
(1956) 10 OHC CK 0001
In the Orissa High Court

Bhagaban Mahakud and Others

APPELLANT

Vs

State of Orissa

RESPONDENT

Date of Decision : 31-10-1956

Acts Referred:

Penal Code, 1860 (IPC) — Section 147, 149, 302, 325, 34

Citation : (1957) 23 CLT 81 : (1957) CriLJ 674

Hon'ble Judges : P.V.B. Rao, J

Bench : Single Bench

Judgement

P.V.B. Rao, J.—The four petitioners were convicted by the learned Assistant Sessions Judge of Mayurbhanj and sentenced to 3 years" R.I. and a fine of Rs. 100 or in default to two months" R.I. u/s 366, I. P. C., and to six months" R.I. u/s 147, I. P. C., the sentences to run concurrently. On appeal, the learned Additional Sessions Judge, Mayurbhanj, confirmed the convictions but reduced the sentences to one year"s R.I. on both counts.

2. The prosecution case is that on 22-2-54 there was a marriage ceremony of one Tubi Debi the sister of P.W. 4 at their father"s residence, namely, Chintamani Mahakud (D.W. 1) of Gagarbeda; that the victim Kuni Debi (P.W. 2) with her brother Maheshwar Mahakud (P.W. 1), his wife Sukamani Debi (P.W. 4) and her first cousin (P.W. 5) as also the accused persons attended the marriage; that on the afternoon of 22-2-54 they all started with the newly married couple to leave them at Village Ha-tin; that while they were at a distance from Gagarbeda Busti the accused persons with some others came from the opposite direction and forcibly took dway P.W. 2 after assaulting P.W. 1 and putting inside P.W. 4 to the house of accused No. 1 in village Hindola; that P.Ws. 1 and 4 with the Padhan of Gagarbeda (P.W. 8) went and found the girl confined in a room of accused No. 1 and as it was night the accused persons expressed reluctance to allow her to go; that the next morning these persons again went to fetch the girl but that the accused persons refused to let her go on the ground that they brought her down to get her married to accused No. 1 and hence P.W. 1 lodged F. I. R. at the Police

Station, Raruan.

3. The petitioners alleged that they did not attend the marriage of Tubi and that they did not accompany the married couple and P.Ws. 1, 2, 4 and 5 of their own accord went to the house of accused No. 1 and being under intoxication created a row at his house and fled away leaving the others and that because the accused persons stood in the way of P.W. 1 securing Tubi in marriage with him he started this false case.

They also contended and the learned Assistant Sessions Judge says in his Judgment that it is an admitted fact that it was customary with the people in the society to which both the victim and the accused persons belong the dragging is a first step in a marriage and that there is in their community a marriage, if 1 may say so, by capture.

4. Shri S. N. Patnaik, Magistrate, 1st Class, committed the case to sessions. The case was tried by the learned Assistant Sessions Judge. The learned Assistant Sessions Judge did not himself frame a charge against the accused persons at the commencement of the trial. He simply noted on the charges framed by the committing Magistrate as follows;- "Charges are read over and explained in Oriya to the accused persons who plead not guilty to the charges" and he signed the same on 14-2-55.

5. The charges as framed by the committing Magistrate run as follows:

I, S. N. Patnaik, Magistrate, I Class, Karanjia, hereby charge you Bhagaban Mahakud, Lalmohan Mahakud, Nilambar Mahakud and Kali Charan Mahakud as follows:

First - That you, on or about the 22nd day of February, 1954, at Ghagarbeda, P. S. Raruan, were a member of unlawful assembly and in prosecution of the common object of such assembly, viz., in kidnapping minor girl Kuni Debi (P. W. 2) committed an offence of rioting....

Secondly - That you, on or about the same day at same place kidnapped the minor girl namely Kuni Debi with intent that she may be compelled to marry against her will and thereby committed an offence punishable u/s 365 of Indian Penal Code....

