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the accused were properly charged with and tried at one trial for each offence under the provisions of section 235 of the Criminal Procedure Code. Even if this be so, the Court should have complied with the provisions of section 233 and framed a separate charge for each offence. Their Lordships of the Privy Council have held in the recent case of *Subrahmania Ayyar* v. *King-Emperor* (1) that the disregard of the express provisions of section 233 and 234 of the Code of Criminal Procedure was not a mere irregularity, such as could be remedied by section 537, but was altogether illegal. The ruling of a Full Bench of the Calcutta High Court in the matter of *Abdul Rahman* (2) was dissented from. Having regard to this ruling of their Lordships, the Court is bound to set aside the convictions and sentences passed on the appellants and to direct a retrial. Accordingly the appeals are allowed and the convictions and sentences of the appellants Fattu, Guddi and Kesri are set aside, and their retrial by the learned Sessions Judge in accordance with law is directed.

Before Sir John Stanley, Knight, Chief Justice.

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August 18.

EMPEROR *v.* TIKA.*

Act No. XLV of 1860 *(Indian Penal Code), sections* 109, 366—*Kidnapping from lawful guardianship—Kidnapping not a continuing offence—Abetment.*

One Musammat Chunia by making certain false representations to the mother of Jiwania, a married girl of eleven years of age, induced her to part with the custody of her daughter. Chunia took the girl away from her own village to a neighbouring village, where she was joined by one Tika. Thence Chunia and Tika took the girl about with them from place to place making unsuccessful attempts to dispose of her in marriage, until they were arrested by the chaukidar of Tiabpur, on his being informed that an attempt had been made to sell the girl in that village. Upon these findings Chunia was convicted of the offence punishable under section 366 of the Indian Penal Code and Tika of abetment of that offence, following the ruling in *The Queen* v. *Samia Kaundan* (3). On appeal to the High Court, that of Chunia was summarily rejected. As to Tika it was *held*, dissenting from *The Queen* v. *Samia Kaundan* and agreeing with the view taken in *Queen Empress* v. *Ram Sundar* (4) and *Rakhal Nikari* v. *Queen Empress* (5),

* Criminal Appeal No. 434 of 1903.

(1) (1901) I. L. R., 25 Mad., 61. (3) (1876) I. L. R., 1 Mad., 173.
(2) (1900) I. L. R., 27 Calc., 839. (4) (1896) I. L. R., 19 All., 109.
(5) (1897) 2, C. W. N., 81.

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that the offence of kidnapping being completed so soon as the minor was actually taken out of the custody of her guardian, Tika could not properly be convicted of abetment on the hypothesis that the offence was a continuing one. But, inasmuch as there was evidence on the record that the assistance given by Tika in attempting to dispose of the girl Jiwania was the result of a conspiracy entered into before the kidnapping took place, the conviction of Tika for abetment of kidnapping was sustained.

THE facts of this case are as follows:—

One Musammat Chunia went to a house in the village of Unchagaon, where a young married girl, by name Jiwania, was living with her mother, and represented to the mother that she was the family priestess of Jiwania's husband; that the husband was seriously ill, and that she had been sent to fetch Jiwania to her husband's house. Upon the strength of these representations Jiwania's mother allowed Chunia to take her away. Chunia took the girl away to the neighbouring village of Chattari, where one Tika was awaiting their arrival, and then the two, Chunia and Tika, took Jiwania from Chattari and went with her from place to place, keeping her at one of these places at the house of one of Tika's relatives, making various attempts to dispose of her in marriage against her consent. Finally Chunia and Tika were arrested by the chaukidar of Tiabpur on his being informed that an attempt had been made to sell the girl in that village.

Chunia and Tika were committed to the Sessions and were convicted by the Additional Sessions Judge of Aligarh, the former of the offence punishable under section 366 of the Indian Penal Code, the latter of abetment of that offence, and were sentenced each to five years' rigorous imprisonment. From these convictions and sentences both appealed to the High Court; but the appeal of Chunia was summarily rejected.

