BOMBAY HIGH COURT

Emperor

Vs

Kasamalli Mirzalli

(John Beaumont, Kt., C.J. N Wadia and Sen , JJ.)

15.10.1941

JUDGMENT

John Beaumont, Kt., C.J.

1. In this case the Court has to consider a certificate given by the learned Advocate General under Clause 26 of the Letters Patent. Under that clause, if the Advocate General certifies that there is a point of law involved in the case which requires further consideration, this Court has to determine the point of law, and, if it thinks that there has been an error in law, can review the whole case and pass the requisite judgment and sentence.

2. There is no doubt in this case that there was an error of law in relation to the use which the learned Judge made of statements of witnesses made before the police. We will deal with that more in detail in a moment. But the existence of that error, which is admitted by Mr. Velinker for the Crown, requires us to review the whole case. It is not essential, whenever there has been some error of law, to set aside the conviction, but undoubtedly we must) set aside the conviction, if we think; that the error of law has prejudiced the accused. If we think that the error of law has not prejudiced the accused, then the conviction can stand. In order to determine the question of prejudice we have gone very carefully through the whole of the evidence on record.

3. The accused was convicted, under Section 366 of the Indian Penal Code, of abduction, which involves, so far as this case is concerned, removing a woman by deceitful means with the intention that she may be seduced to illicit intercourse. That is the charge on which the accused was convicted. The facts on which the charge was based are stated clearly and succinctly in the reference made by the learned Advocate General in paragraph 2, Clauses (a) to (1), which we accept as correct, and which are as follows:

(a) The complainant Sarwarbai was at the date of the alleged offence about thirteen or fourteen years old. She was married to one Gulamhussein when she was six years old.

(b) Gulamhussein came with the complainant to Bombay about the beginning of the month of June, 1940, with a view to find out a job for himself in Bombay. As Gulamhussein did not succeed in getting a job for himself, he and the complainant tried to get a job for the complainant in a film company.

(c) About June 30, they commenced to live with a woman named Mumtaz. Sirdar, one of the daughters of Mumtaz, and her son were working in film companies. Sirdar and her brother promised to make endeavours to obtain a job for the complainant in the film companies in which they were working.

(d) On Friday July 5 accused No. 1 came to the house of Mumtaz. Mumtaz told the complainant and Gulamhussein that accused No. 1 was the proprietor of a film company. Sirdar who was present at the time stated that accused No, 1 had a film company at Andheri. Accused No. 1 told the complainant that he could offer her a job.

(e) On Saturday July 6, Sirdar took the complainant, telling her that she was being taken to a film company, to a room in a hotel. Sirdar then left the complainant alone in the room saying that she was going to buy cigarettes. A person then came into the room and the complainant got frightened. The person who had entered the room thereupon left the room.

(f) On the night of Saturday July 6, the complainant was taken by Sirdar's brother to Circo Film Company and the complainant worked there as an extra hand.

(g) On the morning of Sunday July 7, the complainant reported to her husband how Sirdar had taken her to the hotel on Saturday and stated that Sirdar was not their well-wisher. The complainant and her husband thereupon decided to leave the house of Mumtaz.

(h) The complainant and her husband then started to go to Andheri in order to see accused No. 1 who had promised the complainant a job in his film company at Andheri. When they had gone up to Hind Mata Cinema they saw a car standing near the cinema in which were seated accused Nos. 1 and 2, a boy, one Nazir and the driver. The complainant and her husband went up to the car and told accused No. 1 that they were going to him at Andheri for the job which he had mentioned. Accused No. 1 thereupon stated that it was good that they had happened to meet him at that place. He asked them, to get into the car and promised to take them to the film company at Andheri after he had taken his meals. Thereupon the complainant and her husband got into the car. The car then proceeded to the house of accused No. 1 at Parel.

(i) Accused No. 1 then arranged for the luggage of the complainant and her husband being brought from the house of Mumtaz and thereafter told the complainant and her husband to rent a room for themselves and put their luggage in the room. The complainant's husband, accused No.

2 and Nazir thereupon went to look for a room. As no room was available nearby, accused No, 1 stated that the luggage should be taken to Nazir's room and kept there. After the luggage had been left in Nazir's room, accused No. 1 took the complainant and her husband in the car to an eating house where they were given food.

