BOMBEY HIGH COURT

State

Vs.

Gopichand Fattumal

Criminal Appeal No. 1206 of 1960, with Criminal Appeal No. 1207 of 1960

(Patel and Shah, JJ.)

20.12.1960

JUDGMENT

Patel, J.

1. These two appeals are by the four accused who have been convicted under Section 366 read with section 34 and Section 366-A of the Indian Penal Code and sentenced to two years' rigorous imprisonment on each count, the sentences being directed to run concurrently. These accused were charged along with four others. Accused No. 7 was a motor driver and accused No. 8 is his wife. The girl in this case is one Anusaya, the daughter of one Shakunthala whose husband died when Anusaya was yet a very small child. Shakuntala started living with accused No. 7 as his mistress bringing the child with her. After some time accused No. 7 started illtreating her as a result of which she left him and went to Nasik and married some one else. The girl Anusaya, however, continued to be with accused No. 7 who reared her up. He got her married about a few months before the present incident. The girl stayed with her husband Maruti alias Ramlal for a few days and then was called back by accused No. 7. After that, she again went back to her husband for a few days and then accused No. 7 brought her back allegedly for the Divali holidays. After this, he did not send her to her husband's house. According to her, she was compelled to have sexual relations against her will with customers for money which he recovered from them. It was alleged that on 13th January 1960 accused No. 3 went to the house of accused No. 7 and asked him to bring Anusaya and another girl Chandrakala, a neighbour, to Gulzar Cinema owned by him (accused No. 3) for the second show. After this, accused No. 7 and accused No. 8 along with Anusaya and Chandrakala accused No. 6 the neighbour went to the second show. After the interval, at a sign from accused No. 3 Chandrakala and Anusaya were taken to Bohari Kathada by one Devidas. Accused No. 7 accompanied them upto the stair case of that room. It appears that Sub-Inspector of Police Pagare who had information that these accused were having a chinking bout in that room, raided the room and during the raid he found all these four accused consuming liquor along with one Abdul Rahim a court clerk in the Sessions Court. At this time, both Chandrakala and Anusaya were also in that room. According to the police

officer, he was peeping through the chink in the shutter of the door and he saw accused No. 5 coming out from behind the curtain in that room with Anusaya. Accused Nos. 1 to 5 were sent to the medical officer for their examination. During the course of investigation it was discovered that the age of Anusaya was less than 18 years. Information was laid before the Magistrate for offences under Sections 366 and 386-A against all the accused in regard to Anusaya. Devidas was in the meantime made an approver. The learned Magistrate committed all the accused to stand their trial for these offences in the Court of Session.

2. Regarding the offence, material evidence was that of Anusaya and approver Devidas. The medical evidence proved the age of Anusaya to be below 16 years. The other evidence consisted of the police officers and the panch. The defense of these accused was simple. They said that they were not in the room which was raided by the police officer but in the adjoining room and it was only when the raid was being effected that they all came out and that they had been falsely implicated in this offence. Accused No. 1 stated that his father was a tenant of the adjoining room. They also led defense evidence to show that the girl was more than 18 years of age and that they were sitting in the adjoining room. It is needless to say that this defense was disbelieved by the learned Judge. In the result, he convicted the accused as stated above. It is against this judgment that the present appeals are brought to this Court by accused Nos. 1, 2 and 4 and accused No. 3.

3. It may be mentioned at the outset that accused No. 7 had filed an appeal to this Court through jail, which we dismissed as we were satisfied that he was rightly convicted by the learned Sessions Judge.

4. The learned counsel appearing for these accused have not challenged the finding regarding the age of Anusaya and rightly so. The evidence is conclusive and we agree with the finding made by the learned Sessions Judge that she was below 16 years of age.

5. Regarding the main incident, we have got the evidence of Anusaya and Devidas.

(His Lordship discussed this evidence and proceeded.)

6. So far as the offence under Section 366 is concerned, it appears to us that none of the present accused can be regarded as having committed that offence. The words of the section are

> "whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will or 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, shall be punished with imprisonment of either description etc.....".
> "Kidnapping" is defined in section 360 and Section 361. Section 361 is the relevant

section in this case. It says,

"Whoever takes or entices any minor.....out of the keeping of the lawful guardian of such minor, without the consent of such guardian, is said to kidnap such minor from lawful guardianship".

The Explanation says, that the words "lawful guardian" would include any person lawfully entrusted with the care or custody of such minor. The evidence of Anusaya and that of her husband and husband's father clearly shows that Patilba having brought her from her husband thereafter did not send her to their house. It may be that during the time that the husband acceded to the custody of Patilba, the latter might satisfy the requirement of being the lawful guardian, but once against the desire of the husband Patilba refused to send her to his house, his lawful custody ceased and he cannot be regarded as the lawful guardian. If he retained the custody of the minor against the desire of the lawful guardian i.e., the husband, and he knew that she would be seduced to illicit intercourse, then he himself became the kidnapper. It is no one's case that at the earlier stage when he himself became the kidnapper, it was with the connivance or at the instigation of any of these accused that he did so. Anusaya's evidence shows that she did not know accused Nos. 1, 2 and 4 at all. Even accused No. 3 is not stated to have had any intercourse with her before this date. Her evidence is that Patilba was collecting money from persons to whom he compelled her to submit for sexual intercourse. It is clear, therefore, that these accused had nothing to do with the original kidnapping by Patilba and since he was not the lawful guardian of this girl her being brought to this room cannot be regarded as kidnapping. The finding, therefore, made by the learned Sessions Judge that these accused are guilty under Section 366 read with section 34 cannot be sustained. So far as this offence is concerned, therefore, they are entitled to acquittal.

