

would not seem to be unequal to the framing of separate claims in separate suits against the two companies, and no doubt some procedure is available by which an order could be obtained for the trial of both suits by the same Court.

In the result, I agree that the appeal of the Railway Company succeeds on the preliminary ground that as the suit was framed, the Court had no jurisdiction to try the claim against that company.

A. P. B.

Appeal allowed.

Attorneys for the appellant: *Morgan & Co.*

Attorney for the plaintiff respondent: *Manmatha Nath Dutt.*

Attorneys for the defendant respondent: *Orr, Dignam & Co.*

ORIGINAL CRIMINAL.

Before Sanderson C. J.

EMPEROR

v.

SAFDAR REZA*.

Kidnapping—Kidnapping a minor in order that she might be seduced to illicit intercourse—Minor leaving home with intent of having such intercourse—Penal Code (Act XLV of 1860), s. 366.

The offence of kidnapping a minor girl, in order that she may be seduced to illicit intercourse is established by the accused taking her from lawful guardianship, with such object, although she left home with the intention of having illicit intercourse with him.

The prisoner, Safdar Reza, was alleged to have kidnapped two girls under 16 years of age, Matabia and Bhagbania, the daughter and niece of one Doman

* Original Criminal.

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AND NORTH
WESTERN
RAILWAY
Co., LTD.

v.

SADARAM
BHAIRODAN.

RICHARDSON

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Dhobi, from his house on 10th August 1921. The girls had been married, but had not cohabited with their husbands. The parents of Bhagbania were dead, and she had been reared by her uncle and was living with him at the time of the kidnapping. Information was lodged by the uncle at the thana, and the police ultimately traced the girls, on the 3rd November 1921, to the house of one Azim, in the village of Goberdanga, a few miles from Serampore.

The prisoner was committed to the High Court by the Fourth Presidency Magistrate, and tried at the First Criminal Sessions on charges under ss. 344, 346, 363, 365 and 366 of the Penal Code. The charges under ss. 346 and 365 were withdrawn by the prosecution during the trial, and that under s. 344 was not pressed; and the case, accordingly, went to the jury on the charges of kidnapping under ss. 363 and 366 of the Penal Code. There being no question of the use of force by the accused the charge under the latter section proceeded on the allegation of kidnapping the girls in order that they might be "seduced" to illicit intercourse. The jury found the accused guilty under both sections by a majority of 7 to 2. In reply to his Lordship, the Chief Justice, the jury found that the girls, at the time of leaving home, went with the accused with the intention of having illicit intercourse with him.

Mr. H. S. Suhrawardy, for the prisoner. Section 366 applies to a case where a minor has been kidnapped and the inducement to illicit intercourse takes place subsequently. If she has left her guardian with the intention, present at the time, of having illicit intercourse with the accused, the charge fails. Refers to Ratanlal's Law of Crimes, 4th Ed., p. 766, and the Burma rulings cited therein. No separate sentences

can be passed under ss. 363 and 366 of the Indian Penal Code.

Mr. B. L. Mitter, for the Crown. The accused is triable on both charges. Refers to Russell on *Crimes*, 7th Ed., 968; *Queen v. Isree Panday* (1), *Reg. v. Olifier* (2), *Queen v. Srimotee Poddee* (3). The offence made punishable by s. 366 comprises the offence under s. 363 as a constituent element, and as the consent of the minor is immaterial on a charge thereunder, it would be so also on the charge under s. 366.

SANDERSON C. J. In this case the accused, Safdar Reza, was convicted by the jury of an offence under section 363 and of an offence under section 366 of the Indian Penal Code by a majority of 7 to 2, which verdict I accepted, and the matter which is now for consideration arises with regard to the offence under section 366. The offence under section 363, in this case, consists of kidnapping from lawful guardianship—no question arises with regard to that matter. But with regard to section 366, the material part, which applies to this case, is kidnapping a woman “in order that she may be forced or seduced to illicit intercourse.”

In this case there was no suggestion of any force being used by the accused, and I left it to the jury to say whether the girls, Matabia and Bhagbania, or either of them, were kidnapped by the accused in order that they or either of them might be seduced to illicit intercourse. The jury by their verdict found that the accused kidnapped the two girls with that object and intention, and found him guilty under section 366 by a majority of 7 to 2, as well as under section 363.

