Smt. Saroj Kumari vs The State Of U.P. on 24 November, 1972

Equivalent citations: AIR1973SC201, 1973CRILJ267, (1973)3SCC669, AIR 1973 SUPREME COURT 201, 1973 3 SCC 669, 1973 MADLJ(CRI) 272, 1973 (1) SCWR 354, 1973 ALLCRIR 231, 1973 SCD 145, 1973 SCC(CRI) 475, 1973 (1) SCJ 682

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Bench: A. Alagiriswami

JUDGMENT

C.A.Vaidialingam, J.

1. This appeal by the first accused, on certificate, is against the judgment and order dated the 15th November, 1967, of the Allahabad High Court confirming the conviction and sentence for an offence under Section 368, I.P.C.

2. According to the prosecution, the second accused kidnapped a minor child of Smt. Gomti Devi at about 4.00 A. M. on November 6, 1963. P. W. 1 had given birth to a male child at the Dufferin hospital at Bareilly on the evening of November 5, 1963. The second accused, who was the sister of an aya working in the said hospital, was noticed on the evening of November 5, moving about near the bed where Gomti was lying with her new-born baby. She was noticed by P. W. 12 and on enquiry, she told the latter that she was waiting to see some patient in the clean ward. At about 4.00 A. M. on November 6, 1963, the second accused took away the new-born male child from P. W. 1 on the representation that the staff nurse wanted to do the cord dressing of the child. Believing her representation, P. W. 1 allowed her to take the child. As the child was not returned to the ward even after the lapse of about an hour and a half, P.W. 1 informed the sister on duty about the same. A search was made for the second accused, as well as the child, in the hospital premises. As she was not found, the doctor as well as the Superintendent of the hospital were informed. After preliminary enquiries by the Superintendent of the hospital the matter was reported to the Police. The investigation was taken up by R. W. 14 and in consequence of vigorous search made by the Police party, the child was recovered at about 9.00 A. M. from the first floor of the house owned by one Ram Dass, which was occupied as a tenant by the appellant. At the time of seizure of the child, the appellant was lying on the cot with the child beside her and the second accused was sitting in their company in the same room. The child was identified by the mother and other hospital authorities. The identification was easy in view of the fact that the child was in the hospital's dress and it was also having the ticket number given in the hospital.

3. The second accused was prosecuted for an offence under Section 363 and the appellant under Section 368. After consideration of the evidence adduced in the case, the learned Sessions Judge has convicted the second accused of the said offence and sentenced her to undergo rigorous imprisonment for five years. The said conviction and sentence have been confirmed by the High Court. We are not concerned with that accused, as she is not before us.

4. So far as the appellant was concerned, she denied that the child had been recovered from her room. She has further pleaded that the second accused was not at all with her in her room. She specifically pleaded that the landlady of the house was inimical to her and had arranged to implicate her by foisting a false case. In order to establish enmity of the landlady towards her, the appellant examined a witness to prove a report that had been lodged by her on September 20, 1963.

5. The learned Sessions Judge rejected the appellants plea that the case had been foisted on her due to enmity by the landlady. The learned Sessions Judge accepted the prosecution evidence that the child was recovered from the room occupied by the appellant and that, at the time of recovery, the second accused also was in the same room along with the appellant and the child. The learned Sessions Judge has accepted the evidence of the investigating officer to the effect that the appellant had no explanation to offer regarding the presence of the child along with her in the same bed at the time when the police party visited her room. The appellant had been examined by a doctor and it had been found that she had never given birth to a child. The second accused also was examined by the doctor who has given opinion to the effect that the said accused also had not given birth to any child within 15 days of November 5, 1963. The learned Sessions Judge further held that the circumstances under which the child was recovered, in the absence of any explanation for the presence of the child in her room by the appellant, clearly establish that the appellant had knowledge that the child had been kidnapped by the second accused and that she wrongfully concealed the child by making it appear that it was her child.

6. On these findings, the appellant was convicted of the offence under Section 368 and sentenced to undergo five years rigorous imprisonment.

7. The High Court has upheld the conviction and the sentence.

8. Mr. Yogeshwar Prasad,learned Counsel for the appellant, attacked the findings of the High Court and urged that the prosecution case of the child having been recovered from the room of the appellant is totally opposed to the evidence in the case. The counsel further pointed out that the evidence establishes that the appellant had nothing to do with the second accused and that in any event, the appellant is not guilty of any offence because the child might have been brought to her room by the second accused when she came on a visit. The counsel further urged that it is not established in this case that the appellant had any knowledge that the child had been kidnapped and that, in any event, she is not guilty of having wrongfully concealed or kept the child in confinement.

9. We are not inclined to accept any of the contentions of the learned Counsel for the appellant. It has been concurrently found by both the Courts that the child in question was recovered from the room occupied by the appellant. It has been further found that at the time of the recovery the child

was in the same bed occupied by the appellant and in their company in the same room, the second accused was also present. It has been further found by both the Courts that at the time when the police party went to the room of the appellant, the latter had absolutely no explanation to offer in respect of the presence of the child in her room and in her company. The material evidence bearing on these aspects has been referred to by the two Courts. We are fully satisfied that the attack leveled against the findings,based upon the evidence, cannot be accepted.

10. To constitute an offence under Section 368, it is necessary that the prosecution must establish the following ingredients:

(1) The person in question has been kidnapped.

(2) The accused knew that the said person had been kidnapped. (3) The accused having such knowledge, wrongfully conceals or confines the person concerned.

11. That the child in question had been kidnapped by the second accused from its lawful custody, namely, the mother, P. W. 1, has been amply established) in this case. In fact the appellant's counsel was not able to point out any infirmity in the findings recorded by the Courts in this regard. So far as the second ingredient is concerned namely, that the appellant had the knowledge that the child had been kidnapped, it is an inference to be drawn by the courts from the various circumstances. The child was of tender age, being less than 15 hours old. The appellant admittedly had no child of her own. The second! accused it has been established, had not delivered a child within 15 days of November 5, 1963. The second accused was in the company of the appellant in the tatter's room along with the child when the Police party visited her on the morning of 6th November, 1963. It was not the plea of the appellant that the second accused was on a visit to her with the child at the material time. In fact the appellant's plea was that the entire story of seizure of the child from her room is absolutely false and that she does not know the second accused. It was her further plea that the second accused was not in her room at the material time. From these circumstances, the only legitimate inference that can be drawn, as has been done in this case by the two Courts, is that the appellant must have had knowledge that the child had been kidnapped from the lawful custody of its mother. Therefore the second ingredient is also satisfied in this case.

12. So far as the third ingredient is concerned, the facts, as found by the two Courts, clearly indicate that the appellant made it appear that the child was hers and by her so doing and keeping it in her custody, it may be safely held that she has wrongfully concealed or confined the child which had been kidnapped by the second accused. Whether there has been wrongful concealment or confinement under Section 368, is a matter to be considered from the facts and circumstances of a particular case. In the case before us, such wrongful concealment is clearly established by the evidence on record, which has been accepted by both the Courts. Therefore the appellant has been rightly convicted of the offence under Section 368.

13. Lastly, an appeal was made by the learned Counsel for the appellant that the sentence of five years rigorous imprisonment is rather too severe. He has urged that the appellant's maternal instinct to have a child of her own may have prompted her to get a child by any means.

14. It must be borne in mind that the appellant's attempt was to deprive another mother of her child and in the circumstances we are not inclined to interfere with the sentence. It is a matter for the State to have regard to all the circumstances of the case and deal with the matter.

15. In the result the appellant's conviction and sentence are confirmed and the appeal is dismissed.