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**(1972) 09 BOM CK 0012**  
**In the Bombay High Court**

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| Shamrao Shivram Akhade and Another | APPELLANT  |
| Vs                                 |            |
| State of Maharashtra               | RESPONDENT |

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**Date of Decision :** 28-09-1972

**Acts Referred:**

Penal Code, 1860 (IPC) — Section 366, 376

**Citation :** (1974) CriLJ 86 : (1973) MhLj 688

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

**Bench :** Single Bench

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## Judgement

Vimadalal, J.—This is an appeal filed by the original accused Nos. 1 and 3 against their convictions by the Additional Sessions Judge. Poona, accused No. 1 being convicted of the substantive offences under Sections 366 and 376 of the Indian Penal Code, and accused No. 3 being convicted of the offence of abetment of kidnapping u/s 366 read with Section 109, of the Indian Penal Code. It may be mentioned that accused No. 3 was also charged with the offence of abetment of rape u/s 376. read with Section 109, of the Indian Penal Code, but he has been acquitted of the same by the trial Court. It may also be mentioned that accused No. 2 was similarly convicted of the offence u/s 366, read with Section 109, of the Indian Penal Code, but acquitted of the offence u/s 376 read with Section 109 of the Indian Penal Code. Accused No. 2 has not filed any appeal from her conviction and she is not an appellant before this Court.

2. The facts out of which the prosecution case arises are that a married girl named Shalan used to live with her husband Shrirang and her mother-in-law Gopabai in a hut at Mangalwar Peth. Poona. the prosecution case being that Shalan was born on 30th October, 1955. and was less than 16 years of age at the material time. The prosecution story is that, in course of time. Shalan become acquainted with some of her neighbours, including accused Nos. 1, 2 and 3, and used to exchange visits with them. According to the prosecution, about two days prior to 13th February 1971. Shalan had been to the house of accused No. 2 in order to ask her to accompany Shalan for collecting firewood,

but when she went inside the house of accused No. 2, accused No. 2 came out and bolted the front door and accused No. 1 entered the hut from the rear and had sexual intercourse with Shalan. That, however, is not the subject-matter of the present case and has been narrated by me only as part of the prosecution story.

3. On the 13th of February 1971. according to the prosecution. Shalan's husband Shrirang left his house for work at Maldhakka in the morning and. after doing her husband's work. Shalan took the tiffin-carrier for him to his place of work at Maldhakka, but Shrirang was not there, he having gone to Kirkee. and so she returned home with tiffin-carrier. Thereafter she took her own meals, and then her mother-in-law Gopabai asked her to bring a pot from the house of Gopabai's married daughter and Shalan left the house for that purpose. The prosecution story is that, on the way, she met accused No. 2 who asked Shalan to accompany her and took Shalan to a bus-stop, where accused No. 3 joined them and the two accused took Shalan by bus to the house of Watchman Mohite at another village where they all spent the night after obtaining the consent of the said Mohite. Next day, according to the prosecution, the first accused came there with one other person, and after some intervening facts relating to the ornaments of Shalan, to which it is unnecessary to refer for the purposes of the present appeal, according to the prosecution, the first accused took Shalan to a railway station, and, underneath the railway-bridge, he had sexual intercourse with Shalan, accused Nos. 2 and 3 having left Mohite's house and gone away from there on their own. The prosecution story is that thereafter accused No. 1 took Shalan to Bombay where the two of them lived for about 3 days at Worli and for about 8 days at Andheri, and accused No. 1 then brought Shalan to Poona and. on her request, took her to the house of her parents at Ojani. Shalan's father thereupon contacted Shrirang as well as the Police, and accused No. 1 and Shalan were brought by the Police to Poona on the 10th of March 1971 and the usual investigation by the Police followed. As a result of that investigation, accused No. 1 was charged with the substantive offence of kidnapping and rape under Sections 366 and 376 of the Indian Penal Code respectively and accused Nos. 2 and 3 were charged under Sections 366 read with Section 109 and 376 read with Section 109 of the Indian Penal Code with having abetted accused No. 1 in the commission of both those offences. They were thereafter tried by the learned Additional Sessions Judge, Poona. and were convicted and sentenced on the 21st of April 1972, as already stated above. From their convictions and the sentence passed upon them accused Nos. 1 and 3 have preferred the present appeal.

