[IN THE COURT OF CRIMINAL APPEAL]

1961 *Present :* **Sansoni, J. (President), H. N. G. Fernando, J., and L. B. de Silva, J.**

THE QUEEN *v.* M. MURUGESU and 3 others

APPEALS NOS. 190–193 OF 1960, WITH APPLICATIONS NOS. 213–216

S. C. 39—M. C. Jaffna, 15,528

Abduction—Quantum of evidence—Use of force—Inference of guilt therefrom—Penal Code, ss. 357, 364.

Where, in a prosecution for abduction under section 357 of the Penal Code the forcible abduction of a girl is proved beyond question, it is impossible, in the absence of any evidence suggesting such a conclusion, to hold that she went with the accused willingly. In such a case, the offence of abduction with the necessary intention is complete, whether or not rape was committed subsequent to the abduction or even if the girl had intercourse willingly with the accused.

APPEALS against four convictions in a trial before the Supreme Court.

Colvin R. de Silva, with *V. Karalasingham*, for the 1st accused-appellant.

J. V. C. Nathaniel, for the 2nd accused-appellant.

M. M. Kumarakulasingham, for the 3rd accused-appellant.

F. X. J. Rasanayagam, for all accused-appellants (assigned).

T. A. de S. Wijesundera, Crown Counsel, for the Crown.

Cur. adv. vult.

March 20, 1961. SANSONI, J.—

The four accused were indicted on the following counts:—

1. That on or about the 28th day of November, 1958, at Kandy Road, Aryalai, in the division of Jaffna within the jurisdiction of this Court, you did abduct Poopathy, daughter of Sangarapillai, with intent that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse, and that you have thereby committed an offence punishable under section 357 of the Penal Code.

In the alternative to count 1 above :

2. That at the time and place aforesaid, you the first accused above-named, did abduct the said Poopathy with intent that she may be forced or seduced to illicit intercourse or knowing it to be

likely that she will be forced or seduced to illicit intercourse, and that you, the first accused abovenamed, have thereby committed an offence punishable under section 357 of the Penal Code.

In the alternative to count 1 above :

3. That at the time and place aforesaid, you, the second, third and fourth accused abovenamed, did abet the first accused abovenamed in the commission of the offence set out in count 2 above, which offence was committed in consequence of such abetment, and that you, the second, third and fourth accused abovenamed, have thereby committed an offence punishable under section 357 read with section 102 of the Penal Code.

4. That on or about the 28th day of November, 1958, at Urumpirai, in the division of Jaffna, within the jurisdiction of this Court, you, the second accused abovenamed, did commit rape on the said Poopathy and that you, the second accused abovenamed, have thereby committed an offence punishable under section 364 of the Penal Code.

They were all convicted on all the counts, the jury being unanimous in respect of the first, second and third counts but divided five to two on the fourth count. Each accused was sentenced to 10 years' rigorous imprisonment on the 1st, 2nd and 3rd counts, and the second accused to 15 years' rigorous imprisonment on the 4th count, the sentences to run concurrently.

The evidence of the girl Poopathy, who was about 16 years old at the time of the offences, was that on the afternoon in question she was walking home from school with her friends, two of whom, Elankeswary and Paramsothy, gave evidence for the prosecution. A car driven by the fourth accused overtook them, and was halted in front of them. The fourth accused got down from the car. The first accused also got down, came up to her, carried her and put her in the front seat of the car. She was held there by him and prevented from getting out. She cried out and appealed to her friends to help her. The second and third accused were seated in the rear seat, and after the second accused ordered the fourth accused to drive off quickly the fourth accused drove the car away.

Somewhere between the spot where this happened and Urumpirai, where she was ultimately taken off the car, the second accused took the wheel and the fourth accused then sat in the rear seat. In the course of the journey and while the second and third accused were still sitting in the rear seat, her head was tilted back and her mouth was closed by somebody sitting behind, in order to prevent her shouting out. She was uncertain as to who exactly did that and who tilted her head back while her mouth was being closed. When the car reached a certain house in Urumpirai she was pulled out of it by the first accused, after which the third and fourth accused left in the car. When it was dark she was taken by the first and second accused and a woman to another house close by.

There the first accused ordered her to take off her frock. When she did not do so he tore it off, and the woman then put a saree and a blouse on her. She also removed her knickers on the orders of the first accused. The first accused then left saying that he had to go to hospital, and he was not seen again by her.

She and the second accused were locked inside a room of that house from outside. They were alone in that room, and she went to sleep on a mat on which the second accused also slept. In examination-in-chief she was then questioned as to what happened after she fell asleep and the questions and answers are as follows :

100. Q. Then what happened ?
A. While I was fast asleep the second accused got on top of me and lay on me and held me by his hands.

101. Q. Then ?
A. Holding me tight.
Court : At this stage the girl starts sobbing.
Witness : Holding me tight, in my female organ he inserted his male organ.