The Government Pleader (Maulvi *Ghulam Mujtaba*), for the Crown.

The appellant was not represented.

STANLEY, C.J.—The appellant Tika and one Musammat Chunia were charged, under section 366 of the Indian Penal Code, with kidnapping Musammat Jiwania, a married girl, 11 years of age, with intent to compel her to marry against her will. The learned Sessions Judge has found that

Musammat Chunia made certain false representations to the girl's mother, and thereby induced her to send the girl with Chunia; that Musammat Chunia took her away from the village Unchagaon, where the girl was then living, to the village of Chattari, where the appellant Tika joined her; that the two carried her from place to place, making unsuccessful attempts to dispose of her in marriage, and that finally the accused was arrested by the chaukidar of Tiabpur on his being informed that an attempt had been made to sell the girl in that village. Upon these findings the learned Sessions Judge has convicted Musammat Chunia of an offence punishable under section 366 of the Indian Penal Code. As to Tika he held, following the ruling of the Madras High Court in *The Queen* v. *Samia Kaundan* (1) that so long as the process of taking the minor out of the keeping of her lawful guardian continued the offence of kidnapping might be abetted, and accordingly convicted Tika of abetment. With this ruling I am unable to agree. The offence of kidnapping from lawful guardianship is defined in section 361 of the Indian Penal Code to be "the taking or enticing of a minor or a person of unsound mind out of the keeping of the lawful guardian of such minor or person of unsound mind without the consent of such guardian." Therefore the offence in the case of a minor is complete as soon as he or she is enticed or taken out of the keeping of his or her lawful guardian. The Indian Penal Code makes a distinction between "taking" and "retaining," and between "taking" and "detaining" or "concealing." Section 368, for instance, makes punishable the wrongful concealing or keeping in confinement of a kidnapped person. Section 498 makes a similar distinction between "taking or enticing" and "concealing or detaining." The taking of a minor from lawful custody is not the same thing as keeping the minor out of such custody, and therefore during the time the minor is kept out of the custody of his or her guardian the offence of kidnapping cannot be held to continue. The act of taking is completed so soon as the minor is actually taken out of the custody of his or her guardian. This view was apparently taken in the case of *Queen*

(1) (1876) I. L. R., 1 Mad., 178.

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Empress v. *Ram Sundar* (1). It was also the view which a majority of the Judges held who decided the case of *Rakhal Nikari* v. *Queen Empress* (2). I have had occasion to consider this question in a case which came before a Bench of the Calcutta High Court consisting of Prinsep, J. and myself, when, owing to the difference of opinion among Judges which we found in the reports upon the question, we thought it desirable to refer it to a Full Bench of the Court. I was disposed to agree in the view adopted by the learned Judges in the case of *The Queen* v. *Samia Kaundan*. The reference came before the learned Chief Justice Sir Francis Maclean and Prinsep, Ghose, Rampini and Handley, JJ. The circumstances of that case were very similar to those of the present. A minor girl was taken from her husband's house to the house of one Rambandhu and there kept for two days. Then one Mohendro came and took her away to his house and kept her there for 20 days, and subsequently clandestinely removed her to the house of the petitioner, Nemai Chattoraj, and from that house Nemai Chattoraj and Mohendro took her through different places to Calcutta for the purpose of making her lead the life of a prostitute. Nemai was convicted by the Deputy Magistrate of Bankura under section 363 of the Indian Penal Code for kidnapping the girl. This conviction was affirmed by the Sessions Judge. It was held by a majority of the Full Bench that the taking away of the girl out of the guardianship of her husband was completed before the petitioners joined the principal offenders in taking the girl to Calcutta, and that therefore the petitioner could not be convicted under section 363 of the Penal Code. Rampini, J., expressed the opinion in his judgment that the offence of kidnapping is not necessarily in all cases complete as soon as the minor is removed from the house of the guardian. He observed that "whether the conviction under section 363 of the Indian Penal Code, of the applicant for revision can be upheld, will depend upon whether, when he joined in promoting the purpose of the other accused, the minor was or was not completely beyond the control of her lawful guardian, which is a question of fact. If she was so beyond his control the conviction of

