

(1951) 03 MAD CK 0031

In the Madras High Court

Case No : Criminal Miscellaneous Petition No. 1524 of 1950

The Dist. Mag.

APPELLANT

Vs

K. Subbanna

RESPONDENT

Date of Decision : 21-03-1951

Acts Referred:

Criminal Procedure Code, 1898 (CrPC) — Section 439, 494, 537, 555
Penal Code, 1860 (IPC) — Section 366

Citation : AIR 1951 Mad 900 : (1952) ILR (Mad) 257 : (1951) 64 LW 465 :
(1951) 1 MLJ 570

Hon'ble Judges : Panchapakesa Ayyar, J

Bench : Single Bench

Advocate : Public Prosecutor, for the Appellant;

Judgement

Panchapakesa Ayyar, J.—This petn. has been taken on file on a reference by the Dist. Mag., Chittoor, for quashing the charge u/s 363, I. P. C. framed by the Stationary Sub-Mag., Madanapalle against one Subbanna for having kidnapped one Venkatalakshmamma, a girl of 16 years on 4-12-1949.

2. The facts were briefly these. The Sub-Inspector of Police, Thambalapalle, filed a charge sheet in the Ct. of the Sub-Stationary Sub-Mag., Madanapalle, against accused Subbanna u/s 366, I. P. C. for kidnapping Venkatalakshmamma, a fatherless minor girl of 16, from the guardianship of her mother, P. W. 2, on 4-12-1949, with intent that she might be compelled to marry him against her will. That case was taken on file by the Stationary Sub-Mag., Madanapalle, as P. R. C. No. 4 of 1950. As the girl had stated to P. W. 10, the Sub-Inspector of Police, that she loved the accused & was having sexual intercourse with him even before her marriage, in the fields & elsewhere & had willingly eloped with him & had indeed induced him to take her away & marry her, as she did not like to marry a Bangalore man fixed up for her by her mother & intensely disliked by her, the Asst. Public Prosecutor probably relying on the rulings in Fulchand Teprwalla Vs. Emperor, applied to the Sub-Magistrate by a memo dated

23-3-1950 to send the case to the Sub-Divisional Mag., Madanapalle, for trial u/s 363, I. P. C. as he was not pressing the charge u/s 366, I. P. C. So, without examining the prosecution witnesses, the Sub-Mag. sent the case to the Sub-Divisional Mag., Madanapalle, for taking it on file u/s 363, I. P. C. & disposing of the case. He simply endorsed on the case file thus: "Submitted to the Sub-Divisional Mag., Madanapalle, as requested by A.P.P. II". The Sub-Divisional Mag., Madanapalle, sent the case back to the Sub-Mag., stating that, when the charge-sheet & complaint disclosed an offence u/s 366, I. P. C., the Asst. Public Prosecutor could not say that he was giving up the offence u/s 366, I. P. C. at his will & pleasure & that it was the duty of the Ct, to hear the witnesses & determine what offence was committed. I may here remark that the Asst. Public Prosecutor had not applied to the Stationary Sub-Mag. u/s 494, Cr. P. C. for permission to withdraw from the prosecution of the offence u/s 366, I. P. C. and the Court had not given its consent to any such withdrawal and discharged the accused regarding the offence u/s 366, I. P. C. So the Sub-Divisional Mags". action in returning the case to the Sub-Mag. cannot be said to be unjustified. The Sub-Mag. after receiving back the case, enquired into it as a P. R. case & finally came to the conclusion that only an offence u/s 363, I. P. C. would stand, as the marriage was not by compulsion or against the will of the girl but with her full consent & indeed, demand. So, he framed a charge only u/s 363, I. P. C. against the accused, but unfortunately, fell into an illegality by not framing a charge as in a committal Ct. & also by recording the accused's plea after the charge was framed. The charge runs :

"I, Stationary Sub-Mag., Madanapalle. hereby charge you as follows:

That you, on or about 4-12-1949 kidnapped Venkata-lakshmmamma a minor girl under 18 years, from the lawful guardianship of her mother Siddamma & thereby committed an offence u/s 363, I. P. C. & within the cognizance of the First Class Mag., Madanappalle. I hereby direct that you be tried by the said Ct. on the said charge."

