1951 *Present :* **Gratiaen J.**

K. NALLIAH, Appellant, *and* P. B. HERAT (Inspector of Police), Respondent

S. C. 1,322—M. C. Colombo, 8,874

Evidence—Charge on two counts—Acquittal on one count—Effect on verdict on the other count.

Kidnapping from lawful guardianship—" Takes or entices "—" Out of the keeping of the lawful guardian "—Penal Code, ss, 352, 354.

Where an accused is tried on two connected but different charges in the same proceedings a conviction on one count cannot be based on evidence which has by implication been rejected by an order of acquittal on the other count.

A person who takes out a female child under 16 years of age without her guardian's express consent but without the proved intention of depriving the girl of her unrestricted freedom to return to her guardian's protection whenever she chooses to do so does not commit the offence of kidnapping from lawful guardianship within the meaning of section 352 of the Penal Code.

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

H. V. Perera, K.C., with *C. S. Barr Kumarakulasinghe* and *K. Rajaratnam*, for the accused appellant.

H. A. Wijemanne, Crown Counsel, with *E. H. C. Jayetileke*, Crown Counsel, for the Attorney-General.

Cur. adv. vult.

May 2, 1951. GRATIAEN J.—

The appellant, who is a married man with a long period of service in the Railway Department, was charged in the Magistrate's Court of Colombo with having on 3rd October, 1950, committed the following offences :—

(*a*) Kidnapping a girl aged 13½, named Rita La Faber, from the lawful guardianship of her mother—an offence punishable under section 354 of the Penal Code ;

(*b*) using criminal force on the girl Rita with intent to outrage her modesty—an offence punishable under section 345 of the Penal Code.

The learned Magistrate decided to try these grave charges summarily in terms of section 152 (3) of the Criminal Procedure Code.

At the conclusion of the trial the appellant was acquitted of the charge of using criminal force, but was convicted on the charge of kidnapping. The present appeal is from this conviction.

Rita La Faber's version is that when she and her younger sister were leaving the precincts of St. Anthony's Church at Kochchikade on the afternoon of the day in question they met the appellant (who was well known to them and had until recently been their mother's landlord). He invited Rita to go with him to the Regal Cinema as his guest. She joined him in a bus, having parted company with her sister who went home alone. Rita has made some suggestion in her evidence that she was taken into the bus " by force ", but this allegation can safely be discounted in view of her earlier statement to her mother that she had accepted the invitation. Indeed, she subsequently admitted at the trial that after she entered the bus she " went to the pictures quite willingly ". I am satisfied from an examination of the evidence for the prosecution that during the earlier stages of the transaction, at any rate, Rita had no reason to think that the appellant entertained any sinister motives in making his offer to " treat " her to a visit to a cinema. On the way to the entertainment they had some light refreshments at his expense at a " buriyani " shop.

So far there is no substantial dispute as to what took place. The appellant says that he was kindly disposed towards this young girl and that his only motive was to give her a pleasant " outing " until it was time for her to return to her mother and for him to return to his wife. If that be true, he would certainly be well advised to restrict his future manifestations of genuine affection for other people's children by first consulting the parents concerned.

The main dispute is as to what took place after this incongruous couple had taken their seats together at the Regal Theatre. Rita complains that after the lights went out the appellant put his arms round her and acted improperly towards her. She was considerably upset, she says, and wished to leave the cinema immediately. The appellant then took her away but, instead of accompanying her home direct, he took her by force to the Galle Face green, and taking advantage of the darkness in a secluded spot which he selected for the purpose, took advantage of her in a manner in which to my mind would not only have warranted convictions under sections 345 and 354 of the Penal Code but called for sentences far beyond the jurisdiction of a Magistrate or a District Judge to impose. Indeed, the original complaint to the police was that rape had been committed, but this charge was not persisted in because it was negatived by a medical examination. This part of Rita's story is stoutly denied on oath by the appellant ; he says that the whole transaction was perfectly innocent ; they saw the picture to its conclusion and then went home together. It is common ground that, within a reasonable time of the hour when the theatre would have closed after the performance they returned together by bus to their respective homes which are situated in close proximity to one another.

In this sharp conflict of testimony, the learned Magistrate examined the evidence and acquitted the appellant of the charge of using criminal force

on Rita with intent to outrage her modesty. I agree with Mr. Wijemanne that the grounds on which this order of acquittal was based are not very convincing, but it seems to me that so long as this acquittal stands—and the prosecution has not appealed against it—the appellant is entitled, for the purposes of his defence to the outstanding charge of kidnapping, to claim the full benefit of the order in his favour on the other charge. This is a fundamental principle of the criminal law which was recently emphasised by the Privy Council in *Sambasivam v. Public Prosecutor, Federation of Malaya* [1] :—

> " The effect of a verdict of acquittal pronounced by a competent Court on a lawful charge and after a lawful trial is not completely stated by saying that the person acquitted cannot be tried again for the same offence. To that it must be added that the verdict is binding and conclusive in all subsequent proceedings between the parties to the adjudication. The maxim *res judicata pro veritate accipitur* is no less applicable to criminal than to civil proceedings. Here, the appellant having been acquitted at the first trial . . . . the prosecution was bound to accept the correctness of that verdict at the second trial. *And the accused was no less entitled to rely on his acquittal in so far as it might be relevant to his defence.* " (*Per* Lord Macdermott).