(j) The complainant and her husband then got into the car. When the car came near the J.J. Hospital, the driver and the boy were asked to go out of the car and they did so. Accused No. 1 then began to drive the car. When the car came near the place where Nazir's room was situated accused No. 1 told the husband to go and fetch a match box. When the husband returned with the match box, accused No. 1 asked the husband to go with Nazir to his room and stop there. Accused No. 1 stated that, in the meanwhile, he would take the complainant to the film company and get her name registered there for a job. The husband desired to accompany the complainant. Accused No. 1 however stated that he would return in a short time and that the husband should in the meantime rest in the room of Nazir. The car then drove away with the complainant and accused Nos. 1 and 2 in the car. Accused No. 1 was driving the car.

(k) Accused No. 1 drove the car towards a jungle stating that the company was situated there. The complainant was taken to a hut in Juhu. Accused No. 1 told her to sit down and have her tea and said that he would then take her to the company. Accused No. 1 thereupon brought an open bottle of lemonade from outside. The complainant drank the liquid and began to feel giddy. Accused No. 1 then lifted her up, and put her on a cot and tied her. Accused No. 2 took out a knife and stood with the open knife near the bed. When the complainant began to cry, accused No. 2 stated that he would kill her with the knife. Accused No. 1 then ravished the complainant. Accused No. 2 thereafter came near her. The complainant then became unconscious.

(l) This was the complainant's first experience of sexual intercourse.

4. Accused No. 2 was acquitted, so that in this judgment references to the accused are to accused No. 1.

5. The defence of the accused was somewhat singular. In the Committing Magistrate's Court he stated that he had not taken the complainant to Juhu or anywhere else, that the case was a false one, and that the day of the alleged offence, Sunday, July 7, he had spent in part in his house and in part at a wedding ceremony. In the Sessions Court his counsel, a man of wide experience in criminal cases, cross-examined the complainant and her husband with a view to showing that the accused had taken the complainant to Juhu, as alleged, had had sexual intercourse with her there, but had taken her with her consent, and in consideration of Rs. 20 which he had paid to her husband. The cross-examination seems to have been based on the story of a man named Nazir who gave evidence in the Sessions Court. It is, of course, apparent that the defence set up in the

Committing Magistrate's Court, and the defence outlined in the Sessions Court, are wholly inconsistent; but when the accused was asked under Section 342 of the Criminal. Procedure Code what he wished to say with regard to the evidence led against him, he said that he wished to say nothing. Presumably in so doing he was acting on the advice of his counsel. The result was that the jury had before them two defences relied on by the accused, which were wholly inconsistent with each other, and the accused was unable or unwilling to suggest which of the two defences they might properly regard as true. In the circumstances it is not to be wondered at that they rejected both the defences as untrue.

6. On the application to the learned Advocate General for a certificate the accused elected to stand on the defence of consent, because the learned Advocate General in his certificate says:Whereas it was represented to me that it was the case for accused No. 1 as indicated in cross-examination and by the arguments of his counsel that the story of the complainant and her husband was false. The complainant and her husband had on the day of the alleged offence met accused No. 1 near Hind Mata Cinema by appointment and the complainant had accompanied accused No. 1 to Juhu willingly and with the consent of her husband who well knew the purpose for which she was being taken to Juhu. Accused No. 1 had sexual intercourse with her at Juhu with her consent. Accused No. 1 had paid the husband Rs. 20 on the Friday preceding the day of the alleged offence in the room of Nazir where they were living on that day. The complainant and her husband had made a false charge against accused No. 1 because the husband had on the day following the day of the alleged offence asked accused No. 1 to pay him Rs. 20 which he had declined to do.

7. In this Court, again, the accused stands on that defence. Therefore, admittedly the real question before the jury, and the question on the merits of which this Court has to arrive at a conclusion, is whether, when the accused on July 7 took the complainant in his motor car for a drive to Juhu, he took her with her consent, she understanding that sexual intercourse was the object of the drive, or whether he took her by deceitful means, on the pretence that he would get her a job in a cinema company, and get her name registered, his object in taking her by such deceitful means being that she might be seduced to sexual intercourse.