(1) (1867) 7 W. R. Cr. 56.

(2) (1866) 10 Cox. C. C. 402, 404.

(3) (1864) 1 W. R. Cr. 45.

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The evidence was that after the accused had kidnapped the two girls he did in fact have sexual intercourse with both the girls at Goberdanga. It was, however, argued on behalf of the accused that at the time the girls left Doman's house they had the intention of having illicit intercourse with the accused and that, if that were their intention, the accused could not be convicted under section 366.

In order that this question might be argued before me, I directed the jury to give a special finding upon this question, and they found that the girls intended, at the time they left Doman's house, to have illicit intercourse with the accused.

The question, therefore, arises whether that fact is sufficient to prevent the accused being convicted under section 366.

On the evidence it appears that neither of the girls had been seduced until their illicit intercourse with the accused at Goberdanga, which took place after the kidnapping by him. The material facts in this respect, stated shortly, are that both the girls were under 16 years of age. They lived in Calcutta with Doman, who is the father of Matabia and the uncle of Bhagbania, whose parents were dead, and he was, therefore, the lawful guardian of both girls. They had been married some four years before this occurrence, but it was proved that neither of them had lived with their husbands. They had come back to Calcutta immediately after the marriage ceremony.

The evidence of Matabia on the question of seduction was as follows:—"I had no connection with any "one else." With regard to Bhagbania it seems to me that the doctor's evidence was important: he found that in her case the hymen had not been ruptured: he said that there could be sexual connection without the rupture of the hymen, and especially, having-

regard to the fact that the hymen in this girl was situated far up in the passage, that it would be possible to allow a certain amount of penetration without injuring the hymen. Bhagbania said that the accused cohabited with her at Goberdanga. The doctor's evidence shows this may have been possible; but the doctor's evidence, in my opinion, is inconsistent with Bhagbania having been in the habit of cohabiting with other men.

It is admitted that with regard to the offence under section 363, that is, kidnapping from lawful guardianship, the girls being under 16 years of age, their consent is immaterial. It is further conceded that the offence dealt with by section 366 is merely an aggravated form of the offence created by section 363; and it would, therefore, seem to follow that when the matter under consideration, in relation to section 366, is the seduction to illicit intercourse of a girl under 16 years of age, as in this case, her consent or intention would be just as immaterial as it would be in connection with the offence dealt with under section 363.

One object of the sections under consideration is not only to protect the rights of parents and others having the lawful guardianship of girls under the age of sixteen, but also to protect the girls themselves and to prevent persons taking improper advantage of their youth and inexperience, and it is obvious that, on the facts of this case, however willing the girls may have been, the accused was the cause of their being seduced from the path of virtue and having illicit intercourse with him.

In my judgment, therefore, the fact that the girls, at the time they were enticed away from their home by the accused, had the intention of having illicit intercourse with him, is no defence to the charge under section 366.

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On the facts of this case the consent of the girls, who were under the age of sixteen, and who had not had any illicit intercourse with any man before the accused, is not inconsistent with their having been seduced to illicit intercourse by him.

In my judgment, the intention of the accused is the material matter, and on the findings of the jury and the facts of this case, there can be no doubt that he kidnapped the girls in order that they might be seduced to illicit intercourse with him. In my judgment, therefore, on the facts of this case, the point which has been raised constitutes no defence to the charge under section 366 of the Indian Penal Code. There is no question as to the propriety of the verdict of the jury or the liability of the accused to be convicted in respect of the charge under section 363 of the Indian Penal Code. But inasmuch as the greater offence under section 366 includes the less offence under section 363, the accused should not be convicted under both. I, therefore, convict him under section 366.

The offence, in my judgment, is a serious one; the conduct of the accused was calculated to ruin the two girls for life: fortunately they were discovered and brought back to their home, and I hope that the damage done to them by the accused, may not be irremediable.

The chance, which they now have, however, was in no way due to any action or repentance on the part of the accused. He took advantage of the girls, who were in a humble walk of life, kept them in an out of the way village for over two months, and acted in such a way as was calculated to ruin their lives.

I sentence the accused to two years' rigorous imprisonment.

E. H. M.