

LIONEL AND OTHERS
v.
OFFICER-IN-CHARGE.
MEETIYAGODA POLICE STATION

COURT OF APPEAL.

G. P. S. DE SILVA, J. AND BANDARANAYAKE, J.

C.A. 625 - 631/78 - M.C. BALAPITTIYA - 62797.

FEBRUARY 19, 1985.

Criminal Law - Kidnapping and abduction - Penal Code s. 354 and s. 356 - Errors and omissions in the charge - Mischief - Misjoinder of charges.

The accused were charged on Count 1 with committing an offence punishable under s. 356 of the Penal Code in that they 'kidnapped' one Arnolis Silva. On Count 2 the accused were alleged to have committed mischief by causing damage to the house.

Arnolis Silva who was 56 years old was on 29th May 1970 about 8.30 p.m. enticed to leave his house and forcibly removed in a car from his house in Meetiyyagoda by the 1st to 4th accused. The car proceeded some distance and then the 1st to the 4th accused got down from the car and the 5th and 6th accused and one Kotagala Baas (not an accused) got in. After the car had proceeded many miles, Arnolis Silva was taken to a house and kept tied to a bed inside a room for several days in solitary confinement. He was assaulted by Kotagala Baas and others. On 2nd July 1970 he was put into a car again and taken some distance and left on the road. With the help of passers-by he was able to find his way to the Kuliyapitiya hospital.

In the meantime on 29th June 1970, about 10 minutes after the removal of Arnolis Silva, his house was stoned and his daughter Daya Kumari complained of the forcible removal of her father and the stoning of the house to the Meetiyyagoda Police on the following morning.

On 21.8.1970 the Police filed plaint in the English language. After trial the Magistrate found the 1st to 6th accused guilty on Count 1 but acquitted them on Count 2. The 7th accused was found guilty under Count 2 and not guilty under Count 1.

It was contended on behalf of the accused that as the alleged kidnapping was not from Sri Lanka and not of a person under 14 years of age the offence of kidnapping could not have been committed. Further in abduction the purpose should be to "secretly and wrongfully" confine the person. This element too was not averred in the charge. Further there was a misjoinder of charges and the non-joinder of Kotagala-Baas affects the credibility of Arnolis Silva and is prejudicial to the accused.

Held -

(1) In the context of the present case 'kidnapping' is stealing a minor out of the lawful guardianship without the guardian's consent. Abduction is the wrongful leading away of any person. The former is essentially an offence concerning minors

involving deception of the guardian. The latter includes as an ingredient, deception of the victim who can be any person including a minor and also carries an element of secrecy.

- (2) In the instant case the penal section referring to abduction has been correctly stated although the English word 'kidnapped' has been used. Sufficient particulars had been given and the evidence establishes the offence of abduction. Any error in stating the offence or omission to set out particulars has not misled the accused and no prejudice has been caused to them.
- (3) The non-joinder of Kotagala Baas caused no prejudice to the accused nor does it affect the credibility of Arnolis Silva who is not responsible for the conduct of the prosecution.
- (4) There was no evidence that the 7th accused came to the house with the others and enticed Arnolis to leave the house. The stoning incident had taken place about ten minutes after the abduction of Arnolis Silva. Hence the joinder of charges on the footing of a continuing transaction is bad and accordingly the conviction of the 7th accused on Count 2 cannot be sustained.

APPEAL from the Magistrate's Court of Balapitiya.

E. D. Wickramanaike for 1st and 2nd accused-appellants.

H. L. de Silva, P.C. for 3rd and 4th accused-appellants.

S. Sivarasa for the 5th and 6th accused-appellants.

Rohan Gunapala for the 7th accused-appellant.

A. Wickremarajake, S.C. for the State.

Cur. adv. vult

May 27, 1985.

BANDARANAYAKE, J.