4. The first question that must be considered is in regard to the age of the girl Shalan and it would be convenient to deal with it separately. The extract from the Birth-register (Exh.9) of village Shah in Poona District shows date 30-10-1965 as the date of the birth of a female child to Balu Gopa Mahar. which is the name of Shalan's father. Both, Shalan's father as well as her grand-father, have deposed that Shalan was born in the village of Shah. The evidence of Shalan's father is

that of his four children. Shalan was the only child who was born in the village of Shah. Apart from the bare statement of Shalan's father and the mention of the village, there is, therefore, nothing to connect the said birth-extract as being the extract relating to the birth of Shalan, and not one relating to the birth of any of her brothers or sisters. Shalan's father has, no doubt, deposed that Shalan was about 15 years of age at the time he gave evidence in the trial Court in March 1972. But his cross-examination shows that he has a very vague sense of time and years for he has stated that he was married about 30 years before his giving evidence in the trial Court and Shalan was born 3 years after his marriage. with the result that Shalan should have been about 27 years at the time, which is an absurd statement on his part and shows that he is very ignorant person and has very poor notions of time. He has admitted in cross-examination that he is completely illiterate. He has stated that Shalan was married 3 years prior to his giving evidence in the trial Court and that Shalan had attained puberty before she got married. The evidence of Shalan's grand-father is that Shalan was married 5 or 6 years before he gave evidence in the trial Court in March 1972 and not 3 years prior thereto as Shalan's father has deposed. The expert testimony of Dr. Banerjee, the Assistant Civil Surgeon, Poona, is to the effect that in India menstruation of girls starts between the age of 12 and 14 years. Putting all this evidence together it is therefore, not possible to hold that the prosecution has proved thereby that Shalan was less than 16 years of age on the 13/14th February 1971, being the dates of the offences in the present case.

5. We are, therefore, left with the doctor's opinion evidence in regard to the age of the girl Shalan, based partly on clinical examination and partly on the ossification test conducted by a radiologist at his instance. After examining her height, weight, general development and other facts as well as her statement that she had started menstruating about two years prior to 26th March 1971 when he examined her, and after reading the X-ray plates submitted to him by the Radiological Department, Dr. Banerjee has opined that Shalan was more than 15 years, but less than 16 years of age on the date on which he examined her. He has, no doubt, in cross-examination, denied the suggestion put to him that Shalan might have been more than 16 years of age on that date, but I am rather surprised at that categorical statement of his for the simple reason that it is a fact of which I must take a judicial notice that medical evidence in regard to age is always subject to a margin of error of six months on either side. In my opinion, his evidence, therefore, does not rule out the possibility of Shalan being over 16 years of age at the date when he examined her. which was only about a month and a half after the date of the offence. There could, however, be no doubt on his expert testimony that Shalan was certainly below the age of 18. both at the date of the offence as well as on the date when Dr. Banerjee examined her. It is not the prosecution case, and indeed there is no evidence to that effect, that the first accused committed rape on Shalan against her will or without her consent. Under the circumstances, the offence of rape must be held to be not proved against, the first accused. In fact, on such evidence as there is.

there is no room for doubt in my mind that Shalan was a willing party to the sexual intercourse that is alleged to have taken place.

