1970 *Present :* Samerawickrame, J.

P. SIRISENA and 2 others, Appellants, *and* SUB-INSPECTOR OF POLICE (C. B. I., Fort, Colombo), Respondent

S. C. 632-634/68—M. C. Panadura, 1594

Criminal law—Offence of kidnapping a girl from lawful guardianship—Proof of improper purpose—Immateriality of minor's consent.

On 23rd June 1966 the 1st accused-appellant went through a marriage ceremony with a minor after causing her to be removed by his sisters (2nd and 3rd appellants) from the custody of her mother who was told by them falsely that the minor was being taken for a birthday party. The minor left willingly

[1] *Mohamado v. Ibrahim (1895) 2 N. L. R. 36.*

with the 2nd and 3rd appellants and there was no compulsion used on her. After the marriage ceremony was over, the minor returned home at 1.00 p.m. the same day. On 27th May 1966 the 1st appellant had given notice of intention of marriage stating that the minor's age was twenty-one years and giving a false address.

Held, that the appellants were liable to be convicted of kidnapping the minor from the lawful guardianship of her mother. The taking of a minor for the purpose of contracting a marriage, upon a false pretence that she was a major, without the knowledge of her parents, was taking her away for an improper purpose. It was immaterial that the minor consented or went willingly, for a minor cannot validly consent to the substitution of some other person's control for the control which is exercised over her by her lawful guardian.

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

F. R. Dias Bandaranaike, for the accused-appellants.

Priyantha Perera, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

January 13, 1970. SAMERAWICKRAME, J.—

The first, second and third appellants have been convicted of kidnapping M. Trixie Charlotte Fernando, a minor, from the lawful guardianship of her mother. The second and third appellants are sisters of the first appellant and they were neighbours of the minor and her mother. On 27th May 1966, the first appellant had given notice of intention of marriage to the minor stating that her age was twenty-one years and giving a false address. On 23rd June 1966, the 2nd accused-appellant came to the house of the minor and asked the mother to permit her to take her daughter to a birthday party at Dehiwela. The mother had shown reluctance stating that her husband was not at home. The 2nd accused-appellant, accompanied by the 3rd accused-appellant, came there again and pressed the mother to permit the minor to go with them. She had then permitted them to take the minor to the birthday party on condition that she returns immediately after the party was over. The 2nd and 3rd accused-appellants had taken the minor to the Y. M. B. A. where she was married to the first accused-appellant. Thereafter, the 1st accused-appellant had taken her to a studio where they posed for a photograph. The minor had returned home at 1.00 p.m. the same day. Later, the mother discovered that her daughter had been married.

It would appear that the minor left willingly with the 2nd and 3rd appellants and that there was no compulsion exercised on her. In the case of *Nalliah v. Herat*,[1] Gratiaen, J., held that the taking of a minor temporarily away from a guardian without any intention of depriving her of the unrestricted freedom to return to the guardian's protection whenever she chose to do so did not amount to the offence of kidnapping but he added that if she is taken away for an improper purpose the

[1] *(1951) 54 N. L. R. 473.*

offence of kidnapping would be committed. It appears to me that the taking of a minor for the purpose of contracting a marriage, upon a false pretence that she was a major, without the knowledge of her parents, was taking her away for an improper purpose.

It is true that the first appellant was not present when the minor actually left the house of her mother with the 2nd and 3rd appellants but it appears to me that he was materially instrumental in causing her to leave the custody of her mother along with the 2nd and 3rd appellants and come to him as it is obvious that she did so because of his promise or at least his agreement to marry her. This clearly appears from the fact that he had already given notice of marriage. In *The Queen v. Shaik Adam,*[1] the facts were as follows :—At the invitation of a girl under the age of sixteen years living with her parents, the defendant agreed to elope with her. The girl met the defendant by appointment not far from her father's house, which she had left (with the intention of not returning) on the pretence of going to school, and the defendant took her to his own house. Clarence, J., held that the offence of kidnapping had been committed. He stated, " In the present case, a Eurasian girl under sixteen, apparently but imperfectly educated, sends a message to an Asiatic Mohammedan a few years older than herself, inviting him to elope with her ; and he does so. In my opinion his act in doing so amounted to an offence within the purview of this enactment, and to rule otherwise would be to deprive the enactment of a large part of the effect it was designed to exercise in protecting females of tender age, not merely from force or fraud, but from results of their own immature judgment and unreasoning impulses. " As it appears to be clear that the 1st appellant had arranged with the minor upon a promise or agreement to marry to leave her mother and come with his two sisters to him, it does not seem to me material that he was not present at the time she actually left the guardian. It might have been different if he only came on the scene after the minor had left with his sisters without taking any part in causing her to leave her mother's custody. Clarence, J., referred to this aspect of the matter and stated, " It is true that in the present case the girl had left her father's house with the intention of not returning, when the defendant joined her and escorted her away, but her so leaving her father's house appears to have been the result of pre-arrangement with defendant, which makes all the difference. " It is immaterial that the minor consented or went willingly for a minor cannot validly consent to the substitution of some other person's control for the control which is exercised over her by her lawful guardian.

I affirm the finding of guilt against the appellants. The learned magistrate has, without proceeding to conviction, bound over the 3rd accused-appellant under s. 325 of the Criminal Procedure Code. Her appeal is accordingly dismissed.

[1] *(1888) 8 S. C. C. 161.*

The learned magistrate has sentenced the 1st and 2nd accused-appellants each to one year's rigorous imprisonment. While it is correct that any consent or even forwardness on the part of a minor will not prevent the offence of kidnapping from being committed, they are matters which are not entirely irrelevant in regard to the question of sentence. I alter the sentence passed on the first accused-appellant to one of three (3) months' rigorous imprisonment.

The 2nd accused-appellant was apparently a tool in the hands of the 1st appellant. I accordingly set aside the sentence of imprisonment passed on her and order that on the day she appears for sentence in the Magistrate's Court, she be detained until the rising of Court and also pay a fine of Rupees one hundred and fifty (Rs. 150/-). In default of payment of fine she will undergo six weeks' rigorous imprisonment.

Subject to the variation of the sentences in respect of the 1st and 2nd accused-appellants, their appeals are dismissed.

Appeals dismissed.

Sentences in respect of 1st and 2nd appellants varied.