102. Q. Then what happened ?
A. I tried my best to dislodge.

103. Q. Were you able to succeed ?
A. I could not.

104. Q. So then what happened ?
A. After about five minutes, using my full strength I succeeded in pushing him away.

105. You said that he inserted his male organ into your female organ ?
A. Yes.

106. Q. Were you able to feel the second accused inserting his male organ into your female organ ?
A. Yes.

107. Q. Was it done with your consent or without your consent ?
A. It was done without my consent.

In other words, she claimed that she was awake at the time the second accused had intercourse with her. The next morning the second accused took her to the back room of a temple and they were locked inside that room for the whole day from outside. No advances were made to her by the second accused there. After sunset she was taken by the second accused and the young man across a stretch of paddy fields along a road. A car came along that road. In it were her mother and other relations, and the second accused left her and ran away.

Counsel appearing for the first and second accused at the trial at one stage told the learned Commissioner, when he was cross-examining the girl with regard to her removal in the car, that his defence was that the witness was a willing party. This statement probably related to the charge of abduction. It was also suggested to the girl that she had previously had sexual intercourse with a cousin of hers called Parajasekeram and had broken off that affair and started a love affair with the second accused. She denied all these suggestions. With regard to the circumstances under which the alleged rape was committed, she was cross-examined and her answers to the questions show that she maintained the same position as she had done in examination-in-chief, namely, that she was awake when the second accused had intercourse with her. However, during further cross-examination a passage from her evidence in the lower court was put to her where she had said that penetration took place while she was asleep, and answers which she gave under further questioning bore out that new position.

It was by no means clear, when Counsel for the third accused began to cross-examine, that the girl had been consistent in her evidence as to the details of the alleged rape. He was therefore quite entitled to suggest to her that no penetration had taken place before she woke up. But he was interrupted several times by the learned Commissioner when he was cross-examining her on this aspect of the case, and the learned Commissioner in effect declared that the girl had consistently said that when she awoke penetration had already taken place.

The doctor's evidence regarding his observations after an examination of the girl on the morning of the 30th November, 1958, was that he found no marks at all on her to indicate that any violence had been used. He admitted that if there had been a trivial injury it could have disappeared before he made his examination. He found no signs of recent tears of the hymen but only shreds of tissues. His opinion was that if any rupture of the hymen had taken place that would have happened over two weeks prior to the day of his examination. The doctor admitted that the condition of the hymen was quite consistent with sexual intercourse having taken place at least two weeks prior to his examination. The orifice of the vagina was dilated to such an extent that he was able to insert two fingers with a fair amount of ease, and this was consistent with her having had sexual intercourse, although there were other possible causes. A perusal of the medical evidence indicates quite plainly that it did not help the prosecution, and might even have helped the second accused on the charge of rape. But the cross-examination was interrupted on several occasions. For example,

> 1521. Q. Would you agree that you would have expected to find effusion of blood and laceration of private parts if there had been any resistance ?

The learned Commissioner intervened before the answer was given and the following questions and answers were elicited :

1522. Q. The girl said she was sleeping with face upwards and legs slightly apart and when she woke up she found the second accused's male organ inside her female organ. In such a case would you expect any injury ?

A. Not in this particular case.

1523. Q. Then she says she struggled and tried to shake him off and ultimately she pushed him off. In those circumstances would you expect to find any injury inside her vagina ?

A. In her case I would not expect any injury.

The learned Commissioner was here questioning the doctor as if the girl had adopted one and only one position.

We do not think it necessary to refer to other instances where the learned Commissioner intervened in the course of the cross-examination, except to say that some of them were gravely prejudicial to the second accused on the charge of rape.

In the course of the summing up, on the charge of rape, the learned Commissioner told the jury :

"She stuck to one story, that when she got up she found the male organ inside her female organ. Here she says that when she got up she found the second accused's male organ inside her private parts ",

and again :

"Her evidence here was that when she woke up she found the second accused on top of her and his organ was inside her female organ."

That may have been the impression the learned Commissioner had of the girl's evidence, but it was a wrong impression and the jury would undoubtedly have been misled into thinking that this was the one and only version of the incident which the girl had given.

When dealing with the evidence of the doctor the learned Commissioner told the jury :

"He said he listened to the girl's evidence and he said the girl had stated here that whilst she was sleeping she found the second accused on her body and when she woke up she found the male organ of the second accused inside her female organ. He told you that if that is the case, he will not expect any injuries on her vagina."

This is not an accurate reproduction of the doctor's evidence on this vital matter, and this version of the girl's evidence had been put by

the learned Commissioner to the doctor. We think that on the charge of rape the second accused was gravely prejudiced by misdirections as to the girl's evidence and the doctor's evidence. The interventions of the learned Commissioner seem to show that he held strong views on the question whether sexual intercourse had in fact taken place and the circumstances under which it took place. He indicated to the jury very definitely that intercourse had taken place whilst the girl was asleep, instead of leaving it to them to find whether it had taken place at all, and if so under what circumstances. In our opinion the conviction of the second accused on the charge of rape must be set aside.