6. It would be convenient, at this stage to deal with the question as to whether, even apart from the question of age, the prosecution has succeeded in proving the charge of rape against the first accused. It is too well-settled by now, to need any authority, that it is advisable to have corroboration of the evidence of the prosecutrix in a case of rape, but corroboration can be dispensed with if, in the particular circumstances of the case, the Court is satisfied that it is safe to do so. Ordinarily a woman who has been raped is not an accomplice, but is the victim of the outrage. If, however, she consents, her testimony will naturally be as suspect as that of an accomplice. (See *Rameshwar Vs. The State of Rajasthan*, . It has, however, also been held that the said rule of prudence does not apply to cases of kidnapping *Emperor Vs. Banubai Ardeshir Irani*, followed by *Shah and Patel JJ.* in their unreported judgment dated 28-4-1959 (Bom) in Criminal Appeal No. 349 of 1959.

7. Having regard to the above legal position the first question that arises is whether there is any corroboration to the evidence of Shalan in the present case, and the further question that arises is whether, in the absence of such corroboration, it would be safe to convict the first accused on the evidence of Shalan alone. The learned Assistant Government Pleader has very fairly conceded that there is no corroboration whatsoever to the evidence of Shalan as far as the offence of rape is concerned. A careful scrutiny of her evidence shows that she is not a reliable witness and that it would not be safe to convict the first accused of the offence of rape on her uncorroborated testimony. Shalan is obviously not narrating the real story, as the learned Assistant Govt. Pleader rightly commented in the course of his arguments. The alleged sexual intercourse between her and the first accused a couple of days prior to 13th February 1971 in the hut of accused No. 2, to which she admitted that she did not offer any resistance and about which she did not complain to anybody, shows that she was a willing party to what accused No. 1 did. She has given no explanation at all as to why she did not complain about the same to her husband or her mother-in-law and the explanation which she has given for not resisting the accused at the time of the sexual intercourse is that he had given her threats. She has, however, not stated what was the nature of the threats which he had given to her at the time of the sexual intercourse, and that explanation, in my opinion, is a hollow one. Her entire story of her having been taken by accused No. 2 to the bus-stand and thereafter to the hut of the watchman Mohite and of her having stayed overnight there, of her having left with the first accused for the railway-station, and then for Bombay where she stayed for several days at two different places, sought to be narrated as if all this was done against her will or without her consent, is impossible to believe. The explanation given by her for ultimately going with the first accused to the house of her parents where the accused was apprehended by the Police, viz., that she deceived him into going there, is also, in my opinion false. There was good reason why she obviously did

not dare to go to the house of Gopabai. her mother-in-law, and had to fall back upon her own parents who she knew, would not drive her out. Having regard to all this. I would, consider it unsafe to act on her testimony without corroboration as far as the charge of rape against accused No. 1 concerned. In those circumstances, the conviction of the first accused for the substantive offence of rape by the trial court must be set aside and he must be acquitted of the same.

8. That leaves for my consideration the conviction of the 1st accused of the substantive offence of kidnapping u/s 366 of the Indian Penal Code, and of the third accused of the abetment of kidnapping u/s 366 read with Section 109 of the Indian Penal Code. As already pointed out by me earlier, the rule requiring corroboration to the evidence of the prosecutrix in a case of rape, does not apply to the offence of kidnapping. Moreover, I have also pointed out earlier that there can be no doubt that Shalan was at the time of the offence less than 18 years of age. Under those circumstances, the fact that she may have willingly accompanied accused Nos. 2 and 3, and later on accused No. 1". to various places, cannot help the defence as far as the charges of kidnapping or abetment of the offence of kidnapping are concerned. The correct statement of law on the point is that if a girl below the age of 18 voluntarily, that is to say, at her own instance, abandons the lawful guardianship of her parents or husband and taking the complete initiative in her own hands goes to the accused, the accused does not commit any offence u/s 366 of the Indian Penal Code, for he could not be said to have taken her out of the lawful guardianship of her parents or husband, and the law does not cast upon him a duty of taking her back to the parents" or husband's house, or even of telling her not to accompany him. If however, the girl under the age of 18 even voluntarily, accompanies the accused from her house or from any other place, while she is still in the lawful guardianship of her parents or husband, or joins the accused as a result of pre-arranged plan at some place from where she accompanies the accused person, the accused commits the offence of kidnapping her from the lawful guardianship. Unless, therefore, the evidence in the present case shows that Shalan had already voluntarily abandoned the lawful guardianship of her husband before accused No. 2 met her and took her away to the bus-stand, accused No. 2 would be guilty of the offence of kidnapping, and if the necessary facts are made out. accused Nos. 1 and 3 would be guilty of the offence of abetting that offence, even if Shalan is proved to have voluntarily accompanied accused No. 2. A careful reading of the evidence of the various Prosecution witnesses in the present case has led me to the conclusion that accused Nos. 1 and 3 had conspired with accused No 2 to take Shalan out of the lawful guardianship of her husband, and it was in pursuance of that conspiracy that accused No. 2 obliged them by taking Shalan away to the bus-stand and from there by bus to the house of watchman Mohite in another village. In that connection, the preliminary visit of accused No. 2 to the house of Shalan on the very morning of 13th February 1971, to which both Shalan as well as her mother-in-law Gopabai have deposed (though there is slight discrepancy in their statements inter se in regard to the precise time of