7. The next question is whether any of the accused is guilty under Section 366-A of the Indian Penal Code. This section requires that a minor must be induced to go from any place or to do any act with the intention or knowledge that such minor may be forced or seduced to illicit intercourse with another person. There is no evidence of any direct talk between any of the accused and the girl nor even of any inducement offered through Patilba. Even so far as accused No. 3 is concerned, there is no direct talk between Anusaya and accused No. 3 which can be regarded as an inducement to her to move either from the house of Patilba or from the theatre to the room in question. His case also, therefore, does not come directly within the terms of this section. They cannot, therefore, be convicted under Section 366-A.

8. The matter, however, does not end with this so far as Accused 3 is concerned. The evidence which we have summarized above, clearly indicates that accused No. 3 instigated Patilba and Devidas to bring the girl to the theatre and thereafter to the room in question. Patilba, as we have stated, being in custody of this girl and the girl being minor and helpless, induced or forced her to go to the cinema and thereafter to this room and actually left her there. So far as Patilba was concerned, he intended that she should be forced or seduced to illicit intercourse by one or the

other of the accused. Accused No. 3 by asking Patilba to bring the girl to the theatre and asking Devidas and Patilba to bring the girl to the room clearly instigated Patilba in the commission of this offence. He must, therefore, be held clearly guilty of the offence of abetment of this offence by Patilba.

9. It is contended that Section 366-A is not intended to apply to cases of a girl of easy virtue and one who is accustomed to intercourse. The cases relied upon are *Shaheb Ali v. Emperor*[1], and *Aswini Kumar Roy v. The State*[2], The latter case follows the earlier one. The earlier case was in reference to Section 366. After referring to the opposite views, the learned Judges proceeded to consider the words "seduced to illicit intercourse". They say " 'seduced to illicit intercourse' means 'induced to surrender or abandon a condition of purity from unlawful sexual intercourse'. Therefore, an accused cannot be convicted of an offence unless it is proved that the girl, was leading a life pure from unlawful sexual

[1] ILR 60, Cal 1457 : (AIR 1933 Calcutta 718)

[2] AIR 1955 Cal 100

intercourse at the time when the kidnapping took place. This does not mean that it is necessary to prove that the girl has never at any time surrendered her condition of purity from unlawful sexual intercourse. She may have surrendered it in the past and thereafter have resumed a life of purity. On the other hand, if she is already leading a life of indulgence in unlawful sexual intercourse, it cannot be said that she was kidnapped in order that she might be seduced to illicit intercourse. In such a case the accused could not have kidnapped her in order that she might be led astray in conduct, or drawn away from the right course of action into a wrong one, because she was already astray, and was pursuing a wrong course at the time of the kidnapping." The word "seduction" came up for construction before the Punjab High Court in the case of *Kartara v. State*[3], and the learned Judge expressed the view that the term "seduction" implies that the woman is led away or is induced to stray away from the path of rectitude. This Court had occasion to consider the meaning of this word as used in Section 366 in the case of *Emperor v. Lakshman Bala*[4], and the learned Judge was of the view that it was used in the general sense of enticing or tempting and not in the limited sense of committing the first act of illicit intercourse. To interpret the words "seduced to illicit intercourse" in the limited sense as done by the Calcutta High Court would in oar opinion, be frustrating the very purpose of the section. This and the other cognate sections are intended for protection of minors and women and the Code has made a distinction between a minor and a person of full age. In the case of a minor girl, she cannot be regarded as capable of consenting or forming a judgment as is shown by a reference to Section 276 which deals with the offence of rape. The word "seduction" has several meanings and we do not think that when it is taken in conjunction with the words "to illicit intercourse with another" it can be given the meaning which the learned Judges in the aforesaid Calcutta and Punjab cases assigned to it.

10. It is true that in its ordinary sense it may have the same meaning as inducing, but then, in conjunction with illicit intercourse the word "seduced" seems to be more appropriate than the word "induced". We agree, with respect, with Mr. Justice Divatia who decided the aforesaid Bombay case that the word is used in the ordinary sense of enticing or tempting irrespective of

whether the girl has been previously compelled or has submitted to illicit intercourse.

11. It is argued on behalf of the accused No. 3 that we must accept his contention that he had gone to this room for a legitimate purpose and that was to meet the owner of the room.

(Rejecting this contention, His Lordship proceeded).

The explanation tendered by Accused 3, therefore, cannot be accepted. In that event, it is clear, that he is clearly guilty of abetment of the offence under Section 366-A committed by Patilba. We are also of the view that in view of the answers given by this accused to the Court during his examination under Section 342 of the Cri. P. Code no prejudice is caused to him by our finding him guilty of the abetment of the offences under Section 366-A of the Penal Code instead of the principal offence with which he was charged.

12. Regarding sentence, it is argued that in any case, we should not maintain the sentence

[3] AIR 1958 Pun 323 [4]37 Bom LR 176 : (AIR 1935 Bom 189)

that is imposed on this accused. Offences of this nature where young girls incapable of taking care of themselves are led into prostitution are serious and are mainly, due to the encouragement offered by persons in the position of the present accused. Taking everything into account, we do not think we can justifiably reduced the sentence which has been imposed by the learned Judge.

13. The result is, that the appeal of accused Nos. 1, 2 and 4 must be allowed and they must be acquitted and directed to be released forthwith. So far as the appeal of accused No. 3 is concerned, the appeal must be dismissed.

Order accordingly.