

## FULL BENCH (CRIMINAL).

Before Sir Arthur Page, Kl., Chief Justice, Mr. Justice Das, Mr. Justice Mya Bu, Mr. Justice Brown and Mr. Justice Dunkley.

KHALIL-UR-RAHMAN

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KING-EMPEROR.\*

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Mar. 29.

*Kidnapping—Penal Code (Act XLV of 1860), ss. 90, 361, 366—Basis of offence under s. 366—Intention of the accused—Woman's volition and conduct—Object of s. 90—Distinction between "without a person's consent" and "against his will"—S. 90 inapplicable in case of offence under s. 366—No presumption as to accused's intention—"Unlawful purpose"—Exception to s. 361, Penal Code—Child Marriage Restraint Act (XIX of 1929).*

The intention of the accused is the basis and the gravamen of an offence under s. 366 of the Indian Penal Code. The volition, the intention and the conduct of the woman do not determine the offence; they can only bear upon the intent with which the accused kidnapped or abducted the woman, and the intent of the accused is the vital question for determination in each case. Once the necessary intent of the accused is established the offence is complete, whether or not the accused succeeded in effecting his purpose, and whether or not in the event the woman consented to the marriage or the illicit intercourse.

The object and effect of s. 90 of the Indian Penal Code is not to lay down that a child under twelve years of age is in fact incapable of expressing or withholding his or her consent to an act, but to provide that where the consent of a person may afford a defence to a criminal charge such consent must be a real consent, not vitiated by immaturity, misconception, misunderstanding, fear, or fraud.

Every act done "against the will" of a person is done "without his consent", but an act done "without the consent" of a person is not necessarily "against his will", which expression imports that the act is done in spite of the opposition of the person to the doing of it.

*Rav v. Fletcher*, 8 Cox C.C. 131—*referred to*.

The provisions of s. 90 are not to be applied to s. 366 of the Indian Penal Code. Where the accused has kidnapped a girl under 12 with intent to give her in marriage no *presumptio juris et de jure* arises that the accused kidnapped the child with intent to compel her to marry against her will. The intent must be proved by evidence in each case.

If a child is kidnapped for a purpose which is prohibited and punishable by law the purpose is an "unlawful purpose" within the meaning

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\* Criminal Revision No. 20B of 1933 arising out of the order of this Court in Sessions Trial No. 62 of 1932.

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of that term as used in the Exception to s. 361 of the Penal Code. Thus, the intention to give a child in marriage in contravention of Act XIX of 1929 is an "unlawful purpose" within the Exception.

*Rafi* for the applicant. To sustain a conviction under s. 366 of the Indian Penal Code it must be proved that the accused intended to *compel* the kidnapped woman to marry a person and that such marriage was against her will. The facts of this case show that the girl consented to the marriage. The terms "against her will" and "without her consent" are not synonymous, as is indicated by s. 375, where the terms are separately used. "Against one's will" implies active opposition to an act which is anticipated before it takes place, and "without one's consent" means without intelligent assent. See *Hukum Chand's Law of Consent*, 1897, p. 195; *Nanda Lal's Penal Code*, p. 1814. S. 90 of the Code which defines consent cannot have any application to s. 366 where the term "against her will" alone is used. Even if it were otherwise there is evidence that the minor girl exercised an intelligent assent, and the opening words of s. 90 render that section inapplicable.

[BROWN, J. Are not these sections enacted for the protection of minor girls, and is it to be contended that no offence is committed when a minor under 12 years of age consents to something the effect of which she does not realise?]

In criminal law, unless the necessary ingredients of an offence are proved, no conviction can be had for that offence.

[PAGE, C.J.] The decision in *Emperor v. Safdar Reza* (1) indicates that s. 366 is only an aggravated form of s. 363, and as the consent of the kidnapped

person is immaterial under s. 363, it is equally so under s. 366. Is that decision correct?]

There is nothing inherently incredible in a girl under 12 exercising her will intelligently, and that is the reason why the Legislature has advisedly used the words "against her will" alone in s. 366, thereby precluding s. 90 from being applied. S. 366 requires proof of compulsion to marry against the will of the kidnapped person. *Crown v. Nga Chan Mya* (1); *King-Emperor v. Nga Nge* (2); *Durga Das v. Emperor* (3).

