CRIMINAL REVISION.

Before S. K. Ghose and Henderson JJ.

MAHENDRANATH CHAKRABARTI
v.
EMPEROR.*

1934
Dec 18, 21.

Kidnapping—"Unlawful" and "Proceeding," meaning of—Abettor, when liable as a principal—Indian Penal Code (Act XLV of 1860), ss. 361, 365, 114.

The word "unlawful," as used in the various sections of the Indian Penal Code, means what is not justifiable by law. It is akin to the word "illegal," which is defined in section 43 but has not the same restricted sense, but has been used in a more elastic manner. It is also not restricted to what is "immoral."

The father of an illegitimate child forcibly removing it from its mother to hush up the scandal is not protected by the exception to section 361 of the Indian Penal Code.

Abraham v. *Mahtabo* (1) referred to.

The word "proceed" in sections 339 and 340 of the Indian Penal Code is not confined to the case of a person who can walk on his own legs or can move by physical means within his own power. It includes the case of proceeding by outside agency, which in the case of a baby means the agency of its natural protector or guardian. If a baby is kept shut up, so that its natural protector cannot get at it, it is a case of wrongful confinement. It is not correct to say that whenever a person abetting is present, section 114 of the Indian Penal Code and not section 109 is to apply. Section 114 applies only to those cases where there is evidence of prior abetment, that is to say, where the accused even if not present would be liable to be punished as an abettor and he is also present. In that case, the abettor is liable as a principal, but it does not follow that the person abetted who does the act is not liable as a principal also.

Barendra Kumar Ghosh v. *Emperor* (2) referred to.

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The material facts and arguments appear sufficiently from the judgment.

Pugh and *Sudhanshusekhar Mukherji* for the petitioner.

Anilchandra Ray Chaudhuri for the Crown.

Cur adv. vult.

*Criminal Revision, No. 797 of 1934, against the order of T. H. Ellis, Sessions Judge of 24-Parganas, dated July 4, 1934, affirming the order of S. N. Banerji, Honorary Magistrate, First Class, at Alipore, dated June 6, 1934.

(1) (1889) I. L. R. 16 Calc. 487. (2) (1924) I. L. R. 52 Calc. 197.

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Ghose J. The petitioner, Mahendranath Chakrabarti, has been convicted under section 365 read with section 109 of the Indian Penal Code and the petitioner Miss Few has been convicted under section 365 of the Indian Penal Code and each of them has been sentenced to undergo rigorous imprisonment and also to a fine. The case for the prosecution is shortly this :—Mahendra is a doctor, who owns a private hostel for nurses at No. 159, Russa Road, Calcutta. In this hostel, he generally accommodates nurses, who are mostly Indian Christian girls, and he lets out their services to patients in private houses in the town. On the 6th July, 1931, Miss Sibiya Massey, an Indian Christian, who is the complainant in this case and who had received her training at Cawnpore, was brought to Mahendra's hostel and engaged there as a nurse. At that time, nurse Few and one nurse Lobo were the only other nurses in the hostel. It is alleged that, in November, 1931, Mahendra had sexual intercourses forcibly with nurse Massey and that from that time he continued to have immoral relations with her, with the result that, in January, 1932, nurse Massey realised that she had conceived. On the 5th September, 1932, nurse Massey, under the assumed name of Mrs. John, was delivered of a male child in the Victoria Dufferin Hospital, to which she had been taken by nurse Lobo at the instance of the accused Mahendra. On the 13th September, at about 9 p.m., nurse Massey was removed with the child from the hospital, again at the instance of Mahendra, and with the help of nurse Few and a menial employed in the Marwari hospital named Biswanath Goala. The prosecution case is that the accused Mahendra sent these two to the hospital in a *ticcâ ghârry* and they came back to Mahendra's hostel with nurse Massey and her baby. When the carriage came near the gate of Mahendra's hostel, Mahendra was standing near the gate and he directed nurse Few to take the child from nurse Massey and make it over to Biswanath. Nurse Massey

