
AIR 1957 HP 42 : (1957) CriLJ 847

High Court of Himachal Pradesh

Case No: Criminal Appeal No. 25 of 1956

State of Himachal
Pradesh

APPELLANT

Vs

Mt. Kala and Others

RESPONDENT

Date of Decision: Feb. 8, 1957

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) " Section 417, 423#Evidence Act, 1872 " Section 101, 102, 103, 104, 133#Penal Code, 1860 (IPC) " Section 360, 361, 363, 366, 497

Citation: AIR 1957 HP 42 : (1957) CriLJ 847

Hon'ble Judges: Ramabhadran, J.C.

Bench: Single Bench

Advocate: N.D. Gupta, for the Appellant; H.C. Anand, Nos. 1 and 2, Bhagu and Sohnu, present personally, for the Respondent

Final Decision: Dismissed

Judgement

Ramabhadran, J.C.

1. The four respondents were charged with offences punishable under Sections 363 and 366, I. P. C., in the Court of Mr. Hardayal, Magistrate

first class, exercising Section 30 powers, Bilaspur. The learned Magistrate came to the conclusion that the charges were not proved beyond

reasonable doubt. Accordingly, he acquitted the respondents. The State Government has come up in appeal against that order of acquittal u/s 417,

Cr. P. C.

2. The prosecution story, briefly, is as follows: Mt. Roshni the alleged victim in this case, is the daughter of one Nikru of village Kolhwin, P. S.

Sadar. She was first married to one Lekh Ram of village Kandror about three years ago. That marriage was dissolved and she was, allegedly,

married for the second time to one Ram Lal of village Tarer in Phagun 2011 B. Mt. Roshni's brother Kishan Dayal, was first married to one

Ganga Devi, cousin of Lekh Ram aforesaid. That marriage was also dissolved.

In or about Phagun 2011 B., Kishan Dayal was married for the second time to one Mt. Kashi, who is none other than the sister of Mt. Kala and

Tulsi, accused-respondents 1 and 2. The prosecution case is that after living for some months in the house of Ram Lal, Mt. Roshni returned to her

parent's house in village Kolhwin, with her husband's permission. It was alleged that Mt. Kala Devi and her sister, Mt. Kashi, attempted, on

several occasions, to induce Mt. Roshni to give up her husband, Ram Lal, and, in his place marry their brother Tulsi, respondent No. 2, as she

would be assured of a comfortable, and luxurious, life with him. Similar inducements were, allegedly, held out by respondents 3 and 4, Sohnu and

Bhagu.

In the case of Sohnu, the matter did not rest with persuasions alone. The Court was asked to believe that Sohnu displayed his gun and a belt of

cartridges and threatened Mt. Roshni with serious consequences, if she did not yield to their wishes. On 22-9-1955, at about noon, it is said that

all the four respondents went to the house of Mt. Roshni's parents. The latter were absent. Roshni and her sister-in-law, Mt. Kashi, were cutting

grass in a field. It was stated that, at the point of Sohnu's gun, Mt. Roshni was forcibly taken away from her parent's house by the four

respondents. After an unsuccessful attempt to file an affidavit on behalf of Mt. Roshni in the Court of the Magistrate first class at Bilaspur (with a

view to exculpate the respondents), she was taken to the Sadar Thana at Bilaspur by Sohnu, respondent, where she lodged a report as desired by

the respondents. From there, Mt. Roshni was taken to village Harkhar, where she was kept in the house of Mt. Kala, respondent No. 1.

There, it is alleged, she was seduced by Tulsi, respondent No. 2. The following day, she was removed to Tulsi's house. Eventually, a police party,

headed by S. I. Kashi Ram of Bilaspur, recovered Mt. Roshni from the house of Tulsi on 29-9-1955. On these premises, the respondents were

sent up by the police, charged with offences under Sections 363 and 366, I. P. C., with results already stated.