Moreover, there has been no kidnapping at all in this case. The accused, when he took the girl away from her grandfather's custody, believed himself, in good faith, to be the father of that illegitimate child. Exception 2 to s. 361, therefore, absolves him from any criminal liability. Also, it cannot be contended that the taking away of the girl was for an "unlawful purpose" under that exception. The marriage took place two months later, and it cannot therefore be inferred that, when he took the girl away, he intended to give her in marriage. Even assuming that he had that intention the purpose is not such an unlawful purpose as is contemplated by the Code.

An offence, for the purposes of the Penal Code, is one which is rendered punishable by that Code. An offence created by a special enactment cannot be deemed to be punishable under the Code, unless the second paragraph of s. 40 can be applied to it. Neither s. 361 nor s. 366 finds a place in s. 40, and hence it is wrong to convict a man under the provisions of the Code when he is only guilty of an offence under a special Act, as for instance the

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(1) 1 L.B.R. 297.

(2) 11 L.B.R. 326.

(3) (1904) P.R. (Cr. J.) 39.

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Child Marriage Restraint Act of 1929. That Act has not the effect of rendering a marriage in contravention of its provisions void, but only imposes punishment on persons responsible for such marriages. The word "lawful", as used in the Code, cannot be given a wider meaning than warranted by its provisions.

[MYA BU, J. The Code does not define "lawful" ; but s. 43 defines "illegal" and includes all things prohibited by law. Is not a marriage of the nature in question prohibited by law, namely the Sarda Act?]

[BROWN, J. And s. 43 is not mentioned in s. 40.]

The Penal Code contemplates a distinction between offences which are punishable by the Code, and acts which are prohibited by law but which are not offences under the Code. For instance, there are contracts which are prohibited by law, but are not offences under the Code. See ill. k to s. 23 of the Contract Act.

If an offence under the Sarda Act has been committed the accused ought to have been tried under its provisions.

*A. Eggar* (Government Advocate) for the Crown. The framers of the Indian Penal Code contemplated a distinction between the terms "against one's will" and "without one's consent." S. 375, while showing a distinction, goes further and collates "consent" under various heads according to the manner in which it is obtained. S. 90 cannot apply to s. 375. Similarly, since the term "against her will" alone is to be found in s. 366, s. 90 should not be held to be applicable thereto.

In *Queen v. Lock* (1) the words "against one's will" have been analysed into positive and negative exercise of the will, and it was held that mere submission by a person without the knowledge of the nature of the act that is being committed on him must be deemed to be against his will.

It is clear, in this case that the intention of the accused was to give the girl in marriage, contrary to the provisions of the Sarda Act, and the exception to s. 361 cannot protect the accused. Instead of convicting the accused under s. 366 a conviction under s. 363 would be more proper on the facts of the case.

PAGE, C.J.—Before giving judgment we have taken time to consider this case, which raises a question of general public importance.

The accused was tried at the November Criminal Sessions of the High Court for an offence under s. 366 of the Indian Penal Code. He was convicted and sentenced to suffer four years' rigorous imprisonment.

The High Court is now invited to review the case under clause 25 of the Letters Patent, pursuant to a certificate by the learned Government Advocate that

"the following points of law decided by the learned Judge in the above Sessions Trial should be further considered—

- (a) That the words, in s. 366 of the Indian Penal Code, 'against her will' are equivalent to 'without her consent', and consequently apply, as a matter of law, to a case where consent is void under s. 90.
- (b) That the words 'unlawful purpose' in s. 361 (Exception) include the purpose of giving a child in marriage in contravention of Act XIX of 1929."

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S. 366, so far as material, runs as follows :

"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 for a term which may extend to ten years, and shall also be liable to fine."

At the close of the trial the clerk of the Crown asked the foreman of the Jury

"Q.—Are you unanimous in your verdict ?

A.—We are unanimous.

Q.—What is your verdict ?

A.—The Jury are unanimous that the accused is guilty of kidnapping without the consent of her lawful guardian with the intention of giving her in marriage.

The Judge.—I declare that this is an unanimous verdict of kidnapping the girl, Naw Mu Tu, from lawful guardianship with intent that she may be compelled to marry against her will, an offence punishable under s. 366 of the Indian Penal Code."

