(1957) 09 BOM CK 0055

Bombay High Court

Case No: Criminal Appeal No. 724 of 1957

State		APPELLANT
	Vs	
Ramji Vithal Chaudhari and Another		RESPONDENT

Date of Decision: Sept. 24, 1957

Acts Referred:

- Bombay Hindu Divorce Act, 1947 - Section 15
- Bombay Probation of Offenders Act, 1938 - Section 5(1)
- Law Reports Act, 1875 - Section 3
- Penal Code, 1860 (IPC) - Section 34, 361, 363

Citation: AIR 1958 Bom 381 : (1958) 60 BOMLR 329 : (1958) CriLJ 1296 : (1958) ILR (Bom) 505

Hon'ble Judges: Shelat, J; Miabhoy, J

Bench: Division Bench

Advocate: V.H. Gumaste, Asst. Govt. Pleader, for the Appellant; G.N. Vaidya, for the Respondent

Judgement

Shelat, J.
This appeal raises a point of some interest on the interpretation of Section 361 of the Penal Code.

2. The facts alleged by the prosecution were that wit. Rukhmabai was married to the respondent No. 1 Ramji Vithal Chaudhari, original accused No. 1, when Rukhmabai was only 7 or 8 years of age. For nearly 10 to 12 years the 1st respondent and the said Rukhmabai lived as a husband and wife and during that period a daughter by the name of Suman was born to her. In or about 1943 disputes arose between the 1st respondent and Rukhmabai. In or about the year 1944-45 the 1st respondent) married again with the result that Rukhmabai went to live with her father, one Hari Trimbak, with her minor daughter Suman. These disputes ultimately culminated in

Rukhmabai filing a suit for divorce in the Court of the District Judge at Dhulia. A decree was passed in that suit in favour of Rukhmabai which ordered that the marriage between Rukhmabai and the 1st respondent was thereby annulled. The decree also directed that the minor girl Suman was to remain in the custody of Rukhmabai "till the defendant (the 1st respondent) gets himself appointed as the guardian of the minor under the Guardians and Wards Act". It is admitted that since the passing of the decree the minor Suman was residing with her mother Rukhmabai at the house of Hari Trimbak and Rukhmabai was and has been looking after the minor girl Suman, keeping her and giving her the necessary education.

3. At all material times respondent No. 1 was residing in a different village called Shahade, which is about two miles away from the village Shinde where Hari Trimbak, Rukhmabai and Suman Were residing.

4. On 31-1-1955 Suman had gone to the school at Shinde. At about 2 p.m. she, as usual, cleansed her class room and was there with her friend one Suryaprahba. At that time the 1st respondent went to the school and passing through various classes reached the class in the Sixth form where Suman was sitting. Immediately he entered that class room, he started pulling Suman forcibly from out of the class. Both Suman as well as some teachers of the school resisted the 1st respondent taking away Suman but the 1st respondent paid no heed to them. He forcibly took Suman out of the class room and to the wire compound of the school and picking her up placed her in a bullock cart which was kept ready there by the 2nd respondent. Both the respondents thereafter drove Suman away in the bullock cart and thus carried her to the village called Small Shahade. Hari Trimbak in course of time was informed of this incident by the school teachers, and in consequence of that information Hari Trimbak lodged an application with the Police Patil narrating the incident of the respondents having carried away Suman. The Police Patil wrote out a khabari report and sent it to the Out-Post of Misal in Nandurabar Taluka. It appears that the police officer concerned had some doubt as to whether the respondents could be said to have committed an offence of kidnapping u/s 363 with the result that there was some delay in the matter of proceeding with this case. It appears that the case was in fact referred to for the opinion of the Police Prosecutor at Nandurbar. Ultimately both the respondents were charge-sheeted of having committed an offence u/s 363 of the Penal Code.