3. In acquitting the respondents, the learned trial Magistrate has held:- (a) That Mt. Roshni's second marriage with Ram Lal was not proved, (b)

The prosecution failed to prove that Mt. Roshni was below 18 years of age at the relevant time and, consequently, no case of kidnapping was

made out, (c) The prosecution failed to prove that Mt. Roshni was compelled by force, or induced by deceitful means, by the respondents to leave

her parent's house and go to Tulsi's house in village Harkhar.

4. Arguments of the learned counsel for the parties and of respondents 3 and 4, who were unrepresented, were heard in extenso on the 6th and

7th instant. For reasons to be stated shortly, I am of the opinion that this appeal cannot succeed.

5. Before I go into the merits of the case, I must point out that in an appeal like this against a verdict of acquittal, this Court has to follow certain

well-established principles. In State of Himachal Pradesh v. Chandan Lal AIR 1955 HP 26 following Wilayat Khan and Others Vs. The State of

U.P., , Zwinglee Ariel Vs. State of Madhya Pradesh, and Prandas Vs. The State, I had remarked that:

In an appeal by the Government from an acquittal, it is for the appellant to show conclusively that the inference of guilt against the respondent is

irresistible"".

6. Again, in Aher Raja Khima Vs. The State of Saurashtra, the view of the majority of the learned Judges was that:

In an appeal by a State Government u/s 417, against the acquittal of the accused, it is not enough for the High Court to take a different view of the

evidence; there must also be substantial and compelling reasons for holding that the trial Court was wrong.

And if the trial Court takes a reasonable view of the facts of the case, interference u/s 417 is not justifiable, unless there are really strong reasons for reversing that view".

7. Further, in *Surjan and Others Vs. State of Rajasthan, Bose and Jagannadhadas JJ.* observed that:

In an appeal against acquittal, while the High Court is free to appreciate the evidence for itself and to act on its own view thereof, when it differs

from that of the trial Court, it will not do so lightly and will be slow to reverse an acquittal except for strong and compelling reasons".

8. Again, in *State Vs. Babulal Gaurishanker Misar and Others*, a Division Bench of that High Court expressed itself in the following terms:

In an appeal from an acquittal, the High Court would not be justified in interfering with the order of acquittal unless there were compelling reasons

to do so. If upon the evidence the Magistrate has come to a conclusion which is justified, then it would not be open to it to interfere with the order

of acquittal".

9. I may also refer to *State Vs. Ram Autar Chaudhry and Others*, where a Division Bench of that High Court indicated that:

In an appeal from acquittal, the High Court has the power to review the entire evidence and then to come to its own conclusions, but in arriving at

that conclusion, it must keep in mind the four matters, namely, (i) the views of the trial Judge as to the credibility of the witnesses, (ii) the

presumption of innocence in favour of the accused, a presumption certainly not weakened by the fact that he has been acquitted at his trial, (iii) the

right of the accused to the benefit of any doubt and (iv) the slowness of an appellate Court in disturbing a finding of fact arrived at by a Judge, who

had the advantage of seeing the witnesses. And, in practical application, keeping in consideration those four matters, must mean that the High

Court should find such reasons which may be termed compelling and substantial reasons or which may be deemed to be clinching and conclusive

before it would be justified in upsetting an order of acquittal. It would not be so justified merely because it, after considering the criticism of the

Sessions Judge and his views, feels that a different view should be taken for reasons which are not so strong as to be classed with substantial or

compelling reasons, which seem to be at par with such reasons against which practically nothing be possible to be said"".

10. Bearing these principles in mind, let us go through the facts of the case and see whether there are any compelling or substantial reasons to

justify the reversal of the verdict of acquittal entered by the Court below.