There was ample evidence adduced at the trial to support the finding of the Jury that the accused had kidnapped Naw Mu Tu, and in so doing had committed an offence under s. 363 of the Indian Penal Code. It was contended, however, on behalf of the accused that the case fell within the Exception to s. 361, upon the ground that the accused in good faith believed himself to be the father of Naw Mu Tu, who was an illegitimate child, and that the purpose for which he had taken her out of the keeping of her maternal grandfather, Saw Po Do, namely, to give her in marriage to his nephew Idris Meah, was not an "unlawful purpose" within the Exception to s. 361. It is enough to dispose of this contention that we hold that there

was no evidence fit to be left to the Jury that the accused in good faith believed himself to be the father of Naw Mu Tu, and, in our opinion, the Jury rightly found that he was guilty of kidnapping Naw Mu Tu.

The second point of law raised in the certificate, therefore, does not arise. As, however, it has strenuously been urged on behalf of the accused that an intention to give a child in marriage in contravention of Act XIX of 1929 is not an "unlawful purpose" within the Exception to s. 361, we think it desirable that it should be understood that we have no doubt that such an intention is an "unlawful purpose" within the Exception, upon the simple but sufficient ground that if the purpose is carried out the person giving the child in marriage is liable to conviction and punishment for a criminal offence. It appears to us idle to contend that if a child is kidnapped for a purpose which is prohibited and punishable by law, the purpose for which the child was kidnapped was not an "unlawful purpose" within the meaning of that term as used in the Exception to s. 361.

In order to determine the first point of law set out in the certificate, namely, whether "the words in s. 366 of the Indian Penal Code, 'against her will' are equivalent to 'without her consent' and consequently apply, as a matter of law, to a case where consent is void under s. 90", it is necessary to bear in mind that it was proved at the trial that at the time when Naw Mu Tu was taken by the accused out of the keeping of Saw Po Do, her dead mother's father and her lawful guardian, without his consent, and also when she was given in marriage by the accused to his nephew Idris Meah, Naw Mu Tu was under twelve years of age; that according to a number of witnesses who were called for the Crown—and no evidence

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in rebuttal of their testimony was forthcoming—  
Naw Mu Tu cried out in distress when she realized that she was being taken away from her grandfather by the accused; and that within two months of being kidnapped the accused gave her in marriage to his nephew Idris Meah at Chittagong. In these circumstances there was ample evidence adduced at the trial which, if it was accepted, would have justified the Jury in finding as a matter of fact that when the accused kidnapped Naw Mu Tu he did so with intent that she might be compelled, or knowing it to be likely that she would be compelled, to marry the accused's nephew against her will. Indeed, in my opinion, a finding in that sense would have been the natural and reasonable inference for the Jury to draw from the facts disclosed in the evidence. The learned trial Judge, however, in his charge to the Jury did not treat the intent of the accused in kidnapping Naw Mu Tu as a question of fact to be decided upon the evidence, but as a question of mixed law and fact, and directed the Jury as follows:

“We now come to the remaining question of law. The section you will remember, and the charge too, says in order that the child ‘may be compelled to marry or knowing it to be likely that she will be compelled to marry.’ If you come to the conclusion that this accused took the little girl away in order to give her in marriage, or even with the knowledge that it would be likely when she got to Chittagong that he would give her in marriage, then, as a matter of law you will have to hold that he compelled her to marry. You know, Gentlemen, what ‘compel’ means. It means to cause a person to do something against his or her consent—nothing more than that. It does not mean that you push him, or beat him, or that you do any special act to make him submit to your will. It merely means that by your influence over him, or by force, or by any other means whatever, you make that person do something to which that person does not freely consent.



This girl is a girl who at the time of this marriage was under twelve years of age on the accused's own showing. He says she was born in 1920. Idris Meah has told us that this marriage occurred either in December, 1931, or in January, 1932. The child was under twelve. S. 90 of the Indian Penal Code says that no child under the age of twelve years can give a valid consent within the meaning of the Criminal Law of India. I will read to you exactly what the section says 'Unless the contrary appears from the context, a consent is not such a consent as is intended by any section of this Code, if the consent is given by a person who is under twelve years of age.'

