S. Varadarajan vs State Of Madras on 9 September, 1964

Equivalent citations: 1965 AIR 942, 1965 SCR (1) 243, AIR 1965 SUPREME COURT 942, 1965 MADLJ(CRI) 640, 1965 2 SCJ 493, 1965 (1) SCR 243, 1965 (1) SCWR 512, 1965 SCD 509

Author: J.R. Mudholkar

Bench: J.R. Mudholkar, M. Hidayatullah

PETITIONER:
S. VARADARAJAN

Vs.

RESPONDENT:
STATE OF MADRAS

DATE OF JUDGMENT:
09/09/1964

BENCH:
MUDHOLKAR, J.R.
BENCH:
MUDHOLKAR, J.R.
SUBBARAO, K.
HIDAYATULLAH, M.

CITATION:
1965 AIR 942 1965 SCR (1) 243
CITATOR INFO :
D 1973 SC2313 (10)

ACT:
Indian Penal Code (Act XLV of 1860), s. 361-"Take out of keeping of the lawful guardian", meaning of.

HEADNOTE:
Where a minor girl, alleged to be taken away by the accused person, had left her father's protection knowing and having capacity to know the full import of what she was doing and voluntarily joined the accused, it could not be said that the accused had taken her away from the keeping,, of her lawful guardian within the meaning of s. 361 of the Indian Penal Code (Act XLV of 1860). Something more had to be done in a case of that kind, such as an inducement held out by the accused person or an active participation by him in the

formation of the intention, either immediately prior to the minor leaving her father's protection or at some earlier stage. If the evidence failed to establish one of these things, the accused would not be guilty of the offence merely because after she had actually left her guardian's house or a house where her guardian had kept her she - joined the accused, and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. [248B-E].
Case law reviewed.

JUDGMENT:

CRIMINAL APPELLATE JURISDICTION : Criminal Appeal No.46 of 1963.

Appeal by special leave from the judgment and -order dated March 22, 1963, of the Madras High Court in Criminal Appeal No. 114 of 1961.

A. V. Viswanatha Sastry, K. Jayaram and R. Ganapathy lyer, for the appellant.

A. Ranganadham Chetty and A. V. Rangam, for the respondent. The Judgment of the Court was delivered by Mudholkar J. This is an appeal by special leave from the judgment of the High Court of Madras affirming the conviction of the appellant under S. 363 of the Indian Penal Code and sentence of rigorous imprisonment for one year awarded by the. Fifth Presidency Magistrate, Egmore, Madras. Savitri, P.W. 4, is the third daughter of S. Natarajan, P.W. 1, who is an Assistant Secretary to the Government of Madras in the Department of Industries and Co-operation. At the relevant time, he was living on 6th Street, Lake Area, Nungumbakkam, along with his wife and two daughters, Rama, P.W. 2 and Savitri, P.W. 4. The former is older than the latter and was studying in the Madras Medical College while the latter was a student of the second year B.Sc. class in Ethiraj College.

A few months before September 30, 1960 Savitri became friendly with the appellant Varadarajan who was residing in a house next door to that of S. Natarajan. The appellant and Savitri used to carry on conversation with each other from their respective houses. On September 30, 1960 Rama found them talking to each other in this manner at about 9.00 A.m. and had also seen her talking like this on some previous occasions. That day she asked Savitri why she was talking with the appellant. Savitri replied saying that she wanted to marry the appellant. Savitri's intention was communicated by Rama to their father when lie returned home at about 11.00 A.M. on that day. Thereupon Natarajan questioned her. Upon being questioned Savitiri started weeping but did not utter a word. The same day Natarajan took Savitri to Kodambakkam and left her at the house of a relative of his. K. Natarajan, P.W. 6, the idea being that she should be kept as far away from the appellant as possible for some time.

