
Nanku and others Vs State

Criminal appeal. No. 1175 of 1950

Court: Allahabad High Court

Date of Decision: Jan. 13, 1954

Hon'ble Judges: Asthana, J

Bench: Single Bench

Advocate: Majeeduddin, for, 2 and 3, Mohd. Baqar Usmani, for 1 and 2 and Hasin Ahmad for No. 2, for the Appellant;

Final Decision: Allowed

Judgement

Asthana, J.

Bashir has been convicted under Sections 363, 366, 366A and 368, I.P.C. and has been sentenced to five years u/s 363,

I.P.C., seven years" rigorous imprisonment under each of the two Sections 366 and 366A I.P.C. and four years" rigorous imprisonment u/s 368,

I.P.C. by the Sessions Judge of Mirzapur for kidnapping a minor girl Kumari Phulwa from the lawful guardianship of her uncle Gulli with whom she

was residing at that time and for wrongfully concealing her in his house after kidnapping her. Nanku has been convicted under Sections 365A and

368, I.P.C. in respect of the same offences and has been sentenced to two years" rigorous imprisonment for each of these two offences and his

sentences have been made concurrent. Muhammad accused has also been convicted u/s 366-A and 368, I.P.C. and has been sentenced to five

years" rigorous imprisonment for each of these offences. Mohd. Shafi, Durga and Smt. Mahraji have each been convicted under Sections 366A,

368 and 372. I.P.C. for kidnapping her, wrongfully concenaling her after she had been kidnapped and for selling her in marriage to one Mathura

Brahman. Durga has been sentenced to seven years" rigorous imprisonment under Sections 366A and 372, I.P.C. and five years. rigorous

imprisonment u/s 368, I.P.C. Mohd. Shafi and Smt. Mahraji have each been sentenced to five years" rigorous imprisonment under each of the

Sections 366A, 368 and 372 I.P.C. Five appeals have been filed against the convictions and the sentences of the different accused. One appeal

has been filed by Bashir and Nanku. Another appeal has been filed by Muhammad, Durga, Mohd. Shafi and Smt. Mahraji have filed three

separate appeals from jail. As all these appeals arise out of the same judgment I propose to decide there by one judgment.

2. The prosecution case is that the girl Kumari Phulwa was the daughter of one Bhagwanta Chamar who was living in village Serai in Rewa State.

Her uncle Gulli and aunt Smt. Motia were living in Mirzapur. She left her father on account of her ill-treatment by her step-Brother and come to her

uncle Gulli and was living with him at Mirzapur. One Smt. Titilia who was her neighbour became intimate with Kumari Phulwa. One day when she

was going with Titilia. to the Bazar the accused Bashir met them on the way and inquired from Titilia whom he knew from before about Kumari

Phulwa as he got enamoured of her and wanted to keep her. Smt. Titilia told him that she could not say any thing in the matter and only her parents

could say anything about it. A few days afterwards when Kumari Phulwa was going to bazar to make some purchasee the accused Bashir met her

on the way and enticed her away to his house Smt. Motia defened for her but could not find her. After two or three days the husband of Smt.

Titilia came to know the Kumari Phulwa was in the house of Bashir and informed his wife Smt. Titilia about it who conveyed the information to

Smt. Motia. Thereafter Smt. Motia went to the house of Bashir with Lachman and Lal Bahadur and recovered Kumari Phulwa from there. Some

time afterwards on the Nagpanchmi day Kumari Phulwa had gone to swing in a Jhoola near the house of Nanku sweeper who is not the accused,

and while she was swinging she left dizzy and fell down. While she was lying on the ground the accused Nanku came there and took her away

from there on the pretext that she was wanted by her aunt. She was taken to the house of the accused Bashir where she was confined in a room in

the upper storey. On the third day at about midnight the accused Muhammad and Nanku removed her from there to the house of Muhammad

accused where she was kept that day and the next day. On the third day at about 8 a.m. in the morning she was sent away from there with the

accused Durga who took her to Raniganj in the district of Pratapgarh, and from there to Todarpatti to the house of the accused Smt. Mahraji. The

accused Muhammad Shafi was also living with Smt. Mahraji at that time. She was kept there for about eight or ten days and, thereafter, she was

sold to one Mathura Brahman for Rs. 500/-. The Station Officer of P.S. Raniganj got information of this fact and went to the house of Smt.

