

BOMBAY HIGH COURT

State

Vs.

Harbansing Kisansing

Criminal Appeal No. 842 of 1953, Greater Bombay in case No. 55 of 1953

(Gajendragadkar and Vyas, JJ.)

27.11.1953

JUDGMENT

Gajendragadkar, J.

1. This is an appeal against the order passed by the learned Additional Sessions Judge, Greater Bombay, acquitting the respondent of the offence under Section 366, Penal Code. The charge against the respondent was that on or about 26th April 1952, at Bandra he kidnapped Sharif a Mahomed in order that she may be forced or seduced to illicit intercourse and thereby committed an offence under Section 366, Penal Code. Another charge had been framed against the respondent and that was under Section 376. But it appeared clear that this latter offence was alleged to have been committed outside the jurisdiction of the learned Additional Sessions Judge and so the accused was not tried in respect of this offence.

2. In support of the charge under Section 366 the prosecution examined the girl. Abbas, whom the mother of the girl has remarried, and the doctor. They have also led the evidence of other witnesses; but it is unnecessary to refer to that evidence. After the evidence was recorded and the plea of the accused was taken, the learned Judge directed the jury on 8th January 1953, to return a verdict of not guilty in favor of the accused on the charge in question. Pursuant to this direction the jury unanimously brought in a verdict of not guilty, and acting on that verdict the learned Judge acquitted the accused. It is the order of acquittal thus passed by the learned Judge that is challenged before us by Mr. Chandrachud on behalf of the State of Bombay.

3. In giving his direction to the jury to bring in a verdict of not guilty, the learned Judge told them that under Section 361 it was necessary for the prosecution to satisfy the jury that at the material date the girl kidnapped was below 18 years of age, that she was within the lawful guardianship of her parents, that she was taken away or enticed away by the accused and that the accused had done this act without the consent of the lawful guardian. He then referred the jury to the

Explanation to Section 361 and added that the girl herself had admitted that her mother Jaibunissa was alive, her father was dead and her mother had remarried Abbas who has given evidence in the case and who in fact is the complainant.

The view that the learned Judge took was that it was the natural mother Jaibunissa who was the lawful guardian of Sharifa and that it was not competent to Abbas to file the complaint merely because he may have been maintaining the girl after he married Jaibunissa. The learned Judge thought that, since Jaibunissa had not been examined by the prosecution, it cannot be said to have been proved that the girl had been removed from her custody without her consent; that is why he directed the jury to hold that one essential ingredient under Section 361 had not been proved. In other words, the learned Judge told the jury that, even if the prosecution had established the fact that the girl was below 18 years of age and that she had been kidnapped by the accused without the consent of Abbas, that would not bring the accused within the mischief of Section 366. The correctness of this view is disputed before us in the present appeal.

4. The principal contention which is raised for our decision in the present appeal is that the learned Judge was wrong in holding that, in the circumstances proved in the present case, Abbas was not the lawful guardian of the minor girl Sharifa. It is also urged that, in any event, the question whether Abbas can be treated as the lawful guardian of Sharifa or not was a question of fact which the learned Judge ought to have left to the jury to decide after explaining to them the scope of the Explanation to Section 361. Before dealing with these questions, it would be convenient to mention one or two facts which are relevant. The learned Judge seems to have assumed that Sharifa stated in her evidence that her father is dead. We do not see any such statement made by Sharifa on the record of the case and so it is clear that the learned Judge was in error in mentioning this fact to the jury without any evidence. If the learned Judge assumed that the father of Sharifa has been dead because Jaibunissa has remarried Abbas, that obviously overlooks the fact that Jaibunissa may have been divorced from her first husband and then remarried Abbas. This is undoubtedly a question of fact on which no assumption can be drawn by the Judge and conveyed to the jury. The learned Judge also seems to have assumed that Jaibunissa would be the lawful guardian of Sharifa even after she remarried Abbas. This statement again does not appear to us to be correct in law. Under the Mahomedan law it is true that the mother is entitled to the custody of her female child until she attains puberty and this right continues though she may be divorced by the father of the child, unless she marries a second husband, in which case the custody belongs to the father (Mulla's "Principles of Mahomedan Law", p. 205). It would be noticed that the learned Judge did not probably appreciate that the right of the mother is technically described under Mahomedan law as a right to custody (Hisanat) and that this right must be distinguished from the right of a guardian. It also appears that, under Mahomedan law, a female, including the mother who is otherwise entitled to the custody of the child, loses the right of such custody if she marries a person not related to the child within the prohibited degrees, e.g., a stranger, but the right revives on the dissolution of the marriage by death or divorce. If only the learned Judge had realised that questions of Mahomedan law had to be considered before he could validly make an assumption that

