

Present : Wood Renton J.

June 9, 1911

THE KING v. DE CROOS *et al.*

72—D. C. (Crim.) Kandy, 2,023.

*Kidnapping—May a guardian be guilty of kidnapping his ward?—
Contempt of Court—Penal Code, s. 352.*

The third accused, who was appointed guardian by the District Court of Negombo over two minor girls under 16 years of age, placed the girls at Mount Leo Convent, Kandy, for their education, on the order of the Court. For some time the girls were in the habit of spending their holidays in Negombo, but subsequently the Mother Superior declined to allow the girls to leave Kandy without an express order of Court. The accused moved the District Court of Negombo to direct the Mother Superior to send the girls to Negombo for the Christmas holidays. The Court refused the application. The accused removed the girls by stratagem from the keeping of the Mother Superior and took them to Negombo.

Held, that the accused were not guilty of kidnapping.

THIS was an appeal by the Attorney-General against an acquittal by the District Judge of Kandy (F. R. Dias, Esq.). The facts material to this report are set out in the judgment of Wood Renton J.

Walter Pereira, K.C., S.-G., for the appellant.

H. J. C. Pereira (with him *Elliott* and *B. F. de Silva*), for the respondents.

Cur. adv. vult.

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This was an appeal by the Attorney-General against the acquittal¹ of the four respondents, who were charged in the District Court of Kandy with the offence of kidnapping two young girls from the lawful guardianship of the Mother Superior of Mount Leo Convent, in breach of the provisions of section 352 of the Penal Code. The respondents were acquitted after trial by the District Judge. There is no dispute on any material points as to the facts in the case. They have been stated in a clear and most interesting manner by the District Judge himself, and I adopt what he has said in regard to them for the purposes of my present decision. It is necessary in dealing with this case to keep clearly in view the facts that have to be proved in order to constitute the offence prohibited by section 352 of the Penal Code. It must be shown that (a) a minor under 16 years of age, if a female, (b) was taken, (c) out of the keeping of the lawful guardian of such minor, (d) without the consent of such guardian. Of these elements, two have undoubtedly been established in the present case. The girls in question were under 16 years of age, and they were taken away. The important points for consideration, however, are whether they were so taken out of the keeping of their lawful guardian without the consent of such guardian. The material facts on this point, apart from the question of certain alleged orders of Court, to which I shall refer in a moment, are these. The girls were primarily under the lawful guardianship of the third accused-respondent. Their father and mother are dead, and he was the guardian, who had been appointed by the Court. He had placed them in the Mount Leo Convent in Kandy, and the Mother Superior of that convent fairly admitted, as one would expect from a person in her position, that she was not entitled to the legal custody of the girls as against him, and that she had had no dealings with any one in regard to their custody or their education except with the third accused-respondent. It is clear from these facts that her guardianship, if guardianship it could be called, was only a derivative one, and it could not have been set up, if there were no other circumstances in the case than those which I have just stated, as against the lawful guardianship of the third accused-respondent. It may be interesting in this connection to refer to an Indian decision that throws some light on the question with which we have here to deal. The case that I refer to is *Jagannatha Rao v. Kamaraju*.¹ In that case the father had allowed his infant daughter to live in the house of Kamaraju. From Kamaraju's custody the child was taken away by four cousins, and Kamaraju herself was alleged to have connived at the offence. One of the questions raised in the case was whether she was at the time the lawful guardian of the girl, and in deciding that point, the Court

¹ (1900) I. L. R. 24 Mad. 284.

referred to the explanation of section 361 of the Indian Penal Code, which corresponds to section 352 of our own. That explanation is in these terms : " The words ' lawful guardian ' in this section include any person lawfully entrusted with the care or custody of such minor." The High Court of Madras made use of the following language in dealing with the point : " The explanation of the section says that the words ' lawful guardian ' include any person lawfully entrusted, &c. Such temporary guardianship does not exclude the higher legal guardianship of the father. That remains in full force ". It appears to me that that is the correct interpretation of the law, and that if we had before us only the bare fact of the removal of the girls from the keeping of the Mother Superior by their guardian, who had been lawfully appointed by the Court, the offence of kidnapping could not have been made out.

