

1905  
SEP. 28.

CRIMINAL  
REVISION.

32 C. 444=  
2 Cr. L. J.  
328.

32 C. 444 (=2 Cr. L. J. 328.)

[444] CRIMINAL REVISION.

Before Mr. Justice Harington and Mr. Justice Pargiter.

KORBAN *v.* KING-EMPEROR.\*  
[28th September, 1904.]

*Kidnapping from lawful guardianship—Mahomedan Law—Mahomedan minor, guardianship of—Preferential right of Mahomedan mother—Penal Code (Act XLV of 1860), ss. 361, 363.*

Under the Mahomedan law the mother is entitled to the custody of her daughter, in preference to the husband, until the girl attains the age of puberty.

The removal of an immature Mahomedan girl of eleven or twelve from the house of her mother-in-law in whose charge her husband had left her, by a third person acting at the instance, and under the instigation, of her mother is not taking from "lawful guardianship," and does not amount to "kidnapping."

*Nur Kadir v. Zulaikha Bibi* (1) referred to.

[Ref. 42 All. 146=18 A. L. J. 64=54 I. C. 402.]

RULE granted to Korban, the petitioner.

The complainant Azimun, charged the petitioner with kidnapping her daughter-in-law, Dasadia, a Mahomedan girl of eleven or twelve years of age, who was not proved to have attained puberty. Dasadia had been married to her son and had resided with him at her house. When he went away from home on a voyage, he left his wife under her charge and protection. On 16th May 1904, the petitioner went to the complainant's house and took the girl by force and against the complainant's consent, but at the instance and instigation of the girl's mother, who desired to have her daughter to live with her, having heard that the child was not happy with her mother-in-law.

The petitioner was convicted under s. 363 of the Penal Code by the Second Presidency Magistrate, and sentenced to five [445] months rigorous imprisonment; and the girl was ordered to be restored to the custody of her mother-in-law.

The petitioner then obtained this Rule calling upon the Chief Presidency Magistrate to show cause why the conviction should not be set aside on the grounds, *first*, that the mother under whose direction the petitioner was acting, was entitled to the custody of the female minor Dasadia, until she attained puberty; *secondly* that the case came under the latter part of the Exception to section 361 of the Penal Code; and *thirdly*, that in any view of the case the sentence was too severe.

Mr. Donogh (Babu Amarendra Nath Chatterjee and Babu Surendra Nath Ghosal with him) for the petitioner. The Magistrate finds that the accused brought away the girl from her mother-in-law's house at the request of the girl's mother. He also finds the girl to be eleven or twelve years of age. She cannot, therefore, have attained puberty. The lawful guardianship and custody of a Mahomedan female minor, who has not reached maturity is with the mother, even as against the husband: see *Nur Kadir v. Zuleikha Bibi* (1); *In the matter of Khatija Bibi* (2) and Macnaghten's Principles of Mahomedan Law, page 63. *A fortiori* the mother has preference over the mother-in-law. There could be no kidnapping, as the

\* Criminal Revision No. 925 of 1904, against the order of W. A. Bonnaud, Second Presidency Magistrate of Calcutta, dated Aug. 17, 1904.

(1) (1885) I. L. R. 11 Cal. 649.

(2) (1870) 5 B. L. R. 557.

mother was the lawful guardian, and the girl was taken to her house and under her directions; at any rate it was for the prosecution to show that the minor had attained puberty. The finding is to the contrary. Moreover, as the accused is shown to have acted in good faith, the Exception to s. 361 of the Penal Code applies to this case.

HARRINGTON AND PARGITER, JJ. In this case a Rule was issued calling upon the Chief Presidency Magistrate to show cause why the conviction of the petitioner should not be set aside on the grounds *first*, that the mother, under whose direction the petitioner was acting was entitled to the custody of the female minor, Dasadia, until she attained puberty; *secondly*, that the case came under the latter part of the Exception to section 361 of the [446] Indian Penal Code, and finally, that in any view of the case the sentence is too severe.

It has been found as a fact by the Magistrate who tried the case, that the petitioner took the girl away for no immoral or illegal purpose, but he kidnapped the child at the instigation of and at the instigation of her mother who had learnt that the child was unhappy at her mother-in-law's house and who consequently employed the accused to bring the child back to her. On those findings he has been sentenced to suffer five months' rigorous imprisonment.

It is argued that the conviction must be set aside, because on the findings, the offence of kidnapping from lawful guardianship has not been established. It is found by the Magistrate that the girl is of the age of eleven or twelve years. It has been decided in the case of *Nur Kadir v. Zuleikha Bibi* (1) that under Mahomedan Law, which is the law governing this case, the mother is entitled to the custody of her daughter in preference to the husband, until the girl attains the age of puberty. In this case the girl was taken from the guardianship of her mother-in-law, who must be taken, for the purposes of this case, to have been the lawfully authorized agent of the girl's husband. To enable a conviction for kidnapping to be sustained, it has to be shown that the guardianship of the husband was lawful, that is to say, the onus lay upon the prosecution of showing that the girl had attained puberty, because until she had attained that age her mother, and not her husband, was under the Mahomedan Law her lawful guardian.

On the judgment it is clear that the prosecution failed to show that the girl had attained the age of puberty: indeed the evidence points to her not having attained that age.

The result is, that an essential element in the offence charged, namely, that the girl was taken from her lawful guardian, is not established, and, therefore, the conviction must be set aside.

We desire to add that in view of the finding of fact in the Magistrate's judgment that the petitioner was acting *bona fide* on the instructions of the mother, the mother acting in what she [447] believed to be the interests of her daughter—on those findings, we think, that the sentence passed was a great deal too severe, even if in law the conviction could have been supported.

The conviction and sentence are set aside, and the petitioner is ordered to be released from his bail. The child must be restored to her mother.

*Rule absolute.*

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(1) (1885) I. L. R. 11 Cal. 649.