(1) (1896) I. L. R., 19 All., 109. (2) (1897) 2, C. W. N., 81.

the applicant is without doubt bad." "But," observes the learned Judge, "I cannot consider that she would necessarily be beyond his control, or that the offence of kidnapping her must be complete as soon as she was removed from or left his house." Now, from the view which I take of the evidence in this case, it is unnecessary for me to decide whether or not the kidnapping was completed before Musammat Chunia with the girl joined the appellant in the neighbouring village, as on another view of the facts I am of opinion that the conviction of Tika should be upheld under section 107 of the Code. A person abets the doing of a thing who "engages with one or more other person or persons in any conspiracy for the doing of that." The evidence in this case to my mind leads to the irresistible conclusion that the appellant and Musammat Chunia had conspired to kidnap the girl: it was part of an arrangement between these persons that Musammat Chunia should proceed to the house of the mother of the girl while the appellant awaited her return with the girl at the neighbouring village of Chattari. The presence of the appellant would possibly have aroused the suspicion of the mother, and hence it may have been that he kept away. Musammat Chunia accordingly alone went to the house of the mother of the girl and made false representations to her, which induced her to allow the girl to accompany her, telling the mother that she was the family priestess of the husband of the girl, that the husband was seriously ill, and that she had been sent to fetch the girl to her husband's house. It was thus she induced the mother to allow her to take away the girl. Having accomplished so much of her object, she took the girl to the neighbouring village where the appellant Tika was awaiting their arrival, and immediately the two together took the girl away from that village and from place to place, keeping her at one of these places at the house of one of Tika's relatives and making various attempts to dispose of her in marriage against her consent. It is manifest from the evidence that there was a preconcert between the appellant and Musammat Chunia, that the latter was to kidnap the girl, and that as the result of the concert the kidnapping of the girl took place. The appellant is therefore guilty if not of the

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offence of kidnapping, at least of the offence of abetting the kidnapping, and as the kidnapping was made with intent to compel the girl to marry against her will, the appellant has been rightly convicted of abetment of an offence punishable under section 366. Accordingly I dismiss his appeal.

I desire to mention that this appeal was laid before my brother Banerji, and that he had prepared a judgment, but was unfortunately unable to deliver it owing to indisposition. The appeal therefore came for disposal before me as vacation Judge. I have arrived at the same conclusion as did my learned brother as to the propriety of the conviction of the appellant under section 107 of the Code, and I have in my judgment adopted with but slight modification and additions the language of the judgment prepared by him.

1903
November 3.

REVISIONAL CRIMINAL.

Before Mr. Justice Knox and Mr. Justice Aikman.

EMPEROR *v.* RAJA RAM AND ANOTHER.*

Criminal Procedure Code, section 514—*Security to keep the peace—Forfeiture of recognizance—Criminal Procedure Code, section* 107 *; schedule V, No.* 10.

Held that the mere fact that no immediate action under section 514 of the Code of Criminal Procedure is taken against a person under recognizances to keep the peace, or against his surety, on the conviction of the former of an offence involving a breach of the peace is no bar to the taking of such proceedings at a subsequent time, as, for example, after the time for appealing has expired, or after an appeal by the principal has been dismissed. *In re Ram Chunder Lalla* (1) and *In re Parbutti Churn Bose* (2) dissented from.

ON the 11th of July, 1901, Raja Ram was called upon to execute a bond with one surety to keep the peace for a period of one year. On the following day he executed the bond in the form given in Schedule V, No. 10, of the Code of Criminal Procedure. Before the year expired, namely, on the 5th of June, 1902, Raja Ram was convicted of an offence under section 353 of the Indian Penal Code, and sentenced to pay a fine of Rs. 51. Raja Ram appealed, and the conviction and sentence were affirmed on the 5th of July, 1902. On the 20th

* Criminal Reference No. 451 of 1903.

(1) (1877) 1, C. L. R., 134. (2) (1878) 3, C. L. R., 406.