GUJARAT HIGH COURT

Ghanchi Vora Samsuddin Isabhai

Vs.

State of Gujarat

Criminal Appeal No. 895 of 1968

(J.B. Mehta and A.D. Desai, JJ.)

11.02.1969

JUDGMENT

J.B. Mehta, J.

1. x x x x1-2.

3. Mr. Gandhi for the accused raised the most important question in this appeal as to the age of Sheela and argued that this important ingredient in the offence of kidnapping under Section 361 that Sheela was under 18 years age was not brought home to the accused. The learned Sessions Judge has in this connection relied upon the statement of Sheela at Ex. 9 in her evidence that her father when he visited at Wadhwan before this incident told her that this was her birth date. This reported statement of the father would be no evidence, when the father has not been examined. The learned Sessions Judge further relied upon the birth date certificate issued by the Head Master of the Vikas Vidyalaya, Vadhwan, at Ex. 6, which certifies that the birth-date of Sheela as entered in the General Register of the School was 8th August 1951. The witness Jayantilal Nagardas, the Teacher in the Vidyalaya (Ex. 12) was examined and according to him the certificate was as per general register. Entry Ex. 13. This entry in its turn was made from the School Leaving Certificate Ex. 18 issued by Shishu Mangal, Junagadh by the Head Master of the Primary School Sheela had proved the said School Leaving Certificate Ex. 18 which also mentions the said birth date. On this evidence, the learned Sessions Judge held that there was satisfactory proof as regards the age of Sheela as the birth date was proved to be 8th August 1951. Mr. Gandhi vehemently argued that this School Leaving Certificate was not from any official register and even under Section 35 of the Evidence Act it would not be relevant evidence. As regards the birth date of Bai Sheela it is true that this being not a Government school, the document can go in under Section 35 of the Evidence Act, if it is shown that the headmaster who had issued this certificate was in the discharge of his duties specially enjoined by law to make these entries in the school register. The learned Assistant Government Pleader, Mr. Mehta, in this

connection pointed out the relevant rules from the Bombay Primary Education Rules, 1949. Under Rule 129 the school leaving certificate has to be issued. Under Rule 130, the provision is made for the age certificate to the effect that every child seeking admission for the first time into an approved school shall produce a certificate of age signed by its parent. In the case of illiterate parents, the certificates shall bear their thumb impression, attested by a literate person other than a teacher of the school to which the child seeks admission. The date of birth given in this certificate shall be entered in the School General Register. No subsequent change or alteration therein shall be made except with the sanction of the School Board Chairman. In the case of transfer of pupils from one place to another, the age given in the leaving certificate shall be entered in the register of the new school. From these two rules, and the other relevant rules, laying down duties of the teachers and headmasters to maintain the relevant registers and making proper entries therein. Mr. Mehta argued that by a statutory provision the school authorities were enjoined to maintain the General Register and to issue the school leaving certificate. Mr. Mehta is right in this connection that such duty being imposed by law, the entry of the birth date in the School Leaving Certificate from the General Register would be relevant evidence even under Section 35 of the Evidence Act. The difficulty, however, which still arises, is as to the evidentiary value that can be given to the statement of age in this entry made in the School Register. Mr. Mehta pointed out that because of Rule 130, a presumption would arise under Section 114 of the Evidence Act that the parent had given this age. In the present case even though both the parents are alive and are staying at Ahmedabad and at Surat, none of them was examined to prove the truth of this entry. The prosecution relied on this entry for proving the truth of the statement of the age of Bai Sheela. No connective evidence was led to show that this entry was made on the statement of the parent. No birth register entry or vaccination certificate was even produced. Besides, when both the parents were living and were not shown to be incapable of giving evidence their reported statement would hardly have any higher evidentiary value than hearsay evidence. Mr. Mehta in this connection vehemently relied upon the decision in *Bhim Mandal v. Magaram*[1], by Raj Kishore Prasad J. That decision cannot help Mr. Mehta for the simple reason that in that case the statement of the parent, proved by the relevant entry in the school register maintained under the Bihar and Orissa Education Code, could prove the truth of the contents, because the case was covered under Section 32(5) of the Evidence Act as the concerned parent was proved to be incapable of giving evidence and, therefore, the recognised exception to the hearsay rule came into play. Therefore, on the evidence on record in this case, the prosecution has failed to prove that Bai Sheela was under the age of 18 on the date of the offence and the charge under Section 366 for kidnapping therefore cannot be brought home to the accused. The conviction on that count of kidnapping must, therefore, be set aside.