that visit) is most significant, in so far as that visit was intended to contact Shalan for purposes of carrying out the plan of the three accused about which, it may be, that Shalan herself did not know, at any rate, till then. Accused No. 2 could not, however, speak to Shalan during that visit because of the inconvenient presence of her mother-in-law Gopabai, as Shalan has deposed. It is too much to believe that the emergence of accused No. 3 at the bus-stand at the proper moment was a sheer coincidence. In my opinion, it was in consequence of a preconceived plan that accused No. 3 joined them there. The arrival of accused No. 1 at the house of the watchman Mohite the next morning in another village could also not be a sheer coincidence, but was a part of the same pre-arranged plan to kidnap Shalan. presumably for the benefit of the first accused, for it was he who ultimately took Shalan with himself from place to place after the initial offence of kidnapping by the second accused was completed. The evidence of Shrirang, the husband of Shalan, that accused No. 1 who worked at the same place at which he worked, knew that Shrirang was going to Kirkee on the moraine of 13th February 1971 shows that this was, therefore, the day selected by them for the Purpose of conspiring to kidnap Shalan from her house. There is abundant evidence on record to which it is unnecessary to refer to show that accused No. 1 was with Shalan from the 14th February 1971 till the 10th of March 1971 when he was arrested by the Police at Ojani village. Shrirang has also deposed that it was because accused No. 1 was absconding that he suspected that he was the person who had taken Shalan away, All this evidence leaves no room for doubt in my mind that, though actually the offence of kidnapping or taking away the girl Shalan was committed by accused No. 2. it was committed in pursuance of abetment by conspiracy on the part of accused Nos. 1 and 3 with her.

9. It was, however, sought to be contended by Mr. Naik, the learned Counsel for accused Nos. 1 and 3. that in the absence of a charge of abetment of kidnapping against the first accused, he cannot be convicted of that offence, as he would be prejudiced thereby. It is true that the charge against the first accused is one of the substantive offence of kidnapping u/s 366 of the Indian Penal Code. I. have, however, come to the conclusion that to convict him of the offence of abetment of kidnapping would not cause any prejudice to him. for I cannot conceive of any other witnesses being examined by him, or any further evidence being elicited by him from the witnesses who have been examined in the trial Court, over and above the evidence which is already on the record, in regard to the offence of abetment. There is, therefore, in my opinion, no question of accused No. 1 being prejudiced by my altering the conviction against him from one of the substantive offence of kidnapping u/s 366, to that of abetment of kidnapping u/s 366 read with Section 109 of the Indian Penal Code.

10. I must, however, proceed to consider whether, even if no prejudice is caused to an accused person by convicting him of the offence of abetment when the charge against him is that of the substantive offence, it is permissible in law for the Court to convict him of the former offence. In the case of Bhagat Ram Vs.