Maharaji. He found Durga, Mohd. Shafi and one woman there and on examining her he came to know that a girl had been brought and sold to

Mathura Brahman. He then searched the house of Mathura Brahman and from there the girl Kumari Phulwa was recovered. She one being

questioned by him told him how she had been kidnapped by the accused Bashir and Nanku while she was residing at the house of her uncle Gulli

in Mirzapur and how she was taken from place to place after being kidnapped and was ultimately sold to Mathura. She was then sent to Mirzapur

and information was also sent to the police at Mirzapur and thereafter this case was started. She was examined by Dr. P.R. Suri, Civil Surgeon,

Pratapgirh, after her recovery. On examination he found that she was about 12 years of age and was used to sexual intercourse. After further

investigation the accused were sent up for trial.

3. All the accused denied that they had kidnapped the girl or had committed the offences with while they were charged.

4. The accused Nanku stated that P.Ws. Nankoo and Khushial had hired his ekka and when he demanded hire from them they began to quarrel

with him and it was for this reason that he had been falsely implicated.

5. The accused Muhammad stated that a woman and a girl came on his ekka from Vindhvachal and a quarrel took place between him and them

about the ekka hire, and that several people assembled and intervened and thereafter he went away. He further stated that the girl passenger in the

ekka was Kumari Phulwa and she had got him falsely implicated in this case on account of the quarrel over the ekka hire.

6. The accused Bashir stated that one Mulai used to drive his ekka, that a sum of Rs. 8/- on account of Mulai wages was due from him and Smt.

Titilia who is the wife of Mulai came to demand the same from him and he said that he would pay the amount within two or four days, and that on

this Smt. Titilia began to abuse him and he pushed her and on account of this fact she had falsely implicated him in this case.

7. The accused Srimati Mahraji stated that P.W. Mathura was cutting her bamboo and she stooped him from doing so and on account of this fact

he was displeased with her and falsely implicated her in the case.

8. The accused Mohd. Shafi stated that P.W. Mathura asked him to work at his place and he refused it and for this reason he had been falsely

implicated in the case, He further stated that he used to do labour off and on at the house of Smt. Mahraji, but he denied that he used to live with

her. He stated that he often lived at his house.

9. The accused Durga stated that he along with his daughter-in-law and Mata Prasad had left Raniganj, that on the way at night they stayed at

Mata Prasad's house and Mata Prasad's wife asked his daughter-in-law to lend her Hansali to her as she was going to her father's house

promising to return it on her return from there the next morning, that in the morning when she demanded her Hansali from Mata Prasad he said that

his wife had not returned and that it would be given to her on her return. He further stated that Mata Prasad told them to sit at the well as he was

going to take medicine, and that he stayed there along with his, daughter-in law and was preparing bread when Mata Prasad came there with the

Sub-Inspector and got him arrested.

10. The prosecution examined a large number of witnesses in support of the case. Khushial and Nankoo were examined to prove that the girl

Phulwa was taken away from the house of Nankoo Sweeper where she had gone for swing by the accused Nanku. Sheonath Prasad, Mahadeo

and Kapoor were examined to prove that Kumari Phulwa was concealed in the house of Muhammad accused and from there was taken away by

Durga accused and his two sons to Pratapgarh. Matbura, Mahadeo Parasnath and Bachai were examined to prove that the girl was living at the

house of Maharaji where Mohd. Shafi was also living and was sold by them and Durga to Mathura for Rs. 500/- as a Brahman girl. Bachai is the

ekkawala on whose ekka she was taken away by Mathura after he had purchased her Besides these witnesses there is evidence of Dr. Suri, Civil

Surgeon, about the age of Kumari Phulwa and also the evidence of Sri Tirbhuwan Dutt Tewari, Station Officer, Raniganj and Hasinuddin the

Second officer of Raniganj who are more or less formal witnesses.

