(1959) 07 MP CK 0002

Madhya Pradesh High Court (Indore Bench)

Case No: Criminal Appeal No. 271 of 1958

Pirmohammad Kukaji		APPELLANT
	Vs	
The State of Madhya Pradesh		RESPONDENT

Date of Decision: July 28, 1959

Acts Referred:

- Dissolution of Muslim Marriages Act, 1939 - Section 2
- Penal Code, 1860 (IPC) - Section 366, 452

Citation: AIR 1960 MP 24 : (1960) CriLJ 83 : (1959) 4 MPLJ 1193

Hon'ble Judges: P.V. Dixit, J

Bench: Single Bench

Advocate: G.L. Ojha, for the Appellant; B.S. Johar, Government Advocate, for the Respondent

Judgement

P.V. Dixit, J.

The appellant Pirmohammad was tried by the third additional Sessions Judge of Indore on charges under Ss. 366 and 452, I. P. C. At the end of the trial, ''the learned additional Sessions Judge found the appellant guilty of both the offences and sentenced him to one and half years'' rigorous imprisonment u/s 366, I. P. C., and to one year''s rigorous imprisonment u/s 452, I P. C. The sentences are to run concurrently. The accused has now preferred this appeal against the convictions and sentences.

The case for the prosecution was that Mst. Fatama was married to the appellant some ten years back when she was a minor. After the marriage, the accused did not keep her with him. Mst. Fatma, therefore, continued to live with her parents Kasam and Mst. Suraj. Two years after the marriage the parents of Mst. Fatma entreated the accused to keep Mst. Fatma with him and even sent messengers to him to persuade him to do so. But the appellant paid no heed to these entreaties. The parents then gave away Mst. Fatma in Natra to one Taju. Mst. Fatma got a child

from Taju.

Sometime before 17th February 1957, Mst. Fatma came to her parents'' house to help her mother who was then expecting a baby. It was alleged by the prosecution that on 17th February 1957 at about noon the accused accompanied by seven or eight persons, all armed came to the house of Kasam during his absence, forced open the door of the house and after entering the house forcibly took away Mst. Fatma. The accused and his companions took Mst. Fatma in a cart to the village of the accused. The child which Mst. Fatma had begotten from Taju was left in the house.

According to the prosecution when Mst. Suraj went to the rescue of her daughter, the appellant and his companions gave her a push and she fell; down. Mst. Suraj then called Narayan and sent him to inform her husband and to call him to the house. Kasam returned home and after getting the details of the incident from his wife lodged a first information report on 17-2-1957 at about 9-30 p.m. in Palasia Police Station, Indore. The police then took up investigation and arrested the accused.

The plea of the appellant was that Mst., Fatma went with him of her own accord. He denied having gone to the house of Kasam. He did not deny the fact that on the material date he was in village Naita Mundla where Kasam resided.

The conviction of the appellant is based mainly on the evidence of Mst. Suraj who deposed: to the marriage of Mst. Fatma with the accused, his refusal to keep her with him, the subsequent Natra with Taju and to the fact of the appellant visiting her house with two or four companions all armed with farsa and swords and forcibly taking away Mst. Fatma with them. As Mst. Fatma died before the trial of the accused her evidence was not available.

The learned Additional Sessions Judge accepted the evidence of Mst. Suraj whom he found to be "a very unsophisticated woman". He found her evidence corroborated by the statement of Narayan who was called by Mst. Suraj immediately after the incident and sent to her husband for informing him of the incident and of the witnesses who had seen the appellant and his companions driving away in a cart with Mst. Fatma. The learned trial Judge came to the conclusion that by going armed to the house of Fatma for causing hurt to Mst. Fatma and'' for forcibly taking her away the appellant committed an offence u/s 452, I. P. C. and that he also committed an offence u/s 366, I. P. C., when he forcibly took away Mst. Fatma.

During the trial the accused contended that as. Mst. Fatma was his wife there could be no offence of abduction when he took her with him, even if against her will. The learned trial Judge rejected" this plea observing that according to the evidence of Abbas, the village Patel, for the validity of a Natra marriage it was not necessary that there should have been a formal divorce earlier between Mst. Fatma and the appellant. He further observed that even if Mst. Fatma continued to be the wife of

the appellant Pinnohammad yet he would be guilty of abduction when he forcibly took Mst. Fatma with him. In support of this view, the learned trial Judge relied on Mt. Sakhu v. The Crown AIR 1951 Nag 349 and Dayaram v. State AIR 1953 MP 182.

In my judgment, the conviction of the appellant for the offences under Ss. 366 and 452, I. P. C. cannot be sustained. It is obvious from the language of Ss. 362 and 366, I. P. C. that if a husband by force compels his wife to come to him and to live with him as his wife, he does not commit any offence u/s 366, I. P. C. ''Abduction'' as defined in Section 362, I. P. C. is merely an auxiliary act, not punishable by itself. It becomes a criminal act only when it is done with one or other of the intents specified in Ss. 364, 365 and 366, I. P. C. Section 366, I. P. C. requires that abducting must be with intent that the woman may be compelled'' or knowing it to be likely that she will be compelled to marry any person against her will or that: she may be forced or seduced to illicit intercourse.

There can be no such intent when a husband forcibly takes his wife to his house so that she may live with him. Under the second part of Section 366, I. P. C., criminal intimidation or abuse of authority on compulsion for inducing any woman to go from any place must also be with intent that she may be forced or seduced to illicit intercourse with some person. Now, here there is no evidence whatsoever to show that on 17th February 1957 Mst. Fatma had ceased to be the wife of the appellant. Mst. Fatma might have been given, away in Natra marriage to Taju.