It will be noticed that this kind of charge was not within the powers of the Sub-Mag. as he could not, under the law, frame a charge relating to a first class offence (which he was not "competent to try" u/s 254, Cr. P. C. The principle of the P. C. ruling, in Yousufalli Mulla Noorbhai v. King 1949-2 M L J. 461 that the Ct. should be one "competent to hear & determine the case" will apply) & record the accused's plea of "not guilty" & direct the First Class Mag. to try the case. He could only frame charges for offences within his cognizance or within the cognizance of the Ct. of Session & not for offences within the cognizance of the First Class Mag., Madanapalle, indeed, even the printed form of the charge sheet would have warned him about this illegality. But he corrected the form & committed the error. Nor did he proceed u/s 346, Cr. P. C. & stay the proceedings & submit the case with a brief report to the Sub-Divisional Mag., Madanapalle, as that section requires. Naturally, the Sub-Divisional Mag., Madanapalle moved the District Mag., Chittoor, to move this Ct. to quash the illegal charge & to direct the

committal of the case by the Sub-Mag., Madanapalle, to the Sessions Ct., Chittoor, u/s 366, I. P. C., or to direct the case to be tried by the Sub-Divisional Mag., taking it on file only u/s 363, I. P. C. He urged that, in any case, the charge framed by the Sub-Mag, had to be quashed by this Ct. as it was illegal & not merely irregular & curable u/s 537, Cr. P. C. The District Mag. agreed with him & made this reference.

3. I have perused the records & heard the learned Public Prosecutor. The accused is absent though served. It is clear to me that, under the law & applying the principle of the P. C. ruling in Yousufalli Mulla Noorbhai v. King, 1949 2 M. L. J. 461, the charge framed by the Sub-Mag., is illegal as urged by the Sub-Divisional Mag., the Dist. Mag. & the learned Public Prosecutor & not merely irregular & curable u/s 537, Cr.P. C. Mags, must stick to the law & not strike out the well known & recognised clauses in printed forms of charges approved by this Ct. & frame new & unauthorised methods of charges regarding of. fences which they are not "competent to try" & send the cases up to their superior Mag. to try, after recording the accused's plea also. That is clearly illegal, & not merely irregular u/s 537 Cr. P. C. So I quash the charge u/s 363, I. P. C. framed by the Sub-Mag., Madanapalle.

4. The next question is whether the case is a fit one to be directed to be committed by the Sub-Mag., Madanapalle, to the Ct. of Session, Chittoor for an offence u/s 366, I. P. C., or whether it is to be simply directed to be tried by the Sub-Divisional Mag., Madanapalle, for an offence u/s 363, I. P. C. There is a conflict between the other H. Cts. regarding the validity of a minor girl's consent to marriage with the person who kidnaps her, when considering a charge against him u/s 366, I. P. C. The Calcutta H. C. in Fulchand Tepriwalla Vs. Emperor, & the Oudh Chief Ct. in Bishnath Prasad v. Emperor, 48 Ori L. J. 542 have taken the view that the clause "against her will" in Section 366, I. P. C. means only the minor's own will & not the will of the lawful guardian whereas the Allahabad H. C., in Ch. Resal Singh Vs. Baljit Singh and Others, and Emperor Vs. Timman and Others, & the Emperor Vs. Ayubkhan Mirsultan, have held that the minor's consent is no consent at all even for purposes of Section 366, I. P. C. and that an offence u/s 366, I. P. C. will lie in such circumstances. There is no Madras case on this point. Prima facie, I am inclined to agree with the view of the Bombay & Allahabad H. Cs. as the principle of Section 366 (as of Section 863, itself) is to uphold the lawful authority of the parents or guardians over their minor wards & to throw a ring of protection over the girls themselves, & to penalise sexual commerce on the part of persons who corrupt or attempt to corrupt the morals of the minor girls by taking improper advantage of their youth & inexperience, & as u/s 376, I. P. C. the consent of a girl under 16 is expressly enacted to be irrelevant & immaterial & ignored. I offer no final opinion now on this point, but it is obvious that the point will have to be considered & decided in this state one way or the other, & so, it is better that the accused be directed to be committed to the Ct. of the Sessions, Chittoor, for an offence u/s 366, I. P. C. which will permit of a conviction u/s 363, I. P. C. if it will not stand & the lesser offence will.

Of course, I say nothing also as to whether an offence u/s 363 also will be finally made out. That is all for the trial Ct. In the end, I direct the Sub-Mag., Madanapalle, to commit the case to the Ct. of Session Chittoor, for an offence u/s 366, I. P. C. after framing such a charge against the accused.