KERALA HIGH COURT

Rajappan

Vs.

State of Kerala

Crl. Appeal No. 157 of 1959 from S.C. 18 of 1959

(K. Sankaran, CJ and P. Govinda Menon, J.)

19.01.1960

JUDGMENT

P. Govinda Menon, J.

1. This appeal has been referred to us by our learned brother Velu Pillai J., on the ground that the decision in *Chathan Kunjukunju v. State*[1], requires reconsideration.

2. The appeal is against the conviction of the appellant under Section 366 of the Indian Penal Code and sentence of rigorous imprisonment for 5 years passed against him by the learned Additional Sessions Judge of Parur. The charge against him was that he kidnapped P.W. 5, the minor daughter of P.Ws. 1 and 2, from the lawful guardianship of P.W. 1 on the night of 10-9-58. P.W. 5 had been living with her father, mother, her father's mother P.W. 3, her elder sister P.W. 4 and her younger sisters. The accused is a tapper by profession and lives near the house of P.W. 1. For about 3 years before the occurrence, the accused was tapping coconut trees in the compound in which the house of P.W. 1 is situated. On the night of 10-9-58 at the time the inmates of the house retired for the night, P.W. 5 was in the house. When P.W. 3 woke up at about 4 a.m., she found P.W. 5 missing and she cried out. Hearing the cry; the other inmates woke up. P.W. 9, a neighbour of P.W. 1, came to the house, and on enquiries was told by P.Ws. 1 and" 3 that P.W. 5 was taken by the accused at night. P.Ws. 1 and 9 then went to the house of the accused. The house was locked. They went to the Parur bus stand. No information was received from there and so they returned to their house by about 6 a.m. Then information was received that P.W. 5 was in the accused's house. P.Ws. 1 and 9 again went to the accused's house, P.W. 5 was in the house. She was requested to return to P.W. l's house, but she refused to accused to the request of the father. P.W. 1 complained in the Parur Police Station, but the Sub-Inspector of police, P.W. 12, it is stated, did not take any action. By 7 a.m., the accused and P.W. 5 hired a car and proceeded to Always. P.W. 5' was enrolled as a member of the S.N.D.P. Yogam and after obtaining Ext. P. 15 Vivahapatrika they were married "in the presence of P.W. 10 who was in charge of the Advaithasramam at about 11.15 a.m.

3. Since the police did not take any action, P.W. 1 filed a petition before the 1st Class

[1]1958 KLT 833 : 1958 KLJ 1189

Magistrate of Alwaye on 13-9-58 alleging that P.W. 5, his daughter, was only 14 years of age and that she was kidnapped by the accused and that the accused was going to marry her against her will and praying that P.W. 5 may be got produced in court and entrusted to him. Under a search warrant issued by the Magistrate under Section 100, Criminal Procedure Code, P.W. 12 produced P.W. 5 before the Magistrate. On her declaring that she was 19 years old, she was allowed to go away. She again went to the house of the accused. It is stated that the accused who was present in the court took her with him.

4. Later, on 1st October 1958, P.W. 1 preferred a regular criminal complaint, Ext. P. 2, against the accused, before the 1st Class Magistrate, Alwaye, producing along with the complaint, Ext. P. 4 Transfer Certificate he had obtained from the Paliam High School, showing that P.W. 5 was only 16 years of age at the time of the occurrence and that her date of birth was 11-10-1117 (M. E.) as found in the school records. This complaint was forwarded by the Magistrate to the Circle Inspector of Police, Alwaye for investigation under Section 156 of the Criminal Procedure Code. The Sub-Inspector of Police registered a case against the accused and others mentioned in the complaint. The girl, P.W. 5, was again produced in court and was entrusted to the care of her father. P.W. 8, the Radiologist of the Government Hospital at Parur, examined P.W. 5 in order to ascertain her age. His certificate is Ext. P. 13 which shows that, on the date when he examined her she was about 17 years of age.