Jaibunissa was the lawful guardian of Sharifa at the material date, he would have hesitated to give the direction to the jury in the manner he did. Besides, if the learned Judge was disposed to give such a direction to the jury, he might have considered more carefully the effect of the Explanation to Section 361. The words used in this Explanation have been judicially considered and it does not appear from the charge of the learned Judge that the question which falls to be considered on the construction of these words was fully argued before the learned Judge. In other words, the charge to the jury to bring in a verdict of not guilty has been delivered without ascertaining the material facts and without attempting to apply the principles of Mahomedan law to the said facts.

5. The facts which can be taken to be proved in this case are that Jaibunissa is the mother of the minor Sharifa and that she has re-married. Abbas with whom she and Sharifa have been staying since the date of her remarriage. We do not know whether the natural father of Sharifa is, alive and we do not know whether Jaibunissa's right to the custody of her minor daughter has been affected by her second marriage by virtue of the principle of the Mahomedan law which disqualifies females in the matter of the right of custody of their children to which I have, just referred. On this state of the record, the jury had to consider whether Abbas could be treated as a lawful guardian of Sharifa. The decision of this question would undoubtedly have depended upon the view which the jury might have been directed to take about the effect of the provisions of the Explanation to Section 361.

But even if the view which the learned Judge seems to have taken about the effect of the said provisions be correct, he should have still left it to the jury to decide whether the prosecution had shown that the custody and care of Sharifa had been entrusted to Abbas by her mother Jaibunissa who, according to the learned Judge, was the minor's legal guardian. There can be little doubt that if Jaibunissa was the legal guardian of the minor, she could have entrusted the care and custody of the minor to her second husband, and, even in the absence of her evidence, the jury could have come to the conclusion that, after she remarried Abbas and sought for his protection along with her daughter, she may have entrusted the minor daughter to the care and custody of Abbas. Therefore, the argument is that this was not a question on which the learned Judge should have given a direction to the jury to return a verdict of not guilty. If the Explanation to Section 361 is construed liberally so as to include a lawful guardian as distinguished from a legal guardian, the position would have been even stronger for the prosecution. On this alternative again the matter had to be left to the jury for their decision in the light of the interpretation of the Explanation. In our opinion, there is considerable force in these contentions.

6. It would now be convenient to consider the provisions of Section 381 and the Explanation to it. Section 361 defines "kidnapping from lawful guardianship". It deals with the taking or enticing of minor children and of persons of unsound mind and it requires that such taking or enticing should be out of the keeping of the lawful guardian of the minor or the lunatic concerned, without the consent of such guardian. The Explanation to the section provides that the words "lawful guardian" include any person lawfully entrusted with the care or custody of such