5. The defence taken by the 1st respondent was that the girl had stayed widi him only for 2 or 4 days and that thereafter he had sent her back to Shinde in a bullock cart. His case was that he was the father of the girl and as such her lawful guardian. On merits, his case was that Suman was in the habit of coming to his place at Shahade on several previous occasions. On this occasion also Suman had gone up to the 1st respondent''s house and stayed with him for 4 or 5 days as usual and that therefore he had not committed any offence. He also contended that as a father and, therefore, a legal guardian of the girl, it was his right to settle and perform the

marriage of Suman, that Rukhmabai and her father had made a common cause with one Gopal Narayan to deprive the 1st respondent of that right and had falsely fabricated a case of kidnapping against him.

6. The defence taken by the 2nd respondent was that the 1st respondent did not kidnap the girl and that, therefore, there was no question of his having helped the 1st respondent in any act of kidnapping. He also stated that he and the 1st respondent were returning to Shahade after getting flour from the Flour Mill at Shinde and as usual the girl Suman had accompanied them to Shahade and that 4 or 5 days after her stay there she was sent back by them at her mother''s place at Shinde.

7. Upon the evidence before him of witness Suman and certain teachers as also the companion of Suman wit. Suryaprabha and others the learned Magistrate came to the conclusion that that evidence established beyond any doubt that respondents 1 and 2 took away the girl Suman somewhere between 2 p.m. to 3 p.m. on 31-1-1955 from the school at Shinde. Upon this evidence he also came to the conclusion that the 1st respondent had committed the act of taking away from the school the girl Suman as alleged by the prosecution. In other words, the finding of the learned Magistrate was that the girl Suman had been taken away by the 1st respondent forcibly as alleged by the prosecution and disbelieved the case of both the respondents that Suman had gone to her father''s place at Shahade willingly as On the previous occasions. Mr. Vaidya, who appears for both the respondents, has not challenged in this appeal the findings of fact by the learned Magistrate. Although the learned Magistrate came to these conclusions, he found that by reason of the 1st respondent being the father of the girl and therefore the legal guardian, he could not be said to have been guilty of kidnapping within the meaning of Section 361 and, following certain cases referred to by him in his judgment, came to the conclusion that the prosecution had failed to establish their case and acquitted both the respondents. The learned Magistrate''s attention was pointed to a decision of a Division Bench of this Court in Criminal Revision Application 313 of 1917, Imperator v. Soni Damodar Kuberdas, decided by Heat on and Shah JJ., on 30-11-1917 (A). The learned Magistrate, however, felt that since that was an unreported judgment, it was not binding upon him and preferred to rely upon the decisions cited by him of other High Courts which he thought had decided the question before him. It is against this order of acquittal of both the respondents that the State has presented this appeal.

8. The question for our consideration is whether the 1st respondent, being the father of the girl Suman can be said to have taken the girl away from the lawful custody of her mother Hukhmabai as-contemplated by Section 361 of the Penal Code and (hereby rendered himself liable for the consequences under that section.

9. The learned Asstt. Government Pleader contended that the fact the respondent No. 1 happens to be the father of the girl in question is not material and that fact

cannot avail the 1st respondent as and by way of defence, if it is established that he was not entitled at the material date to the custody of the girl and had committed the act of forcibly taking away the girl without the consent of the mother who was then the lawful guardian. The contention of the learned Assistant Government Pleader was based upon the decree that was passed in the divorce suit already referred to. In the course of the judgment it was stated as follows :

"As regards the minor daughter of the plaintiff (Rukhmabai), I had caused her to be brought before me. I have examined her and she appears to be a tender girl of 7 years and it would not be in the interest of the minor that she should be at present handed over to the custody of the defendant (1st respondent). The plaintiff (Rukhmabai) has stated that she would have no objection if her daughter goes to live with the defendant after she is sufficiently grown up. The defendant (1st respondent) if so advised may make an application for his appointment as the personal guardian of the minor. In this suit I am not prepared to make an order that the minor should be handed over to the defendant.""