On the next day, i.e., on October 1, 1960 Savitri left the house of K. Natarajan at about 10.00 A.m. and telephoned to the appellant asking him to meet her on a certain road in that area and then went

to that road herself. By the time she got there the appellant had arrived there in his car. She got into it and both of them then went to the house of one P. T. Sami at Mylapore with a view to take that person along with them to the Registrar's office to witness their marriage. After picking up Sami they went to the shop of Govindarajulu Naidu in Netaji Subhas Chandra Bose Road and the appellant purchased two gundus and Tirumangalyam which were selected by Savitri and then proceeded to the Registrar's office. Thereafter the agreement to marry entered into between the appellant and Savitri, which was apparently written there, was got registered.Thereafter the appellant asked her to wear the articles of jewellery purchased at Naidu's shop and she accordingly did so. The agreement which these two persons had entered into was attested by Sami as well as by one P. K. Mar, who was a co- accused before the Presidency Magistrate but was acquitted by him. After the document was registered the appellant and Savitri went to Ajanta Hotel and stayed there for a day. The appellant purchased a couple of sarees and blouses for Savitri the next day and then they went by train to Sattur. After a stay of a couple of days there, they proceeded to Sirukulam on October 4, and stayed there for 10 or 12 days. Thereafter they went to Coimbatore and then on to Tanjore where they were found by the police who were investi-

gating into a complaint of kidnapping made by S. Natarajan and were then brought to Madras on November 3rd. It may be mentioned that as Savitri did not return to his house after she went out on the morning of October 1st, K. Natarajan went to the house of S. Natarajan in the evening and enquired whether she had returned home. On finding that she had not, both these persons went to the railway station and various other places in search of Savitri. The search having proved fruitless S. Natarajan went to the Nungumbakkam Police Station and lodged a complaint stating there that Savitri was a minor on that day and could not be found. Thereupon the police took up investigation and ultimately apprehended, as already stated, the appellant and Savitri at Tanjore.

It is not disputed that Savitri was born on November 13, 1942 and that she was a minor on October 1st. The other facts which have already been stated are also not disputed. A two-fold contention was, however, raised and that was that in the first place Savitri had abandoned the guardianship of her father and in the second place that the appellant in doing what he did, did not in fact take away Savitri out of the keeping of her lawful guardian.

The question whether a minor can abandon the guardianship of his or her own guardian and if so the further question whether Savitri could, in acting as she did, be said to have abandoned her father's guardianship may perhaps not be very easy to answer. Fortunately, however, it is not necessary for us to answer either of them upon the view which we take on the other question raised before us and that is that "taking" of Savitri out of the keeping of her father has not been established. The offence of "kidnapping from lawful guardianship" is defined thus in the first paragraph of s. 361 of the Indian Penal Code :

> "Whoever takes or entices any minor under sixteen years of age if a male, or under eighteen years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship."