In that case the Judicial Committee of the Privy Council was concerned with the effect of an acquittal on a particular charge in an earlier trial on a connected but different charge at a subsequent trial. But the rule is of general application and has equal force when one considers the effect which an order of acquittal on one charge would have on a connected charge in the same proceedings. A verdict on one count cannot be based on evidence which has by implication been rejected in disposing of another count at the trial.

It is in the light of this principle that the evidence on the charge of kidnapping outstanding against the appellant must be approached. Rita's version of the alleged offence against her modesty has considerable bearing on the question of the appellant's guilt or innocence on the charge of kidnapping. This evidence, in the learned Magistrate's judgment, could not with safety be acted upon in regard to the charge of criminal force. It necessarily follows, I think, that as long as the order for acquittal stands on that count, this evidence cannot be taken into account against the accused for any purpose whatsoever in connection with the kidnapping count. If then the conviction for kidnapping is to be established, it must be supported by evidence in the case other than that which must be regarded as having already been rejected by the learned Magistrate. This represents the main difficulty which I have encountered in deciding the present appeal.

The view I have taken is that the charge of kidnapping fails because the rest of the evidence is insufficient to establish the appellant's guilt and it is not permissible to act upon Rita's evidence as to what occurred after she and the appellant took their seats together at the Regal Theatre.

[1] (*1950*) *A. C. 458 at p. 479.*

Up to that point of time, no " kidnapping " within the meaning of section 52 of the Penal Code was proved to have been committed. As to what happened thereafter it is impossible to say because one's vision is blurred, so to speak, by the impenetrable " smoke screen " set up by the order of acquittal on the second count. When the smoke screen lifts, the parties are observed returning together by bus to their respective homes in circumstances which are by themselves consistent with the theory that Rita's removal from her parental custody had never been intended.

A person is not guilty of " kidnapping " a female child under 16 years of age unless he is proved to have " taken or enticed " her " out of the keeping of her lawful guardian ". Can it be said that a person necessarily " kidnaps " a young girl by merely taking her to a cinema show without her guardian's express consent but without the proved intention of depriving the girl of her unrestricted freedom to return to her guardian's protection whenever she chose to do so? I do not think so. It seems to me that in such a case the girl has not, even temporarily, left her mother's " keeping ". Where a minor leaves the immediate custody of his lawful guardian for a temporary purpose he must be deemed to be still in the guardian's keeping (*Ratanlal on Crimes, 16th Edition, page 855*), and the correct view is that the relationship of guardian and child suffers no break in its continuity *so long as there is not interference with the child's opportunity of returning to the guardian.* Although Rita's mother was absent at the time, Rita remained in her mother's " keeping " when she first met the appellant near the Church—and there is no proof that she did not so remain when she was a passenger in the bus or a guest at the " Buriyani Shop " and later at the cinema. The offence of kidnapping would have been complete if she had been forced or enticed away for an improper purpose. But this vital part of the case for the prosecution has not been established by evidence on which it is permissible to act. As the case now stands, I am logically compelled to hold that the offence of kidnapping has not been made out because the person of the minor Rita has not been proved to have been " *transferred from the custody of her guardian into the custody of some person not entitled to her custody* ". (*Gurdit Singh v. Emperor, A. I. R. (1916) Lahore 230*). I agree that Rita's so-called " consent " to her alleged kidnapping would be immaterial. (*R. v. Booth* [1]). A child cannot validly consent to the substitution of some other person's control for the control which is exercised over her by her lawful guardian. But, apart from the issue of consent, the accused must be acquitted because " kidnapping "—involving an even temporary severance of parental control—has not been established.

I allow the appeal and quash the conviction on the charge of kidnapping but I feel constrained to say that my order would have given me greater satisfaction if I were convinced that the appellant is in fact innocent of both offences which were framed against him at the trial. If ever there was a criminal proceeding which, by reason of the gravity of the charges and the intrinsic difficulties of the case, called for a preliminary investigation before committal and trial, this was one. It seems to me that the

[1] (*1872*) *12 Cox 231.*

Magistrate acted unwisely in exercising his discretion to dispose of the case summarily. I had at one stage considered whether I should quash the proceedings and order a fresh inquiry to be held under Chapter 16 of the Criminal Procedure Code. But Mr. Perera has pointed out that there are many infirmities in Rita's evidence, and in all the circumstances I do not think it would be right to place the appellant "in peril" for a second time after the lapse of many months. The appellant is acquitted.

Appeal allowed.