

CRIMINAL APPELLATE.

Before Mr. Justice Shah and Mr. Justice Marten.

EMPEROR *v.* HARIBHAI DADA.*

Indian Penal Code (Act XLV of 1860), sections 366, 360, 90—Kidnapping a girl out of British India to seduce her to illicit intercourse—Consent of the girl aged fifteen years.

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The accused kidnapped a girl fifteen years of age out of British India, with her consent, in order that she might be seduced to illicit intercourse. He was convicted of an offence under section 366 of the Indian Penal Code. On appeal,

Held, reversing the conviction, that the accused had committed no offence under section 366 of the Indian Penal Code, inasmuch as the girl who was over twelve years of age was kidnapped with her consent.

APPEAL from conviction and sentence passed by B. C. Kennedy, Sessions Judge of Ahmedabad.

The six accused in this case were charged with an offence punishable under section 366 of the Indian Penal Code, for kidnapping a girl named Pashi from the guardianship of her father into Baroda territory in order that she might be seduced to illicit intercourse.

Pashi was a married girl, of about fifteen years of age. She used to live with her father at Dedurda, a village in the Borsad Taluka. Accused No. 2 (Chanda) kidnapped her from her father's house on the night of the 25th January 1917, and took her to an adjacent house where she met Fula, Amba and Fuli (accused Nos. 1, 4 and 6). The same night she was taken in the same village first to the house of accused No. 4 and then to the house of accused Nos. 5 and 6, who were husband and wife. For five days she was kept there; she was then taken to Napa first, and Wadtal afterwards. At the latter place she lived for five more days. Once more

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she was taken to Napa and thence to Asodar. From there, Haribhai (accused No. 3) and Shankar (father of accused No. 5) took her to Vasad, where they got into a railway train and left for Baroda. At Baroda the party spent the night at a *vishi* (hotel); and the next morning they went to Rampura, where they were arrested.

The accused were tried by the Sessions Judge of Ahmedabad with the aid of assessors. The learned Judge acquitted accused Nos. 1, 2, 4 to 6 of the offence charged; but convicted accused No. 3 and sentenced him to suffer rigorous imprisonment for one year, observing as follows :—

The charge as framed contemplates that it was intended all along to take the girl and sell or marry her in Baroda. But there is not the faintest indication that it was so. There are lots of *patidars* wanting wives in Kaira who are not very particular as to where they get them, and the various peregrinations of the girl seem to show that Shankar or Soma was hawking her about. The case, therefore, splits up into separate parts. First, the kidnapping from lawful guardianship, and, secondly, the kidnapping from British India, and that being so, there really should have been separate trials of the various offenders as they were connected with distinct offences. Now as regards kidnapping, the offence is complete as soon as the child is removed absolutely from the guardian's control. There is no such thing in our law as an accessory after a fact and to make a person who has detained a kidnapped child liable for the offence of kidnapping, the detention must be of such a character as to show that he had conspired to commit kidnapping, *i.e.*, that he was detaining the child in such circumstances that the Court ought to find that he had instigated the actual kidnapper to remove the child. If this be not shown, then, though he may be guilty of certain offences yet he is not guilty of kidnapping.

Applying this to the facts alleged it appears that Chanda and Fula and Anba and Fuli would by their actions have certainly made it clear that they conspired together to make Chanda to remove the child. As for Soma the question might be more difficult and as for Haribhai it would be clear that he had nothing to do with the kidnapping.

As for the kidnapping out of British India it would seem that there was no case against any of the accused except Haribhai.

Haribhai (accused No. 3) appealed to the High Court.

No appearance for the accused.

S. S. Patkar, Government Pleader, for the Crown.

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SHAH, J.:—The appellant, accused No. 3, along with the other accused, was charged in the lower Court with having conspired and kidnapped the girl Pashi, a minor under sixteen years of age, from the guardianship of her father into the Baroda territory in order that she might be seduced to illicit intercourse, under section 366 of the Indian Penal Code. With the other charge we are no longer concerned. All the accused except the appellant were acquitted, and it was definitely found by the trial Judge that Hari had nothing to do with the kidnapping, that is, kidnapping from lawful guardianship. It is clear from the evidence relating to the movements of this girl that she first left her father's house on the 25th of January and that she was taken to different places at Napa and Vadtal. She was taken to Asodar by Shankar to Hari's house on the 6th February. Shankar, Haribhai and the girl left Asodar for Baroda and they were arrested in the Baroda territory on the 7th of February. It is not suggested that Hari had anything to do with, and had any knowledge of the movements of, the girl before she was brought to him on the 6th February.