The other charges refer to the abduction of the girl. It cannot be said that there has been any misdirection which invalidates the convictions in respect of those charges. One complaint made against the summing up on these charges was that the learned Commissioner, in dealing with the question of intention which the accused should have had before they could be found guilty of the offence, told the jury that there was a commonsense principle that a man intends the natural consequences of his acts. It would have been better if he had told them that the actual intention of the abductors could be inferred from the circumstances, such as the time and manner of removal, the number of persons engaged in the enterprise, whether the girl protested or not, whether force was used or not. "Human nature being what it is, whenever one finds a young man abducting a girl of marriageable age the first and natural presumption must be that he had abducted her with the intention of having sexual intercourse with her . . . . if he had any intention other than that which is suggested by the natural circumstances of the case the burden lies upon him under section 106 of the Evidence Act to prove his innocence. Illustration (*a*) is clearly in point." (See *R. v. Mohammed Sadiq* [1].)

In this case, even if we follow the well-settled rule that the evidence of the girl is to be treated with caution, her forcible abduction was proved beyond question, and it is impossible, in the absence of any evidence suggesting such a conclusion, to hold that she went with the accused willingly. Mr. de Silva complained that a proper and correct summing up on a charge of rape was vital to the whole case and to all the accused. He submitted that if the jury found that there had been rape they would have been satisfied with regard to the intent with which the abductors acted. The question is whether the converse is also true, namely, that if they had found the second accused not guilty on the charge of rape they would have held the charge of abduction to have failed. We do not think so. The offence of abduction with the necessary intention was complete, whether or not the rape was committed; whether intercourse took place or not subsequent to the abduction, or even if the girl had intercourse willingly with the second accused, the proved circumstances under which her removal took place were sufficient to establish the charges of abduction.

[1] *A. I. R. (1938) Lahore 474.*

Mr. de Silva's main complaint was against the whole conduct of the case; he submitted that the accused had not been given a fair trial because of the repeated interruptions of the cross-examination by the learned Commissioner, his threats to report Counsel to higher authorities, and other remarks made by him against Counsel appearing for the accused. We were referred to *Rex v. Clewer* [1] and *James v. National Coal Board* [2], where it was held that the frequency and nature of the Judge's interventions prevented Counsel from presenting their case fairly. If we had thought that the interventions of the learned Commissioner had affected the accused to this extent prejudicially on the charges of abduction, we would have had no option but to set aside their convictions. But we do not think that the accused were prevented from properly placing their defence on those charges before the jury. We wish to add that Counsel for the first and second accused was guilty of certain lapses which caused the learned Commissioner to intervene at times in order to protect the girl while she was under cross-examination.

We have considered the submissions made on behalf of the third and fourth accused whose conduct does not appear to be quite as culpable as that of the first and second accused with regard to the charges of abduction. The third accused made a statement to the Magistrate on the 12th December, 1958, in which he accounted for his presence in the car by saying that he had merely accepted an invitation by the second accused. He claimed that he knew nothing of the purpose of the journey which the second accused had undertaken that afternoon. But there is the girl's evidence that he was seated in the rear seat with the second accused when her head was tilted back and her mouth closed in the course of the journey. She was naturally not able to say exactly what he did, but it was for the jury to decide whether he was intentionally assisting or taking part in this criminal adventure. One question they might well have asked themselves, without getting a satisfactory answer, was why the third accused continued to sit in that car whilst this girl was struggling to free herself from the first accused, whilst she was being forcibly put into the car, and even after it had been stopped to enable the second accused to take the wheel. The same applies to the fourth accused who, in his statement to the Magistrate on the 1st December, admitted that he had been told previously that he was required in order that a girl might be taken secretly to Urumpirai, and that he drove this car according to the directions given by the second accused. He was apparently turned out of the driving seat later by the second accused when he started shivering whilst driving, but he may have shivered because he was conscious of his guilt and not because of his innocence. It is difficult to understand why neither of them went to the assistance of the girl when she struggled and cried out, if their presence was wholly innocent, or even protested to the first accused against his high-handed conduct, as one would expect any sensible, innocent man to have done.

[1] (1953) *Cr. App. Rep. 37.*

[2] (1957) *2 A. E. R. 155.*

We affirm the convictions of the accused on the 1st, 2nd and 3rd counts of the indictment. However, we think that the sentences passed were excessive and we reduce the sentences passed on the first and second accused on count (1) to 5 years' rigorous imprisonment; and the sentences passed on the third and fourth accused on count (1) to 2 years' rigorous imprisonment. It is not necessary to pass any sentence on counts (2) and (3) since they are alternative to count (1).

Convictions on counts 1 to 3 affirmed.

Sentences reduced.