

1971

Present : Weeramantry, J.

K. MURUGESU and another, Appellants, and R. M. WEERAKOON
(S. I. Police), Respondent

S. C. 129-130/71—M. C. Nuwara Eliya, 40539

*Penal Code—Section 354—Offence of kidnapping a girl from lawful guardianship—
Burden of proof as to age of girl.*

Where a person is charged with kidnapping a girl from lawful guardianship in breach of section 354 of the Penal Code, the burden is on the prosecution to prove that the girl was under 16 years of age at the time of the offence. If the prosecution has failed to produce the birth certificate of the girl after dates have been obtained for its production, the mere *ipse dixit* of the father of the girl is insufficient to discharge the burden of proof if the girl appears to be of an age very near to the marginal age.

APPEAL from a judgment of the Magistrate's Court, Nuwara Eliya.

C. Motilal Nehru, with *A. Chinniah*, for the accused-appellants.

K. W. D. Perera, Crown Counsel, for the Attorney-General.

April 20, 1971. WEERAMANTRY, J.—

In this case the 1st accused is charged with kidnapping a girl named Pushpa and the 2nd accused with abetting the commission of the offence of kidnapping. The kidnapping was alleged to be from the lawful guardianship of Kalimuttu wife of Munian and the offence is one punishable under Section 354 of the Penal Code.

In order to maintain this charge it was necessary for the prosecution to prove that the girl was under 16 years of age.

Realising the importance of the girl's birth certificate in order to prove this matter, the prosecution had on two dates of trial obtained postponements stating that the birth certificate had not been obtained.

On the third date the birth certificate had apparently still not been obtained and the case proceeded to trial. The accused were undefended. The learned Magistrate assumed jurisdiction in terms of Section 152 (3) of the Criminal Procedure Code and after trial found the accused guilty and sentenced the 1st accused to 8 months' rigorous imprisonment and the 2nd accused to 6 months' rigorous imprisonment.

The girl stated in her evidence that she does not know her age, and her mother has also been unable to assist the Court on the question of her age except to state that the girl was 16 years of age on the date she gave evidence. Her father has also given evidence but has not explained the absence of the birth certificate which apparently the prosecution had endeavoured to obtain. He has further stated that the child was born on 7th October, 1955.

In a criminal case where the burden lies heavily on the prosecution to prove every ingredient of the offence with which the accused is charged, the mere *ipse dixit* of the father seems in these circumstances to be altogether insufficient to prove the age of the child, where the age is material to the charge and the child appears to be of an age very near to the marginal age in question. There should have been evidence as to the reasons for the non-production of the birth certificate, and in the absence of the birth certificate, some more satisfactory evidence in regard to the manner in which the exact date of birth was fixed. Reference to some incident at or around the time of the birth may have sufficed for this purpose, but the mere statement by the father seems insufficient in this case to discharge the burden of proof of age which lies upon the prosecution.

Had the accused been represented by counsel he would no doubt have been able with ease to shake the evidence of the father on the question of the date. In the absence of further material supporting his bare assertion of a particular date, he would in all probability have been quite unable to maintain the correctness of the precise date he had mentioned.

In any event in a case such as this when two dates had been obtained for the production of the birth certificate, I consider that it was incumbent on the prosecution to explain to the Court the reasons for its non-production.

In these circumstances I take the view that the prosecution has failed to prove a material ingredient of the charge laid against the accused. I therefore quash the convictions and acquit the accused.

Appeal allowed.