11. The accused Bashir examined two witnesses, viz. Satya Narain and his mother, Mariam. They have not deposed anything about the

occurrence. They have deposed about the construction in the house in which Bashir was living and where the girl according to the prosecution is

said to have been kept for some days. The accused Muhammad examined two witnesses, viz. Kallu and Asghar to prove the quarrel between him

and the uncle and the aunt of Phulwa about the ekka hire. These witnesses, however, did not support his case.

12. The learned Sessions Judge did not believe the evidence of Kumari Phulwa and the two witnesses, viz. Khushial and Nankoo who deposed

that she was taken away by the accused Nanku to the house of Bashir on the pretext that she was wanted by her and when she was lying on, the

ground near the Jhula. He was of the opinion that the statement which she had made before the police u/s 162, Code of Criminal Procedure was

the correct statement and relying on that statement are found the accused Bashir and Nanku guilty of the offence of kidnapping wrongful

concealment. He believed the evidence of Sheo Nath, Kapoor and Mahadeo against the accused Muhammad and also the evidence of Mathura,

Mahadeo and Parasnath regarding the sale the girl by the accused Durga; Maharaji and Mohd. Shafi. He, therefore, convicted and sentenced the

accused as stated above.

13. The question which first arises for consideration is whether Kumari Phulwa was kidnapped by the accused Bashir and Nanku. It is proved

from the evidence of Dr. Suri, Civil Surgeon, that she was about 12 years old and was a minor at the time of her examination. She was examined

after her recovery from the house of Mathura Brahman in Pratapgarh. In the circumstances there is no doubt that she was a minor at the time when

she is said to have been kidnapped. It is also proved from the evidence of her uncle Gulli and aunt, Srimati Motia that Kumari Phulwa had come

away from her father's place and was residing with them when she was kidnapped. The question, however, is whether she was kidnapped by the

accused Bashir and Nanku. Her statement before the Sessions Court is entirely different from that which she made before the police u/s 162,

Code of Criminal Procedure She stated before the sessions Court that on the Nagpanchmi day she had gone to swing is the (sic) which had been

put in from the house of Nanku Mehtar at about 4p.m., that she remained on the Jhoola up to 6 or 7 p.m., that when she was going to the Jhoola

she met her aunt Smt. Motia who had gone to the Jhoola at 2 p.m. and was returning from there, that owing to the swinging she felt giddy and lay

down near the lime-kiln there but got well after a short time, that Nanka accused who is the ekkawan of Bashir came there and said to her that her

aunt was at his house and was calling her, that he then took her to the house of Bashir, that she was kept there that night and the second day and

on the third day in the evening the accused Muhammad came and then at midnight Muhammad and Nanka veiled her in a Chader and took her to

the house of Muhammad that she remained at the house of Muhammad at night and the next day and on the third day fine accused Durga came

there and she was handed over to him by the accused Muhammad, and that Durga took her to his house. in her statement before the when she was

going to the (sic). The accused Bashir met her on the way and took her with him to his house on the pretext that he would get her swung on a good

Jhoola, that while she was staying at the house of Bashir the accused Nanka who is the ekkawan of Bashir was present there, that he went away

somewhere and returned after a short while with a person whose name was Muhammad and she was sent with Muhammad to his house and was

kept there in the upper storey, and that afterwards a person whose name is Durga came there and she was handed over to him by Muhammad.