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So, Gentlemen, you need not trouble to enquire whether this girl did consent to marry Idris Meah or not, because her consent would be no consent in law. If you hold that this accused did, when he left Rangoon, intend to give this girl in marriage, or that when he left Rangoon he knew it to be likely that he would give her in marriage, then his offence is not merely the simple offence of kidnapping, but it is the graver offence of kidnapping in order to compel the girl to marry or knowing it to be likely that she would be compelled to marry, the offence with which he is charged."

The question is whether this statement of the law does not go too far. We think that it does. The intention of the accused is the basis and the gravamen of an offence under s. 366. It follows that in considering whether an offence has been committed under this section the volition, the intention, and the conduct of the woman are *nihil ad rem*, except in so far as they bear upon the intent with which the accused kidnapped or abducted her. If the accused kidnapped or abducted the woman with the necessary intent the offence is complete whether or not the accused succeeded in effecting his purpose, and even if in the event the woman in fact consented to the marriage or the illicit intercourse taking place. All the material authorities upon s. 366, so far as we know, were cited at

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the hearing, but we do not think it necessary to analyse them in detail, for it appears to us that the error into which we venture to think that the learned Judges in some of the cases upon this section have fallen is that they attached too much importance to the question whether the woman did, or could, consent to marry or have illicit intercourse, and failed to pay due regard to the vital question that fell for determination, namely, whether the accused kidnapped or abducted the woman with the particular intent that forms the basis and the heinousness of an offence under s. 366.

The learned trial Judge in the present case, if I may say so with all due deference, appears to have approached the consideration of this section from the same point of view; for the law as laid down by the learned Judge in his charge to the Jury was to the effect that, inasmuch as the consent of Naw Mu Tu to the marriage was not such a consent as is intended by any section of the Indian Penal Code, it followed as a matter of law that if the accused kidnapped Naw Mu Tu with intent to give her in marriage he must be taken to have done so with intent to compel her to marry against her will.

I am of opinion, however, with all respect to the learned trial Judge, that in construing s. 366 in this sense he did not correctly lay down the law.

It is to be borne in mind that under s. 90 the Legislature did not, and did not purport to, enact that a child under twelve years of age could not in fact consent to an act or a course of conduct, but provided that in sections of the Indian Penal Code in which reference is made to consent the consent of a child under twelve years of age, unless the contrary appears from the context, is not such a consent as would afford a defence to a criminal charge if the person consenting was of more mature years.

Of course, as a matter of fact and of common knowledge, an offence can be committed in connection with a child under twelve years of age which is perpetrated against the will of the child, or with or without the child's consent. No parent,—indeed, no person capable of appreciating the simplest traits of human nature—would venture to assert that a child of the most tender years cannot possess a will of its own, or is incapable of withholding or giving its consent to what is done to it. To hold the contrary view would be to harbour an illusion too absurd to be imputed to the Legislature. The object and effect of s. 90 obviously was not to lay down that a child under twelve years of age is in fact incapable of expressing or withholding his or her consent to an act, but to provide that where the consent of a person may afford a defence to a criminal charge such consent must be a real consent, not vitiated by immaturity, misconception, misunderstanding, fear or fraud.

Further, in the Indian Penal Code a distinction is drawn between an act which is done “against the will” and an act done “without the consent” of a person. [See s. 375. *Rex v. Fletcher* (1).] Every act done “against the will” of a person, no doubt, is done “without his consent”, but an act done “without the consent” of a person is not necessarily “against his will”, which expression, I take it, imports that the act is done in spite of the opposition of the person to the doing of it.

Now, having regard to the distinction that is drawn in the Indian Penal Code between the expressions “against the will” and “without the consent” of a person, and the fact that in s. 366

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it is specifically provided that the intent of the accused must be that the woman may be compelled, or knowing it to be likely that she will be compelled, to marry "against her will", I am of opinion that the provisions of s. 90 are not to be applied to s. 366. I am further of opinion, for the reasons that I have stated, that unless the intent of the accused is to compel the woman, whatever her age may be, to marry against her will, that is, in spite of her opposition to the marriage, or unless he knows that it is likely that she will be compelled to marry against her will, no offence under the first part of s. 366 has been committed. The construction which we put upon this section appears to us to be both good law and good sense, and if the meaning and effect of s. 366 is properly explained to a Jury its application to the facts of any particular case ought to be free from difficulty.