But that fact itself cannot lead to the conclusion that her marriage with the appellant had been Ivalidly and legally dissolved. In fact, the statements of Abbas and Suraj clearly show that Mst. Fatma was never divorced by the appellant. In connection with the validity of the divorce and subsequent marriage, there can be no such thing as an informal divorce. The divorce has to be valid and according to law before the second marriage can be regarded as valid.

Learned Government Advocate admitted that there was no evidence to prove the dissolution of marriage of Mst. Fatma with the appellant and that if Mst. Fatma was the wife of the appellant on 17th February 1957 the appellant could not be convicted u/s 366, I. P. C., he, however, faintly argued that as Mst. Fatma was married to the appellant during her minority, she had the option to repudiate the marriage on attaining puberty and that her remarriage with Taju was in itself an exercise of the option. He relied on Shafi Ullah Vs. Emperor, .

I am unable to accept this contention. Before the Dissolution of Muslim Marriages Act, 1939 was enacted the option of repudiating a marriage on attaining puberty was available to a girl only when the marriage had been contracted for her during her minority by any guardian other than the father or the grand-father. Here, Mst. Fatma''s marriage with the appellant was contracted by her father and not by any guardian other than the father. That being so, she had no right of repudiating the marriage on attaining puberty. Again the mere exercise of the option of repudiation

does not operate as a dissolution of the marriage. The repudiation is required to be confirmed by the court, (see Mafizuddin Mandal Vs. Rahima. Bibi, .

In Shafi Ullah Vs. Emperor, , Young J. no doubt observed that the fact of second marriage was itself an evidence of repudiation of the first marriage by the girl on attaining puberty. Those observations seem to be obiter as the learned Judge had held earlier that the first marriage of the girl in that case was invalid. The observation does not seem to "be in consonance with the principles of Mohamma-den Law (see Mulla''s Mohammaden Law pp. 243-244, 14th Edn.). The Dissolution of Muslim Marriages Act in no way helps the prosecution as even if that Act was in force in the territory of the former Madhya Bharat on 17th February 1957 there was no decree of the court dissolving the marriage of Mst. Fatma with the appellant.

Learned Government Advocate did not rightly support the view taken by the learned trial Judge on the authority of AIR 1951 Nag 349 and AIR 1953 MP 182 that even if Mst. Fatma was the wife of the appellant still he would be guilty u/s 366, I. P. C. when he took her away forcibly with him. The view taken by the learned trial Judge is clearly wrong. The authorities on which he has placed reliance do riot really support that view. In both those cases, the question that was considered was of the right of selfdefence when a husband attempts to take away his wife from her parents'' house forcibly and assaults her or attempts to assault her.

The use of the word ''abduction'' in the judgments in those cases is for indicating the taking away of the wife forcibly and not for holding that a husband commits an offence u/s 366, I. P. C. when he forcibly carries away his wife against her will from her parents'' house. The learned trial Judge went altogether wrong in reading those cases as authorities to support his view that a husband commits an offence u/s 366, I. P. C. when he forcibly carries away his wife against her will from her parents'' residence. The conviction of the appellant u/s 366, I. P. C. must, therefore, be set aside.

The appellant''s conviction u/s 452, I. P. C. is also erroneous. The evidence of Mst. Suraj shows that the appellant and his companions went armed to her house for the purpose of forcibly taking away Mst. Fatma. This fact is not sufficient to support a conviction u/s 452, I. P. C. which requires that the house trespass should have been committed in order to cause hurt to or to assault or to wrongfully restrain any person after having made preparation for that purpose.

For a conviction u/s 452, I. P. C. it is necessary to prove that the dominant intent of the accused was to cause hurt to or to assault or to wrongfully restrain any person. Here, the accused no doubt went armed to the house of Kasam. But he went there primarily for the purpose of forcibly taking away Mst. Fatma and not in order to cause hurt to or to assault her. No dubt by going armed the accused intended to intimidate the inmates of the house and thus facilitate his object of taking away Mst.

Fatma with him. But the fact that he had the intention to intimidate Mst. Fatma and her mother, or that he caused them hurt in forcibly carrying Mst. Fatma does not mean that he went to the house of Kasam for the purpose of causing hurt to or assaulting or wrongfully restraining any inmate of the house. In my opinion, on the evidence on record the appellant can be held guilty only u/s 448, I. P. C.

Learned counsel for the appellant urged that the statement of Mst. Suraj that the appellant forcibly broke open the door of the house and entered the house with his companions all armed should not be acted upon in the absence of any corroborative evidence. I do not find anything in her evidence to persuade me to discard her statement. It is true that the prosecution did not produce any witness who might have seen the appellant and his companions entering Mst. Suraj''s house after breaking open the doors.

But, as Mst. Suraj herself said, no one was present at that time in the house except herself and Mst. Fatma and the neighbours were also not in their houses. No eye-witness could, therefore, be produced to corroborate her statement. Mst. Suraj''s evidence receives indirect corroboration from the statement of Narayan whom she called immediately after the incident and sent to her husband. The suggestion of the accused that Mst. Fatma went with him voluntarily and he had no occasion to enter the house is unsupported by any evidence.

For these reasons, the convictions and sentences of the appellant under Ss. 366 and 452, I. P. C., are set aside. The appellant Pirmohammad is, however, found guilty u/s 448, I. P. C. He has already served out rigorous imprisonment for eleven days. In my opinion it would meet the ends of justice if he is sentenced u/s 448, I. P. C. to the imprisonment already served out by him.