There is nothing in her statement before the police that she felt giddy while she was swinging and and fell down on the ground and that while she

was lying there the accused Nanka came there and took her from there on the pretext that she was wanted by her aunt. There is also nothing in this

statement that the accused Bashir took her to the house of Muhammad. According to her statement she had once before been taken by Bashir

while she had gone to the bazar to purchase berra on the pretext that she was wanted by her aunt and was kept in his house for three or four days

and was raped there. In the circumstances it appears very unlikely that she would have again believed the statement of Bashir as was stated by her

before the police that he met her while she was going for the Jhoola and promised to give her a swing in a better Jhoola. Khushial and Nanku are

the two witnesses who were examined in support of her statement The evidence of Khushial is that his house is close to the house of Nankoo

Mehtar and he saw Kumari Phulwa swinging in the Jhoola in front of the house of Nankoo Sweeper and the accused Nanka taking her away from

there while she was lying on the ground after she had felt giddy. According to the statement of this witness Nankoo Mehtar is his brotherin law. He

stated that after Kumari Phulwa had been taken away by Nankoo accused Smt. Motia came there, but he did not tell her that Kumari Phulwa had

been taken away by the accused Nankoo. He further stated that the house of Smt. Motia is close to his house, there being only three rooms

between their houses, that Nankoo Sweeper and he had gone to the Municipality on work and he was not present when Kumari Phulwa came for

swinging. He did not see Smt. Motia coming to the Jhoola and swining before through according to the statement of both Motia and Kumari

Phulwa, Smt. Motia had gone to the same Jhoola with Smt. Titilia and enjoyed the Jhoola till 4 p.m. When she returned from there and when

Kumari Phulwa went there. According to the statement of Nankoo (P.W. 11) the accused Nankoo came to the Jhoola about one hour after he

reached there and by that time Kumari Phulwa had already regained consciousness and had told him that she had fallen from the Jhoola as she had

felt giddy. It is not quite clear why Kumari Phulwa whose house was only at a short distance from the Jhoola remained there for about an hour

after she had regained consciousness. Nankoo further stated that he went to his work at 2 p.m. He could not say if Khushial had also gone on

work to the Municipality or not. He clearly denied that Smt. Motia, wife of Gulli, had come to the Jhoola for a swing. If Nankoo and Khushial

were present at their houses or near the Jhoola they must have seen Motia who according to her statement went to the Jhoola at about 2 p.m. and

returned from there at 4 p. m. The fact that none of these two witnesses told Smt. Motia when she came to them to inquire about Kumari Phulwa

that they had seen the accused Nankoo taking her with him shows that neither of these two witnesses had seen the accused Nankoo taking Phulwa or

that Phulwa had gone to the Jhoola on that day. There is also no satisfactory reason why Phulwa did not accompany Smt. Motia if she had gone to

the Jhoola stated by her on that day. In view of these facts I am not satisfied that the statement of Kumari Phulwa and these two witnesses that

Kumari Phulwa had gone to the Jhoola on that day and was kidnapped from there by the accused Nankoo is correct. This evidence has also been

disbelieved by the learned Sessions Judge. As already stated above he has relied upon the statement of Kumari Phulwa before the police which

was quite different from that made before the Sessions Judge. I need hardly say that the learned Sessions Judge was wrong in relying upon that

statement of Kumari Phulwa as a substantive piece of evidence. He should have known that under no circumstances the statement of a witness

made before the police u/s 162, Code of Criminal Procedure is a substantive piece of evidence of can be relied upon by the prosecution. This

statement can be used by the accused only for the purpose of contradicting a witness in cross-examination. In fact the statement Ex-D. 1 was used

not by the prosecution but by the accused for the purpose of cross-examining Kumari Phulwa because she had made a contradictory statement

before the Sessions Court. In the circumstances the statement of Kumari Phulwa u/s 162, Code of Criminal Procedure is of no help to the

prosecution and when her statement before the Sessions Court and the evidence of the other two prosecution witnesses, viz. Khushial and Nankoo

on this point has been disbelieved there is no other evidence against the accused Nanku and Bashir that they kidnapped Kumari Phulwa or

concealed her in their houses.