11. (A). First of all, I may take up the question of Mt. Roshni's alleged marriage, for the second time, with Ram Lal. The Court below has held

that this marriage has not been proved satisfactorily. The learned counsel for the appellant urged that this finding was erroneous, while learned

counsel for respondents 1 and 2 supported the finding of the trial Court. For the purpose of disposing of this appeal, however, it is not necessary,

in my opinion, to give a finding on this point. The respondents were charged with offences punishable under Sections 363 and 366, I. P. C. To

constitute an offence under those sections, it is not incumbent upon the prosecution to prove that the person kidnapped or abducted (in this case a

girl, i.e. Mt. Roshni) was married. The question of marriage would have been material in case the respondents had been prosecuted u/s 497 or

498, I. P. C., by Ram Lal in his capacity as a husband of Mt. Roshni. That not being the case here, I do not consider it necessary to go into this

question any further.

12. (B). Mt. Roshni's age, however, is a material point in this case, because unless it is shown that she was below 18 years of age at the relevant

time, there could be no case of kidnapping within the meaning of Section 363, I. P. C. The prosecution relied upon the following pieces of

evidence in their attempt to establish that Mt. Roshni was below 18 of years of age on 22-9-1955, the date of the alleged kidnapping.

13. (i) Statement of Lady Doctor S. Puri (P. W. 9). According to her certificate, Ex. P. E., Mt. Roshni was about 16 years of age at the date of

examination, i.e. 3-10-1955. The learned trial Magistrate found himself unable to accept the doctor's estimate, firstly, because the X-ray test was

not applied and, secondly, in view of the ratio laid down in Nathu v. Emperor AIR 1931 Lah 401 and Emperor Vs. Qudrat and Another, There, it

was held that, in such a case, the doctor's estimate does not amount to proof, but is merely an opinion. During the course of the hearing of this

appeal, the learned Government Advocate rightly did not base his case on the opinion of Dr. Puri. He urged that the Court below should have

accepted the testimony of Roshni's mother, Mt. Goga (P. W. 6) and should have relied upon the various birth entries produced by the

prosecution,

14. (ii) Mt. Goga deposed to having given birth to six daughters, out of whom one was still-born and out of the remaining five, two died and three

are still alive. According to her, Mt. Roshni (the alleged victim in this case) was born to her and Nikru on 10-12-1994 Bk.

15. (iii) The learned Government Advocate for the appellant invited my attention to the birth entries, P. L., P. K., P. J., P. H. and P G as well as

the death entries P. M. and P. N. From these, I was asked to draw the conclusion that Mt. Roshni is the girl, who was born to Goga on 10-12-

1994 Bk. If this contention be accepted, Mt. Roshni would have been a few months less than 18 years of age at the time of the alleged abduction.

In support of his argument, the appellant's learned counsel cited (a) Nanhak Lal v. Baijnath Agarwala AIR 1935 Pat 474 and (b) Allianz Und

Stuttgarter Life Insurance Bank Ltd. Vs. Hemanta Kumar Das, In the former decision Wort, J., held that:

A certificate of birth of person is evidence and conclusive evidence of his age, unless disproved by the evidence of the witness of the party

denying the correctness of it".

In the latter case, Costello and Panckridge, JJ. held that:

The entries in death or birth certificates are prima facie evidence of the facts stated therein".

Mr. Anand for respondents 1 and 2, however, urged that the prosecution has failed to connect the birth entry, Ex. P. L., with Mt. Roshni,

conclusively. He pointed out and in my opinion with considerable justification--that Nikru, the father of the girl, who is a lambardar and would have

been the best person to prove the age of the girl, was not produced as a prosecution witness although his name was included in the list of such

witnesses. If, as I am asked to believe, Mt. Roshni was kidnapped by the respondents for immoral purposes, I fail to understand why her father,

Nikru, should shrink from deposing as to her correct age. Even if neither party was willing to take the risk of producing Nikru, I should have

thought the trial Magistrate would have summoned him as a Court witness u/s 540, Cr. P. C., and recorded his statement for what it was worth.

