

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 06.02.2018

CORAM:

THE HONOURABLE MR. JUSTICE M.S.RAMESH

Crl.O.P.No.1218 of 2016 and
Crl.M.P.Nos.544 & 545 of 2016

1. Ramakrishnan
2. Murugan
3. Saravanan

... Petitioners

Vs.

1. State rep. by
The Inspector of Police,
E-8, Kelambakkam Police Station,
Kancheepuram District.

2. S.T.Ponsubbaiah

... Respondents

PRAYER: Criminal Original Petition filed under Section 482 Cr.P.C. praying to call for the records pertaining to the proceedings pending in P.R.C.No.36 of 2011 on the file of the learned Judicial Magistrate No.1 at Chengalpet, and quash the same.

For Petitioner : Mr.M.Md.Riyaz

For Respondents : Mrs.P.Kritika Kamal
Government Advocate (Crl.Side) for R1
No Appearance for R2

ORDER

This petition has been filed to call for the records pertaining to the proceedings pending in P.R.C.No.36 of 2011, on the file of the learned Judicial Magistrate I, Chengalpet, and to quash the same.

2 The petitioners herein have been arrayed as A2 to A4 in the impugned proceedings. The case of the prosecution is that on 05.02.2011 at about 2.00 p.m., the first accused, at the instigation of the petitioners herein, kidnapped the victim minor girl aged about 17 years, and thereby have committed offences under Sections 366, 376, r/w 109 of I.P.C.

3 The learned counsel for the petitioners, by relying on the statements under Section 161 (3) of Cr.P.C. of the victim girl, submitted that the victim had voluntarily called the first accused on 05.02.2011 at about 2.00 hours to come to her house and from there they had left the house and reached the Bus Stand, wherein the petitioners herein were present. Apart from this statement, there are no other overt acts attributed by any of the witnesses to implicate the petitioners herein for having committed offences, either under Section 366 or 109 of I.P.C. and therefore, the proceedings against the petitioners herein are liable to be quashed.

4 The learned Government Advocate (Crl.Side), on the other hand, by relying on the statement of victim girl, submitted that these petitioners, who were present at the Bus Stand, had sent the victim girl as well as the first accused from that place, asking them to live happily. Further by relying on the statement of witness, who was a driver of the victim girl, submitted that he had seen the victim girl and the first accused accompanied by the petitioners herein and therefore submitted that the offences under Sections 366 and 109 of I.P.C. are clearly made out as against the petitioners herein.

5 I have carefully considered the rival submissions made on either side and perused the materials placed before the Court.

6 It is not in dispute that the victim girl was aged about 17 years at the time of occurrence. None of the witnesses have spoken anything about the petitioners herein, apart from the limited overt acts attributed by the learned Government Advocate (Crl.Side). As such what could be derived from the statements of these witnesses is that these petitioners were present only at the Bus Stand from where the first accused and the victim girl had eloped. It is not the case of the prosecution that these petitioners had aided the first accused and helped him from taking the victim girl from her lawful guardianship. It is also not the case of the prosecution that these petitioners had come at an earlier point of time abetting the first accused to commit any of the offence either under Section 366 or 376 of I.P.C. A mere act of being present in the Bus Stand, while the first accused and the victim girl had eloped may not be sufficient to constitute an offence of having committed kidnapping or for an offence under Section 109 of I.P.C.

7 The learned counsel for the petitioners by relying upon the judgment of Hon'ble Supreme Court reported in AIR 1965 SC 942, submitted that the ingredients to constitute an offence of kidnapping is absent in the present case, since there was no act of "taking or enticing". The relevant portion of the said order

reads as follows:

7. The question whether a minor can abandon the guardianship of his or her own guardian and if so the further question whether Savitri could, in acting as she did, be said to have abandoned her father's guardianship may perhaps not be very easy to answer. Fortunately, however, it is not necessary for us to answer either of them upon the view which we take on the other question raised before us and that is that "taking" of Savitri out of the keeping of her father has not been established. The offence of "kidnapping from lawful guardianship" is defined thus in the first paragraph of Section 361 of the Indian Penal Code:

"Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any 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 is said to kidnap such minor or person from lawful guardianship."

It will thus be seen that taking or enticiting away a minor put of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here, we are not concerned with enticement but what we have to find out is whether the part played by the appellant amounts to "taking" out of the keeping of the lawful guardian of Savitri. We have no doubt that though Savitri had been left by S.Natarajan at the house of his relative K.Natarajan she still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant did that constitutes in law "taking". There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K.Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to

Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub-Registrar's office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishments or anything like that. On the other hand the evidence of the girl leaves no doubt that the insistence of marriage came from her side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited different places. There is no suggestion in Savitri's evidence, who it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was course implicit. In these circumstances we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. She was not a child of tender years who was unable to think for herself but, as already stated, was on the verge of attaining majority and was capable of knowing what was good and what was band for her. She was no uneducated or unsophisticated village girl but a senior college student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her won than perhaps an unlettered girl hailing from a rural area. The learned Judge of the high Court has referred to the decision In Re Abdul Satarl in which it was held that where the evidence disclosed that, but for something with the accused consented to do and ultimately did, a minor girl would not have left her husband's house, or would not have been able to leave her

husband's house, there was sufficient taking in law for the purpose of Section 363 and expressing agreement with this statement of the law observed: "In this case the minor, PW4, would not have left the house but for the promise of the appellant that he would marry her." Quite apart from the question whether this amounts to blandishment we may point out that this is not based upon any evidence direct or otherwise. In Re Abdul Sathar case1 Srinivasa Aiyangar, J., found that the girl whom the accused was charged with having kidnapped was desperately anxious to leave her husband's house and even threatened to commit suicide if she was not taken away from there and observed:

"If a girl should have been wound up to such a pitch of hatred of her husband and of his house or household and she is found afterwards to have gone out of the keeping of her husband, her guardian, there must undoubtedly be clear and cogent evidence to show that she did not leave her husband's house herself and that her leaving was in some manner caused or not brought about by something that the accused did."

In the light of this observation the learned Judge considered the evidence and came to the conclusion that there was some legal evidence upon which a court of fact could find against the accused. This decision, therefore, is of little assistance in this case because, as already stated, every essential step was taken by Savitri herself: it was she who telephoned to the appellant and fixed the rendezvous she walked up to that place herself and found the appellant waiting in the car; she got into the car of her own accord without the appellant asking her to step in and permitted the appellant to take her wherever he liked. Apparently, her one and only intention was to become the appellant's wife and thus be in a position to be always with him.

19. As against this Mr. Ranganadham Chetty appearing for the State has relied upon the decisions in Bisweswar Misra v. King and In re Khalandar Saheb. The first of these decisions is

distinguishable on the ground that it was found that the accused had induced the girl to leave the house of her lawful guardian. Further the learned Judges have made it clear that mere passive consent on the part of a person in giving shelter to the minor does not amount to taking or enticing of the minor but the active bringing about of the stay of the minor in the house of a person by playing upon the weak and hesitating mind of the minor would amount to "taking" within the meaning of Section 361. In the next case, the act of the accused, upon the facts of the case was held by the Court to fall under Section 366 IPC and the decision in *Nura v. Rex* on which reliance has been placed on behalf of the appellant is distinguished. Referring to that case it was observed by the Court:

"Reliance is placed upon the decision of Mustaq Ahmed, J., in *Nura v. Rex* wherein the learned Judge observed that where a minor girl voluntarily leaves the roof of her guardian and when out of his house, comes across another who treats her with kindness, he cannot be held guilty under Section 361 of the Indian Penal Code. This decision cannot help the accused for, on the facts of that case, it was found that the girl went out of the protection of her parents of her own accord and thereafter went with the accused...In the present case it is not possible to hold that she is not under the guardianship of her father. In either contingency, namely, whether she went out to answer calls of nature, or whether she went out to the house of the accused pursuant to a previous arrangement, she continued to be under the guardianship of her father. On the evidence, it is not possible to hold that she abandoned the guardianship of her father and thereafter, the accused took her with him."

After pointing out that there is an essential distinction between the words "taking" and "enticing" it was no doubt observed that the mental attitude of the minor is not of relevance in the case of taking and that the word "take" means to cause to go, to escort or to get into

possession. But these observations have to be understood in the context of the facts found in that case. For, it had been found that the minor girl whom the accused was charged with having kidnapped had been persuaded by the accused when she had gone out of her house for answering the call of nature, to go along with him and was taken by him to another village and kept in his uncle's house until she was restored back to her father by the uncle later. Thus, here there was an element of persuasion by the accused person which brought about the willingness of the girl and this makes all the difference. In our opinion, therefore, neither of these decisions is of assistance to the State.

8 As observed by the Hon'ble Supreme Court, there was no element of persuasion or abetment, on the part of these petitioners to enable the first accused to commit any offence. In the absence of any incriminating material to establish that the petitioners herein could have committed the offence, I am unable to comprehend as to how the trial court could reach a logical conclusion to find the petitioners' guilty. As such, I do not find any justification as to why the petitioners herein should be made to undergo the ordeal of a criminal trial. Under these circumstances, I am of the view that the petitioners herein are entitled to succeed.

9 In the result, the Criminal Original petition stands allowed. Consequently, connected miscellaneous petitions are closed. The proceedings in P.R.C.No.36 of 2011, on the file of the Judicial Magistrate I, Chengalpet, is quashed, insofar as the petitioners herein are concerned. It is made clear that the trial court is at liberty to proceed against the first accused.

Sd/-

सत्यमेव जयते
Assistant Registrar(CS VI)

//True Copy//

WEB COPY
Sub Assistant Registrar

cgi

To

1. The Judicial Magistrate I,
Chengalpet.

2. The Inspector of Police,
E-8, Kelambakkam Police Station,
Kancheepuram District.

3. The Public Prosecutor
High Court, Madras.

+3cc to Mr.R.Sasi Kumar, Advocate, S.R.No.9260

CrI.O.P.No.1218 of 2016 and
CrI.M.P.Nos.544 & 545 of 2016

KAN(CO)
RRK(15/02/2018)



WEB COPY