It will thus be seen that taking or enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here, we are not concerned with enticement but what, we have to find out is whether the part played by the appellant amounts to "taking", out of the keeping of the lawful L2Sup./64--3 guardian, of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the house of his relative K. Natarajan ,She still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant did that constitutes in law "taking". There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at a certain place, went up to that place and finding him waiting in the car got into that car of her own accord. No doubt, she says that she did not tell the appellant where to go and that it was the appellant himself who drove the car to Guindy and then to Mylapore and other places. Further, Savitri has stated that she had decided to marry the appellant. There is no suggestion that the appellant took her to the Sub- Registrar's office and got the agreement of marriage registered there (thinking that this was sufficient in law to make them man and wife) by force or blandishments or ,anything like that. On the other hand the evidence of the girl leaves no doubt that the insistence of marriage came from her own side. The appellant, by complying with her wishes can by no stretch of imagination be said to have taken her out of the keeping ,of her lawful guardian. After the registration of the agreement both the appellant and Savitri lived as man and wife and visited -different places. There is no suggestion in Savitri's evidence, who, it may be mentioned had attained the age of discretion and was on the verge of attaining majority that she was made by the appellant to accompany him by administering any threat to her or by any blandishments. The fact of her accompanying the appellant all along is quite consistent with Savitri's own desire to be the wife of the appellant in which the desire of accompanying him wherever he went was of course implicit. In these circumstances we find nothing from which an inference could be drawn that the appellant had been guilty of taking away Savitri out of the keeping of her father. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. She was not a child of tender years who was unable to think for herself but, as already stated, was on the verge of attaining majority and was capable of knowing what was good and what was bad for her. She was no uneducated or un- sophisticated village girl but a senior college student who had probably all her life lived in a modern city and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing from a rural area. The learned Judge of the High Court has referred to the decision In re : Abdul Sathar(1) in which it was held that where the evidence disclosed that, but for something which the accused consented to do and ultimately did, a minor girl would not have left her husband's house, or would not have been able to leave her husband's house, there was sufficient taking in law for the purpose of S. 363 and expressing agreement with this statement of the law observed: "In this case the minor, P.W. 4, would not have left the house but for the promise of the appellant that he would marry her." Quite apart from the question whether this amounts to blandishment we may point out that this is not based upon any evidence direct or otherwise. In Abdul Sathar's case(1) Srinivasa Aiyangar J., found that the girl whom the accused was charged with having kidnapped was desperately anxious to leave her husband's house and even threatened to commit suicide if she was not taken away from there and observed :

> "Ifa girl should have been wound up to such a pitch of hatred of her husband and of his house or household and she is found afterwards to have gone out of the keeping of her husband, her guardian, there must undoubtedly be clear and cogent evidence to show that she did not leave her husband's house herself and that her leaving was in some manner caused or brought about by something that the accused did."

In the light of this observation the learned Judge considered the evidence and came to the conclusion that there was some legal evidence upon which a court of fact could find against the accused. This decision, therefore, is of little assistance in this case because, as already stated, every essential step was taken by Savitri herself :

> it was she who telephoned to the appellant and fixed the rendezvous, she walked up to that place herself and found the appellant waiting in the car; she got into the car of her own accord without the appellant asking her to step in and permitted the appellant to take her wherever he liked. Apparently, her one and only intention was to become the appellant's wife and thus be in a position to be always with him.
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> The learned Judge also referred to a decision in R. v. Kumarasami(2) which was a case under s. 498 of the Indian Penal Code. It was held there that if whilst the wife was living with her husband, a man knowingly went away with her in such a way as to deprive the husband of his control over her with the intent stated in the section, it would be a taking from the husband within the meaning of the section. (1) 54 M.L.J. 456.
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> (2) 2 M. H. C. R. 331.

It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstance can the two be regarded as meaning the same thing for the purposes of s. 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian. It would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our, opinion if evidence to establish one of those things is lacking it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the

fulfillment of the intention of the girl. That part, in our opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to "taking".

The case before us is not of a kind considered by Srinivasa Aiyangar J., in that the facts established do not show that Savitri would not have left K. Natarajan's house in which her father had left her without the active help of the appellant.

In the next decision, that is, that in Kumarasami's case(1) upon which the High Court has relied, it was observed that the fact that a married woman whom the accused was alleged to have taken or enticed away for certain purposes was a temptress, would make no difference and the accused who yielded to her solicitations would be guilty of an offence under s. 498 (b) of the Penal Code. This decision was approved of in In re: Sundara Days Tevan (2) , a case (1) 2 M. H. C. R. 331.

(2) 4 M. H. C. R. 20.

to which also the High Court has referred. The basis of both these decisions appears to be that depriving the husband of his proper control over his wife, for the purpose of illicit intercourse is the gist of the offence of taking away a wife under the same section and that detention occasioning such deprivation may be brought about simply by the influence of allurement and blandishment. It must be borne in mind that while ss. 497 and 498, I.P.C. are meant essentially for the protection of the rights of the husband,- s. 361 and other cognate sections of the Indian Penal Code are intended more for the protection of the minors and persons of unsound mind themselves than of the rights of the guardians of such persons. In this connection we may refer to the decision in State v. Harbansing Kisansing(1). In that case Gajendragadkar J., (as he then was) has, after pointing out what we have said above, observed:

> "It may be that the mischief intended to be punished partly consists in the violation or the infringement of the guardians' right to keep their wards under their care and custody; but the more important object of these provisions undoubtedly is to afford security and protection to the wards themselves."