objected to part with the child, whereupon nurse Few snatched it away from her and made it over to Biswanath. Biswanath took the child away and kept it in his charge, but about ten days later the child died and it was cremated under a false name. The prosecution story further is that nurse Massey returned to Mahendra's hostel, but, as she was illtreated by Mahendra, she wrote a letter to her former principal at Cawnpore, Miss Higgins, who communicated with Deaconess Moore in Calcutta and the latter communicated with Miss Arbuthnot, the Secretary of the Society for the Protection of Children in India. On the 14th November, 1933, these two ladies came to the hostel and met nurse Massey. On the 16th November following, nurse Massey lodged an information at the police-station against Mahendra alleging that he had assaulted her. This information was lodged at 7-45 a.m. At 8 a.m. on the same day, Mahendra lodged an information charging nurse Massey with refusing to leave the hostel although she had been dismissed. On the 20th November, nurse Massey went to Miss Arbuthnot and subsequently the latter communicated with the police, who recorded nurse Massey's statement on the 21st November. As a result of the police investigation, the two petitioners were sent up for trial and convicted. Their appeal was dismissed by the learned judge and against his judgment the present petition was filed and a Rule obtained.

In this Rule, the question is whether the petitioners have been properly convicted. I shall first of all dispose of certain questions of law which have been argued by Mr. Pugh in support of the Rule. It is contended that, in the circumstances, the conviction of Mahendra under section 109 of the Indian Penal Code is incorrect, that the proper section is section 114 and that, in that view, it cannot be said that Miss Few is liable to be convicted as a principal. Mr. Pugh's contention is that, according to section 114, when the abettor is present, he "shall be deemed "to have committed" the act and therefore he is liable

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as a principal. This argument is of no force whatever for the simple reason that, even if section 114 should apply to the facts of the present case, it would not follow that Few would be entitled to acquittal. Under section 114, no doubt, the abettor, if present, is deemed to have committed the act, that is to say, he is to be treated as a principal. It does not necessarily follow that the person who does the act is not liable as a principal also. So it has been said that section 114 provides for the punishment of principal of the second degree. But, in any case, it is not correct to say that whenever a person abetting is present section 114, and not section 109, is to apply. Section 114 applies only in those cases where there is evidence of prior abetment, that is to say where the person, even if not present, would be liable to be punished as an abettor and he is also present. It is sufficient to refer to the authority of the decision in the case of *Barendra Kumar Ghosh* v. *Emperor* (1). In the present case there is no evidence that, prior to the snatching away of the baby, there was an act of abetment on the part of Mahendra and therefore it cannot be said that in his case section 109 has been improperly applied.

Mr. Pugh's next argument is that the act of the accused Mahendra is covered by section 361 of the Indian Penal Code, inasmuch as, according to the prosecution case itself, he was the father of the illegitimate child. I may point out that there was no such defence raised in the courts below. But, in any case, this argument overlooks the further provision that the father of an illegitimate child is not protected if the act is committed for an immoral or an unlawful purpose. Can it be said that the act of the accused Mahendra, in causing the forcible separation of the child from its mother, was not for an unlawful purpose? The child was only 10 days old and obviously the purpose was to hush up the scandal and not to serve the welfare of the child. On the contrary, the act was likely to injure the child; in fact, the child

(1) (1924) I. L. R. 52 Calc. 197.

