

ALLAHABAD HIGH COURT

Nura

Vs

Rex

Criminal Appeal No. 700 of 1947

(Mushtaq Ahmad, J.)

29.11.1947. 25.05.1949

JUDGMENT

Mushtaq Ahmad J.

1. Nura, aged 40, Azimuddin, 24 or 25, Ibrahim 35, Jumma 25, and Karma 60 or 62 years of age, the first being resident of village Harsauli, the second of village Nirmana and the the others of village Kaserwa, district Muzaffarnagar, appeal against their conviction and sentences passed by the learned Sessions Judge of that place. Appellant 1 was convicted under Section 366, the second under Sections 366 and 376, the third under Sections 366 and 368, the fourth under Sections 368 and 376, and the fifth under Section 366, Penal Code each being sentenced to a period of three years' rigorous imprisonment, the same being cumulative in the case of appellants 2 to 4.

2. There were two other persons also tried with these appellants, Najmuddin and his wife Mt. Saeedan, but they were acquitted by the learned Judge.

3. A girl named Hajra, aged about 12 or 13 years was alleged to have disappeared from the house of her father Alimuddin, 4 gharis after nightfall on 30th March 1947, in village Harsauli.

4. A report of the disappearance was made by Alimuddin, the girl's father, at 11.30 A. M. about five days later on 4th April 1947, at the police station Titavi, 7 miles from village Harsauli.

5. The prosecution case occupies a wide range of facts as embracing the five appellants and the two acquitted persons, and were it necessary for me to form my judgment with regard to the conduct of the appellants independently of the judgment written by the learned Sessions Judge, the hearing of this appeal would have taken much longer than it has actually taken. Fortunately one gets a clear idea of the position, both legal and as regards the actual facts from the judgment itself. Indeed, in coming to the conclusions at which I have arrived, I have in no small measure been helped by the learned Judge's own representation of the evidence adduced by the prosecution. The case against the accused was, briefly, this :

6. The girl Mt. Hajra was in the habit of visiting the house of one Najmuddin, a neighbour of her father Alimuddin, as she was on terms of intimacy with Najmuddin's wife, Mt. Saeedan, who used to receive her, the girl, with kindness and even serve her with sweets. In the course of these visits Mt. Saeedan used to assure the girl that she would be better off in marrying Azimuddin appellant, who, in fact, had been employed as a servant by Najmuddin only three or four days before the disappearance of the girl, on 30th March 1947. It may be incidentally stated that Azimuddin himself was a married person. Mt. Hajra on this date also, in the ordinary course of her practice, visited Mt. Saeedan at about noon, when again, she was served by her with sweets and asked to see her in the evening also. She did go to her in the evening on the pretext of easing herself, and there Najmuddin and Azimuddin accused also met her. Then Mt. Saeedan told her that she (the latter) would have to go with Azimuddin appellant. Azimuddin after a while went away to the Khaddi where he was working as a servant of Najmuddin. Some time later Najmuddin accused took Mt. Hajra with him to the Khaddi where Azimuddin was. From there she was taken by both of them out of the village, but when they reached the canal bank, Najmuddin entrusted her to Azimuddin appellant asking him to take her with him, himself going away towards village Barwala as his sister-in-law had died there. Azimuddin then took the girl to village Jasoi to the house of one Mt. Naziran Julahin, a relation of his, and on his way to that place, he committed rape on her. On being questioned by Mt. Naziran, Mt. Hajra disclosed that she was a Mula Jat of village Harsauli and had been kidnapped by Azimuddin accused. Mt. Naziran then informed Imamuddin and Nasiruddin Mula Jats about the arrival of the girl at her house, on which Nasiruddin came and took the girl and Azimuddin to his own place. There Nura, Ibrahim and Karma appellants also happened to be present, Nura being a distant uncle of Mt. Hajra, and a resident of village Harsauli. Nura on hearing about the girl's arrival there, offered to take her and Azimuddin back to village Harsauli. Then Nura, Ibrahim and Karma, accompanied by Nasiruddin started from the village for Harsauli, although Nasiruddin, after a short distance, came back to his own place. On the way, there was some hustling between Azimuddin on the one side and Nura and Karma on the other, with the result that Azimuddin was driven away. Then Nura and Karma also decided to come away, asking Mt. Hajra to go with Ibrahim alone, to which she did not agree. These persons then threatened to beat her, on which she did proceed with Ibrahim. Ibrahim, instead of taking her to Harsauli, took her to his house in village Kaserwa along the canal bank and committed rape on her (this story of a rape by Ibrahim not believed by the learned Sessions Judge). Ibrahim then leaving the girl at his house in the custody of his brother Jumma, went away. Jumma committed rape on her several times when the girl was at his house. It was then that one Hamid Sheikh informed Maujuddin, an uncle of the girl, that she was in village Jasoi. Maujuddin and one Allahdin then went to that village and visited the house of Imamuddin and Nasiruddin and enquired from them about the girl. Being told by them that the girl had been sent back with Nura, Karma, Ibrahim and Azimuddin appellants to Harsauli, where, in fact, she had never arrived, they went back to Harsauli with Nasiruddin. There Nura was called to the house of Maujuddin, and Nasiruddin asked him about the girl. Nura first denied all knowledge of her, but, when pressed, he admitted that she was in village Kaserwa with Ibrahim, and offered to accompany Nasiruddin there to recover the girl. On this, one Lakhmira, a brother

of Imamuddin and some other persons went to the house of Ibrahim in village Kaserwa, and enquired from Jumma accused, who happened to be present there, about the girl. Jumma denied all knowledge about her. Thereupon the entire party entered the house and called out Mt. Hajra by name. She then came out from one of the rooms and was taken to her father in village Harsauli.