5. According to the accused, he used to go for tapping the trees in the compound of P.W. 1. His case is that he did not. take P.W. 5 on the night of 10-9-58 as alleged by the prosecution. He would have it that P.W. 5 voluntarily went to his house at 8 a.m., on 11-9-58, that after some time P.Ws. 1 and 9 went there, that P.W. 1 asked her to return with him when P.W. 5 told P.W. 1 that she was pregnant and that the accused was going to marry a girl from his own community and if that was done her future would be blasted and so she would not go back to P.W. 1's house. The accused and his parents advised P.W. 5 to go back with P.W. 1. P.W. 5 still refused and then P.W. 1 asked the accused to marry her according to the customs prevailing in his community. It is also stated that, when P.W. 5 refused to go with P.W. 1, he went to the house of D.W. 1 Kumaran. Kumaran got Velayudhan Vaidyan, who also advised P.W. 5. But she would not heed to the advice to go with P.W. 1. The accused stated that he married P.W. 6 as desired by P.W. 1. He examined 3 witnesses. D.W. 1 is Kumaran. He stated that at about 7-30 a.m., on 11-9-58, he learnt that P.W. 5 was in the house of the accused. He sent Velayudhan Vaidyan to ascertain whether that fact was true. D. W. 2, Anthony Kochappu stated that he was giving tuition to P.Ws. 4 and 5 and he was going to the house of P.W. 1 and teaching them. According to him, P.Ws. 4 and 5 were admitted in the D.D.S. School, that it was he who took the application form to P.W. 1 and that they together filled up the form. He says that P.W. 1 produced the horoscopes of P.Ws. 4 and 5 and that they decided that the correct age of the children need not be shown and their date of birth should be reduced by 2 years. D. W. 3 is a neighbour of P.W. 1. She stated that at about 8 a.m., on 26th Chingom 1134 corresponding to 11-9-58, she saw P.W. 5 going through the lane in front of her house.

6. The first question for determination in this case" is whether P.W. 5 was born on 11-10-1117 and was below 18 years of age at the time of the occurrence. It would be an offence of kidnapping from the lawful guardianship , only if the prosecution succeeds in proving beyond reasonable doubt that the girl is below 18. The question of age therefore is very important in determining whether the accused is guilty of the offence of kidnapping P.W. 5 from the lawful

guardianship of her parents. P.W. 1 deposed that it was he who took P.Ws. 4 and 5 to the D.D.S. School and it was he who gave the dates of birth of his children. Ext. P. 5 is the transfer certificate obtained by I. W. 1 on 27-5-54 from the D.D.S. School. That shows the date of birth of P.W. 5 as 11-10-1117. The admission register or the application form has not been produced. This Ext. P. 5 was produced before P.W. 6, the headmaster of Paliam High School on 3-6-54 along with Ext. P. 6 application form for admission. P.W. 6 says that P.Ws. 1, 4 and 5 were personally known to him and that Ext. P. 6 application contains his initial and he says that the date of admission and the admission number found on the back of P. 6 were filed up by either the clerk or one of the teachers of his school. So, with regard to the age of P.W. 5, the prosecution relies on the evidence of P.Ws. 1 and 2 and Exts. P. 4 to P. 6.