8. There are substantially four objections taken to the legality of the trial. It is said, in the first place, that there was a wrong joinder of charges, because the accused was charged in the alternative with kidnapping or abduction. Whether the charge of kidnapping could be supported would depend on whether the prosecution evidence that the complainant was under sixteen at the time of the offence was accepted by the jury. If it was, there would be a clear case of kidnapping. If it was not, then the case would be abduction. It seems to me that the alternative charge was justified by Section 236 of the Criminal Procedure Code, which provides:If a single act or series

of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

8. Sir Jamshedji Kanga has referred us to two cases of the Calcutta High Court, *Meher Sheikh v. Emperor*[1] *and Istahar Khondkar v. Emperor*[2] which seem to us to take too narrow view of Section 236 of the Code. That High Court considers that Section 236 does not apply, if "the facts are in doubt" (the phrase is that used by the learned Judges in Calcutta); it only applies where, assuming the facts alleged by the prosecution to be proved, there is a doubt as to what offence has been committed. We do not think that is the meaning of the section. The condition on which the section comes into operation must be complied with, and there must be a single act or series of acts of a certain nature, and that nature must raise a doubt about which of several offences the facts, which can be proved, will constitute. But we think that doubt may include a doubt as to what exact facts within the ambit of the series of acts postulated can be proved. At the time the charge is framed, the prosecution can never know exactly what facts they will succeed in establishing. The most promising witness may break down in cross-examination; and in our view the prosecution are entitled to say: "If we prove certain of our alleged facts, then such and such an offence will be committed; but if we prove other of such facts, then it will be another offence", and to charge the offences in the alternative. That is the exact case here, the prosecution being in doubt whether they could prove that the girl was under sixteen. "We think ill. (a) to Section 236 shows that the Calcutta view of the section is too narrow.

9. Then the next objection taken is that the learned Judge did not warn the jury that in cases involving sexual intercourse it is a rule of practice, amounting almost to a rule of law, that corroboration of the woman's story must be obtained. But that point seems to be founded in error. This was not a case of rape. The evidence suggested rape, but rape outside the jurisdiction of the Court of Session. The only charge was of abduction, and the offence was complete, if the accused took the complainant away on July 7 by deceitful means intending to seduce her to sexual intercourse. It was not necessary that the details of the alleged sexual intercourse should be corroborated, and intercourse was admitted by the cross-examination. Of course, any Court would normally require corroboration of a woman's statement that intercourse was without her consent. But that does not rest on any technical rule. There was any amount of corroboration of the girl's evidence that the taking away was not with her consent. There was the evidence of her husband; the medical evidence; and the whole history of the case from which the jury might infer that her consent was lacking.

10. The third point is the point to which I have already alluded, namely, that the learned Judge

made an improper use of statements made by witnesses to the police in the course of the investigation. This case is governed by Section 63 of City of Bombay Police Act, and not by Section 162 of the Criminal Procedure Code. Section 63 of the City of Bombay Police Act is in the form which Section 162 of the Criminal Procedure Code took before it was amended in 1923, and is a good deal less wide than the amended Section 162. Section 63 of the City of Bombay Police Act provides:No statement made by any person to a police officer in the course of an investigation under this Act shall, if taken down in writing, be signed by the person making it nor shall such writing be used as evidence.

11. Then there is a proviso similar to that in Section 162 of the Criminal Procedure Code, which says:Provided that, when any witness is called for the prosecution whose statement has been taken down in writing as aforesaid, the Court shall, on the request of the accused, refer to such writing and may then, if the Court thinks it expedient in the interests of justice, direct that the accused be furnished with a copy thereof.

12. So that the right to cross-examine a prosecution witness on his statements made to the police is a privilege conferred on the defence.