7. I have set forth the above allegations in detail so as to embrace all the appellants with reference to the conduct attributed to them and in order to appreciate the part alleged to have been played by them in this case. Before I take up their cases individually, I would indicate the legal position, which has to be kept in view to determine their responsibility for the absence of the girl from her father's house. The main sections to be considered in the case are Sections 361 and 362, Penal Code, the one defining "kidnapping from lawful guardianship" and the other defining "abduction." The former section reads as follows :

"Whoever takes or entices any minor under 14 years of age if a male, or under 16 years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

The latter section provides that

"Whoever by force compels or by any deceitful means induces any person to go from any place is said to abduct that person."

8. In the section first quoted, the most essential ingredient of the offence defined thereby obviously is that the minor should have been "taken" by the accused "out of the keeping" of his lawful guardian. In the present case, as I have already shown in my summary of the prosecution case, the girl, Mt. Hajra, though on the request of Mt. Saeedan, had already gone to the latter's place on the evening of 30th March 1947, and remained there for some time. That she had gone there willingly is obvious from the fact that she admitted in her evidence that she had done this on the pretext of easing herself at the house of Mt. Saeedan. Neither at the time when Mt. Hajra left her father's place nor until the time she remained at Mt. Saeedan's house, Azimuddin appellant is alleged to have had any exchange of words with her so that her going out from her father's house could, in no sense, be attributed to him. All the talk that took place, according to her evidence, at the house of Mt. Saeedan, was between her and Saeedan whether it had any reference to Azimuddin or not. She did not suggest that Azimuddin had even indicated his consent to the proposal which Mt. Saeedan had made about her going and living with Azimuddin. It was not until Najuddin had taken the girl to the Khaddi where Azimuddin was working, and indeed, it was not until Najmuddin had gone out with the girl up to a certain point on the way from the Khaddi to village Jasoi and left her there that Azimuddin came into real contact with her. Till then Azimuddin could not be said to have had any control or dominion over her. I am saying this with some emphasis because Najmuddin, as well as his wife Mt. Saeedan, have alone been alleged by the prosecution to have advised her till that moment. It is rather curious that on the evidence led by the prosecution, the learned Judge, while acquitting both

Najmuddin and Saeedan, should have held Azimuddin guilty of kidnapping Mt. Hajra from the house of her father. As I have already pointed out, Azimuddin had absolutely no concern in the matter of the girl leaving her father's place, and, indeed, it was after a fairly long interval that the two had got together after Najmuddin had left them on the way leading to Jasoi.

9. There can also be no doubt that, so far as the legal position is concerned, if a minor girl voluntarily leaves the roof of her guardian and when out of his house, comes across another, who treats her with kindness, or at least without employing any force or practising any fraud on her, he cannot be held guilty under Section 361, Penal Code. This was held by a Bench of this Court in *Emperor v. Ram Chander*¹, and by Tudball, J., in *Emperor v. Ewaz Ali*²,

10. Learned counsel appearing for the prosecution contended that Azimuddin's conviction might be affirmed under the later part of Section 366. To convict a person under that part it is essential that he is found to have practised some "criminal intimidation" or employed "any other method of compulsion." In the present case the learned Sessions Judge, however, found that

"I think she willingly went with him (Azimuddin in the hope of getting good clothes and ornaments which was promised to her."

The promise referred to in the above passage can be attributed on the evidence only to Mt. Saeedan, there being nothing to show that any such promise had been thrown out by Azimuddin himself. But the point really is that the girl had gone out of her father's house, and gone out with Azimuddin willingly and without anybody having exercised any compulsion on her. I, therefore, have come to the conclusion that no charge under Section 366, Penal Code, can be made out against Azimuddin, and he must be acquitted of it.