While, therefore, it may perhaps be argued on the basis of the two Madras decisions that the word "taking" occurring in ss. 497 and 498 of the Indian Penal Code should be given a wide interpretation so as to effectuate the object underlying these provisions there is no reason for giving to that word a wide meaning in the context of the provisions of s. 361 and cognate sections.

The last case relied upon by the High Court is Ramaswami Udayar v. Raju Udayar(2) which is also a case under s. 498, I.P.C. In that case the High Court has followed the two earlier decisions of that Court to which we have made reference but in the course of the judgment the learned Judge has observed that it is not open to a minor in law to abandon her guardian, and that, therefore, when the minor leaves the guardian of her own accord and when she comes into the custody of the accused person, it is not necessary that the latter should be shown to have committed an overt act before he could be convicted under s. 498. The learned Judge has further observed :

> "A woman's free will, or her being a free agent, or walking out of her house of her own accord are absolutely irrelevant and immaterial for the offence under s. 498."

(1) I.L.R. [1954] Bom 784.

(2) 1952 M.W.N. 604 Whatever may be the position with respect to an offence under that ,section and even assuming that a minor cannot in law abandon the guardianship of her lawful guardian, for the reason which we have already stated, the accused person in whose company she is later found cannot be held guilty of having taken her out of the keeping of her guardian unless something more is established.

The view which we have taken accords with that expressed in two decisions reported in Cox's Criminal Cases. The first of them is Reg. v. Christian Olifier(1). In that case Baron Bramwell stated the law of the case to the jury thus :

> "I am of opinion that if a young woman leaves her father's house without any persuasion, inducement, or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her parent's custody, yet his not doing so is no infringement of this Act of Parliament (24 & 25 Vict. c. 100, s. 55) for the Act does not say he shall restore her, but only that he shall not take her away."

The jury returned a verdict of guilty in this case because the girl's evidence showed that the initial formation of her intention to leave her father's house was influenced by the solicitations of the accused and by his promise to marry her.

The other case is Rex v. James Jarvis(2). There Jelf J., has stated the law thus to the jury :

> "Although there must be a taking, yet it is quite clear that an actual physical taking away of the girl is not necessary to render the prisoner liable to conviction; it is sufficient if he persuaded her to leave her home or go away with him by persuasion or blandishments. The question for you is whether the active part in the going away together was the act of the prisoner or of the girl; unless it was that of the prisoner, he is entitled to your verdict. And, even if you do not believe that he did what he was morally bound to do-namely, tell her to return home- that fact is not by itself sufficient to warrant a conviction : for if she was determined to leave her home, and showed prisoner that that was her determination, and insisted on leaving with him-or even if she was so forward as to write and suggest to the prisoner that he should go away with her, and he (1) X Cox's Criminal Cases, 402.
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> (2) XX Cox's Criminal Cases, 249.

yielded to her suggestion, taking no active part in them matter, you must acquit him. If, however, prisoner's conduct was such as to persuade the girl, by blandishments or otherwise, to leave her

home either then or some future time, he ought to be found guilty of the offence of abduction."

In this case there was no evidence of any solicitation by the accused at any time and the jury returned a verdict of 'not guilty'. Further, there was no suggestion that the girl was incapable of thinking for herself and making up her own mind.

The relevant provisions of the Penal Code are similar to the provisions of the Act of Parliament referred to in that case.