6. On these charges, the petitioners were tried by the learned Assistant Sessions Judge. The prosecution examined nine witnesses and the accused examined two witnesses in their defence. The witnesses for the defence were not believed by the trial Court, their evidence being only that nothing happened on the day of the alleged occurrence. The prosecution witnesses of whom P.Ws. 1, 4 and 5 are eye-witnesses spoke mainly to the incident. P.W. 6 is the mother of P.Ws. 1 and 2 and she deposed to certain other circumstances before and after the occurrence.

P.W. 7 is ft witness to the rescue of P.W.2. P.W. 8 is a witness accompanying P.W. 1 to the place of accused No. 1 on that night but he did not support the version

of P.W. 1. P.W. 9 is the Sub-Inspector who recorded the F. I. R. and rescued the girl on 25-2-54. P.W. 3 is the Medical Officer who examined P.W. 2. On this evidence, after an elaborate discussion, the learned Assistant Sessions Judge came to the conclusion that P.W. 2 was not a minor, but convicted the accused persons u/s 147, I. P. C., for rioting and also u/s 366, I. P. C., for abduction. On appeal, the learned Additional Sessions Judge confirmed the said convictions mollifying the sentence.

7. Mr. R. K. Das, the learned Counsel for the petitioners contends that the convictions are illegal as the conviction u/s 147, I. P. C., is based upon a charge in which only four persons were charged as being members of an unlawful assembly and the common object alleged failed, and that the conviction u/s 366, I. P. C., for abduction is based upon a charge for kidnapping and the accused were not charged for having committed the offence of abduction for which they were convicted.

8. It is clear from the second charge that the petitioners kidnapped the minor girl with intent that she may be compelled to marry against her will. That was the only charge made against the accused and on which they were tried for an offence punishable u/s 366, I. P. C. But the conviction on the second charge was for abduction as the learned trial Judge came to the conclusion that P.W. 2 was not a minor. I fail to understand how the learned Assistant Sessions Judge could convict the petitioners for abduction and specially when the categorical charge against the petitioners was for kidnapping.

Kidnapping and abduction are two distinct offences. The ingredients of the two offences are entirely different. Kidnapping except kidnapping from India is an offence against guardianship. As defined in Section 361, I. P. C.) it consists of enticing or, removing a girl from the keeping of the lawful guardian without his consent. Abduction is an offence, as defined in Section 362, I. P. C., when a person is by force compelled or by any deceitful means induced to go from any place. In abduction the person abducted may be a minor or a major.

Kidnapping is punishable per se and Section 363, I. P. C., is the punishing section for kidnapping per se. Abduction is not punishable per se and is punishable only when accompanied by a particular purpose as contemplated in the latter sections of the Code, Sections 364 to 366. But as kidnapping also may be for the same purposes, Sections 364 to 366 deal with both kidnapping and abduction for the purpose stated therein and prescribe the punishments.

But when a person is specifically charged for the offence of kidnapping a minor girl for being compelled to marry a person against her will, he cannot be convicted for abducting a woman for being compelled to marry against her will, if it is found on evidence that the victim is not a minor as defined in the Code. Unfortunately this important distinction was not noticed by the trial Judge as well as by the appellate Judge. But the learned Assistant Sessions Judge even though he definitely found that P.W. 2 was not a minor, nevertheless convicted the

petitioners u/s 366, I. P. C., as he found P.W. 2 was by force compelled to go with petitioner No. 1 to his house.

The learned Additional Sessions Judge also confirmed the conviction u/s 366, 1. P. C. In my opinion, both the learned Judges were misled by the fact that both these offences "kidnapping" and "abduction" for the said purpose of compelling a person to marry against her will were made punishable under the same Section 366, I. P. C. Had they read the section or had they bestowed any attention to the fact that "kidnapping" and "abduction" are quite different offences and that the charge against the accused persons on which they were tried was only for kidnapping the minor girl (P.W. 2), they would not have committed this mistake.