11. Azimuddin having also been convicted under Section 376, Penal Code, that position too has to be examined. It is in the evidence of the girl Mt. Hajra that, when she was being taken by him from Harsauli to Jasoi, rape was committed by him on her in the jungle. There was no evidence in corroboration of this statement of the girl. I find it difficult to accept this evidence for a number of reasons. If Azimuddin, already a married man, had been so fortunate as to have induced his employer Najmuddin, who had engaged him only three or four days earlier, to find a second wife for him, there seems to be no occasion for such a frantic haste for Azimuddin so as to commit rape on the girl even before he had taken her to a place of residence. He knew that he was taking her to Mt. Naziran in Jasoi, she being a relation of his. There seems to be no reason why Azimuddin, if he was so excessively voluptuous, as suggested by Mt. Hajra, had not satisfied his lust even at Harsauli or had not waited until he had reached Mt. Naziran's house in Jasoi. The learned Sessions Judge himself threw out her entire evidence, in so far as it implicated Najmuddin and his wife Saeedan. He gave good reasons on p. 131 of the paper-book for disbelieving her evidence on several important points. In view of this, I find it very difficult to endorse the uncorroborated evidence of the girl that she had been raped by Azimuddin when being taken to Jasoi. Their Lordships of the Bombay High Court in *Emperor v. Mahadeo Tatyia*³, held that in a charge of rape the uncorroborated testimony of the girl alone should not be accepted as a sufficient foundation for convicting the accused. The unripe age of the girl, the

immaturity of her mind and its amenability to diverse influences are matters which make it highly impolitic that her testimony, in the absence of some corroborative evidence, should be accepted, where the charge is one of rape. I, therefore, set aside the conviction of Azimuddin appellant under Section 376, Penal Code, also and acquit him.

12. The position with regard to Nura, Karma and Ibrahim is among themselves very nearly the same. The first two were convicted by the learned Sessions Judge under Section 366, Penal Code, only, for abducting Mt. Hajra. The evidence given by her and two other witnesses Nasiruddin P. W. 9 and Imamuddin P. W. 8 was that Hajra and Azimuddin had both been entrusted to these appellants and also to one Ibrahim to be taken to Harsauli, although on the way these appellants forcibly compelled her to go with Ibrahim to his house in village Kaserwa.

13. From the definition embodied in Section 362, Penal Code, it would appear that the main ingredient of the offence of abduction is that the accused should have "by force compelled any person to go from one place to another". The word "force" is defined in Section 349 of the Code as implying a contact between the person on whom force is used and some other person or object in order to compel the former to move or to cease to move from a certain place. In the present case the evidence of Mt. Hajra, which, again, is not supported by any other evidence, only was that she had been threatened by these appellants Nura and Karma to go with Ibrahim accused. There was no suggestion that any "force" was used on her in the sense in which that word is defined in Section 362, Penal Code, as already quoted. In *Koya Moidin v. Emperor*^d it was held that the word "force" in this section meant actual force and not merely a show or threat of force. This seems to be the correct interpretation in view of the definition I have already quoted. I am, therefore, not satisfied that the charge under Section 366, Penal Code, against these appellants was legally made out.

14. Ibrahim appellant, as already mentioned, was convicted under Sections 366 and 368, Penal Code. The conviction under the latter section, of course, would depend on whether any offence had been committed under the former section. There can be no question of kidnapping in his case and an offence under Section 366 could be deemed to have been made out only if the appellant could be charged with having used any 'force' and thereby compelled Mt. Hajra to change her position from one place to another. There being no evidence of an actual force, just as in the case of Nura and Karma appellants, having been employed by Ibrahim appellant on the girl, no charge under Section 366, Penal Code, against him could be made out. Indeed I am inclined to think that the girl must have proceeded after Azimuddin had left her on the way from village Jasoi to Kaserwa, even as advised by Azimuddin. Given the fact that Azimuddin himself had not employed any force or practised any fraud upon her and that she had accompanied him of her own accord, I cannot imagine that Azimuddin should not have made himself sure about the comforts of the girl before leaving her. There can, thus, be no question of the girl having proceeded with Ibrahim under any compulsion or force.

15. The last appellant Jumma was convicted, as also I have mentioned, under Sections 368 and 376. My observations with regard to Section 368 in connection with Ibrahim would apply to this

appellant also. As regards the charge under Section 376, there is, again, only the uncorroborated statement of the girl Mt. Hajra, on which I have already made observations when dealing with that charge in connection with Azimuddin appellant.

16. In adjudging the value of the evidence given by Mt. Hajra in this case, it will have to be remembered that the girl appears, in spite of her minority, to have gone rather too fast morally in her immediate antecedents. The doctor, after examining her, found that her hymen was absent and that there was no tear or laceration of the vaginal orifice, nor was there any mark of any injury. The girl, therefore, appears to have had some previous experience of sexual life, and the fact that there was no mark of any injury on any portion of her body would clearly suggest that there had been no tussle between her and Azimuddin or between her and Jumma, when either the one or the other should have committed rape on her. This, again, would affect the prosecution case that rape had been committed on her. I, therefore, acquit this appellant also.

17. In the result, the appeal of all the appellants is allowed, and they are acquitted. They are on bail, to which they need not surrender. The bail and surety bonds are discharged.

Appeal allowed.

Cases Referred.

1AIR 1914 All 376 : (15 Cr LJ 265)

237 All 624 : (AIR 1915 All 390 : 16 Cr LJ 663)

3AIR 1942 Bom 121 : (43 Cr LJ 621 FB)

4(1937 MWN 1198 (1))