Let me illustrate what I mean

I take it that normally where a little girl under twelve years of age is taken out of the keeping of her guardian without the guardian's consent the act of the accused would arouse suspicion, and where, as in the present case, it also transpires that the child within two months of being kidnapped is given in marriage by the accused, it would not require a great stretch of imagination for the Jury to conclude that the accused when he kidnapped the little girl intended to compel her to marry willy nilly and in spite of her opposition. But to hold, as the learned trial Judge has done in the present case, that where the accused has kidnapped a little girl under twelve years of age with intent to give her in marriage a *presumptio juris et de jure* arises that the accused kidnapped the child with intent to compel her, or knowing it to be

likely that she will be compelled, to marry "against her will", in my opinion, would be to travel outside the ambit of s. 366. It may be that in the circumstances of a particular case such a conclusion would be utterly opposed to the true facts of the case, and it is possible to conceive of cases in which grave injustice would be done if the section was so construed. I have no hesitation in stating that, in my opinion, so to hold would be to lay down the law in a sense that neither the object nor the terms of the section warrant.

Each case turns on its own facts, and before the accused can be convicted of an offence under the first part of s. 366 I am of opinion that the tribunal must be satisfied as a matter of fact upon the evidence that the accused when he kidnapped or abducted the woman, whatever her age might be, did so with intent to compel her or knowing it to be likely that she would be compelled, to marry against her will, that is to say, in spite of her opposition; and unless such an intent is proved, in my opinion, the accused is entitled to be acquitted.

The Court, having determined the points of law referred to it in the above sense, orders that the conviction and sentence of the accused under s. 366 be set aside, and that the accused be convicted of an offence under s. 363, and sentenced to four years' rigorous imprisonment, the sentence to run from the 2nd December 1932.

DAS, J.—I agree.

MYA BU, J.—I agree.

BROWN, J.—I agree.

DUNKLEY, J.—I concur in the judgment of my Lord the Chief Justice. At the Sessions I directed

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the Jury that the question of the intention of the accused was a question of mixed law and fact, and I agree that in so doing I went too far. I should have left the decision as to the accused's intention to the Jury as a question of pure fact, to be decided on a consideration of the established facts, namely, the age of Naw Mu Tu, the circumstances under which she was taken by the accused out of Burma, and the short time that elapsed between the kidnapping and the marriage to the accused's nephew.

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### FULL BENCH (CRIMINAL).

1933

Apr. 5.

*Before Sir Arthur Page, Kt., Chief Justice, Mr. Justice Mya Bu, and Mr. Justice Baguley.*

MAUNG TIN

v.

MA HMIN.\*

*Maintenance order—Criminal Procedure Code (Act V of 1898), s. 488—Refusal to enforce order for one period—Subsequent application for a later period—Res judicata—Duty to maintain—Personal law—"Sufficient means"—Burmese Buddhist monk's liability for maintenance—Rules of the Vinaya.*

An order refusing to enforce a maintenance order, made under s. 488 of the Criminal Procedure Code, in respect of arrears of maintenance for one period does not operate as a bar to a subsequent application to enforce the order for arrears of maintenance that have accrued during a different and a later period.

*Lavali v. Ram Dial*, I.L.R. 5 All. 224; *Ma Su v. Sason*, 1 U.B.R. (1892-96) 64; *Po So v. Ma Kyin May* (1907-08) 4 L.B.R. 337—*referred to*.

S. 488 gives effect to the natural and fundamental duty of a man to maintain his wife and children so long as they are unable to maintain themselves. Its provisions apply and are enforceable whatever may be the personal law by which the persons concerned are governed.

*Baran Shanta v. Ma Chan Tha May*, 1 L.R. 2 Ran. 682; *Kariyadan v. Kutti*, I.L.R. 19 Mad. 461; *Lingappa v. Esudasan*, I.L.R. 27 Mad. 13; *Luddun Sahiba v. Kudar*, I.L.R. 8 Cal. 736; *Venkatakrishna v. Chimmukutti*, I.L.R. 22 Mad. 246—*referred to*.

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\*Criminal Reference No. 8 of 1933 arising out of Criminal Revision No. 430B of 1932 of this Court at Mandalay.