7. The learned counsel for the appellant contended that Ext. P. 5 cannot be admitted in evidence, without examining the headmaster of the school and without the production of the admission register of the school. As stated earlier the admission register and the application form filled up by P.W. 1 at the time of the admission are not produced. No explanation is given as to why these documents were not produced or why none from the D. D. S. School was examined. The learned Sessions Judge would say that Ext. P. 5 was properly proved by P.W. 1, that Ext. P. 5 had been produced before P.W. 6 as early as 3-6-54 along with the application form Ext. P. 6 and that there can be no question of the document being got up for the purpose of this case. That may be so. But the age shown in Exts. P. 5 and P. 6 is what P.W. 1 is alleged to have given to the school authorities at the time when P.W. 5 was admitted into the school. That P.W. 1 has no consistent case with regard to the age of his daughter is clear when we see Ext. P. 1, petition filed by P.W. 1 before the 1st Class Magistrate. There, P.W. 1 has shown the age of P.W. 5 as 14. When examined in court, his case was that it was a mistake. As against this, we have the evidence of D.W. 2 that himself and P.W. 1 prepared the application form and that P.W. 1 purposely gave a wrong date of birth in the application for admission when admitting the children into the school. It may or may not be true. But we feel that absolute reliance cannot be placed on the testimony of P.W. 1. The prosecution relies on Ext. P. 8, the S. S.L.C. book of P.W. 4, the elder sister of P.W. 5 which shows that the date of birth of P.W. 4 is 16-9-1116 and the prosecution argues that if P.W. 4 was born only in Medom 1116, P.W. 5 would have been born only sometime in 1117. But this also depends upon the correctness of the date of birth given by P.W. 1 at the time when P.W. 4 was admitted into the school. We have held that it would not be safe to rely on the evidence of P.W. 1 to fix the date of birth of his children. The oral evidence of P.Ws. 2 and 3 also, regarding the age of P.W. 5, do not stand on a better footing.

8. The learned counsel for the appellant further argued that Exts. P. 4 to P. 6 are not admissible in evidence and that the learned Judge erred in admitting them in evidence and relying on them to fix the age of P.W. 5. The only two sections of the Evidence Act under which these documents could be admitted in evidence are Sections 34 and 35. Section 34 deals with entries in books of accounts and these documents, Exts. P. 4 to P. 6, obviously do not come under the category of books of account. Section 35 of the Evidence Act reads as follows :

> "An entry in any public or other official book, register or record stating a fact in issue or relevant fact and made by a public servant in the discharge of his duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact".

It is only necessary to read through the section to see that an entry made by a teacher in a private school in his admission register or transfer certificate cannot come within the scope of Section 35. It is stated at the bar that the D.D.S. School and the Paliam High School are both private schools. A similar question came up for consideration in *Gopalan v. Kannan*[2], and it was held that:

> "As the schools concerned are private schools, the entries cannot be 'considered as entries made by a public servant in the discharge of his official duty".

It was also held that:

> "the Admission Registers of private aided schools are not kept in performance of a duty specially enjoined by the law of the country and as such S. 35 of the Evidence Act is unavailable".

We are therefore of opinion that Exts. P. 4 to P. 6 are inadmissible in evidence.

9. The learned Judge then relies on the evidence of P.W. 8, the Radiologist and his certificate Ext. P.13 which shows that, at the time of his examination, P.W. 5 was only about 17 years old. The learned Judge says that this certificate can at least be used to assure the court that the evidence adduced by P.Ws. 1 to 3, regarding the age of P.W. 5, is true. Much reliance cannot be placed on the opinion of the Radiologist, "particularly when medico-legal opinion is that, owing to the variations in climatic, dietetic, hereditary and other factors affecting the people of different States of India, it cannot reasonably be expected to formulate a uniform standard for the determination of the age by the extent of ossification and the union of epiphyses in bones". Vide Modi's Medical Jurisprudence (Eleventh Edition, page 29). Reference may also be made to the case of *Marudevi Avva v. State of Kerala*[3], where, referring to certain earlier cases, it was held that the statement of medical witness regarding the age is no legal proof but is only an opinion. On a consideration of all these, we feel that it would not be safe to conclude that the prosecution has satisfactorily proved that P.W. 5 was less than 18 years of age at the time of the occurrence. This, by itself, would be sufficient to dispose off this appeal.