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It remains, however, to consider whether the guardian, the third accused-respondent, has been put in a different position by virtue of two orders of Court, with which I will deal now. It must be borne in mind that as guardian, and by virtue of an express provision in his letters of appointment, he was entitled to the custody of those girls. It was contended on behalf of the Crown that that right had been, if not taken away altogether, at least so seriously restricted that the removal of the girls constituted the offence with which he is charged. The two orders on which reliance was placed in support of this argument are marked A 7 and A 8 in the record of the proceedings in the Police Court. I will deal with A 8 first, as it is prior in point of time. It seems to have been the desire of the third accused-respondent that the girls should be placed in a convent at Negombo, on the ground that they were too young to be sent elsewhere. An application was made to the District Court of Negombo in connection with the attitude taken by the third accused-respondent in this matter. On the hearing of the application the respondent undertook to send the girls to Kandy after Easter. The Court thereupon made the following order : " In consequence of the agreement of the curator " (that is, the guardian) " to remove the children to the convent of Kandy after Easter, I adjourn the inquiry to May 1. If the children are not removed to Kandy before that date, I shall consider it a sufficient reason to withdraw the certificate." The matter with which the District Court was concerned on that application was, not the temporary absence of the girls from Kandy, but their education in the meantime at Negombo instead of at the Kandy convent. In pursuance of his undertaking, the third respondent did in fact send the girls to Kandy. I do not think that that order can be interpreted as in any way withdrawing the girls from the legal custody of the third respondent. The right to the custody of a ward is inherent in the office of guardian, and if it is to be entirely taken away, it must be so taken away, I think, in express terms.

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I come now to deal with A 7. It results from the evidence that for some time the girls had been in the habit of spending their holidays with their relatives at Negombo. For some reason or other exception was taken to that on the part of the Mother Superior, and she declined to allow the girls to leave the Kandy convent, except upon an express order of Court. The third respondent took legal advice on the question, and being anxious, as he says, to avoid any difficulty in his assertion of his legal rights as guardian, he made a formal motion to the District Court of Negombo supported by an affidavit, asking the Court to direct the Mother Superior of the Kandy convent to send "the children to Negombo for their Christmas holidays, and give the guardian custody of the minors" for the purpose of taking them there. That motion was considered by the District Judge in chambers. I have no doubt that what he said about it constituted an order of Court. His order was in these terms: "This is contrary to the will. Refused." In spite of that order, by proceedings as to the good faith or good taste of which I am not here called upon to inquire, the third respondent, with the assistance of the first, second, and fourth respondents, did in fact remove the girls by stratagem from the keeping of the Mother Superior and took them to Negombo. I am unable to see that the order made by the District Judge on the motion with which I have just dealt in any sense took away from the guardian his legal right to the custody of these children. It prohibited him from exercising that right by the removal of the children from Kandy to Negombo. But if he had come to the Mother Superior and had said to her, "I intend to take these children for their holidays from Kandy to Jaffna," I do not think that she would have had, in law, any answer to his demand. If that view is correct, it follows that he cannot be convicted of the offence of taking the children out of the keeping of their lawful guardian, even in the sense in which the last words are interpreted in the explanation to section 352.

But there is a further point, which I confess strikes my mind very strongly. The criminal act in section 352 is the taking, and it has been held in India (see the case of *Nemai Chattoraj v. Queen Empress*¹) that the offence of kidnapping from lawful guardianship is completed when the minor is actually taken from lawful guardianship, and that it is not an offence continuing so long as he is kept out of such guardianship. As I interpret the facts of this case, the taking of these children was no offence at all. The offence committed by the third respondent was the removal of the children from Kandy to a particular place, viz., Negombo, contrary to an express order of Court. That may be a breach of the guardian's duties, which would expose him to punishment for contempt of court, but it is not kidnapping as I understand the law. On these grounds I think

¹ (1900) I. L. R. 27 Cal. 1041.

that the learned District Judge came to a right conclusion in the result, when he held that all four respondents were entitled to be acquitted on the charge under section 352.