Any way, the fact remains that Nikru, who would have been a material witness on this point was not produced by the prosecution on whom the

burden lay affirmatively to prove that Mt. Roshni was below 18 years of age at the time of the alleged offences. Mr. Anand also invited my

attention to Hemanta Kumar Das Vs. Alliantz Und Stuttgarter Life Insurance Co. Ltd., where Lord-Williams J. remarked that:

Entries of the names of persons in a register of births or deaths or marriages cannot be positive evidence of the birth, death or marriage of such

persons unless their identity is fully proved

We have already seen that there is only the statement of Mt. Goga, mother of Mt. Roshni, to connect the latter with the birth entry, Ex. P. L. Even

if one is morally convinced that Mt. Roshni is the same girl, which was born to Mt. Goga on 10-12-1994 Bk., still in my opinion, this point has not

been proved: affirmatively, so as to form the basis of conviction on the charge of kidnapping.

16. I, therefore, see no reason to reverse the finding of the trial Court on this point.

17. (C). To constitute an offence of kidnapping, the prosecution has to prove, not only that the victim was a minor, but further that the minor was

taken or enticed out of the keeping of the minor's lawful guardian without the consent of such guardian. Similarly, there can be no abduction unless

a person is compelled by force, or induced by deceitful means, to go from any place. The recovery of Mt. Roshni from the house of Tulsi and Kala

(respondents) is not denied.

Their case, however, was that Mt. Roshni had come to their house, accompanied by her brother, Kishan Dayal, since Mt. Kashi (sister of Tulsi

and Mt. Kala) and wife of Kishan Dayal, was sick. What is the evidence to show that Mt. Roshni was compelled by force or induced by deceitful

means to go from her parent's house in village Kohlwin to the house of Tulsi and Kala in village Harkhar? It has to be borne in mind prominently

that parties are not mutually strangers. On the other hand, they are closely related. Mt. Roshni's brother, Kishan Dayal, is admittedly married to

Mt. Kashi. sister of respondents 1 and 2. Kishan Dayal appeared as D. W. 1 and supported the case of the accused. It is, therefore, not surprising

if Mt. Roshni went to the house of her brother's mother-in-law.

It is not disputed that at the time Mt. Roshni was recovered from the house of Tulsi, his mother, Mt. Shanti, was also found in the same place (vide

the statement of Sohnu, P. W. 3, a search witness). To prove abduction, the prosecution relied upon the statements of Mt. Roshni and Sohnu Ram

(P. W. 4) and Sant Ram (P. W. 5). As far as Roshni is concerned, her testimony must be taken with great deal of caution. I am supported in this

view by Mohammad Sadiq v. Emperor AIR 1938 Lah 474 where Blacker J. observed that:

In cases of offences u/s 366, the evidence of the girl alleged to have been abducted must be taken with a great amount of caution"".

The learned trial Magistrate has noted that Mt. Roshni's demeanour in the witness-box was highly unsatisfactory. At various times, she hesitated to

answer questions and sometimes flatly refused to answer questions. I agree with the view of the Court, below that it is difficult to believe that Mt.

Roshni--who even according to the prosecution was only a few months below 18 years of age--could have been abducted in broad-day light near

the town of Bilaspur town and taken, firstly, to the Court of the Magistrate at Bilaspur and then to the police station at the point of Sohnu's gun. As

regards the statements of Sonhu Ram (P. W. 4) and Sant Ram (P. W. 5), the learned trial Magistrate has referred to the various inconsistencies

and contradictions to be found there. Admittedly, Tulsi respondent No. 2 had made a report against Sant Ram (P. W. 5) u/s 107, Cr. P. C., one

year previously. Therefore, he cannot be deemed to be a disinterested witness. The plea that Mt. Roshni was taken or enticed or abducted was

not at all, satisfactorily made out.