This is an appeal from the Magistrate's Court against the conviction and sentence of the accused. The facts relied upon by the prosecution reveal that on the 29th of May, 1970, one Arnolis Silva was forcibly taken away from his house in Meetiya-goda at about 8 30 p.m. by the 1st to 4th accused who had come to the home, spoken to him saying that his boutique was being broken and when he came out carried him into a car and taken him away. Along the way the car was stopped and the 1st to 4th accused got down from the car and the 5th and 6th accused got into the car with one Kotagala Baas and thereafter they proceeded for many miles. Arnolis Silva says that he was taken to a house, taken into a room and tied to a bed and was kept in that room for several days without food or water and on the 2nd of July 1970 he

was put into a car again and taken some distance and left on the road. With the help of passers-by he was able to find his way to the hospital. It was the Kuliya-pitiya Government Hospital, and he was treated and he returned home to Meetiya-goda. In the meantime, on the 30th of May, 1970 Arnolis Silva's daughter, witness Daya Kumari had given the first information to the Meetiya-goda Police which information was produced in the case marked P1. She corroborates her father in regard to the circumstances under which he was forcibly removed from the house. She also said that about 10 minutes later her house was stoned and she fled into the jungle and when she returned to the house the following morning she found it damaged and she then went to the Police. Upon these facts and circumstances the Police filed a plaint on 21.8.70.

The plaint is in the English language and alleges in Count 1 that Arnolis Silva was 'kidnapped' by the accused, an offence punishable under section 356 of the Penal Code. On Count 2 it is alleged that the accused committed mischief by causing damage to the house.

At the hearing of this appeal learned Counsel for the appellants who were the 1st to the 7th accused raised two matters of law. The first matter raised was to the wording of the plaint. It was submitted that 'kidnapping' in law if not from Sri Lanka must be of a minor under 14 years of age out of lawful guardianship. It was submitted that the complainant was not a minor and therefore the offence charged could not have been committed. In these circumstances the charge was bad.

It was also submitted by learned Counsel for the appellants that under section 356 of the Penal Code the purpose should be to 'secretly and wrongfully' confine a person and that that element of 'secrecy' was not averred in the charge. If at all the proper charge should have been one of abduction.

This matter of law was indeed raised at the trial before the learned Magistrate. He held that although the plaint which has been filed in English and the word 'kidnap' has been used, the Sinhala translation of the word 'kidnap' would be "එකර කෙරුණ අය" which also means 'abduct' and also that in any event, the section under which the act is punishable had been correctly stated as s. 356 and that in these circumstances no prejudice has been caused to the accused.

Learned Counsel for the appellants have strenuously argued that the charge as framed is fundamentally bad in law and that no attempt has been made to amend it at the trial and consequently it vitiates the trial.

Learned State Counsel on the other hand, submitted that the Sinhala translation of the English charge set out the position correctly and that in any event the accused have denied the charges completely and therefore no prejudice has been caused to any of them one way or the other and that the Penal section has been correctly stated in the charge.

'Kidnapping' from lawful guardianship is a substantive offence made punishable by s. 354. Abduction is an ancillary act applicable to any person including a minor but not punishable by itself. It may be criminal when done with one of the ingredients specified in the following sections 355 to 358 and s. 360. In the present context 'kidnapping' is stealing a minor out of the lawful guardianship without the guardian's consent. Abduction is the wrongfully leading away of any person. The former is essentially an offence concerning minors involving deception of the guardian. The latter includes as an ingredient, deception of the victim who can be any person including a minor.

We have the following facts in the instant case:—

- (a) A plaint filed on 21.8.70 was in the English language and contains the word 'kidnap' punishable under s. 356 of the Penal Code. At that time the provisions of Article 11 (1) of the Republican Constitution of 1972 did not apply.
- (b) Evidence was led on 31.1.71 for the purpose of considering assuming jurisdiction to try the case summarily. All the accused were present and were represented by counsel.

The complainant Arnolis Silva testified in their presence. He gave his age as 56 years and he had concisely stated what happened to him on 29th May, 1970. His daughter Daya Kumari also gave evidence. Upon this evidence the learned Magistrate assumed jurisdiction and proceeded to hear the case summarily upon the charges aforesaid. It was therefore quite clear to the accused as well as to their Counsel that the complainant was not a minor. The learned Magistrate assumed jurisdiction on 31.1.71 and the trial was postponed thereafter many times and was taken up for hearing only on 11.8.77. Plenty of time was available for the defence to meet the complaint of Arnolis Silva and the accused were throughout represented by Counsel.

In these circumstances it is my opinion that any error in stating the offence or omission to set out particulars in these circumstances has not or have not misled the accused and that no prejudice has been caused to them.

Sufficient particulars have been given of the offence committed in the charges as framed. It is also to be observed that the evidence led to assume jurisdiction refers to the fact that Arnolis Silva had been removed in a car with his eyes blindfolded and he had been kept in solitary confinement, tied to a bed in a room for several days at a place approximately 70 miles away from his home. The element of secrecy therefore was quite apparent. In these circumstances I am of the view, that this matter of law raised is without merit.