State of Punjab, the accused had been convicted at two separate trials - one in respect of a charge u/s 420 and the other in respect of a charge u/s 409. As against the accused who was the appellant before the Supreme Court, the view taken was that the entrustment of money was not proved, but that he can be said to have abetted criminal breach of trust by the Subordinate Judge himself who was merely a witness in those proceedings. The Supreme Court observed : "in an appropriate case the conviction may probably have been altered to one of abetment of an offence u/s 409 of the Indian Penal Code." Having regard to the facts of the said case, as it would imply a definite finding of guilt against the Subordinate Judge who was not a party to the proceedings, their Lordships however thought it unfair to make such an alteration in the conviction (paragraph 16). The opinion expressed on the point by the Supreme Court is a tentative opinion which, in my opinion, does not amount to a definite decision that a person accused of substantive offence can be convicted of the abetment thereof. In the case of Major E.G. Barsay and Others Vs. The State, accused Nos. 4, 5 and 6 had been charged only with the offence u/s 5(1)(c) and (d) punishable u/s 5 (2) of the Prevention of Corruption Act. read with Section 34 of the Indian Penal Code. The question which arose was whether they could be convicted of the offence of abetment in respect of the offence u/s 5 (1)(c) and (d) read with Section 109 of the Indian Penal Code. The Division Bench took the view that P. 1641 that since accused Nos. 4, 5 and 6 were not only charged with the offences of criminal conspiracy to do certain illegal acts. including offences u/s 5(1)(c) and (d), but were also charged with having committed those offences in pursuance of that conspiracy, read with Section 34 of the Indian Penal Code, it would not be illegal to alter the charge against accused Nos. 4 to 6 to one of abetment of the offence of criminal misconduct, as no prejudice was likely to be caused to any of the accused by the Court doing so. In taking that view, the Division Bench relied on the decision of the Privy Council in the case of Begu v. Emperor 27 Bom LR 707 : (1925) 26 Cri LJ 1059 in which the provisions of Sections 236 and 237 of the Criminal Procedure Code were resorted to. In the said case, the five appellants before the Board were jointly charged with murder u/s 302 of the Indian Penal Code and tried before the Sessions Judge who convicted the second and the third appellants of the offence of murder and sentenced both of them to death, but convicted the remaining three appellants u/s 201 of the Indian Penal Code of causing evidence of the murder to disappear and sentenced them to seven years' rigorous imprisonment. On appeal to the Privy Council, it was sought to be contended that the said appellants not having been charged with the offence u/s 201 of the Indian Penal Code of which they had been convicted, the whole trial in which they were jointly tried with the second and third appellants was bad. The Privy Council affirmed their convictions as well as the sentences passed upon them u/s 201 of the Indian Penal Code and, in doing so. they referred to Sections 236 and 237 of the Code of Criminal Procedure and stated that a man can be convicted of an offence, though there has been no charge in respect of it "If the evidence is such as to establish a charge that might have been made" (at page 711). The Privy Council held that the said three

appellants were, therefore, rightly convicted as they were tried on the evidence which brought their case u/s 237 of the Code of Criminal Procedure.

