

## Original Jurisdiction. (a)

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The Queen on the prosecution of DOWLATH BEE
   
against SHAIK ALI.

The prisoner was tried upon a charge of having obtained possession of Dowlath Bee, a minor, aged ten years, with intent that she should be used for an unlawful and immoral purpose, that is to say, for the purpose of illicit intercourse, and having thereby committed an offence under Section 373 of the Indian Penal Code.

The evidence shewed that the prisoner met Dowlath Bee, a girl eleven years old, in a street at Triplicane and promised to give her a pice if she would accompany him into an uninhabited house close by and allow him to have sexual intercourse with her. The girl went willingly with the prisoner, and both were detected in the act of having sexual intercourse. The girl had gone out without permission, had not attained the age of puberty, and the evidence tended to show that the girl had not before had sexual connexion.

The Jury convicted the prisoner.

*Held* by the High Court that the case proved against the prisoner did not make out the offence charged.

CASE referred by Scotland, C. J. for the opinion of the High Court :—

1870.  
May 27.

The prisoner, Shaik Ally, was tried before me at the second Criminal Sessions of the High Court in the present year, upon an indictment which charged that he the said Shaik Ally, on or about the third day of April in the year of our Lord Christ, one thousand eight hundred and seventy, at Madras, obtained possession of one Dowlath Bee, a minor under the age of sixteen years, to wit, of the age of ten years, with the intent that the said Dowlath Bee should be used for an unlawful and immoral purpose, that is to say, for the purpose of illicit intercourse, and that he has thereby committed an offence punishable under Section 373 of the Indian Penal Code.

The evidence proved that the prisoner met Dowlath Bee, a girl eleven years of age, in a street in Triplicane, at about 9 o'clock in the morning, on the new moon day of the Mohurram, and promised to give her a pice if she would accompany him into an uninhabited house close by, and allow him to have sexual intercourse with her. That she consented and went willingly with the prisoner into an upper room of the house, where they were followed by two Police Con-

(a) Present : Scotland, C. J., Holloway and Iunes, JJ.

1870. stables who had seen them, and were detected in the act of  
 May. 27 having sexual intercourse.

It was also proved that the girl had not arrived at puberty, that she lived with an aunt who had nurtured her, and had on the day of the occurrence gone out without permission to see the tamash of the Mohurrum, and that she had not been known to misconduct herself previously. Further, the evidence of the girl herself and her aunt tended to show that the girl had not before had sexual connexion.

I entertained considerable doubts as to whether the soliciting a girl under the age of sixteen to submit to a single act of connexion was an offence within the section on which the indictment is framed, and I inclined to the opinion that the section applied only to a case of buying or hiring or other similar transaction by which the possession of a girl is obtained, with the intention of employing or using her habitually for the purpose of indiscriminate sexual intercourse with man, or in some unlawful and immoral course. With a view, however, to the deliberate determination of the question, I directed the jury that the evidence, if believed, proved an obtaining possession of the girl within the section, and that such obtaining would be for an unlawful and immoral purpose, if they thought it shown by the evidence that she had not before had sexual connexion.

The jury found the prisoner guilty, and I deferred passing sentence and reserved for the opinion of the High Court the question whether the obtaining the consent of the girl to the sexual intercourse which took place was sufficient to constitute the offence charged.

*Mayne*, for the prosecution.

The following Judgments were delivered :—

SCOTLAND, C. J.—Very careful consideration of the section under which the prisoner has been found guilty has removed my doubts and confirmed the impression I had formed before the trial as to its proper construction. I am now of opinion that the case proved against the prisoner does not make out the offence charged.

It is not, I think, essential to the offence that the buying, hiring or other obtaining of the possession of the minor should be from a third person. The language of the section is quite applicable to an agreement or understanding come to with the minor without the intervention of a third person and the vice against which the section is directed is certainly not of any less enormity in the latter case.

1870.  
May 27.

But to bring a case within the section, it is in my opinion essential to show that possession of the minor has been obtained under a distinct arrangement come to between the parties that the minor's person should be for sometime completely in the keeping and under the control and direction of the party having the possession whether ostensibly for a proper purpose or not. The words "buys" and "hires" convey that meaning according to their ordinary acceptation, and giving them due effect it seems to me that the associated words "or otherwise obtains possession" were not intended to do more than include other modes of obtaining the same kind of possession as that of a buyer or hirer. This, I think, is shown more clearly to be the meaning intended by the provision which follows as to the other essential of the offence—the intent or knowledge of its being likely "that such minor shall be employed or used for the purpose of prostitution or for any unlawful and immoral purpose," indicating plainly as it does an employment or use of the minor at some time future to the obtaining of possession:—its effect is to my mind strong to show that complete possession and control of the minor's person obtained by buying, hiring or otherwise with the intent or knowledge that, by the effect of such possession and control, the minor should or would afterwards be employed or used for either of the purposes stated, is what the section was intended to make punishable as a crime. The provision seems to me to exclude the supposition that an obtaining of possession in the sense in which that expression is, no doubt, sometimes used, of merely having sexual connexion with a woman, could have been in the contemplation of the framers of the section.

This construction of the first part of the section when read by itself, is, I think, rendered still more certain by the correlative terms of Section 372, "whoever sells, lets to hire

1870.  
May 27.

or otherwise disposes of any minor," for there can be no doubt that they import a complete making over of the possession of the minor to the person buying or hiring.