I have also to observe that the Sinhala translation of the charge relied upon by State Counsel is that of the learned Magistrate set down by him in the course of his judgment dealing with the point of law taken and cannot therefore in my consideration affect the point of law aforesaid raised at the hearing of this appeal.

The other matter of law raised by Counsel for the appellants was that the complainant Arnolis Silva's evidence taken on 31.1.71 to assume jurisdiction stated that one Kotagala Baas was present associating with the accused in the commission of the crime. The witness had taken up this position even in the first statement that he made to the doctor at the Kuliypitiya Government Hospital on 2.6.70 at 5 p.m. There he has told the doctor that he was assaulted by Kotagala Baas and others. The witness has consistently alleged this fact in his evidence at the trial.

Counsel for the appellants submits that Kotagala Baas was not made an accused and this has prejudiced the defence as the prosecution has given no explanation for not charging him. Therefore, Counsel submits that the credibility of the witness Arnolis Silva is affected as either Kotagala Baas had a foolproof alibi or the Police were bribed and the Police have not said that he could not be found; in these circumstances Counsel invited the Court to draw the presumption of fact as likely to have happened namely that Arnolis is an unreliable witness.

Counsel submitted that this was a natural inference which the Court could draw in the circumstances of this case. I am unable to draw such an inference adverse to the witness Arnolis Silva on these facts. There has been no cross-examination of the Police witnesses in the

case in regard to this matter and the witness is not responsible for the conduct of the prosecution ; again, when Arnolis Silva's evidence is examined intrinsically his evidence in regard to the 1st to the 4th accused's conduct is corroborated independently by his daughter, his evidence in regard to the involvement of the 5th and 6th accused has been consistent and stands uncontradicted ; so when looked at intrinsically it does not stand to reason that the witness should implicate some person when he could equally well have stated that other persons participated who were not known to him or whose names were not known to him. I am of the view, that it would be pure speculation to exercise the Court's discretion to draw an inference adverse to the credibility of the witness in these circumstances.

In these circumstances, I am of the opinion that the second point of law taken above is also without merit.

Arnolis Silva's complaint was that he was assaulted when being abducted. The medico-legal report produced in the case is to the effect that there were no external injuries on him when he was examined at the hospital on 2.6.70. Appellants' Counsel made a point of this. It was also the evidence in the case that several days had elapsed since the alleged assault to the time of the examination. The accused have given evidence and they have merely denied the charges. The learned Magistrate has considered the evidence led in the case and the submissions made by Counsel and has believed the prosecution witnesses and come to a finding that the 1st to the 6th accused are guilty on count 1 and not guilty on the other count of mischief, as there was no evidence led before him against these accused in respect of that charge.

As far as the 5th and 6th accused are concerned their conduct amounts to taking over the abduction of Arnolis Silva who was in the car and their convictions are justified upon an acceptance of that evidence.

In my view, it is not appropriate to disturb the findings of the learned Magistrate as regards the 1st to 6th accused and their convictions and sentences are affirmed. As far as the 7th accused is concerned, the learned Magistrate has acquitted him of the 1st count but convicted him on the 2nd count of mischief for causing damage to Arnolis Silva's house. The acquittal on count 1 shows that the evidence does not warrant the view that the 7th accused had joined

the 1st to the 6th accused in their criminal conduct. In fact there is no evidence that the 7th accused came to the house with the others and enticed Arnolis to leave the house. The question of joinder of charges therefore on the footing of a continuing transaction is an issue in the case. In the absence of a charge of conspiracy or of unlawful assembly the evidence itself does not disclose a continuing transaction.

The witness Daya Kumari has said that the stoning of the house occurred about 10 minutes after her father was taken away. The facts are therefore consistent with there being two unconnected transactions where a particular group of people had decided to abduct Arnolis unknown to others who may have gathered around the house of Arnolis to damage it due to political rivalry and would have damaged it whether or not Arnolis was inside it. The conviction of the 7th accused on count 2 therefore cannot be sustained. I, therefore, set aside the conviction and sentence of the 7th accused on count 2 of the charge. The appeal of the 7th accused is accordingly allowed. The convictions of the 1st to the 6th accused and the sentences imposed on them are affirmed and their appeals are dismissed.

G. P. S. DE SILVA, J. – I agree.

Appeal of 1 to 6 accused-appellants dismissed.

Appeal of 7th accused-appellant allowed.