minor or other person. In considering the provisions of Section 361 and the other cognate sections of the Indian Penal Code, it is necessary to bear in mind that these provisions are intended more for the protection of the minors and persons of unsound mind themselves than for the rights of the guardians of such persons. It may be that the mischief intended to be punished partly consists in the violation or the infringement of the guardians' right to keep their wards under their care and custody; but the more important object of these provisions undoubtedly is to afford security and protection to the wards themselves. The guardian is described in this section as a "lawful guardian" and not as a "legal guardian", and the significance of the adjective "lawful" is emphasized by the Explanation which shows that it includes any person who is lawfully entrusted with the care or custody of the ward concerned. There can be no doubt that the expression "lawful guardian" cannot include a person who obtains the care or custody of the minor by illegal or unlawful means. If the minor or the lunatic is in the custody of his legal guardian and he is taken or enticed out of the custody of such legal guardian without his consent, it would obviously be a case of kidnapping. If the legal guardian entrusts in a formal way his ward to the care of another person, such other person would also be clearly his lawful guardian, and in case the ward is removed from his custody without his consent, the offence would be one of kidnapping. But the question is whether the expression "lawful guardian" would or would not include a person who voluntarily undertakes the care and custody of the minor in a lawful manner. In our opinion, this question must be answered in the affirmative. There may be cases where the minors or lunatics would have no legal guardians as such and in their case if the words "lawful guardian" are strictly construed so as to include only legal guardians, taking or enticing them away from the custody of persons who are looking after them in a legal and legitimate way would not constitute the offence of kidnapping. That, we think, could not have been intended to be the result of the definition of "kidnapping" mentioned in Section 361 of the Code. If an orphan is left without the protection of the legal guardian and a philanthropic person out of humanitarian or charitable motives takes up the care and custody of such an orphan and treats him as his child, the person so taking the custody and care of the orphan would, in our opinion, be a lawful guardian of the orphan within the meaning of Section 361. The word "lawful" is deliberately used in its wider denotation and must, in the context, be distinguished from the word "legal". Wherever the relationship of a guardian is established by means which are lawful and legitimate, that relationship is intended to be included within the Explanation to Section 361. Otherwise, in the case of an institution like an orphanage where orphans are left in the charge and care of the Superintendent of the orphanage, the protection afforded by Section 361 would not be available to the orphans and malevolent persons would be able to kidnap them with impunity. A strict and narrow construction of the words "lawful guardian" used in Section 361 would thus expose a large class of minors and lunatics to the danger of kidnapping. This, we think, could not have been intended by the Legislature when Section 361 was enacted. We would, therefore, construe the words "lawful guardian", as explained in the light of the Explanation, as including all persons who have obtained the care and custody of their wards in a lawful manner. It is clearly with the object of bringing within the protection of Section 361 and the other cognate sections all minors and unsound persons mentioned in Section 361, that the Explanation to that section gives the

denotation of the expression "lawful guardian" in an inclusive way. In other words, the Explanation does not exhaustively deal with all classes of lawful guardians.

7. In our opinion, the words "lawfully entrusted" which are used in the Explanation must likewise be liberally construed. It is not intended that the entrustment should be made in a formal manner by a document executed in that behalf. It can be done orally and it is not even necessary that there should be direct evidence available about the entrustment as such. From the course of conduct and from the other surrounding circumstances it would be open to the Court to infer lawful entrustment in favour of the person in whose custody the minor or the lunatic is living and who is taking his care in all reasonable ways. The questions in every such case would be, is the person who claims to be the guardian of the minor or the lunatic in charge of his ward? Did he secure the custody of the ward by lawful means and has he been looking after the maintenance and the education of the ward in the same way as he would have done if he were the legal guardian of the ward?

8. We must, therefore, hold that under Section 361 the expression "lawfully guardian" includes the legal guardian as well as a person who has become the guardian of the minor or the lunatic in a lawful manner. We also hold that a person can be said to be lawfully entrusted with care or custody of the minor or the lunatic if it is shown that the care or custody of such ward was given to him by a person who was the legal guardian of the ward or was his lawful guardian. Reading the section as a whole, we do not think that this liberal construction of the words "lawful guardian" and "lawfully entrusted" is inconsistent with their plain and grammatical meaning, and we have no doubt that this liberal construction is consistent with the policy underlying the section and would help to prevent or punish the mischief at which it aims.