The passage above cited makes it abundantly clear that the learned Judge, who decided that divorce suit, was firmly of the opinion that in the interest) of the minor it was not proper and advisable to hand over the custody of the minor to her father. The decree expressly directs that it was Rukhmabai, who was to have the custody of the minor girl and that Rukhmabai was to continue to have that custody of the minor girl until the respondent No. 1, if so advised, made an application for his appointment as the personal guardian of the minor. That order was made by the learned Judge, it would seem, u/s 15 of the Bombay Hindu Divorce Act, being Act No. XXII of 1947. That section provides that a Court dealing with matters under that Act may from time to time pass such interim orders-and make such provisions in the decree as it may deem just and proper with respect to the custody, maintenance and education of minor children, the marriage of whose parents is the subject of such suit, and may, after the decree is passed, upon an application before it make, revoke, suspend or vary from time to time all such orders and provisions with-respect to the custody, maintenance and education, of such children as might have been made by such; decree or interim orders in case where the suit for obtaining such decree was still pending. It is clear from the provisions of Section 15 that the District Court of Dhulia was competent under that section to pass the order which it did in the matter pf the minor Suman. The position, therefore, that "would seem-to follow from this order would be that although the 1st respondent happened to be the natural guardian of the girl in question, and was therefore under Hindu law entitled to the custody of the girl, under the order passed by the learned District Judge the custody of the girl was handed over to Rukhmabai until such time as the 1st respondent made an application, presumably u/s 15 of the Bombay-Hindu Divorce Act of 1947, & either had the said order revoked or had himself appointed as the personal guardian of the minor. It is, therefore, clear that by virtue of this order it was Rukhmabai who was entitled to the custody of the

minor Suman and the 1st respondent was not entitled to have the custody of the girl Suman,

10. The learned Assistant Government Pleader pointed out to us the three decisions which seem to have been relied upon by the learned Magistrate. Those are Sital Prasad and Others Vs. Emperor, ; Dhuma Manjhi and Others Vs. Emperor, ; and In re Chowdarayya AIR 1938 Mad 656. It is somewhat difficult to understand as to how the learned Magistrate thought that the decisions in these three cases were of any assistance to him in coming to the conclusion which he did, as against the decision in Imperator v. Soni Damodar (A) which decision, as we have already said, was in fact cited before him. In the first place, the facts in all the three cases were entirely different from the facts before him. In the second place, the only proposition that has been laid down in these three cases is that where a minor in question happens to be in the custody of a do facto guardian, if a legal guardian were to take such a minor from the custody of such a defacto guardian, the case would not fall u/s 393. In our opinion, that is all that these three cases decide. In other words, the point that seems to have been decided in these three cases was that where there was a competition between de facto guardian and a legal guardian, the de facto guardian cannot be said to have higher rights than the natural guardian and therefore there would be no question of taking a minor girl away from the custody of a lawful guardian. It is obvious from the facts, which have been mentioned hereinabove, that in this case the question of the mother being a de facto guardian does not and cannot arise.

11. The learned Assistant Government Pleader then contended that Rukhmabai, by reason of the order passed by the learned District Judge in the aforesaid divorce suit, was a lawful guardian within the meaning of Section 361, that the girl Suman was in She keeping of her mother, the lawful guardian and therefore the act of forcibly taking away the girl by the 1st respondent must be said to be taking out of the keeping of the lawful guardian as provided for in Section 361 and that such taking, admittedly being without the consent of the lawful guardian, constituted kidnapping as defined by Section 361. He has relied upon the unreported judgment in Criminal Revn. Appl. No. 313 of 1917 (A) and has urged that the facts in that case were on all fours with the facts of this case and that therefore, on the authority of that decision the act in question of the 1st respondent amounted to kidnapping. Mr. Vaidya, on the other hand, contended that the 1st respondent being the father was, under the Hindu law, the natural guardian of the girl and that so long as he was alive he continued to he the natural guardian of the girl and that therefore, there could be no other person who can be a guardian, of the girl. He also contended as a corollary of this proposition that the girl Suman continued to be in the keeping of her father in spite of the order made by the District Court. He urged that there was a distinction between the order made under the Bombay Hindu Divorce Act of 1947, under which the custody of the girl was given to the mother and an order appointing a guardian under the provisions, of the Guardians and Wards Act. He

therefore, urged that a natural guardian cannot be said to be guilty of taking his own minor child from out of the keeping of the lawful guardian, as by virtue of his being the natural guardian, the keeping of the girl continues with him.