[2]1958 KLT 388 : 1958 KLT 549
[3]1957 KLT 720

10. Even if P.W. 5 were a minor below 18 years, the question is whether there was kidnapping. For kidnapping there must be either "taking" or "enticing". The evidence regarding this is mainly that of P.W. 5. The case of P.W. 5, in the Sessions Court, was that she was taken by force by the accused. A reading of the evidence of P.W. 5 and her previous statements would go to show that she is a thoroughly unreliable witness with no regard for truth and therefore no reliance can be placed on her testimony. The learned Judge also was not prepared to believe her story of forcible removal, but would have it that the prosecution has succeeded in proving "that P.W. 5 went away on account of a pre-concerted arrangement with the accused". To the police, the case of P.W. 5 and her father P.W. 1 was that P.W. 5 voluntarily went to the house of the accused with no intention to return. Exts. D5 and D6 are the case diary statements of P.Ws. 1 and 5. It is seen from Ext. D5 that P.W. 1 had told P.W. 12, the Sub-Inspector of police, that P.W. 5

left the house of P.W. 1 voluntarily, that she refused to return to his house in spite of the advice given to her and that, when P.W. 1 asked the accused, the latter told him that P.W. 5 may be taken back if she was willing to return with him. Ext. D6, the case diary notes] of P.W. 5 shows that she had told P.W. 12 that she went to the house of the accused of her own accord after the latter had returned to his house after tapping, which is in the compound of P.W. 1, that she had at that time no idea to return to her house, that the accused and his parents insisted that she should go back to her house, that she refused to leave the accused's house, that P.W. 1 went to the house of the accused and asked her to go with him, that she refused to do so since she was pregnant and since she knew that the accused was going to marry another girl. She had also told P.W. 12 that nobody took her by force to the house of the accused and that nobody compelled her to marry the accused. There is absolutely no reason for us to believe that P.W. 12, a responsible police officer, would have gone out of his way to record a false statement and there is no material on record to show that "police record is suspect or unreliable". We are not prepared to agree with the opinion of the learned Judge that much weight cannot be attached to the case diary statement and that it cannot be relied upon to discredit the testimony of P.Ws. 1 and 5. If those statements are a correct record of what P.Ws. 1 and 5 told P.W. 12, as we hold they are, then the present versions of P.Ws. 1 and 5 are false and got up for the purpose of sustaining the charge. In any view, it seriously affects the veracity of the witnesses.

11. The learned Judge was rightly not prepared to accept the evidence of P.W. 9 who stated that on the night of 10-9-58 he saw the accused and P.W. 5 going away in the northern direction from the compound of P.W. 1. There is therefore no evidence of "taking" P.W. 5 from the lawful guardianship of P.W. 1.

12. To sustain the conviction under Section 363 or 366 I.P.C., there must be proof of "taking". The consent of the minor is no excuse, for, even then, it would amount to "taking". What "taking" has been stated by Bramwell B in *Christian Olifer*[4]*,*

> "I am of opinion that, if a young woman leaves her father'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, although it may be his moral duty to return her to her parent's custody, yet, his not doing so, is no infringement of this Act of Parliament, for the Act does not say he shall restore

[4](1866) 10 Cox. 402, 404

> her, but only, says that he shall not take her away."

In *R.V. Garvis*[5]*,* it is stated, 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 the person took some active steps by persuasion or otherwise to cause the girl to leave her house.

13. Following these English decisions in *Lachi Ram v. Crown*[6]*,* Shadi Lal C. J. observed :

> "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 construing the meaning of the word "take", Ramaswamy J. in *In re Abdul Azees*[7], following the decision in *R.V. Mankletow*[8], and *R.V. Timmins*[9], 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 *In re Khalendar Salteb*[10], Subba Rao C.J. also stated that "the word 'take' in section 361 meant to cause to go, to escort or to get into possession". All these decisions were considered in *Chathu v. Govindan Kutty and Another*[11], and it was held that the prosecution had to prove that the accused had some active part in the girl leaving her father's house and taking shelter in his house. As stated earlier, we are not prepared to believe the evidence of P.Ws. 1 and 5 and we find that the prosecution has no succeeded in proving the necessary ingredients that constitute the offence.