It follows that the sexual intercourse proved in the present case is not in my opinion an obtaining possession of the girl by hiring within the meaning of the section, and on this ground the conviction is unsustainable.

A decision becomes unnecessary as to the other question affecting the validity of the conviction, whether the single act of sexual intercourse proved was an employment or use of the girl for an "unlawful and immoral purpose," and I have not formed a settled opinion upon the point. I think it right however to state that I incline to the opinion that the act was not an unlawful use. I am not aware of any existing law providing against such an act unless it rendered the prisoner liable to a civil action, in which case it would be unlawful by force of Section 43 of the Penal Code and by the operation of Sections 90 and 44 amount to the offence of criminal force. But at present I am not prepared to hold that any civil action would lie against the prisoner.

With respect to the further point of the meaning of the words "for the purpose of prostitution" which it has been necessary to consider in deciding this case I have a clear opinion. Acts of improper sexual intercourse are acts of prostitution in one strict sense of the term. But proof of more than that I think is required. The ordinary and commonly understood meaning of the word prostitution is the offering of the person for promiscuous sexual intercourse with men, and that I think must be taken to be its meaning in the section, there being nothing in the context opposed to it, but rather the contrary. The words "employed or used" strike me as confirmatory of that being the only meaning intended. If those words had been followed by the words "as a prostitute," no doubt could have arisen, and I see no indication that anything different was meant by the words "for the purpose of prostitution." Further, it is a weighty consideration in support of this construction as well as of that given to the first part of the section, that if not right there would be no stopping short of holding

every man to be punishable under Section 373, who had casual sexual intercourse with a willing girl under the age of 16 capable of giving consent or kept her as his mistress or concubine, even although the girl had been a common prostitute before he associated with her. Such an effect could not possibly have been intended. Obtaining a girl for the purpose of illicit intercourse with a man is made punishable by other sections of the Code, and this section, I think, was intended to prevent trafficking in the employment or use of minors as prostitutes or for a purpose both immoral and unlawful.

1870.  
May 27.

The conviction I think should be annulled, and the prisoner set at liberty.

HOLLOWAY, J.—I am of opinion that the prisoner must be discharged because there was no evidence to go to the jury that within the true meaning of this section he obtained possession of the minor. If there had been so far as I have been able to discover, he would not have done anything which within the definitions of the Penal Code would be an illegal act other than the obtaining itself.

I think that even the construction of the bare words of this section is in favor of the conclusion that there must be a transaction of which other parties are the subjects and the minor the object.

It is of course not to be denied that in common discourse we speak of a man or woman selling himself or letting himself to hire, but in countries, at all events, in which slavery is unknown, what is really sold or let is the labor or skill of the seller or letter. Here the language of the section points to a contractual or contract-like obligation—"whoever by buying, hiring or other similar transaction obtains possession, &c."

This construction preferable on the mere words is, I think, shown to be the only true one by the sections which precede this—361 and 363 provide an adequate punishment for taking or enticing out of the keeping of a lawful guardian and the definition of this person renders the operation of the sections very wide; 364, 365, 366, 367 and 369 provide for

1870.  
May 27.

other offences of the same character. Then by natural transition, section 372 seeks to protect the minor against the act of the parent or guardian. After consideration I can entertain no doubt that the person aimed at in 373 is the other party to the transaction in 372. The whole of the words point to something having the form of a contract. A minor is *ex vi termini* incapable of binding himself by one but if 373 applies to him, who without any dealing with a third party obtains possession for the purpose or with the knowledge specified then the minor is equally punishable under 372.

The collocation of the words "use and employ" in both these sections is probably explicable by the fact that some of the acts aimed at may be more properly expressed by the one word, some by the other.

I am unwilling to deal with hypothetical cases, but I must guard myself against being supposed to think that nothing more is required than minority, a contract and an intent to have sexual connexion, to render the man who hires punishable under this section. The intention or knowledge must be made out, and it may well be, looking at the whole scope of the sections, that the previous ones deal with the corruption of girls without the consent of their guardians, or of women by suppressing their will by force or deceit, and that these deal with the case of trafficking in innocence. They are perhaps not intended, by confounding the provinces of law and ethics, to make men virtuous by Legislative enactment.

A minor not generally unchaste may still be protected by its provisions, while she who has been already devoted to prostitution may not be within the protection, because on any reasonable construction of the words an unchaste act cannot have been committed with intent to do that which has already been done.

This view need afford no encouragement to the debauching or seduction of innocent girls without the consent of their guardians; such cases are fully provided for elsewhere and the fact that they are so removes all doubt from my mind as to the construction of the present section.

INNES, J.—I concur in thinking that the prisoner should be discharged.

1870.  
May 27.

I am of opinion that "possession" in the section under which he is indicted means possession with a power of disposal, and in this sense there is no evidence that the prisoner had possession of the girl. I think also that the mischief against which the section is directed is a trafficking in the prostitution or other unlawful and immoral use of minors, and that it was not intended to make punishable the buying, hiring or otherwise obtaining possession for a single act of sexual intercourse with the person so obtaining possession. This seems to me to be apparent from the relation in which this section stands to the two preceding sections.