The learned Sessions Judge has convicted the present appellant on the charge of kidnapping Pashi from British India. This girl is found to have been nearly fifteen years old at the date of the offence charged. In order to establish the charge of kidnapping from British India, it is essential for the prosecution to prove that she was conveyed by the appellant beyond the limits of British India without her consent. Having regard to the provisions of section 90 of the Indian Penal Code and to the fact that Pashi was more than twelve years old

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at the time, she would be competent to give her consent. It is clear from the judgment of the lower Court that under the circumstances it cannot be said that she was conveyed without her consent. All along in her movements from place to place she seems to have been a consenting party and there is absolutely nothing to show that when the party left Asodar the girl was in the slightest degree unwilling to go to Baroda, i.e., out of British India. The girl is described by the Judge as "obviously a loose girl, discontented with and not inclined to live with her husband and anxious to find a well-to-do husband of a superior class." Further on the learned Judge observes that "Pashi may have walked straight over to the house of Shankar or Soma and asked them to fix matters up for her". That is, even as regards her having been taken out of the custody of her father the Judge is not satisfied that the girl was not a consenting party. The consent of Pashi as regards kidnapping from lawful guardianship would not be material, but on the question of kidnapping from British India, her consent would be very material. I am quite satisfied that on the findings of the learned Sessions Judge the charge of kidnapping from British India cannot be sustained.

I, therefore, allow the appeal, set aside the conviction and sentence and direct the accused to be acquitted and discharged.

MARTEN, J. :—As we are differing from the learned Sessions Judge, I should like to add this. He says at p. 59 as follows :—"The case therefore splits up into separate parts. First, the kidnapping from lawful guardianship, and secondly, the kidnapping from British India, and that being so, there really should have been separate trials of the various offenders as they were connected with distinct offences". Stopping there, I

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think it is a great pity that the learned Sessions Judge did not take that course, for the conviction of the present accused may well be due to a confusion as to the effect of the Indian Penal Code, arising from the single trial of the various offenders for separate offences. Then at p. 62 he goes on : "The next question is as to Haribhai (accused No. 3). There is no question that he had nothing to do with the kidnapping". And then finally the learned Judge at p. 63 says : "Disagreeing with the assessors I find Haribhai Dada guilty of the offence charged, viz., of kidnapping Pashi, from British India".

Now the offence with which he was charged was what I may call a double-barrelled offence. It was that of kidnapping this girl "from the guardianship of her father into Baroda territory". That included both kinds of kidnapping defined in section 359, viz., kidnapping from British India and kidnapping from lawful guardianship. In the view I take, I think the learned Judge only meant to convict this particular accused of the crime of kidnapping from British India, namely, under section 360, Indian Penal Code. That must be without the consent of the person alleged to be kidnapped. But if one looks at the earlier sections of the Indian Penal Code, namely, section 90, it appears that the consent of a child is only invalidated if the child be under twelve years of age. In the present case the child is over twelve and it is not shown that she was taken out of British India without her consent. The evidence indeed is all the other way, viz., that she consented. The learned Sessions Judge has not dealt with this point in his judgment and I am satisfied that it is fatal to the conviction.

If on the other hand the learned Judge intended to rely on the other kind of kidnapping, viz., kidnapping from legal guardianship under section 361 there are

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other legal difficulties involved there, and I think that on the facts of the case and on his own finding, the conviction would be improper under that section too. But I am satisfied that he did not intend to convict under section 361.

Under these circumstances I agree with my learned brother that the appeal should be allowed and the conviction set aside.

Appeal allowed.

R. R.

CRIMINAL REFERENCE.

Before Mr. Justice Shah and Mr. Justice Marten.

EMPEROR *v.* ABAS MIRZA.*

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Penal Code (Act XLV of 1860), section 336—Doing a rash or negligent act endangering human life or personal safety of others—Licensed taxi-cab driver asked to wear spectacles at the time of driving—Driver using no spectacles at the time of driving—Liability.

The accused was, at the time he took out a license to drive taxi-cabs, asked to use spectacles at the time of driving owing to his defective eyesight. Still, he was one night driving his taxi-cab without wearing spectacles, when his car collided with another car; but it appeared that he was not liable for the accident. He was tried for an offence punishable under section 336 of the Indian Penal Code, for doing an act so rashly or negligently as to endanger human life or the personal safety of others. The medical evidence adduced at the trial showed that the defect in the eyesight of the accused was not very much, and that it would not appreciably interfere with his efficiency as a driver. The Magistrate having convicted him of the offence, charged, the accused applied to the High Court:

Held, setting aside the conviction and sentence, that it was not made out that the accused if he drove his car without wearing spectacles would be acting so rashly or negligently as to endanger human life or the personal safety of others.

* Criminal Application for Revision No. 389 of 1917.