4. Mr. Mehta, however, next argued that as the offence of abduction would be by way of alternative charge to one of kidnapping, the case would clearly fall under Section 236 of the Criminal Procedure Code and in such a case, it is open to the Court under Section 237 of the Criminal Procedure Code to convict the accused for the offence of abduction under the same Section 366 of the Indian Penal Code, if the facts proved established that charge, as the accused

met that charge right from the beginning and his explanation was even sought under Section 342. In *Smt. Ram Devi v. State of U. P*[5]*.,* at p. 576, the Supreme Court had to consider this question as to whether the accused could be convicted for abduction under Section 366, when the prosecution failed to prove the ingredient of age for the offence of kidnapping under Section 361. Their Lordships of the Supreme Court held at page 576 that apart from the fact that that was not the charge under Section 366, the evidence on record did not warrant the conclusion that the concerned lady was either

[4] AIR 1961 Pat 21

[5] AIR 1955 SC 574

compelled by force or induced by any deceitful means to go
from her father's place by the accused, nor was any question put to the accused in the examination under Section 342, Criminal Procedure Code in that connection. In these circumstances, the Supreme Court did not accept that argument. The fact of absence of a specific charge of abduction would not be material in this case as the accused at the initial stage on the facts disclosed in the charge-sheet could have been alternatively charged both for kidnapping and abduction under Section 366. After the decision in *Emperor v. Kasamalli Mirzalli*[6]*,* by the Full Bench consisting of Sir John Beaumont, Kt. Chief Justice, Wadia J. and Sen J., it is well settled that if the prosecution had been doubtful whether they could prove that the girl was under the relevant age they could put up alternative charge of kidnapping and abduction for Section 236 of the Criminal Procedure Code would be clearly applicable. In view of this specific provision of Section 237, the want of a specific charge could not by itself be treated as any prejudice to the accused. The position of law in this connection is also well settled after the decision of the Supreme Court in *Willie (William) Slaney v. The State of Madhya Pradesh*[7]*,* In the majority judgment, by His Lordship Chandrasekhar Aiyar J., on behalf of himself and Jagannath Das, J. and with which Inam, J. agreed, at page 137, it is in terms held that there may be cases where a trial, which proceeds without any kind of charge at the outset, can be said to be a trial wholly contrary to what is prescribed by the Code and in such cases, the trial would be illegal without the necessity of a positive finding of prejudice. By way of illustration, it is in terms pointed out that where the conviction is for a totally different offence from the one charged and not covered by Sections 236 and 237 of the Code, the omission to frame a separate and specific charge would be an incurable irregularity amounting to an illegality. When the charge is of a minor offence, there would be no conviction for a major offence, e.g., grievous hurt or rioting and murder. Therefore, where a charge is not for such a distinct offence, which would not be covered by Sections 236 and 237 of the Criminal Procedure Code, the conviction for the other charge which could have been made in the alternative would always be legal, provided no prejudice has resulted to the accused. On that principle, in *Sunil Kumar Paul v. State of West Bengal*[8]*.* the Supreme Court held that the accused could be convicted for the offence under Section 420, Indian Penal Code, even though he was charged only for the offence under Section 409 because that alternative charge could have been framed under Section 236 of the Criminal Procedure Code on the basis of the allegation in the charge-sheet. Such conviction would be in accordance

with the provision of Section 237 of the Criminal Procedure Code. The Supreme Court further held at p. 712 that in the circumstances of the case the accused could not be said to have been prejudiced in his conviction under Section 420, Indian Penal Code on account of non-framing of the charge, and consequent non-trial, under Section 420, Indian Penal Code. Their Lordships further observed that in the circumstances of the case no question of irregularity in the trial arose. The framing of the charge under Section 420, Indian Penal Code was not essential and Section 237, Criminal Procedure Code itself justified his conviction of the offence under Section 420 if that be proved on the findings on the record. Mr. Gandhi, in this connection, relied upon the decision in *Bhagaban Mahakud v. State*[9]*, in* holding that where the charge of kidnapping is not proved, the conviction could not be

[6]44 Bom LR 27 : (AIR 1942 Bom 71) (FB)
[7] AIR 1956 SC 116
[8] AIR 1965 SC 706
[9](1957) 58 Cri LJ 674 (Ori) at p. 676

had for the offence of abduction under Section 366. That decision cannot help Mr. Gandhi as in that case the accused was held to be prejudiced, if he was convicted for abduction, because the original charge of kidnapping was one read with Section 149. As the prejudice had been duly established, the conviction could not be on the basis of abduction which was found on the record. In view of this settled legal position, as the accused had met the charge right from the beginning of abducting Sheela by deceitful means, with the same intention with which he was charged for kidnapping, and as the explanation under Section 342 was also taken in that connection, no question of prejudice could arise. Under Section 237 Criminal Procedure Code the accused could, therefore, be convicted for the offence under the said Section 366, I P. C., even if instead of kidnapping, the offence of abduction with the same intention is proved.

5-9. x x x x

Appeal dismissed.