13. In this case certain witnesses were called by the prosecution, who did not corroborate the complainant and her husband on certain material points. Their evidence was that although the complainant and her husband had stayed with Mumtaz, as alleged, they had left her house on July 5, two days before the offence, and that accused No. 1 was not known to Mumtaz and her daughter Sirdar, and had not come to their house on July 5, and had not been introduced to the complainant at their house. So that to that extent they did not help the prosecution, and in those circumstances, naturally, counsel for the defence did not cross-examine them on their police statements. But the learned Judge himself called for the police statements, and put to some of the witnesses questions founded on those statements. That was a clear breach of the provisions of Section 63, as Mr. Velinker in this Court has admitted. We are told that counsel for the defence protested, but there is no record of his so doing. We accept the statement; but he might not carry his protest very far, because it would probably be apparent to him that the course which the learned Judge was adopting was likely to lead the learned Advocate General to grant a certificate in case of conviction. We think it unfortunate that counsel for the prosecution did not point out to the learned Judge the illegality of the course he was adopting. A protest from the prosecution would have come with more force; and the Public Prosecutor, at any rate, must know by heart Section 63 of the City of Bombay Police Act. We think that he ought to have instructed his counsel to draw the learned Judge's attention to the illegality of the course he was adopting. Judges have a right to expect assistance from counsel, and more particularly from counsel instructed on behalf of the Crown. Mr. Justice Kania is a Judge, whose experience at the bar and

on the bench has not brought him much into touch with the criminal law, and, therefore, he would be more likely to fall into an error of practice in a criminal matter than some other Judges. We think the Crown ought to have pointed out to him the effect of Section 63 of the City of Bombay Police Act. However, that was not done, and the question is whether the action, which the learned Judge took, has prejudiced the accused.

14. The learned Judge did not use the statements before the police in the cases-of Mumtaz and her daughter Sirdar, but he did use them in the case of Jaywant and in the case of Nazir. Sirdar had stated in the witness-box that she did not know accused No. 1, but when the police came' to her on the information of the complainant for the purpose of tracing accused No. 1 under the name of Kasamalli, and knowing that he was employed in the G.I.P. Railway, Sirdar took them to Jaywant who lived in a chawl close to hers. Sirdar says that she had known a Kasamalli when she was employed with the Wadia Movietone Company, and that she went to Jaywant because Jaywant knew that Kasamalli. Jaywant inquired what Kasamalli was meant, and being told that he was engaged in the G.I.P. Railway, took them to the accused. Jaywant said that he did not know whether Sirdar knew accused No. 1 or not, and the learned Judge did put to him a statement which he had made to the police, that he had seen Sirdar speaking to the accused. That, no doubt, tended to suggest that Sirdar was an untruthful witness, but there was ample other material on which the jury could have come to that conclusion.

15. The learned Judge also used a statement to the police in the case of the witness Nazir. Now, Nazir's evidence is in a very unsatisfactory condition He was called before the Committing Magistrate, and presumably told a story which the prosecution believed to be false; and consequently they did not wish to call him in the Sessions Court. In our opinion their proper-course in such a case was, not to call him themselves, but to give his name to the defence, see that he was present in Court, and tell the defence, if they did not already know it, what he was prepared to say. As he had given evidence before the Committing Magistrate, the defence probably knew what he was prepared to say, and the defence, if they thought fit, could have called him as a witness. In our opinion, the duty of the prosecution in criminal cases is clear. It must always be perfectly fair. It has been said over and over again that it is not the function of the Crown to procure the conviction of an innocent person. That is obvious. But the Crown is not bound to call before the Court a witness who, it believes, is not going to speak the truth. If the Crown informs the accused of the name of the witness and produces him in Court, it can then leave it to the accused to call him or not, as he thinks fit. If the witness is called, the Crown can cross-examine him. But in this case Nazir was tendered for cross-examination. In a recent case, Emperor v. Sadeppa Gireppa Mutgi , this Court has pointed out that this practice of tendering witnesses for cross-examination is inconsistent with Section 138 of the Indian Evidence Act, and that it ought not to be employed in the case of a witness whose evidence is not merely formal.

The present case affords a good illustration of the disadvantages of the practice. Nazir gave evidence, which was of considerable importance. We have his examination by the accused, which is called cross-examination, but is in fact examination-in-chief, and we have no cross-examination by the Crown, because he was supposed to be a prosecution witness. It is very difficult, therefore, to determine whether the witness was a credible person or not. We ought to have had examination-in-chief and cross-examination. The practice of tendering witnesses for cross-examination leads to confusion and does not induce to the discovery of the truth.

