KERALA HIGH COURT

Chathu

Vs.

P. Govindan Kutty

Criminal Appeal No. 29 of 1956, Kozhikode in C. C. No. 233 of 1956

(Koshi, C.J. and Vaidialingam, J.

11.06.1957

JUDGMENT

Koshi, C.J.

1. This is a complainants appeal, with special leave obtained from this Court under Section 417 (3), Criminal Procedure Code, against an order of acquittal. In C. C. No. 233 of 1956 on the file of the Additional First Class Magistrate (Judicial), Kozhikkode, the appellant before this Court launched a prosecution against the respondent herein for kidnapping from his lawful guardianship his daughter, a girl 17 years and 5 months old. The occurrence was alleged to have taken place on the morning of 11-7-1956 at about 8 A.M., but the complaint was filed only on 1-9-1956. On 11-7-1956 itself the appellant informed the Police that his minor daughter who was living with him in his house had disappeared from there and that her whereabouts remained unknown. When information reached him a week or so afterwards that the girl was living with the respondent in his house, a proper complaint was also lodged. The police registered a case against the respondent under Section 366, I. P. C., but after investigation submitted a referred charge-sheet before the lower court. On receipt of notice from that court about the said police report the appellant filed the complaint giving rise to this appeal. The lower court eventually acquitted the respondent holding that the prosecution had not proved its case against him beyond reasonable doubt.

2. The prosecution case against the respondent was that on the morning of 11-7-1956 he took away the appellant's daughter Malukutty alias Madhavikutty, aged 17 years and 5 months, from his (appellant's) lawful guardianship. It would appear that at about 7 O'clock in the morning on the said date she left the appellant's house ostensibly for the purpose of bathing in a not far distant canal, but she did not return to the house afterwards. The father was not in the house when the girl left. No other inmate of the house was examined to show when she left or for what purpose. The petition of complaint did not allege what action of the respondent brought him within the mischief of Section 363 I. P. C., under which section the complaint was filed. Even at the stage of the trial there was no attempt to prove any 'enticing', but the prosecution depended upon the evidence of P. W. 3 that the respondent had 'taken' the minor girl out of the lawful guardianship of the father.

The real question in the case, therefore, is whether the evidence of P. W. 3 established the fact that the respondent had 'taken' the girl within the meaning of Section 363, Penal Code. The lower court, however, did not apply its mind to this question, but held that the prosecution had not proved that the girl was below 18 years of age at the time of the alleged kidnapping and that therefore the case cannot be sustained.

3. Leave was granted under Section 417 (3), Criminal Procedure Code, as prima facie the conclusion of the trial Court on the question of the girl's age appeared to be open to exception. Brushing aside the evidence furnished by the register of births maintained in the Kozhikode Municipality for February 1939, during which month the girl was alleged to have been born and the evidence furnished by the admission register of the school where the girl had her studies, as also the evidence of the father the lower court acted upon the opinion of the expert evidence of the radiologist who took X-ray picture of the bones and joints of the girl to determine her age. According to the radiologist the girl had completed 19 years of age. We are not at all satisfied that the learned Magistrate was right in preferring the opinion of the radiologist to the positive evidence furnished by the Municipal birth register, the school admission register and the evidence of the girl's father, particularly when medico-legal opinion is that owing to the variations in, climatic, dietetic, hereditary and other factors affecting the people of the different States of India it cannot be reasonably expected to formulate a uniform standard for the determination of the age by the extent of ossification and the union of epiphysis in bones. Modi's Medical Jurisprudence (Eleventh Edition) p. 29. However we do not desire to dilate more upon this aspect of the case as in our opinion the order of acquittal has to be sustained for other reasons.

4. The only evidence in the case which has any bearing as to kidnapping is the evidence of P. W. 3, who spoke to having seen the respondent and the complainant's daughter Malukutty going along the road towards the former's house at about 8 a.m. on 11-7-1956 and who, five or six days afterwards, saw the girl in the residential compound of the respondent. The witness's testimony further shows that on the latter date, that is, on the day he is alleged to have seen the girl in the premises of the respondent's house, he informed the appellant about it. The witness admitted that some days prior to that Malukutty was reported to have been missing from her house and that her whereabouts remained unknown in spite of vigorous enquiries made by the appellant. It is, therefore, difficult to believe the version that he had seen Malukutty and the appellant walking along the road on the morning of 11-7-1956. Had that been true he would certainly have reported about it to P. W. 1 when he knew that Malukutty was missing from the house. P. W. 3 and the appellant belonged to the same community of Chalias and they lived in the same 'colony'. Even his evidence does not show that the respondent was 'taking' Malukutty. In the course of the cross-examination he stated:

> "I did not then know that the accused was taking her.....It was only about a week later that I felt that Malukutty was taken by the accused".

