

**(1928) 05 CAL CK 0026**

**Calcutta High Court**

**Case No:** None

Fedu Sheikh and Others

APPELLANT

Vs

Emperor

RESPONDENT

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**Date of Decision:** May 9, 1928

**Citation:** 117 Ind. Cas. 862

**Hon'ble Judges:** Jack, J; Charu Chander Ghose, J

**Bench:** Division Bench

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### **Judgement**

1. In this case the petitioners were charged under Sections 147 and 366 of the Indian Penal Code. As regards the charge u/s 366 it ran as follows:

That you on or about the night of the 12th day of June, 1927, at Dasora Ambori Village kidnapped Tola Bibi, a woman with intent that she may be compelled to marry against her will or may be forced to illicit intercourse and thereby committed an offence punishable u/s 366 of the Indian Penal Code....

2. The learned trial Judge directed the Jury that the portion of Section 366 relating to the intention of compelling the girl to marry against her will did not apply in the present case and without amending the charge u/s 147, Indian Penal Code left to the Jury the case with regard to that charge, and with regard to the question of guardianship the learned trial Judge did not charge the Jury at all but towards the end of the charge he told the Jury as follows:

3. "If she is 14 or below 16 and if you believe the evidence the accused will be guilty u/s 363, Indian Penal Code irrespective of any indent with which she was taken as she was living under the lawful guardianship of her mother and step-father." It is to be remembered that the charge against the petitioners u/s 386 was one of kidnapping only, but the learned Judge directed the Jury in several places in his charge to the following effect: "So you see the accused persons may be guilty u/s 366 if they kidnapped or abducted the girl in order that she may be forced or seduced to illicit intercourse either when the girl is under 16 or above 16" The Jury

returned a unanimous verdict of guilty u/s 147 and by a majority of 4 to 1 a verdict of guilty u/s 366 against the petitioners, The learned trial Judge accepted the verdict and convicted the petitioners under Sections 147 and 366 and sentenced each of them to undergo rigorous imprisonment for four months u/s 147, Indian Penal Code and two and half years u/s 366, Indian Penal Code the sentences in each case to run concurrently.

4. There was an appeal to the Sessions Judge of the Assam-Valley Districts and the learned Sessions Judge by his judgment and order affirmed the said convictions and sentences and dismissed the appeal. The learned Sessions Judge in the course of his judgment dealing with the point that the Judge in the trial Court has misdirected the Jury when he led the Jury to believe that it was open to them to return a verdict of guilty u/s 366, Indian Penal Code, of abduction with the intention that the girl in question might be forced or seduced to illicit intercourse whereas the charge u/s 366, Indian Penal Code, was one of kidnapping with such intention observed as follows: "He" that is, the Judge in the trial Court "told the Jury that they must first determine the age of the girl, and he then went on to say, if she is below 16, and if you believe the evidence, the accused will be guilty u/s 363, Indian Penal Code, irrespective of any intent with which she was taken. If she was ravished by Baru as alleged by her, and the other accused knew that she would be so ravished, and with that intent, she had been carried away by them, then all will be guilty u/s 366, Indian Penal Code, whether the girl was below or above sixteen. The Jury were not asked to state their opinion as to whether the girl had or had not been proved to be below sixteen, and the above and other similar passages in the charge may well have given them the impression that, if they believed the evidence regarding the actual occurrence, and if the intention or knowledge of the accused was such as is described in Section 366, Indian Penal Code, it did not very much matter whether the girl was below or above sixteen. It is, therefore, possible that it was the intention of the Jury to find the appellants guilty of abduction u/s 366, Indian Penal Code, an offence with which, they had not been charged, but it cannot be positively asserted that this was really the case. In my opinion there is a misdirection in the charge, in that the Jury were led to believe that it was open to them to return a verdict of guilty of abduction u/s 366 Indian Penal Code, though the appellants had not been charged with abduction. I am not, however, prepared to hold positively that the verdict was erroneous owing to the said misdirection, even in the process by which it was arrived at, and still less am I prepared to hold that the said misdirection has in fact occasioned a failure of justice."

5. In our opinion, as has been laid down in this Court in a series of cases the last of which is [Isu Sheikh Vs. King-Emperor](#), , notice of a charge of kidnapping u/s 366, Indian Penal Code, is not a fair, proper or sufficient notice of a charge of abduction. There is very great sense in that, because on a charge of abduction u/s 366, Indian Penal Code, the accused has got to meet that charge on facts different from those which would be involved in a charge of kidnapping u/s 366. It is, there fore,

impossible to say that no prejudice has been caused to the accused in the circumstances which have happened in this case. At any rate, it is very doubtful whether prejudice has been caused or not; and in that view of the matter the accused are entitled to ask that the convictions and sentences in this case should be set aside and that they should be re-tried. We think in the circumstances of this case that there is very great reason in the demand made on behalf of the petitioners and we accordingly set aside the conviction and sentences and direct that the petitioners be re-tried in accordance with law. The petitioners who are on bail will remain on the same bail as they are on now pending further orders of the trial Court.