

CRIMINAL REVISION.

Before Rankin C. J. and Costello J.

SAHARALI MAHAMMAD

v.

KAMIZUDDIN MAHAMMAD.*

1930
Nov. 21.

Kidnapping—“Lawful guardian”, meaning of—Right of civil law guardian as against de facto guardian—Indian Penal Code (Act XLV of 1860), ss. 361, 363.

The explanation to section 361 of the Indian Penal Code extends the accepted definition of the words “lawful guardian” under civil law to preclude persons other than the civil law guardian from raising the technical plea that the legal relation of ward and guardian did not exist between the person kidnapped and the person from whose actual custody the minor is taken away. But, as against a person, who in fact, is the civil law guardian of the minor, mere *de facto* guardianship cannot be set up so as to convict the real civil law guardian of an offence under section 361.

Emperor v. Sital Prasad (1) relied on.

Actual entrustment is not necessary to constitute lawful guardianship, consent of the relatives is sufficient.

Criminal Rule on behalf of the accused.

The relevant facts appear from the judgment.

Santoshkumar Basu (with him *Sisirkumar Banerji*) for the petitioners. The petitioners were acting on behalf of the boy’s paternal aunt, who was his lawful guardian under the Mahomedan law. A Mahomedan boy, up to the age of seven, can have a number of persons as guardian and there is a list of priority. The paternal aunt is included in that list, but the consanguine sister is not. Further, even if the half-sister could be a guardian, she has lost her right by marrying outside the prohibited degrees. *Harbhorsha Mahomed v. Jhapuran Bibi* (2).

De facto guardianship may be lawful guardianship within the meaning of the explanation to section 361 of the Indian Penal Code, but as against the guardian in civil law she cannot set up any right so as to bring

*Criminal Revision, No. 720 of 1930 against the order of G. Waight, Sessions Judge of Jalpaiguri, dated June 27, 1930.

(1) (1919) I. L. R. 42 All. 146. (2) (1929) 51 C. L. J. 476.

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the said guardian within the mischief of section 363. The Sessions Judge was wrong in upholding the conviction without deciding the question as to who was the guardian under Mahomedan law.

Manindranath Banerji (with him *Jyotishchandra Banerji*) for the opposite party. It is immaterial as to who is the guardian under the Mahomedan law. It is enough to show that the complainant was lawfully entrusted with the care or custody of the kidnapped person. Explanation to section 361 of the Indian Penal Code clearly extends the meaning of "lawful guardian" to include the *de facto* guardian. Where a person has been for some time the *de facto* guardian of a minor and the legal guardian has acquiesced in it, it is not open to such legal guardian to claim his better right as defence to a charge of kidnapping.

Also it is not clear that under Mahomedan law a consanguine sister would have a right inferior to that of the paternal aunt.

RANKIN C. J. In this case, the two petitioners apply to us in revision, complaining of the conviction which has been recorded against them by the trial magistrate and the appellate court under section 363, Indian Penal Code, in respect of a boy as to whom it is not clear whether he is just above or just below the age of seven. The boy is a Mahomedan and it seems that the petitioners are persons who took the boy away from the custody of his half-sister's husband and herself, with whom he had been living for about a year and a half since his father's death. The petitioners, in so acting, were apparently acting on behalf of the boy's paternal aunt and, no doubt, the circumstance that this boy has a certain amount of property is the cause of the battle raging as to who shall have the custody. Still, prosecution under section 363, Indian Penal Code, must be properly grounded. The learned Sessions Judge, in the course of his judgment, says: "I am not prepared to enter "into questions of Mahomedan law to the extent of