died. Now the word "unlawful" is not defined in the Indian Penal Code, though it is akin to the word "illegal" which is defined in section 43. The effect of the definition is to make the word "illegal" applicable in a restricted sense, whereas the word "unlaw-"ful" has been used in a more elastic manner and with a wider connotation at various places in the Code. For instance, it occurs under general explanations in sections 23 and 24. It is used in various other sections relating to substantive offences of widely differing kinds as represented by sections 226, 269, 372, 373 and 374. Mr. Pugh has referred to the use of the word in section 552 of the Code of Criminal Procedure and contended that the word "unlawful" has been taken to mean immoral by the decision in the case of *Abraham* v. *Mahtabo* (1). But to take it in that sense only in the exception to section 361, where the words are "immoral or unlawful," would be to make the word "unlawful" redundant. This is emphasised in section 373 for instance, where the words are "unlawful and immoral." So the meaning of the word is to be gathered with reference to the context as implying some thing which is against the purpose of the enactment where it occurs. In the case of *Cahoon* v. *Mathews* (2), it is pointed out that an act may be unlawful, though not illegal. We may also refer to the remarks of Lord Halsbury in the case of *Mogul Steamship Company* v. *McGregor, Gow and Co.* (3). Speaking, with reference to the subject matter of the litigation before him, he says that the word "unlawful" has been used in two senses; first, in relation to "contracts to which the law will not give "effect"; and, secondly, and more accurately, in relation to contracts which are "contrary to law." That the word "unlawful" has been used in various senses in English law will be apparent from a glance at the explanation of the word as given in Stroud's Judicial Dictionary. Turning back to the Indian Penal Code, it may be relevant to refer to another section, *viz.*,

(1) (1889) I. L. R. 16 Calc. 487. (2) (1897) I. L. R. 24 Calc. 494.
(3) [1892] A. C. 25, 32.

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section 99, which seeks to protect an official act, even though it "may not be strictly justifiable by law," that is, not strictly lawful. So, if I were to attempt a general connotation of the word "unlawful," I would take it to be, what is not justifiable by law. Referring to the facts of the present case, it is material to remember that an act which may cause harm to a child is protected, provided that it is done in good faith for the benefit of the child and with the consent of the person having lawful charge of the child. See section 89. All these conditions are absent in the present case. On the contrary, the accused acted merely to cover his own wrong. His act was *mala fide* and positively harmful to the child, and so it was unlawful. I consider, therefore, this contention of Mr. Pugh cannot be supported and the accused is not protected by the exception to section 361.

Mr. Pugh has next contended that section 365 of the Indian Penal Code would not apply to the case of a child of tender age, because such a child cannot be the subject of wrongful confinement as defined in sections 339 and 340 of the Indian Penal Code. The question is purely academical, because, even if the accused may not be convicted under section 365, he may be convicted under section 363 and Mr. Pugh has not been able to cite any authority. Nevertheless the argument does not seem to me to be sound, because it presupposes that the word "proceed" in sections 339 and 340 is confined to the case of a person who can walk on his own legs or can move by physical means within his own power. The position becomes absurd when we consider the case of a paralytic or a sick person, who, on account of his sickness, cannot move. Can it be said that such a person may never be the subject of wrongful confinement? Surely the word "proceeding" in section 340 includes the case of proceeding by outside agency which, in the case of a baby, must mean the agency of its natural protector or guardian. Just as a child can only express consent through its guardian (sections 89 and 90), so I take it a child can exercise its "right to proceed"

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(section 339) with the help of its guardian or the person in lawful charge of it. If a baby were kept shut up so that its natural protector or guardian could not get at it, in other words, if it were prevented from proceeding with the help of its natural protector or guardian, I do not see why that should not be a case of wrongful confinement. Therefore, this argument of Mr. Pugh's also has got no force.

On the merits, the facts lie within a very short compass. The question in this Rule and upon which also the conviction rests is whether the baby was given to Biswanath with or without the consent of the mother. While dealing with this question, the learned judge has referred to some evidence of the bad character of the accused Mahendra as being a general seducer of Indian Christian girls who are brought to his hostel. All this is irrelevant and it is difficult to say that the learned judge has not been prejudiced in drawing an inference against the accused. On the question of the actual kidnapping, the direct evidence is that of nurse Massey and Biswanath Goala, prosecution witness No. 4. Then there is other evidence furnished by Miss Grace David, prosecution witness No. 13, Deaconess Moore, prosecution witness No. 2 and Miss Arbuthnot, prosecution witness No. 3, and also there are circumstances and probabilities to be considered. Now Biswanath Goala is an important witness. He states in his cross-examination "The mother of the child did not tell me "anything. She stated that she would give up the child." The learned magistrate, upon a consideration of Biswanath's evidence, has found that the word 'not' has dropped out here, in other words the sentence should read "she stated she would not give up "the child." The magistrate's reasoning for taking this view is that without the "not" it does not fit in with the succeeding sentence in Biswanath's deposition, *viz.*, that "she did not cry aloud." The learned judge has accepted this view of the magistrate. But both courts have overlooked the fact that the evidence was read over to the witness and not objected to by