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At the argument yesterday various points were touched upon, as to which I wish to say a few words, not with any intention of deciding them, but in order to prevent this decision from being considered to have in any way done so. Towards the close of his judgment the learned District Judge says : " So long as the letters issued to him, that is, the third respondent, stand uncancelled, and they are still uncancelled, it seems to me that no one, not even the Negombo Court has the right to question the accused's right to the persons of these minors." That passage states a very broad proposition of law, and I only desire to say at present that I do not uphold the acquittal on the strength of it. It was argued by Mr. Elliott yesterday, on behalf of the respondents, for he was dealing at that part of the argument with the case as a whole, and not merely with the interests of his particular clients, that the District Court would have no power to deal with a guardian, whom it had once lawfully appointed, except by the recall of his letters of guardianship under section 591 of the Civil Procedure Code. I am not certain that the learned District Judge intended in the passage quoted to go so far as that, and before any decision is given to that effect there are important and difficult questions of law which would have to be faced. Section 71 of the Courts Ordinance is still unrepealed, and it must be observed that that section, before it confers on the Court " full power to appoint guardians" over minors, expressly vests the District Court with the care and custody of the persons, as well as of the estates, of minors. Chapter XL. of the Civil Procedure Code deals with the appointment of guardians. It was held by Sir John Bonser C.J., in the case of *Mana Perera v. Perera Appuhamy*,¹ that the Civil Procedure Code does not limit the powers conferred on guardians by the Roman-Dutch law. If we are to look beyond the text of the Civil Procedure Code for the powers of guardians, it would surely be our duty to look beyond the provisions of that Code also for the rights of the Court over guardians, particularly in view of the fact that section 71 of the Courts Ordinance expressly invests the District Court with the right and the duty of protecting the persons of minors. It is not necessary to decide that point now. But I may refer to a case on which I have been unable to lay my hand for the moment, but in which it was held that, entirely irrespective of any express enabling provisions in the Charters, the Supreme Court had the power to issue writs of *habeas corpus*, in view of the general supervision and control over criminal proceedings in this Island which it undoubtedly enjoyed. I am by no means prepared to say that the District Court would be bound to sit still, with full knowledge of the fact that a minor was being taken away, and to

¹ (1895) 1 N. L. R. 140.

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wait for some formal application for the recall of the letters of guardianship, before it performed the duty cast upon it by section 71 of the Courts Ordinance.

I asked the Solicitor-General yesterday whether there was any authority for a prosecution for kidnapping in a case of this kind. He was unable to give me any, and I have not succeeded in finding any decision on the point myself. There are cases which go right back to the beginnings of English law, where the courts of proper jurisdiction have exercised their powers for the protection of minors and lunatics by the issue of injunctions, or by proceedings for attachment for contempt. I have known no case, however, where a lawful guardian has been charged with the offence of kidnapping under such circumstances as we have here before us. I have not thought it necessary to deal with the question as to whether, if a *prima facie* offence of kidnapping had been made out, the respondents would not have been entitled to an acquittal on the ground of the statutory exception to section 352, which provides that the offence is not committed by any one who in good faith believes himself to be entitled to the lawful custody of such child, unless such act is committed for an immoral or unlawful purpose. As I understand the language of the District Judge he has not himself decided the question. He has acquitted the respondents on the ground that they were acting in the exercise of their legal rights. After careful consideration I do not think that the elements necessary to constitute the offence of kidnapping have been made out. I dismiss the appeal.

Appeal dismissed.

