knowledge that it was likely that the girl would be forced or seduced to illicit intercourse. If one looks to this charge one will, find that various combinations of possible circumstances which can be covered by it are numerous. It is perfectly true that the prosecution may be in some doubt in certain cases whether the offence disclosed is that of kidnapping or that of abduction. If this is so, nothing is easier than to frame two charges and take the verdict of the Jury upon them both. What has happened in this case is a good example of the mischief that can arise if that rule is not observed. Evidence was called and presumably reliance was sought to be placed by the prosecution on that evidence as to the age of the girl. The Jury have brought in a verdict of guilty under Section 366, but whether they have brought in that verdict because they considered the accused guilty of the offence of kidnapping or of the offence of abduction no one is

able to say. As I have pointed out in the course of the argument it might well be that the importance of an alleged misdirection in the charge would depend entirely upon which view of the facts the jury had taken. I see that a view similar to my own was taken by this Court in the case of *Mafizaddi v. Emperor* 101 Ind. Cas. 935 : AIR 1927 Cal. 611 : 28 Cr. EJ 805 where Cuming and Graham, JJ., laid down that the ingredients of the two offences are different and that the accused is entitled to know which of the charges he is asked to meet. They add that the two offences are distinct offences and that separate charges should have been framed if it was desired to charge the accused with both the offences. I entirely agree with this view. The learned Deputy Legal Remembrancer has drawn our attention to the case of *Prafulla Kumar v. Emperor* : AIR 1930 Cal 209 . In that case it was argued that it was illegal to frame one count or charge setting out both the offences in the alternative and the court observed:

We are not prepared to say that a charge of the latter character contravenes the requirements of the law, far less that there was the least prejudice caused to the appellant thereby.

4. That was doubtless because the learned Judge specifically ascertained whether the Jury considered the accused guilty of kidnapping or guilty of abduction. Having ascertained that the Jury were of opinion that he should be convicted of kidnapping, but acquitted of abduction the court proceeded to deal with the accused on that basis. Therefore whatever the defect in the charge may have been steps were taken to cure it. There the difficulty under which we labour as to the nature of the offence of the accused did not arise. In the circumstances we are of opinion that this case must go back for a retrial and we direct that the accused be tried on a charge framed in accordance with the principles I have enunciated, that is to say, if it is desired to charge him with both kidnapping and abduction, those offences must be made a subject in separate charges. Similarly if it is desired to charge him with abduction either with intent that the girl might be compelled to marry against her will or forced or seduced to illicit intercourse, separate charges must be framed contemplating both sets of circumstances. But, in my opinion, having regard to the unsatisfactory state of the evidence as to the girl's age and having regard to the fact that the accused persons have already

been acquitted of charges under es. 366-A. and 368 the best course will be for the accused to be re-tried on the simple charge of abducting Mastura Bibi with intent that 'she might be compelled to marry Husmutulla against her will.

5. We therefore allow the appeal, set aside the conviction and sentence and direct re-trial in the manner I have indicated. The recommendation that I have made with regard to limiting the number of charges to one is in no sense mandatory, but merely the result of a first impression of the evidence. If the Public Prosecutor or the court thinks fit in the intejest of justice is try the case on a specific charge of abduction knowing it to be likely that the girl would be forced or seduced to illicit intercourse he will use his own discretion in the matter. Pending the re-trial the appellants will be released on bail to the satisfaction of the Deputy Commissioner.

M.C. Ghose, J.

6. I agree.

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