11. In the case of Chainsukhlal Punamchand Meher Vs. The State of Maharashtra, , my brother Tulzapurkar J. had referred to a Division Bench consisting of myself and my brother Kamat J. the question as to whether in a case falling under Sections 236 and 237 of the Code of Criminal Procedure, it was permissible for a Criminal Court to alter the conviction from an offence which is of lesser gravity to an offence of greater gravity After considering the various authorities on the point and having regard particularly to the provisions of Sections 236 and 237 of the Code of Criminal Procedure, we held that in a case falling under these sections, it was permissible for a Criminal Court to alter the conviction from an offence which is of lesser gravity to an offence of greater gravity, provided that prejudice is not caused to the accused thereby. The view taken by us was that the only limitation that can be read into Section 237 of the Code of Criminal Procedure, having regard to its plain language and the Supreme Court decisions discussed by us in that judgment was the overriding consideration of prejudice to the accused Though the question of altering the conviction from that of a particular offence of lesser gravity to one of greater gravity does not arise in the present case, the said decision has been cited for the purpose of showing the manner in which the provisions of Sections 236 and 237 of the Code of Criminal Procedure should be interpreted and applied. In my opinion, as far as the offence of abetment of kidnapping by the 1st accused is concerned, the facts and the evidence bring it within Section 237 of the Code of Criminal Procedure. The facts of the prosecution case against the 1st accused were of such a nature that it was doubtful whether he had committed the substantive offence of kidnapping itself, or the offence of abetment of kidnapping. He could therefore, by virtue of the provisions of Section 236 of the Code of Criminal Procedure have been charged with both these offences. He was in fact, not so charged and, in those circumstances, the provisions of Section 237 of the Code of Criminal Procedure are attracted I therefore hold that he can be convicted of the offence of abetment of kidnapping with which he might have been charged under the provisions of Section 236 of the Code of Criminal Procedure, although he was not charged with it, subject of course to this that the first accused must be shown not to be prejudiced in any manner thereby. As already stated by me above, there is, to my mind, no other evidence, either by way of additional witnesses, or by way- of further evidence elicited from the same witnesses, which could have been led if the charge of abetment had been framed against the first accused and, in those circumstances, the fact that he was not so charged and is now sought to be convicted of the offence of abetment of kidnapping cannot cause him any prejudice.

12. Two subsidiary points were sought to be raised by Mr. Naik. the learned Counsel appearing for accused Nos. 1 and 3 before me. and they were, first, that to convict accused No. 1 of the offence of abetment of kidnapping by accused No. 2. who has been convicted by the trial Court not of the substantive offence of

kidnapping but only of the offence of abetment of kidnapping and who is not before the Court in this appeal, would not be fair, and the Court should not, therefore, alter the conviction of the first accused as is sought to be done. Secondly, it was sought to be contended by Mr. Naik that whatever may be the powers of the trial Court, the appellate Court cannot resort to the provisions of Sections 236 and 237 of the Code of Criminal Procedure.

13. The decision of Division Bench of this Court in the case of Nana Gangaram Dhore v. State of Maharashtra 71 Bom LR 375 : 1970 Cri LJ 621 Provides a complete answer to both these contentions raised by Mr. Naik. It has been laid down in the said case that the powers of the appellate Court u/s 423 of the Code of Criminal Procedure, are the same as those of the trial Court at page 3831 and that if for the purpose of deciding the appeal, the evidence examined as a whole shows that the appellants are guilty u/s 34 of the Indian Penal Code having shared a common intention with the other accused who are acquitted, and that the acquittal of those persons was bad. there was nothing to prevent the appellate Court from expressing that view and giving that finding at page 386), The view taken by the Division Bench in the said case is binding upon me, and following the same. I must reject both these contentions of Mr. Naik.

14. I, therefore, alter the convictions of the first accused from the substantive offence of kidnapping u/s 366 of the Indian Penal Code to one of abetment of the offence of kidnapping committed by the second accused u/s 366 of the Indian Penal Code, and pass upon him the same sentence as has been awarded in respect of the substantive offence of kidnapping of which he was found guilty by the trial Court. The conviction as well as the sentence passed against him by the trial Court for the offence u/s 376 of the Indian Penal Code are set aside and the appeal filed by accused No. 1 is allowed to that extent.

15. As far as accused No. 3 is concerned his conviction of the offence of abetment of kidnapping u/s 366 read with Section 109 of the Indian Penal Code will stand, with the only alteration that he is convicted of the offence of abetment of the substantive offence of kidnapping committed by accused No. 2 instead of by accused No. 1 as stated in the charge. With this modification, the appeal filed by accused No. 3 is dismissed.