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him, and further that it was open to the magistrate to re-call the witness in order to give him an opportunity to correct any possible mistake. Surely the matter is left in doubt whether the witness really meant to say what is actually recorded and it is the accused who should get the benefit of that doubt. I consider that, upon a proper view of the circumstances, the evidence of Biswanath must be taken as it stands recorded without the interpolation of the word "not" and the case must be decided on that evidence which must of course be read along with the other evidence in the case. In this Rule it is impossible to deal with the matter finally and we think, in the circumstances, that the appeal should be re-heard, and the proper course will be to direct a re-hearing of the appeal by the Additional Sessions Judge of 24-*Parganâs*.

The Rule must be made absolute accordingly.

The petitioners will continue on the same bail till the disposal of the appeal.

HENDERSON J. My learned brother has fully set forth the facts of this case and it is unnecessary for me to refer to them any further. Mr. Pugh's main contention was that this conviction must be set aside because both the learned magistrate and the learned Sessions Judge failed to notice that even on their own findings the case comes within the exception to section 361. The difficulty has of course arisen owing to the fact that the accused themselves never took any such plea at the trial and contended themselves with setting up a case which has been found to be untrue to the effect that neither of them had anything to do with the removal of the baby. The burden of proving that their case comes within the exception rests upon the petitioners. In the present case, it is common ground, both to the complainant and to the petitioner, Mahendra, that Mahendra is the father of the complainant's illegitimate child. Thus the case is within the exception on the prosecution case itself, unless it could be held that the burden of proof rests upon the

accused to show that the act of the petitioners was committed for some moral or lawful purpose. In my judgment, this contention is not well founded and I am of opinion that it is for the prosecution to show that the act was committed for an immoral or unlawful purpose.

As has already been pointed out, there is no specific finding on this point and this is due to the course taken by the defence at the trial. There is, however, ample evidence to show that the act was committed for such a purpose. There can be no question that, whether the complainant was a consenting party or not, the baby was removed to the house of the witness Haridasi to hush up the scandal. If this was done against the wishes of the mother of the child, the mere fact that the baby was a few days old when it was taken away from its mother would require some explanation: it is also clear that such a thing would not be done in the interest of the child. In the present case, no attempt whatever was made to give an explanation. The fact is that the petitioners contented themselves with a mere denial. It appears from the evidence of Haridasi that no attempt whatever was made to look after the welfare of the child or to take the slightest interest in it and there seems to be little doubt that the death of the child was due to neglect. In these circumstances, I agree with my learned brother that the exception has no application to the facts of the present case.

I also agree with him that the term "wrongful "confinement" cannot reasonably be given the narrow interpretation which Mr. Pugh has sought to place upon it.

Finally, I am of opinion that the Rule should be made absolute on the sixth ground. I cannot understand why the learned magistrate did not re-call the witness, if he felt any doubt as to the correctness of the record. The learned magistrate recorded the deposition in a certain way: it was read over to the witness and admitted by him to be correct. In these

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circumstances, I think the learned magistrate was not right in saying on mere grounds of speculation that the witness must have said exactly the opposite. There is no doubt that this passage in the evidence is most important and it is impossible to say whether the petitioners would have been convicted either by the learned magistrate or by the learned judge if they had dealt with the evidence as it was recorded at the time of the deposition. For these reasons, I consider that the Rule should be made absolute and the appeal should be reheard.

Appeal to be reheard.

A.C.R.C.