9. This question has been judicially considered by some of the High Courts in India and we may now refer to these decisions. In - '*Empress v. Pemantle*', (A), a Full Bench of the Calcutta High Court has held that the explanation of the words "lawful guardian" in Section 361 is intended to obviate the difficulty the prosecution might be put to in being bound to prove strictly in cases of abduction that the person from whose care the minor had been abducted was the guardian of such minor within the meaning of the legal acceptation of the word. The Court was dealing with an illegitimate minor child and it appeared that the mother of this illegitimate minor child, on her death-bed, had entrusted the care of her child to a person who accepted the trust and maintained the child. When the minor had been kidnapped from the custody of the said person, it was urged that the mother of the illegitimate minor was not the legal guardian of the minor and so no offence under Section 361 could be said to have been committed in that the person in whose custody the minor lived had not been lawfully entrusted with the care and custody of the said minor. This contention was negatived. Chief Justice Garth who delivered the judgment of the Full Bench observed that the object of Section 361 and the cognate sections of the Code is at least as much to protect children of tender age from being abducted or seduced for improper purposes, as for the protection of the rights of parents and guardians; and then he added that the

use of the words "lawful guardian" was intended to obviate the difficulty which would inevitably arise in all cases under Section 361 if a narrow and strict construction of the expression was accepted. Niyogi, J., of the Nagpur High Court has taken the same view in - '*Nathusingh v. Emperor*²',

10. In the Patna High Court there has apparently been a conflict of judicial opinion. A Full Bench of the Patna High Court in - '*Mt. Kesar v. Emperor*³', held that for an entrusting, within the meaning of the Explanation to Section 361, there must be necessarily three persons, viz., (1) the person imposing the confidence or trust; (2) the person in whom the trust is imposed; and (3) the person constituting the subject-matter of the trust. The Full Bench took the view that the Explanation contemplates a declaration of trust by a person competent to make such a declaration, conveying handing over and confiding a minor to the care and custody of another in whom a confidence and trust is imposed. It appears that the learned Judges repelled the contention that the material expression in Section 361 should be more liberally construed on the ground that the words of a statute must be construed in their ordinary grammatical and natural sense, and not in a forced and artificial sense, unless such conclusion would give rise to an obvious absurdity which could never have been contemplated.

¹8 Cal 971 (PB)

³ AIR 1919 Pat 27

² AIR 1941 Nag 66

Atkinson, J., who delivered the judgment of the Full Bench, was prepared to concede that neither the declaration of trust nor its acceptance need necessarily be in writing. According to his view, it is sufficient if the declaration is verbally made and given or it arises from a course of conduct consistent only with the existence of such antecedent declaration; acceptance also can be made verbally or may arise by necessary implication from the conduct of the party so entrusted with the duty imposed. It is, therefore, clear that, though Atkinson, J., was prepared to be liberal up to a point in the construction of the word "entrusted" used in the Explanation, he apparently insisted on the requirement that the entrustment must be made by a person competent to do so.

11. A contrary view has, however, been expressed in the same High Court in - '*K.K. Ali v. Emperor*⁴', This time the question arose before Fazl Ali, J., and Dhavle, J., Referring to the decision in - '*Mt. Kesar v. Emperor, (C)*', Mr. Justice Fazl Ali observed (p. 269) :

".....With great respect to the learned Judges who decided that case I would venture to say that in my opinion they have taken a much more rigid view of the section than what the words of the section warrant and I doubt if the section contemplates either a formal declaration of trust or that there must necessarily be three persons in order that a person may be lawfully entrusted with the care and custody of a minor."