18. In passing, I may also refer to the attempt allegedly made by the respondents to file an affidavit, on behalf of Mt. Roshni in the Court of the

Magistrate first class, Bilaspur. The alleged affidavit was not produced. Similarly, one Gurditta Mal, petition-writer, who is alleged to have drafted

the affidavit, was not produced, although his name was included in the list of the prosecution witnesses. The learned Government Advocate then

invited my attention to a report, Ex. P. W. 17/1, lodged by Mt. Roshni at the Sadar Thana, Bilaspur, on 23-9-1935. He urged that this report was

a collusive one and was lodged at the instance of the respondents in order to safeguard their position in the event of trouble. The Head-Constable

Baldev Singh, who took down that report, tried to improve matters by stating at the trial that Mt. Kala, Sohnu and Bhagu, respondents, were

outside the police station, while the report was being written out, and Tula had come inside the Thana with Mt. Roshni. The trial Magistrate has

given good reasons for holding that the constable could not have seen Mt. Kala, Sohnu or Bhaga from the place where he was writing the report.

This lodging of this report may create some suspicion against the accused, but it does not carry the prosecution case very far. In Lachhi Ram v.

The Crown AIR 1923 Lah 330 Shadi Lal, C. J., observed that:

If a minor girl leaves her husband's house without any persuasion, inducement or blandishment held out to her by a man, so that she has got fairly

away from home and then goes to him, he cannot be deemed to have infringed the law, even if he does not restore her to her lawful guardian".

Similarly in Nura and Others Vs. Rex, following Emperor v. Ram Chander AIR 1914 All 376 and Ewaz Ali and Others Vs. Emperor, a learned

Judge of that High Court remarked that:

The most essential ingredient of the offence defined in Section 361 is that the minor should have been "taken" by the accused "out of the keeping"

of his lawful guardian.

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, or at

least without employing any force or practising any fraud on her, he cannot be held guilty u/s 361".

19. On the same analogy, it can be said here that if Mt. Roshni took it into her head to go to Tulsi's house in village Harkhar (Tulsi's sister being

married to her own brother), then in the absence of clear and cogent evidence as to enticement or abduction, no offence under Sections 363 and

366, I. P.C., is made out.

20. As Mr. Anand for respondents 1 and 2 rightly pointed out, the report, Ex. D. F. lodged by Mt. Goga at the Thana on 27-9-1955 goes in

favour of the respondents, i.e. suggests that Mt. Roshni went away to Tulsi's house in Harkhar, of her own accord. There is nothing in it to suggest

that the girl had been enticed or abducted. The police themselves decided to treat the case as a non-cognizable one under Sections 497 and 498,

I. P. C. No further action was taken and Mt. Goga was referred to the Courts.

Subsequently, the police took a somersault when Ram Lal, the

alleged husband of Mt. Roshni lodged a report, Ex. P. A., on 29-9-1955 and a case under Sections 363 and 366, I. P. C., was then registered

and investigated. Mr. Anand contended that the report of 29-9-1955, Ex. P. A. was manoeuvred by interested parties. He pointed out, in this

connection, that it was only one day earlier, i.e., 28-9-1955, that Ram Lal applied to the District Medical Officer for copies of relevant birth and

death entries. It is not necessary to speculate as to what happened behind the scenes, but so much is clear that the police themselves felt at first that

the case was one under Sections 497 and 498, I. P. C., and its subsequent amendment or enlargement to one under Sections 363 and 366,

I.P.C., was an afterthought.

21. In view of all that has been said above, I am unable to see that there are such compelling and substantial reasons, which would justify this

Court in upsetting the order of acquittal passed by the learned trial Magistrate. The offences, with which the respondents were charged in my

opinion, were not brought home to them beyond reasonable doubt. Consequently, they were rightly acquitted by the trial Court. This appeal,

therefore, must fail.

ORDER

22. The appeal fails and it is dismissed. The respondents are on bail; their bail bonds are discharged.