14. At this stage I would like to point out that the learned Sessions Judge has committed another mistake in convicting the accused Bashir under all

the Sections 363, 366, 366A and 368 I.P.C. In fact the offence u/s 366 or 366A is a graver offence than the one u/s 363 which is a simple case of

kidnapping. Where a person is guilty u/s 366A he cannot be convicted at the same time of the minor offence u/s 363 or 366. Again the same

person cannot be convicted both for the offence u/s 366 and 368 for kidnapping and concealing the kidnapped person. See Bannu Mal v. King-

Emperor AIR 1926 Oud 560.

15. I am, therefore, of the opinion that there is no satisfactory evidence on the record in proof of the fact that the accused Bashir and Nanku

kidnapped the girl Phulwa and concealed her after kidnapping her. In the circumstances the offences under Sections 363, 366 or 366A and 368,

I.P.C. are not made out against them.

16. I shall now take up the case of the accused Muhammad who has been convicted under Sections 366A and 368, I.P.C. I shall first take up the

offence u/s 368, I.P.C. In order to establish this offence it is necessary for the prosecution to prove that the person in question had been

kidnapped or abducted that the accused know of such kidnapping or abduction, that he having such knowledge wrongfully concealed or kept such

person in confinement. It will thus appear that the first essential ingredient of this offence is that the person who is said to have been concealed

should have been kidnapped or abducted. The only evidence against this accused is that Kumari Phulwa was seen inside his house and that from

there she was taken away by him and Durga accused to some other place. I have already held above that the kidnapping of Kumari Phulwa by

Bashir. or Nanku has not been proved. There is no other evidence to prove that she was kidnapped by any other person. I do not think that

merely because she was found inside the house of Muhammad it necessarily leads to the conclusion that she was a kidnapped girl. It is not

improbable that she might some how have reached there either of her own accord or under some other circumstances. In any case, there can be no

presumption that she was a kidnapped girl merely because she was a minor and was found at the house of Muhammad. In the absence of any

satisfactory evidence that she was a kidnapped girl the offence u/s 368, I.P.C. is not made out against this accused even if she was found at his

house and from there was taken by him and Durga. Moreover, it is doubtful that this accused can be convicted simultaneously of both the offences

under Sections 366A and 368, I.P.C.

17. Coming now to the offence u/s 366A, I.P.C. There is the evidence of three witnesses, viz. Sheonath Prasad, Kapoor and Mahadeo who

deposed that they saw this accused, Durga and Kumari Phulwa coming out of the Patak of the Bara in which the accused Muhammad is living and

going in the lane towards the west. Sheonath Prasad has got a shop in the lower storey of the house in the upper storey of which the accused

Muhammad lives Kapoor has got a shop adjoining those of Sheonath Prasad and Mahadeo in the same building and Muhammad accused lives in

the upper storey of the same building. There is nothing in the cross-examination of these three witnesses to show that they have got any enmity with

Muhammad. In the circumstances there does not appear any reason to disbelieve their evidence. It further appears from the evidence of Mathura,

Mahadeo and Parasnath that the girl Phulwa was subsequently sold to Mathura Brahman as a Brahman girl though she was a Chamar girl. Section

366A provides that whoever by any means whatsoever induces any minor girl under the age of eighteen years to go from any place or to do any

act with intent that such girl may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person will be

deemed to have committed an offence under this section. It is proved from the evidence of Sheonath Prasad, Kapoor and Mahadeo that

Muhammad accused handed over the girl Phulwa to Durga with the object that she might be forced or seduced to illicit intercourse by the person

to whom she might be sold. There is no doubt that there is definite evidence of Dr. Suri that she was below eighteen years at the time of her

examination by him. There is no doubt that there can be no direct evidence about the intention of a person who induces such a girl to go from one

place to another with the intention that she may be forced or seduced to illicit intercourse; it has to be inferred from the surrounding circumstances

of each particular case. In my opinion in this case the subsequent circumstances clearly indicate that the accused Muhammad had the intention

when sending the girl Phulwa with Durga that she might be subjected to illicit intercourse. In view of this fact I am of opinion that the offence u/s

366A has been satisfactorily proved against this accused.