9. I may also observe that the learned Assistant Sessions Judge could not have the distinction between these two offences in his mind as he did not frame the charges himself but simply read over the charges framed by the committing Magistrate. Had he applied his mind for the purpose of framing charges, he would have certainly framed a charge in the alternative for abduction also. Further, the other mistake in the first charge pointed out by Mr. R. K. Das in charging only four persons as being members of an unlawful assembly also would not have arisen if the learned Assistant Sessions Judge would have made a proper charge.

It is highly desirable that Sessions Judges when they commence the trial should themselves frame a charge instead of reading over the charge framed by the committing Magistrate and in making an endorsement to the effect that the charges are read over, explained to the accused and so on.

10. Anyway there is no doubt in my mind that the accused persons cannot be convicted for abduction when the charges against them are for kidnapping. Mr. Acharya, the learned Counsel who appeared on behalf of the State contended that the defect in a charge does not vitiate the trial and that prejudice must be shown. He relied upon recent decisions of the Supreme Court reported in cases of Willie (William) Slaney Vs. The State of Madhya Pradesh, and Sukha and Others Vs. The State of Rajasthan, .

In those two cases, very exhaustive Judgments were written by their Lordships in which it was specifically laid down that unless there is prejudice and prejudice is shown at the first available opportunity, any omission or mistake in a charge does not vitiate the trial. In the case of Willie (William) Slaney v. State of Madhya Pradesh (A), where two accused were charged u/s 302 read with Section 34, Penal Code and the charges against each of them were framed that he along with the other in furtherance of the common intention did commit murder by intentionally or knowingly causing the death of the victim and thereby committed an offence punishable u/s 302, I, P. C., read with Section 34, I. P. C., a Bench of five Judges of the Supreme Court held,

Having regard to the nature of the charge framed, the omission to frame a separate charge u/s 302, Penal Code, against one of the accused was only a

curable irregularity which in the absence of prejudice could not affect the legality of conviction u/s 302, Penal Code

and that on the facts of the case, "There was no prejudice to the accused by way of failure of justice." It was also observed in the majority Judgment that,

In generality of cases the omission to frame a charge is not per se fatal. The very broad proposition that where there is no charge the conviction would be illegal, prejudice or no prejudice, cannot be accepted as sound. The group of sections relating to absence of a charge, namely Sections 225, 226 and 232 and the powers exercisable thereunder, are with reference to a trial which has already commenced or taken place. They would, therefore, normally relate to errors or omissions which occur in a trial that has validly commenced.

There is no reason to think that Section 535 of the Code of Criminal Procedure is not also to be understood with reference to the same context. There may be cases where, a trial which proceeds without any kind of charge at the outset, can be said to be a trial wholly contrary to what is prescribed by the Code. In such cases the trial would be illegal without the necessity of a positive finding of prejudice. The omission to frame a charge is a grave defect and should be vigilantly guarded against. In some cases, it may be so serious that by itself it would vitiate a trial and render it illegal, prejudice to the accused being taken for granted.

In the case of *Sukha v. State of Rajasthan (B)*, the trial Judge acquitted twenty-five of the accused of the charge u/s 325 read with Section 149 and convicted nine. He acquitted all the eleven who were charged u/s 302 read with Section 149, but convicted nine of them u/s 325 read with Section 149. The State did not appeal against the acquittals of the twenty-five under Sections 325/149 nor did it appeal against the acquittals of two of the eleven who were charged under Sections 302/149, but it appealed against the acquittals of the remaining nine who had been convicted under Sections 325/149. These nine convicts also appealed.

The High Court had therefore two appeals before it - one against the acquittals of nine persons u/s 302 read with Section 149 and the other by the same persons against their convictions u/s 325 read with Section 149, The High Court dismissed the appeal of the convicts and allowed that of the State. The convictions of these nine persons were accordingly altered to ones under Sections 302/149, I. P. C., and the lesser sentence of transportation was given to each. It is these nine persons that appealed to the Supreme Court. One of the contentions raised was that the charge was defective. The learned Judges observed, at page 520.

