

**(1938) 02 MAD CK 0012**  
**In the Madras High Court**

**In Re: Kanneganti Chowdarayya and Another**

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**Date of Decision :** 22-02-1938

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 363, 364

**Citation :** AIR 1938 Mad 656 : (1938) ILR (Mad) 805 : (1938) 47 LW 568 :  
(1938) 1 MLJ 670

**Hon'ble Judges :** Burn, J

**Bench :** Division Bench

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**Judgement**

Burn, J.—This is a case of an unusual kind. In fact I am informed that it is the first case of its kind. The appellant in C.A. No. 456 of 1937

was the first accused and the appellant in C.A. No. 465 of 1937 was the second accused in S.C. No. 22 of 1937 on the file of the learned

Sessions Judge of Guntur. Along with them two Muhammadans were tried and the charges upon which they were put up for trial were that the first

accused kidnapped a minor boy from lawful guardianship with intent that he should be murdered (Section 364, Indian Penal Code). The second,

third and fourth accused were charged with abetment of this offence. The learned Sessions Judge found the first accused guilty of an offence u/s

363, Indian Penal Code, holding it not proved that the kidnapping was in order that the little boy might be murdered. The first accused has been

sentenced to 7 years" rigorous imprisonment. The second accused was convicted of abetment oĩ½ the offence u/s 363, Indian Penal Code, and

sentenced to 5 years" rigorous imprisonment. The third and fourth accused were acquitted.

2. The remarkable feature of this case is that the first accused is the father of the boy, whom he is said to have kidnapped from the keeping of the

boy"s mother (P.W. 1). P.W. 1 and the first accused were married several years

ago and according to P.W. 1 her husband deserted her. She filed a suit for maintenance and this was compromised on terms by which the first accused gave her some land to defray her cost and some additional land for her maintenance. This compromise took place on the 19th July, 1933, and in 1936 P.W. 1 put the decree in execution and got delivery of the lands. In the meanwhile in 1935 the first accused had filed a suit in the Court of the District Munsiff, Guntur, to set aside the compromise entered into in July, 1933, on the ground that it had been obtained by fraud. A copy of the plaint has been filed as Ex. 1 and it shows that the first accused alleged that his marriage with P.W. 1 had never been consummated, that her child was illegitimate, and that she was actually pregnant as the result of adulterous intercourse at the time the compromise took place. The plaint was dated the 22nd November, 1935. In that it is alleged that P.W. 1's son was born on the 2nd January, 1934.

3. In these circumstances on the 11th April, 1937, it was alleged that the first accused with the help of the other three kidnapped his own son from the guardianship of the little boy's mother. Earned Counsel for the appellants has argued that the evidence of P.Ws. 1 to 5 who speak to the kidnapping ought not to be accepted. P.W. 1 is the mother of the child; P.W. 2 is the woman with whom P.W. 1 was lodging while she was in Guntur for the purposes of her litigation : P.W. 3 is another woman who was lodging in the same house, and P. Ws. 4 and 5 are boys aged 13 and 11 respectively who were employed in sweetmeat shops in Guntur. The boys described how the 2nd accused picked up the child in front of their shops, took him down a side lane and handed him over to the first accused. These two boys picked out the first and second accused at an identification parade which was held on the 12th April, and there is really no reason for rejecting their evidence. In addition to this there was a confession (Ex. C), made by the 2nd accused to the Taluk Magistrate, Guntur, on the 17th April. The learned Sessions Judge discarded this confession on the ground that the Taluk Magistrate had not in spirit observed the proper precautions to ensure that the confession should be voluntary. Mr. Vepa who appears for the appellants contends that the learned Sessions Judge was right. The learned Public Prosecutor on the other hand contends that the learned Sessions Judge was wrong, and that there

are no proper reasons for supposing the second accused's

confession to have been anything but voluntary. I do not see any necessity to discuss this question at length, because I am satisfied, as the learned

Sessions Judge was, that the other evidence in the case is sufficient to establish the fact.

4. The facts proved therefore are that the little boy (the son of the first accused and P.W. 1), who had been brought up by his mother from the

date of his birth, and who was in her keeping on the 11th April, 1937, was taken from her keeping by the second accused who handed him over

to the first accused, and who must of course have been -acting under instructions from the first accused. The first accused does not now deny the

paternity of the child. He alleges that he was ill-advised when he filed his suit against his wife. He says that the plaint was not drafted on his own

instructions but on the advice of his pleader's clerk. This is not of course true. The pleader was examined as P.W. 12 and he testified that the

plaint (Ex. L) was prepared in accordance with the instructions of the first accused. His evidence is no doubt true. The interesting question which

arises is whether in these circumstances the first accused can be held guilty of an offence u/s 363, Indian Penal Code. I am told that there is as yet

no record of any case in which a father has been convicted of kidnapping his own child from the guardianship of the child's mother. I have

therefore to decide the matter as well as I can without the assistance of any reported cases.