18. I now take up the case of the other three accused viz. Srimati Mahraji, Mohd. Shafi and Durga. The evidence against these accused is of

Mathura, Mahadeo and Parasnath. Mathura is the person from whose house the girl Phulwa was recovered. His evidence is that he was in need of

a Brahman girl for the marriage of his younger brother and in that connection the accused Mahraji, Mohd. Shafi and Durga came to him and

informed him that they had a Brahman girl and could arrange for the marriage of his younger brother. The evidence of Mathura further shows that

they wanted Rs. 800/- as the price of the girl but he was not prepared to pay more than Rs. 500/- and so the transaction could not be settled on

the first day. He further stated that Smt. Mahraji and Mohd. Shafi approached him again and asked him to come to their house when the thing

would be settled. Thereafter Mathura went to Mahadeo and Parasnath to consult them in the matter and take their advice and with these two

witnesses he went to the house of Smt. Mahraji and Mohd. Shafi where Durga was also present and the bargain was settled at Rs. 500/- and the

girl Phulwa was handed over to him as a Brahman girl and he took her away in the ekka of Bachai Mahadeo and Parasnath have corroborated his

statement. Bachai has deposed that Kumari Phulwa was taken by Mathura in his ekka, There does not appear any reason to disbelieve the

evidence of these witnesses. If Smt. Mahraji, Durga and Mohd. Shafi had not sold the girl to Mathura it is not clear how Mathura came to know

their names. There is no satisfactory evidence on the record to show that Mathura as not any enmity or any other reason to falsely implicate them.

These persons knew full well that Kumari Phulwa was a Chamatin and her marriage could not legally be performed with the brother of Mathura

who was a Brahman. Their object in selling the girl was that she might be forced to illicit intercourse by the person to whom she could not be

married. In the circumstances I am of opinion that the offence u/s 372, I.P.C. has been clearly made out against them.

19. As far their conviction u/s 368, I.P.C. I am of opinion that it cannot be maintained because there is no satisfactory evidence on the record in

proof of the fact that the girl had been kidnapped. I am further of the opinion that where an accused person has been convicted u/s 372, I.P.C. for

selling a minor girl for immoral or unlawful purpose or for the purpose of illicit intercourse he cannot, at the same time be convicted u/s 366A,

I.P.C. Section 366A will be applicable where there is no sale of the girl, but she is induced by some other means to go from any place or to do any

act so that she might be forced or seduced to illicit intercourse with another person., Where she has been sold with that object the appropriate

section under which the accused can be convicted is Section 372, I.P.C. I am, therefore, of opinion that the conviction u/s 366A also cannot be

maintained.

20. The result is that the appeal of Bashir and Nanku is allowed and their conviction and sentences for the various offences are set aside. As they

are on bail they need not surrender. Their bail bonds are discharged. The appeal of Muhammad is allowed only to this extent that his conviction

and sentence, u/s 368, I.P.C. is set aside but his conviction u/s 366A, I.P.C. and the sentence of five years rigorous imprisonment under that

section is maintained. He is on bail. He shall surrender to it and serve out his sentence. The appeal of Mohd. Shafi . Srimati Mahraji and Durga is

allowed only to this extent that their conviction and sentences u/s 372, I.P.C. are maintained but their conviction and sentences under the other

sections are set aside. As they are in jail they shall serve out their sentence u/s 372, I.P.C.