The other is that the absence of this in the charge occasioned prejudice. We have recently decided that we will be slow to entertain question of prejudice when details are not furnished; also the fact that the objection is not taken at an early stage will be taken into account.

11. With regard to the charge u/s 147, I. P. C., Mr. R. K. Das contended that four persons cannot be charged as being members of an unlawful assembly and consequently the conviction cannot be sustained. I have gone through the examination of the petitioners u/s 342, Cr. P. C., as also the evidence. In the examination under S. 342, Cr. P. C., as well as in the evidence, the accused were asked questions in the following terms. You four persons and others"....In evidence the witnesses stated "the accused and others" did such and such act.

Consequently the accused had notice that they were charged for being members of an unlawful assembly along with others and they were represented by a pleader and I do not think, they were in any way prejudiced by the first charge framed against them. Mr. Das also contended that the common object being kidnapping a minor girl Kuni Debi the common object also failed, as there is no evidence that the common object was for kidnapping. With regard to this portion of the charge I think, the accused were prejudiced inasmuch as there is no finding that there was kidnapping, the finding being that P.W. 2 was not a minor, the common object fails and as such the conviction cannot be sustained.

12. In the case of Chikkarange Gowda and Others Vs. State of Mysore, , where the common object of an unlawful assembly as mentioned in the charge and as found by the Court was merely to administer a chastisement to the deceased and the charge did not mention that the members of the unlawful assembly knew that the deceased was likely to be killed in prosecution of that common object, it was held that,

As the finding of the Court was that none of the members of the unlawful assembly had the intention to kill the deceased nor did any of them knew that the deceased was likely to be killed in prosecution of the common object of chastisement and as the charge gave no notice to the accused that they had a separate common intention of killing the deceased different from that of the other members of the unlawful assembly, the conviction of the accused who had not caused any fatal injury of an offence u/s 302 read with Section 149 or Section 34 could not be sustained.

In the case of Suraj Pal v. State of Uttar Pradesh, decided by their Lordships Jagannadhadas and Sinha, JJ., of the Supreme Court, reported in Suraj Pal Vs. The State of Uttar Pradesh, , and which was only distinguished in the case reported in Willie (William) Slaney Vs. The State of Madhya Pradesh, , it was observed,

The framing of a specific and distinct charge in respect of every distinct head of criminal liability constituting an offence, is the foundation for a conviction and sentence therefor.

13. On a review of these authorities, I am of opinion that the two decisions reported in Willie (William) Slaney Vs. The State of Madhya Pradesh, and Sukha and Others Vs. The State of Rajasthan, , do not apply to the facts of the present case, the charges against the petitioners being only for being members of an

unlawful assembly with the common object of kidnapping a minor girl punishable under Sections 147 and 366, I. P. C., the petitioners were prejudiced in the trial as they were convicted for abduction and it was definitely held that P.W. 2 was not a minor.

14. Mr. Acharya also tried to contend that there is evidence in the case that P.W. 2 was a minor and therefore they might be held guilty for kidnapping. He read over to me the evidence of the Medical Officer, but as I have already stated, the learned Assistant Sessions Judge, after a careful discussion of the evidence, came to the conclusion that P.W. 2 was not a minor. This finding was not challenged in appeal by the public prosecutor who appeared for the State before the learned Additional Sessions Judge and under these circumstances, I do not think Mr. Acharya can argue in revision that the evidence regarding P.W. 2 being a minor should be looked into by me at this stage.

15. Mr. Acharya lastly contended that in such a case u/s 232 of the Criminal Procedure Code, the case ought to be remanded for fresh trial. It is already more than two years since the accused were on trial and I do not think any useful purpose will be served by remanding the case for fresh trial.

16. In view of the above observations, I am of opinion that the convictions under Sections 366 and 147, I. P. C., cannot be upheld.

17. In the result, therefore, the revision petition is allowed. The convictions and sentence are set aside and the accused are acquitted. The bail bonds will be cancelled.