5. There is no doubt of course that P.W. 1, the mother of the child, was on the 11th April, 1937, the lawful guardian of the child for the purposes

of Section 361, Indian Penal Code. The parties being Hindus, the father is the lawful guardian, whose rights of guardianship until they are taken

away by a decree of a competent Court or surrendered by himself are paramount to those of any other person. The father having acquiesced in the

retention by the mother of the custody of this child from the date of his birth for over three years and three months, the mother clearly comes within

the meaning of the explanation to Section 361, Indian Penal Code. It was observed by Rankin, C.J., in *Saharali Mahammad v. Kamizuddin*

*Mahammad* I.L.R.(1930) 58 Cal. 897:

I do not doubt at all that the explanation to Section 361 was intended to extend

the meaning of the words "lawful guardian" beyond their ordinary scope. It is extended to include any person lawfully entrusted with the care or custody of such minor or other person. I do not doubt either that, where, by consent of the relatives, a minor has been allowed to be in the custody of a particular relative, the definition given by the section will be satisfied. In such a case, there may be no definite transaction of entrustment, but the consent of the relatives would be quite sufficient to make the guardianship lawful guardianship.

6. Therefore what we have proved in this case is that the child was in the keeping of his mother who was a lawful guardian within the meaning of Section 361, Indian Penal Code and that the child was taken or enticed away out of her keeping. Section 361 says that ""whoever takes or entices...is said to kidnap"" and there can be no doubt that the word ""whoever"" will include P.W. I's husband. But this is not quite sufficient. The exception to Section 361 states as follows:

This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

7. Now, if a person who in good faith believes himself to be entitled to the lawful custody of a child cannot commit an offence u/s 361, Indian Penal Code, it seems to follow a fortiori that a person who is in fact the father of the child, and therefore in law entitled to the lawful custody of the child cannot come within the scope of Section 361, Indian Penal Code. In this case it can be said on behalf of the first accused that he did not merely in good faith believe himself to be entitled to the lawful custody of his child, but that he was beyond the possibility of any challenge entitled to the lawful custody of the child, and that therefore his act in taking the child from the keeping of his mother could not amount to an offence of kidnapping from lawful guardianship.

8. I think this contention is correct. The learned Public Prosecutor has drawn my attention to the final words of the exception to Section 361, Indian Penal Code, ""Unless such act is committed for an immoral or unlawful purpose"". He points out that according to the finding of the learned Sessions Judge, the first accused had a strong motive to get the child away from

his mother in order to stifle any suit for partition on behalf of the child. The learned Public Prosecutor suggests that this is an immoral or unlawful purpose, and invites my attention to the case reported in Mahendranath Chakrabarti v. Emperor I.L.R.(1934) 62 Cal. 629. That was a case in which the father of an illegitimate child was said to have taken the child away from its mother at the age of ten days, in order to hush up a scandal. It was held that in such circumstances the father of the illegitimate child might not be protected by the exception to Section 361, Indian Penal Code. There was however no decision in the case, the appeal being remanded for re-hearing, but I notice that in the judgment of Henderson, J., it is observed that it is for the prosecution to show that the act was committed for an immoral or unlawful purpose. By Section 105 of the Evidence Act it is of course the duty of the accused to show that his offence falls within any of the exceptions in the Indian Penal Code; but where it appears from the prosecution evidence itself that the act falls within the exception, the accused will clearly be relieved of that burden. In this case the exception itself states that Section 361 does not extend to the act of a person who in good faith believes himself to be entitled to the lawful custody of the child, unless such act is committed for an immoral or unlawful purpose; and that, as Henderson, J., observes, lays upon the prosecution the burden of proving that the act was committed for an immoral or unlawful purpose. In the present case it cannot be said that the prosecution has established that the act of the first accused was committed for an immoral or unlawful purpose. The charge against the first accused was that he had caused this child to be kidnapped in order that he might be murdered but the learned Sessions Judge has expressly found that that charge was not established. No other object was attributed to the first accused and it is not in my opinion justifiable to say that even though he has not been proved to have intended to murder the child, yet he must have had some other unlawful or immoral purpose.

9. In the absence of proof of the purpose for which the accused caused the child to be taken away from the keeping of his mother, all that we have proved is that the father of the child by deceitful means got the child from the keeping of his mother to his own. This in my judgment is not an offence u/s 361, Indian Penal Code, and I am fortified in this opinion by the

reasoning of Rankin, C.J., in the case in Saharali Mohammad v.

Kamizuddin Mahammad I.L.R.(1930) 58 Cal. 897. The learned Chief Justice quoted with approval the decision in Emperor v. Sital Prasad I.L.R.

(1919) 42 All. 146 as authority for the proposition that:

The explanation to Section 361 cannot be used\* to mean that, as against a person, who, in fact, is the civil guardian of the minor, mere de facto

guardianship can be set up so as to convict the real civil guardian of an offence u/s 361.

10. I therefore find that the appellant in C.A. No. 456 of 1937 has been wrongly convicted of an offence u/s 363, Indian Penal Code. I set aside

the conviction and acquit him. The conviction of the appellant in C.A. No. 465 of 1937 also for abetment must be set aside for the same reason.

He also is acquitted. The appellants have been released on bail and I direct that their bail bonds be cancelled.