12. We are not, however, able to agree with the submissions made by Mr. Vaidya. The words lawful guardian" as is apparent from the language of Section 361 are of wider connotation ''than the words "legal guardian." The word "lawful"'' in that section has been deliberately used in its wider connotation, and that word would mean that wherever the relationship of a guardian and a ward is established by means winch are lawful and legitimate that relationship is intended to be included within the meaning of the words lawful guardian'' as used in flu''s section. In the case of State Vs. Harbansing Kisansing, , it was observed that the words "lawfully entrusted" which are used in the explanation to Section 361 must be liberally construed and that it was not intended that the entrustment should be made in a formal manner nor need there be any direct evidence available about such entrustment. It cannot be disputed in this case that Rukhmabai was at the material time the lawful guardian of the minor Suman by virtue of the order passed by the learned District Judge in her favour handing over the custody of the minor Suman to her. It is obvious from the provisions of that order that the relationship between her and the girl was established by means which were both lawful and legitimate. As regards the contention of Mr. Vaidya that so long as the father was alive the keeping of the girl continued with him notwithstanding the order made by the Court has, in our opinion, no substance. The order expressly states that the custody of the girl Suman was to remain with the mother. The effect of that order is clear and that was that the 1st respondent, notwithstanding his being the father of the girl, was not to have the custody of the minor. That order was made by virtue of Section 15 of the Bombay Hindu Divorce Act of 1947 and was made as is apparent from the order itself, after the Court had considered that it was beneficial and proper in the circumstances that the girl should remain with her mother. It seems to us, therefore, obvious that the 1st respondent was not only not entitled to keep the girl in his custody but was in tact directed not to disturb the keeping of the girl by Rukhmabai until he made an application u/s 15 of the Bombay Hindu Divorce Act, 1947, to revoke or vary the order passed in that suit. We are, therefore, of the view that in the circumstances existing in this case there could be no doubt that the 1st respondent did take, the girl Suman from out of the keeping of the lawful guardian without the consent of such lawful guardian.

13. In the case of Soni Damodar (A) the facts, as we have already indicated, were similar to the facts before us. There also disputes had arisen between a husband and wife and they were living separately, the wife having the care of children. The husband then made an application to the District Court to be appointed the guardian of the children. The District Court, however, did not formally appoint anyone to be the guardian of the children but simply said that the minors were to continue in the custody of their mother though the father was give" the liberty to

have free access to ''the children. The order that was made in connection with that application was that except for the custody of the minor children, the rights of the father as a natural guardian under Hindu Law were not interfered with. Mr. Justice Heaton observes in his judgment that the order passed by the learned District Judge meant that the wife was to have the custody of the children and that it was because of this order that the father when he took away the girl, as he did had been rightly convicted of the offence of kidnapping. The lather in that case also had behaved in the same manner as the 1st respondent in this case before us, for there the father had the minor girl seized as she was going to school early in the morning, placed in a motor car in which he was silting and had carried her off. The girl had been rescued the same day and returned to her mother. It was held in that case that the action of the father amounted to kidnapping, her legal guardian for the purpose of Section 361 being then her mother and that therefore the girl had been taken out of the keeping of the guardian by the accused. Though the words "legal guardian" are used in this connection, obviously what was intended to be conveyed was that the mother was the lawful guardian at the material time. The facts in this case being almost identical to the facts before us, even Mr. Vaidya was not in a position to distinguish this decision upon any footing and, therefore, the judgment in this case is binding upon us.