14. The learned Public Prosecutor referred us to the decision in *Abdul Sathar v. Emperor*[12], where, Srinivasa Ayyangar J. stated 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."

Even in that case, it was held that there must be clear proof of the accused having done something which was the proximate cause of the girl going out of the keeping of the guardian.

15. The decision in *Chathan Kunjukunju v. State*[13], was also relied

[5](1903) 20 Cox. C.C. 249
[6] AIR 1923 Lahore 331
[7]AIR 1954 Mad. 62
[8](1853) 22 L.J.M.C. 115
[9](1861) 30 L.J.M.C. 45
[10] AIR 1955 And59
[11]1957 KLT 613
[12] AIR 1928 Mad. 585
[13]1958 KLT 833

upon by the learned Public Prosecutor. 'There, the girl in question was found to be a minor and the prosecution evidence was that the accused and his brother together had caught hold of the girl and taken her away to the accused's house. The only question that was considered there was whether the consent of the girl, in going with the accused and marrying, affords protection to him. The question of what amounts to 'taking' has not been considered at all and the evidence in the case probably justified that there was "taking". The case of *Safdar Reza*[14], was referred to in the above decision. That was a case of seduction to illicit inter-course and is on that ground distinguishable from a case of compelling the minor to marry against her will. These material words in Section 366 were not adverted to or considered in the above decision. So, these cases cannot be taken to have laid down the law that, without the accused being actively instrumental in the girl leaving the guardian, he would be guilty or that unless there is any intention to compel the woman to marry against her will, section 366 would apply.

16. The accused has been convicted in this case under Section 366, I.P.C., viz., kidnapping with

intent that the woman may be compelled or knowing it to be likely that she will be compelled to marry any person against her will. The question is whether the facts disclosed would amount to an offence under Section 366. The evidence shows that P.W. 5 was willing to marry and the evidence does not in any way show that the accused was attempting to marry her against her own will. The learned Public Prosecutor contended that, she being a minor, she has no will of her own and that it is the will of the parents that must count. In support of this position, he relied on 3 decisions, 2 of the Allahabad High Court and one of the Bombay High Court. The two Allahabad decisions are reported in *Bhagwati Prasad v. Emperor*[15], and *Sultan v. Emperor*[16], and the Bombay decision is reported in *Emperor v. Ayub-khan Nirsultan*[17], All these cases deal, not with the case of marriage, but with the other part of Section 366 I.P.C., viz., "in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse." The learned Judges discussed whether the girl's consent would exonerate the accused and held her consent was not material. These decisions do not actually bear on the question of 'will'. On the other hand, the learned counsel for the defense has brought to our notice the cases reported in *Fulchand v. Emperor*[18], where, it was held that 'will' means the will of the girl and certainly did not" mean the will of the guardian. To the same effect is the decision In *Khalil-ur-Rahman v. King Emperor*[19], The learned Judges said:

> "unless the intent of the accused is to compel the woman, whatever her age may be, to marry against her will, that is, in spite of her opposition to the marriage, or unless he knows that it is likely that she will be compelled to marry against her will, no offence under first part of Section 366 has been committed."

We respectfully agree with the view expressed above and hold that on the evidence it not made out that the accused intended to marry P.W. 5 against her Will. The.

[14] ILR 49 Cal. 905 [16] AIR 1930 All.19 [18] AIR 1932 Cal. 442
[15] AIR 1929 All. 709 [17] AIR 1944 Bom.159 [19] ILR 1933 Ran. 213

evidence is clearly to the contrary, namely, that the girl was quite willing to marry the accused and in fact pressed the accused to marry her. In the circumstances, we hold that the offence under Section 366 has not been made out.

17. For the reasons stated above, we allow the appeal, set aside the conviction and sentence, and acquit the appellant of the offence with which he was charged. His bail bond will be cancelled.
Allowed.