16. Nazir's story was that the complainant and her husband came to his room, not on the Sunday, the day of the offence, as the prosecution say, but on the previous Friday; that accused No. 1, who was a Head Time-Keeper in the G.I.P. Railway, Nazir being a rivettor, used to come and see him as a friend every three or four months, and he chanced to come in on July 5 and met the complainant and her husband, and that out of sympathy, because the complainant's husband was very poor, gave him Rs. 20. It is now, of course, suggested that there was something beyond sympathy which induced his generosity. But Nazir says that it was induced by sympathy. Then he says that the complainant and her husband remained in his room until Tuesday, July 9. He does not say that they were present there during the day on Sunday the 7th, but he says they slept there that night, and that on Monday the 8th, the day after the offence, the accused came to his room again, because he wanted to ask him to fetch some ghee from his native place, to which Nazir was proposing to go, and that on that occasion the complainant's husband asked for a further Rs. 20. That evidence is the basis of the story that this visit to Juhu was taken with the consent of the complainant and her husband in return for Rs. 20, and that the subsequent charge before the police was induced by failure to get a further Rs. 20. It was entirely a matter of fact for the jury to decide whether they would accept Nazir's evidence or not. The only point on which he was cross-examined by the learned Judge in connection with his police statement was as to whether he had mentioned before the police that the accused came to see him on the Monday to ask him. to fetch ghee from his native place, an entirely irrelevant point, because such a matter, even if true, might very well not have been stated to the police, who might not have asked why the accused came. Therefore, the point is of no relevance at all, and I do not think it could have influenced the jury in any way.

17. So that, it really comes to this, whether the jury could have been influenced by the statement of Jaywant made to the police that he had seen Sirdar speaking to accused No. 1, and it seems to me that it would be altogether wrong to set aside the conviction, because that statement was wrongly admitted in evidence. There was a mass of evidence on which the jury could find the charge proved. We have pointed out the singular behaviour of the accused himself in not making any statement in the Sessions Court. Of course, an accused is not bound to make a statement; he can keep his mouth closed. But having already set up an alibi as his defence in the Committing

Magistrate's Court, which he was not proposing to prove in the Sessions Court, and having, presumably, instructed his counsel to cross-examine with a view to showing that his trip with the complainant to Juhu was an assignation made with her consent, it was bound to prejudice the jury very much when he declined to say which of the two stories was true. There was also the conduct of the complainant and her husband, which on the evidence seems to be utterly inconsistent with the suggestion that the husband was seeking to dispose of his wife for prostitution. It is quite clear that these two people, who were strangers to Bombay, got into the hands of Mumtaz and her party, who were on the fringe of the cinema business, and if the husband had been desirous of disposing of his wife for the purposes of prostitution, we have no doubt that the parties, into whose hands they got, would have provided the means without the slightest difficulty. If the accused made this arrangement with the husband to enjoy the wife in return for Rs. 20, and possibly a promise of a further Rs. 20, why should he bother to take her to Juhu in the rainy season? There would have been very little difficulty in finding some room or hotel in Bombay, to which he could have taken her.

18. There was ample material on which the jury could find that the story of the complainant and her husband was true, and we do not think that the use which the learned Judge made of the police statement, though undoubtedly wrong, had any influence whatever on the verdict of the jury.

19. Then another objection, and the last objection, which is taken to the conduct of the trial, is in paragraph (p) of the representations made to the learned Advocate General, which reads:The charge of the learned Judge to the jury was in contravention of Section 297 of the Criminal Procedure Code inasmuch as it was not a summing-up of the evidence for the prosecution and defence, containing an endeavour to present the evidence on both sides impartially before the jury but that the said charge amounted to a sustained effort at persuasion of the jury to take a particular view.