In his further cross-examination the witness said: "I first saw the accused and Malukutty going along the foot-path through the Parambu in front of one merchant Gopalan's house. That Parambu also belongs to Gopalan. The footpath goes to Gopalan's house. The road is on the east of Gopalan's house. The foot-path branches from the road and leads to Gopalan's house. The

accused and Malukutty were going towards this road. I was behind them. From this road the accused turned towards south and went towards north. This did not arouse any suspicion in me". The petition of complaint makes no reference to this incident at all and taking the evidence at its face value it does not amount to 'taking' within the meaning of the section. The witness nowhere said that Malukutty followed the respondent after he turned to the north from the foot-path leading to Gopalan's house. The evidence only amounted to proving that on the morning of 11-7-1956 Malukutty and the respondent happened to be fellow-pedestrians on one and the same public thoroughfare.

5. To sustain a conviction under Section 363, Penal Code, there must be proof of taking: Mayne's Criminal Law of India (Fourth Edition) p. II 571. Also see p. II 573.

> "If however the girl leaves her home, without any persuasion or inducement held out to her By the prisoner, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to restore her to her home, yet his not doing so is no infringement of the law, for the statute does not say he shall restore her, but only that he shall not 'take her away'."

R. v. Olifier[1] *Queen v. Neela Bebee*[2], (1) (B). A man is not bound to return to her father's custody a girl who, without any inducement on his part, has left her home and come to him; it must be shown that prisoner took some active step, by persuasion or otherwise, to cause the girl to leave her home; *R. v. Jarvis*[3] (C). In *Lachi Ram v. Crown*[4] Shadi Lal C. J. followed these English decisions and said:-

> ".....it is an established principle of law that if a minor girl leaves her husband's house without any persuasion, inducement or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him he cannot be deemed to have infringed the law, even if he does not restore her to her lawful guardian".

In *Abdul Sathar v. Emperor*[5] Srinivasa Ayyangar J. gave the meaning of the relevant words thus:

> "Then as regards 'taking', it has been conceded by the learned counsel for the petitioner that that expression in the section is not confined to mere physical taking. There is such a taking as is indicated in the common expression. "If you will come along, I shall take you". The expression 'taking out of the keeping of the lawful guardian" must therefore signify some act done by the accused which may be regarded as the proximate cause of the person going out of the keeping of the guardian or in other words, an act but for which the person would not have gone out of the keeping of the guardian as he or she did".

In construing the meaning of the word "take" a girl under 18 out of the possession and

[1](1866) 10 Cox CC 402 [3](1903) 20 Cox CC 249 [5] AIR 1928 Mad 585
[2]10 Suth WR Cr 33 [4] AIR 1923 Lah 330 at P. 331

against the will of her father or mother, etc., "in *In re Abdul Azeez*[6] Ramaswami, J. referred to *R. v. Mankletow*[7] (G) and *R. v. Timmins*[8] (H) and stated that while it did not imply force, actual or constructive, it meant being a party to the father, etc., being deprived of the possession of the girl,

her willingness being immaterial. *In re Khalandar Sahab*[9] Subba Rao, C. J. stated that the word 'take' in Section 361 meant to cause to go to escort or to get into possession. These authorities show that to sustain a conviction the prosecution had to prove that the respondent had some active part in Malukutty leaving her father's house and taking shelter in his house. As stated earlier it is difficult to believe P. W. 3 and even if he is believed the necessary ingredients of the offence remained not proved.

6. In coming to this conclusion we have not overlooked the statement the respondent gave before the trial court under Section 342, Criminal Procedure Code. At one place the respondent said that he took Malukutty with her consent, but that statement was immediately followed by further statement that he did not take her at all, that she came to his house on her own accord and that the evidence that he took her was false. The learned counsel for the respondent urged before us that the evidence in the case did not warrant the accused being put such questions as the learned Magistrate did, as according to him there were no circumstances appearing in the evidence for the accused to explain. We cannot, however, agree to that contention. P. W. 3 had stated that he saw the respondent and Malukutty together going in the direction of the former's house. No doubt answers given in cross-examination showed that the witness's inference was unwarranted, but if the trial court took the view that the evidence justified an examination under Section 342, we do not flunk it proper to hold that its action was wrong. All the same we feel constrained to observe that the mode of examination followed by the learned Magistrate is open to serious exception. We find the first question put by him really involved eight or nine questions and it is to that complex question that the respondent had once said that she was taken with her consent. Immediately that was given the go-by and he asserted that he had not taken her at all. He opened his answers to the 1st question by stating that "these were all incorrect", that is, the matters formulated by the question. In the circumstances the prosecution cannot in our opinion lay store on the alleged admission by the respondent. It is not known why the girl was not called as a witness or why the information the appellant lodged with the police was not got produced. The girl was the best person to speak about the circumstances under which she left her father's roof and the earliest version the appellant gave about the incident would have been of help to the court in making a proper decision in the case.

7. In the result we uphold the order of acquittal though on grounds different from those the learned Magistrate based his order. The appeal is dismissed. Order accordingly.

Appeal dismissed.

[6] AIR 1954 Mad 62
[7](1853) 22 LJ MC 115
[8](1861) 30 LJMC 45
[9] AIR 1955 And 59