14. Mr. Vaidya has next relied upon the exception to Section 361 and has contended that the 1st respondent believed in good faith that he was entitled to the lawful custody of his child and that therefore he could not be said to be guilty of kidnapping. He relied upon for that purpose the case of Howka Ramalakshmi (1886) 1 Weir 348. That was a case where a mother in good faith believed that she was entitled to the custody of her own minor children and the conviction for kidnapping against her was upon that fact set aside. It is quite clear from the language of the exception itself, apart from any decisions thereupon, that if a person, were in good faith to believe himself to be entitled to the lawful custody of a minor child, unless that act was committee for any immoral or unlawful purpose, the exception would prevail. In this case, however, upon the facts before us, Mr. Vaidya cannot legitimately argue that the 1st respondent carried the girl away from the school either in good faith or in the belief that he was entitled to the lawful custody of the girl Suman. At the date of the incident he was fully aware of the order that had been passed by the learned District Judge and he must have been, therefore, equally aware that he was not entitled lawfully to have the custody of the minor, that custody having been handed over under the order to Rukhmabai. Then again, there is ample evidence on record which, as we have already pointed out, has not been challenged by Mr. Vaidya, that the carrying away of the girl in the bullock cart had been resorted to by force and even against the resistance by Suman, herself and her teachers. We should think that a forcible taking of a minor child, in these circumstances, is contrary to the very concept of good faith. In these circumstances, it is difficult to appreciate the contention that the 1st respondent is entitled to the

benefit of the exception to Section 361.

15. In the circumstances aforesaid, we have come to the conclusion upon the record before us that the 1st respondent was guilty of the offence u/s 363 and the 2nd respondent though not actually charged u/s 363 read with Section 34 but only u/s 363, can be convicted u/s 363 read with Section 34 of the Penal Code. There is, in our view, ample evidence to show that both the respondents had a common intention to commit the offence of kidnapping the minor Suman, for they had come together in the bullock cart from the village Shahade, that it was the 2nd respondent who drove that cart and both of them carried the girl to their village Shahade from Shinde. In these circumstances, we do not see any difficulty in convicting the respondents u/s 363 read with Section 34 of the Penal Code.

16. In view of the learned Magistrate finding a difficulty in following the decision in the case of Soni Damodar (A), it is necessary for us to refer to Section 3 of the Indian Law Reports Act, 1875. It may be mentioned that what was produced before the learned Magistrate was not an unauthorised report of the decision but a certified copy of the Judgment in Soni Damodar''s case (A). Section 3 of the Act provides

"No Court shall be bound to hear cited, or shall receive or treat as an authority binding on it, the report of any case .....other than a report published under the authority of any State Government". The language of Section 3 is quite clear that it is only when a report other than the one published under the authority of a State Government is cited before a Court that such a Court is not bound to hear such a report cited or to receive or treat it as an authority binding upon it. We do not see anything in the language of Section 3 that a certified copy of a decision of this Court is not to be treated as binding upon a lower Court. In our view, what is binding is the decision of the High Court and not merely a report. It is difficult, in these circumstances, lo see as to how the learned Magistrate could stop the Police Prosecutor in his Court from citing or relying upon the decision in the case of Soni Damodar when the learned Prosecutor had taken pains to produce a certified copy of the judgment. If any authority is needed for this proposition, the same is to be found in a Full Bench decision of the Nagpur High Court in the case of AIR 1944 44 (Nagpur) . This being the position, we must observe that the learned Magistrate was not justified in not treating the decision in Soni Damodar''s case as binding upon him and the observations that he has made in the course of his judgment while referring to this decision are, in our view, to say the least, not proper.

17. For the reasons aforesaid, we allow the appeal, set aside the order of acquital passed by the learned Magistrate against the respondents and convict both the respondents u/s 363 read with Section 34 of the Penal Code.

18. As regards the sentence, there is no question that either of the two respondents committed the act of taking the minor girl sway from the keeping of her mother for any criminal object or purpose. Equally there is no evidence that the respondents

carried away the girl for the purpose of any forcible marriage. It is true, no doubt, that the act of the respondents was in violation of the order passed by the learned District Judge. The act being in violation of such an order would be looked upon with some amount of gravity. But then the consideration for such violation of the order of the District Judge and the one u/s 363 are distinct and in awarding the sentence we have no intention of mixing thorn up. In the result, therefore, we think that the ends of justice would be met if the respondents are bound over u/s 5 (1) of the Bombay Probation of Offenders Act, 1938, for a period of one year from the date of the execution of the bond. The respondents to execute a personal bond in the sum of Rs. 250/- each and in the meantime to keep peace and be of good behaviour. The respondents to execute the bond in the lower Court within a period of one month after the receipt of this order by the lower Court.

19. Appeal allowed.