20. Having considered very carefully the whole of the charge to the jury and all the evidence on the record, we are satisfied that that allegation is not maintainable. The learned Judge did put the evidence on both sides. It is a little hard to say that the learned Judge did not put the accused's case fairly, when the accused himself would not say what his case was. But the learned Judge did refer to the evidence of Nazir, and he did refer to the discrepancies, which, no doubt, exist in the evidence of the complainant and her husband, though he intimated to the jury his view that those discrepancies were not on matters vital to the establishment of the charge, and we think that view is right. We think that the learned Judge showed in the charge that he had formed a view in favour of the complainant's story, and it may very well be that the colour of his charge was to some extent determined by the nature of the address for the defence, of which we have no record;

but the learned Judge in his charge mentions that counsel for the defence had suggested that the prosecution story was an insult to the intelligence of the jury. If that sort of extravagant statement was made, the Judge in charging the jury was bound to try and remove its effect and to point out that the complainant's story was at any rate a perfectly rational one. The learned Judge, we think, rather unduly emphasised the poverty and lack of friends of the complainant and her husband, and possibly some of his observations would have been more appropriate in an address by counsel for the prosecution, but taking the summing-up as a whole, we do not think it can be said to have omitted any point in favour of the accused or to contain any misdirection or non-direction.

21. A great point was naturally made by the defence of the delay which took place in lodging the complaint with the police. The offence took place on Sunday, July 7. Gulamhussein, the husband of the complainant, says that his wife was unconscious until Monday night; and her evidence also is that she was given something to drink in the hut at Juhu, which rendered her unconscious. She probably was not wholly unconscious, but she was not in a condition to tell her story until Monday. Gulamhussein says that he had gone to the police station on Tuesday, but they laughed at him, and suggested that he was a; man who was using his wife for the purposes of prostitution. He has evidently gone wrong in his memory, because he puts many incidents of the police inquiry as taking place on. Tuesday, whereas the police records show that they happened on Wednesday the 10th. It may be that Gulamhussein went on Tuesday, and not getting any encouragement did not go again until Wednesday. But, at any rate, he did go on Wednesday the 10th some time in the morning, and his complaint was entered by Sergeant Guilfoyle in the non-cognizable register. We think that that entry is difficult to understand. It says:The complainant says that she is seventeen years of age and came to Bombay from Delhi about a month back, and came to know the accused who were said to be film actors. On July 7, 1940, they took her in a motor car No. 9486 to some unknown spot and she had had liquor and thus they had sexual intercourse with her. They treated her roughly in doing so. She complains of pain in abdomen.

22. It was noted at the end that she was treated at the K.E.M. Hospital for two abrasions on chest and ruptured hymen and allowed to go, and the charge is entered in the non-cognizable register under Section 323 of the Indian Penal Code. The entry does not state whether the sexual intercourse was with or without her consent, which would seem to have been a relevant detail. In any case, when a charge of this sort is made, and supported by medical evidence of ruptured hymen, Section 323 seems a peculiar section to name. The learned Judge evidently thought that the police did not take sufficient trouble over this case, and were very unsympathetic to the complainant and her husband (which was their own story). The entry in the non-cognizable register lays some foundation for that suggestion. But fortunately the Inspector noted the entry, and told Deputy Inspector Kale to make a proper inquiry, and then an inquiry was made. We do

not think that the conduct of Deputy Inspector Kale is open to so much criticism as the learned Judge suggests. However, the learned Judge was very careful to point out to the jury that whether the police had behaved properly or improperly had nothing to do with them, or with the charge which they were investigating, and he pointed out to them that, if they rejected the evidence as to the girl being under sixteen, the whole question was of abduction, and that depended on whether she was taken on Sunday to Juhu by deceitful means with the intention that she might be seduced to sexual intercourse. The delay of two days in going to the police is not, in our view, remarkable in the case of illiterate persons with no money and no friends in Bombay.

23. In our opinion, the verdict, which the jury arrived at, was the only possible verdict which they could have arrived at on the evidence; and, although the learned Judge undoubtedly was guilty of an error of law in using the police statement, we are satisfied that that did not affect the verdict of the jury.

24. We, therefore, propose to make no order on the reference.

25. We are not prepared to interfere with the sentence passed on the accused.

26. With regard to the class, the accused seems to be a person of the character which falls within class B, and we may recommend this classification to Government, though it was refused by the trial Judge.

Cases Referred.

1(1931) I.L.R. 59 Cal. 8
2(1935) I.L.R. 62 Cal. 956