Relying upon both these decisions and two other decisions, the law in England is stated thus in Halsbury's Laws of England, 3rd edition, Vol. 10, at p. 758 :

> "The defendant may be convicted, although he took no part in the actual removal of the girl, if he previously solicited her to leave her father, and afterwards received and har- boured her when she did so. If a girl leaves her father of her own accord, the defendant taking no active part in the matter and not persuading or advising her to leave, he cannot be convicted of this offence, even though he failed to advise her not to come, or to return, and afterwards harboured her."

On behalf of the appellant reliance was placed before us upon the decisions in Rajappan v. State of Kerala(1) and Chathu v. Govindan Kutty (2). In both the cases the learned Judges have held that the expression "taking out of the keeping of the lawful guardian" must signify some act done by the accused which may be regarded as the proximate cause of the person going out of the keeping of the guardian; or, in other words an act but for which the person would not have gone out of the keeping of the guardian as he or she did. In taking this view the learned Judge followed, amongst other decisions, the two English decisions to which we have adverted. More or less to the same effect is the decision in Nura v. Rex(3). We do not agree with everything that has been said in these decisions and would make it clear that the mere circumstance that the, act of the accused was not the immediate cause of the girl leaving her father's protection would not absolve him if he had at an earlier stage solicited her or induced her in any manner to take this step.

(1) I.L.R. [1960] Kerala, 481.

(2) I.L.R. [1957] Kerala, 591 (3) A.I.R. 1949 All. 710.

As against this Mr. Ranganadham Chetty appearing for the State has relied upon the, decisions in Bisweswar Misra v. The King (1) and In re : Khalandar Saheb(2). The first of these decisions is distinguishable on the ground that it was found that the accused had induced the girl to leave the house of her lawful guardian. Further the learned Judges have made it clear that mere passive consent on the part of a person in giving shelter to the minor does not amount to taking or enticing of the minor but the active bringing about of the stay of the minor in the house of a person by playing upon the weak and hesitating mind of the minor would amount to "taking" within the meaning of s. 361. In the next case, the act of the accused, upon the facts of the case was held by the Court to fall under s. 366, I.P.C. and the decision in Nura v. Rex(3) on which reliance has been

placed on behalf of the appellant is distinguished. Referring to that case it was observed by the Court :

> "Reliance is placed upon the decision of Mustaq Ahmed J. in Nura V. Rex wherein the learned Judge observed that where a minor girl voluntarily leaves the roof of her guardian and when out of his house, comes across another who treats her with kindness, he cannot be held guilty under secti on 361, Indian Penal Code. This decision cannot help the accused for, on the facts of that case, it was found that the girl went out of the protection of her parents of her own accord and thereafter went with the accused..... In the present case it is not possible to hold that she is not under the guardianship of her father. In either contingency, namely, whether she went out to answer calls of nature, or whether she went to the house of the accused pursuant to a previous arrangement, she continued to be under the guardianship of her father. On the evidence, it is not possible to hold that she abandoned the guardianship of her father and, thereafter, the accused took her with him."

After pointing out that there is an essential distinction between the words "taking" and "enticing" it was no doubt observed that the mental attitude of the minor is not of relevance in the case of taking and that the word "take" means to cause to go, to escort or to get into possession. But these observations have to be understood in the context of the facts found in that case. For, it had been found that the minor girl whom the accused was charged with having (1) I.L.R. [1949] Cuttack, 194.

(2) I.L.R. [1955] Andhra 290.

(3) A.I.R. 1949 All. 710.

kidnapped had been persuaded by the accused when she had gone out of her house for answering the call of nature, to go along with him and was taken by him to another village and kept in his uncle's house until she was restored back to her father by the uncle later. Thus, here there was an element of persuasion by the accused person which brought about the willingness of the girl and this makes all the difference. In our opinion, therefore, neither of these decisions is of assistance to the State.

We are satisfied, upon the material on record, that no offence under S. 363 has been established against the appellant and that he is, therefore, entitled to acquittal. Accordingly we allow the appeal and set aside the conviction and sentence passed upon him.

Appeal allowed.