Fazl Ali, J., then proceeded to consider the case of an unclaimed child wandering about and he observed that if a person out of humanitarian motive takes charge of the child and brings him up, there is no reason why he should not be treated in the eyes of the law as the lawful guardian of the minor within the meaning of the Explanation to Section 361. With respect, we agree with the

view thus expressed by Mr. Justice Fazl Ali. In - '*Banamali Tripathy v. Emperor*⁵', Meredith, J., and Brough, J., appear to have accepted the proposition that a lawful guardian in Section 351 includes a 'de facto' guardian. Thus it would appear that though there is a conflict of judicial opinion in the Patna High Court, the majority view is in favour of the construction which we are disposed to place on the words of the Explanation to Section 361.

12. Mr. Vakil has referred us to two Calcutta judgments which appear to be in his favour. In - '*Darajuddin v. Emperor*⁶', Newbould and Suhrawardy, JJ., have held that the husband of a Mahomedan girl, who has not attained puberty, is not the lawful guardian of her person under the Mahomedan law, and that her lawful guardian is ordinarily her mother, and if the mother is dead, the mother's mother. Acting on this view, the learned Judges held that no offence of kidnapping had been committed when a minor girl had been kidnapped from the house of her lawfully married husband. A somewhat similar view has been expressed by Ghose and Pearson, JJ., in - '*Harbhorsha Md. v. Jhapuran Bibi*⁷', (2) (G). With very great respect, the question of the construction of the words used in the Explanation to Section 361 does not appear to have been argued before the learned Judges in both these cases, and even the material provisions of the Mahomedan law affecting the question of the guardianship of minors does not appear to have been seriously or fully considered. Besides, the earlier decision of the Calcutta High Court in - '8 Cal 971 (FB) (A)', in which the same question has been fully considered was not cited before the

⁴ AIR 1937 Pat 263

⁶ AIR 1923 Cal 672

⁵ AIR 1943 Pat 212

⁷ AIR 1930 Cal 665

learned Judges in both the cases. With respect, we do not think that the view taken in these two cases is justified by the words used in the Explanation to Section 361.

13. We may incidentally refer to the corresponding position under the English law which has been considered in some of the decisions to which we have just referred. This is how Section 55 of the English statute (1861) 24 and 25 Vic., c. 100, reads :

"Whosoever shall unlawfully take or cause to be taken any unmarried Girl, being under the Age of Sixteen years, out of the Possession and against the Will of her Father or Mother, or of any other Person having the lawful Care or Charge of her, shall be guilty of a misdemeanour....."

It is perfectly true that the words used in this section are wider than the words used in Section 361 as well as the Explanation to it. But it may not be out of place to emphasize the significance of one important word which is common to both the provisions, and that is the word "lawful". In our opinion the use of the adjective "lawful" in describing the guardian in Section 361 is intended to distinguish the position of such a lawful guardian from that of a legal guardian, and in that sense there can be said to be resemblance between the two provisions. It is clear that under the English law a ward would be entitled to the protection even though he may not be under the care or charge of his legal guardian, but of any other person having his lawful care or charge.

14. In view of the construction which we have put upon the expression "lawful guardian" in Section 361 and "lawfully entrusted" in the Explanation to Section 361, we must hold that the learned Additional Sessions Judge was wrong in directing the jury to bring in a verdict of not guilty in the present case. It is clear that the question as to whether an offence had been committed should have been left to the jury for their decision and the jury should have been properly directed about the requirements of Section 361. It would then have been the function of the jury to consider and decide whether Abbas could claim to be a lawful guardian of Sharifa within the meaning of Section 361. We must accordingly set aside the verdict of the jury obtained by the learned Judge and the consequent order of acquittal passed by him.

15. The next question which we have to consider is whether we should proceed to deal with the evidence ourselves or direct a retrial of the accused on the charge under Section 366. Since the jury were not given an opportunity to give their verdict on questions of fact, we think it would be in the interests of justice that the accused should be allowed the privilege of having his case tried by a jury rather than that we should proceed to deal with the evidence ourselves. We, therefore, set aside the verdict of the jury and the order of acquittal consequent upon it and direct that the accused should be tried for the offence under Section 366 afresh.

Retrial directed.