“determining whether either the complainant or the complainant’s wife was entitled to be the legal guardians of the child, but I am satisfied that the child was actually in the *de facto* custody, and I am of opinion that section 363, Indian Penal Code, does not call for a closer degree of guardianship, specially in the circumstances of the present case.” I do not doubt at all that the explanation to section 361 was intended to extend the meaning of the words “lawful guardian” beyond their ordinary scope. It is extended to include any person lawfully entrusted with the care or custody of such minor or other person. I do not doubt either that, where, by consent of the relatives, a minor has been allowed to be in the custody of a particular relative, the definition given by the section will be satisfied. In such a case, there may be no definite transaction of entrustment, but the consent of the relatives would be quite sufficient to make the guardianship lawful guardianship. In the present case, however, the petitioners before us were claiming that they had ceased to consent to any guardianship on the part of the complainant and his wife. They claimed that they were asserting the higher right of the paternal aunt and the question arises whether, as against one who is asserting a better right than the person who has a *de facto* guardianship, the explanation to the section does not require the court to examine into the question whether they have a better right or not. It seems to me that the case of *Emperor v. Sital Prasad* (1), which has been cited to us by the learned advocate for the complainant, is a direct authority to the effect that the explanation cannot be used to mean that, as against a person who, in fact, is the civil guardian of the minor, mere *de facto* guardianship can be set up so as to convict the real civil guardian of an offence under section 361. Mr. Justice Dalal at pages 149 and 150 says: “It was argued that Ram Tawakkal was the guardian of the girl under the law applicable to Hindus in this province, and that,

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“therefore, the taking away of the girl by him and his
“associates from the custody of Musammad
“Chandarkali did not amount to kidnapping as
“defined in section 361, Indian Penal Code. I would
“accept the inference of law under the Indian Penal
“Code if Ram Tawakkal were proved to be the girl’s
“guardian under the Hindu law. The first
“explanation to section 361, Indian Penal Code, which
“defines lawful guardian, extends the accepted
“definition of these words under the civil law
“governing the minor. The definition does not
“exclude the person who would be the minor’s guardian
“under the civil law applicable to the minor. This
“precaution of extending the meaning of the words
“‘lawful guardian’ under the criminal law was taken
“to preclude persons other than the civil law guardian,
“from raising the technical plea that the legal
“relation of ward and guardian did not exist between
“the minor and the person from whose actual custody
“the minor may happen to be taken away.” I pause
there to observe that action was taken to preclude
persons “*other than the civil law guardian*” from
raising the technical plea. “The person in temporary
“charge of the minor cannot, however, take advantage
“of this definition given in the first explanation to
“section 361, Indian Penal Code, as against the
“guardian at civil law. If I had been satisfied that
“Ram Tawakkal was the guardian of the minor girl,
“Musammad Rajpatia, at civil law, I would not have
“inquired further into this case.” It is contended
by the petitioners in the present case that, having
regard to the fact that it is common ground that the
taking away was done by them in association with and
on behalf of the paternal aunt, it is not possible to
convict them without coming to a conclusion whether
the paternal aunt is the guardian of the minor at
civil law. The learned Judge has refused to enquire
into that question at all, saying that the mere *de facto*
guardianship of his half-sister and her husband
would be sufficient to conclude the case. It appears
to me that the authority to which we have been

referred is a clear authority the other way and that it was incumbent on the learned Judge, before disposing of this appeal, to make up his mind one way or the other, whether, in the circumstances of this case, the paternal aunt was the guardian at civil law of this Mahomedan boy. The learned Judge not having dealt with that question, I am of opinion that the appeal must be reheard and that the Rule must be made absolute, sending the case back for that purpose. At the rehearing, the question whether the half-sister has lost her right by reason of her marriage to someone within prohibited degree or otherwise may be one of the questions upon which will depend whether or not this paternal aunt has the right of the guardian at civil law. Any other question which is necessary for that purpose, such as the exact age of the boy, must also be dealt with. If the learned Judge is not certain what is the exact age of the boy and if he is not certain who is his civil guardian, then, if it seems to him that the paternal aunt may be the civil guardian, the criminal appeal must be disposed of accordingly. The Rule is made absolute on these terms. The petitioners will continue to remain on the same bail as before pending their retrial.

COSTELLO J. I agree.

Rule absolute. Case remanded.

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