

APPELLATE CRIMINAL.

*Before Mr. Justice Batty and Mr. Justice Heaton.*EMPEROR *v.* ISAP MAHOMED.*1906.
December 7.*Criminal Procedure Code (Act V of 1898), secs. 227, 228, 199, 238, 537—
Charge—Addition of a charge—Irregularity—Indian Penal Code (Act
XLV of 1860), secs. 363, 366, 498.*

The accused was tried on charges under sections 363 (kidnapping from lawful guardianship) and 366 (kidnapping a woman) of the Indian Penal Code (Act XLV of 1860). At the conclusion of the evidence to establish those charges and after the evidence for the defence had been recorded, the Court added a charge under section 498 (enticing a married woman) of the Code, notwithstanding the objection by the accused's counsel. The trial ended in conviction of the accused on all the three charges. The accused appealed contending that the procedure adopted was contrary to the provisions of section 199 of the Criminal Procedure Code and to the spirit of section 238 of the Code :—

Held, (1) that the procedure adopted in the case was not regular. The additional charge framed at the stage it was framed, notwithstanding the objection by the accused's counsel, was prejudicial to the accused ;

(2) that the conviction under section 498 of the Indian Penal Code should be set aside : and further investigation be made into the remaining charges.

APPEAL from convictions and sentences passed by G. D. Madgaokar, Sessions Judge of Broach.

The accused was committed to the Sessions Court at Broach to take his trial for offences under sections 363 and 366 of the Indian Penal Code (Act XLV of 1860), for enticing away one Bai Rewa, a minor girl under 16 years of age, from the lawful custody of her mother, in order to have illicit intercourse with her.

In the Sessions Court, the trial went on on charges under sections 363 and 366 of the Indian Penal Code. On the last day of the trial, and after the examination of the witnesses for the accused, the Court, under section 227 of the Criminal Procedure Code (Act V of 1898), added a charge under section 498 of the Indian Penal Code for enticing away a married woman with criminal intent and proceeded with the trial under section 228 of the Criminal Procedure Code. The accused's counsel objected to

* Criminal Appeal No. 426 of 1906.

this course. But the Court overruled the objection and proceeded with the trial under section 228 of the Criminal Procedure Code.

The accused was convicted on all the three charges and was sentenced separately on each charge. The sentences were ordered to run concurrently.

The accused appealed to the High Court.

Marzban (with *P. N. Godinho*) for the accused.—It was an error on the part of the Sessions Judge that he added a charge against the accused under section 498 of the Indian Penal Code, after the evidence in the case had closed. The proceedings were originally launched by the Police: but a charge under section 498 contemplates a complaint by the husband or guardian.

The Sessions Judge further contravened the provisions of section 229 of the Criminal Procedure Code, which made it obligatory on him to order a new trial or to adjourn the trial after the addition of a charge under section 498. He was not justified in leaving it to the discretion of counsel for accused whether he would tender further evidence and further cross-examine witnesses. The section clearly throws the onus on the presiding Judge.

The charge under sections 363 and 366 of the Indian Penal Code does not involve any question as to the marriage of the person abducted: but in a charge under section 498, the marriage must be strictly proved. See *Empress v. Pitambur Singh*⁽¹⁾; *Queen-Empress v. Dal Singh*⁽²⁾; *Empress of India v. Kallu*⁽³⁾; *Queen-Empress v. Santok Singh*⁽⁴⁾.

M. B. Chaubal (Government Pleader) for the Crown.—In the present case, although the accused was tried for and convicted on three charges, he was in effect given but one sentence, inasmuch as the three sentences were ordered to run concurrently. It is, therefore, immaterial under which section the charge is allowed to stand. Even if the charge under section 498 were allowed to stand, there is sufficient evidence on the record as to the marriage of the girl. The defence witnesses say that she has a husband living. The charge under section 498 of the Indian Penal Code

(1) (1879) 5 Cal. 566.

(3) (1882) 5 All. 233.

(2) (1897) 20 All. 166.

(4) (1898) 18 All. W. N. 186.

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was no doubt added almost at the end of the trial, but that by itself would be no ground for setting aside the conviction under it, unless it is shown that the accused was prejudiced.

BATTY, J.—The accused in this case was committed to the Sessions on two charges, neither of which involved any question as to the marriage of the person whom he was said to have kidnapped or abducted. At the conclusion of the evidence to establish those charges, and after the evidence for the defence had been recorded, the Court added a charge under section 498, Indian Penal Code, which involved the question of the marriage of Rewa, the woman said to have been kidnapped or abducted. Objection has been taken in this appeal that this procedure was contrary to the provisions of section 199, *Criminal Procedure Code*, and to the spirit of section 238, *Criminal Procedure Code*. It appears from the proceedings that the accused's Counsel, Mr. Dehlvi, objected to that charge being framed at that stage.

We think he had good grounds for objecting. He could not be expected to examine and cross-examine witnesses on a point which was not in issue or raised by the charges originally framed. It is also contended in this appeal, that the marriage of Rewa, under the rulings of *Empress v. Pitambur Singh*⁽¹⁾; *Queen-Empress v. Dal Singh*⁽²⁾; and *Queen-Empress v. Santok Singh*⁽³⁾ should have been strictly proved. We are unable to say, whether the accused could or could not have challenged the formal evidence as to her marriage, because he had no opportunity given him of doing so, either by cross-examination or adducing rebutting evidence. There is also objection taken that the charge under section 498, Indian Penal Code, was framed in contravention of the provisions of section 199, *Criminal Procedure Code*, and, having regard to the ruling of *Bangaru Asari v. Emperor*⁽⁴⁾ which follows *Empress of India v. Kallu*⁽⁵⁾, we are not prepared to say that the procedure in this case was regular. Certainly we think that the additional charge framed at so late a stage, notwithstanding objection by the accused's Counsel, was prejudicial to the accused. Lastly, the evidence as to the age of Rewa

(1) (1879) 5 Cal. 566.

(3) (1898) 18 All. W. N. 186.

(2) (1897) 20 All. 166.

(4) (1903) 27 Mad. 61.

(5) (1882) 5 All. 233.

was of the greatest importance : neither section 363 nor 366 would apply unless she was shown to be under 16 years of age at the date of the offence. The mother has certainly given evidence to the birth of Rewa as being 14 or 15 years ago, but it is clear that she cannot be relied upon for great exactitude, and she is practically unconfirmed by anybody professing to have personal knowledge on the subject. The entry in the Municipal register produced, no doubt might afford some corroboration if the person referred to in the entry could be identified with reasonable certainty with the person now in question. But the entry in Exhibit 6, as appears in the record of this case, seems, to be strangely incomplete, if not possibly misleading. The caste of the father is given as Thakore Bhatia, which does not exactly correspond with the description of the caste given by the members of the complainant's family : and then the subsequent columns are left unfilled in. We think that it is very desirable indeed that before the entry is accepted there should be very searching enquiry to ascertain the reason for those columns being left vacant as well as on the question of the correct description of the complainant's caste. Seeing that the mother's evidence did not pretend to great accuracy and had barely any confirmation apart from this entry, the accused was certainly entitled to every means that he could possibly avail himself of, for shaking or rebutting the probative force of that evidence. We find from Exhibit 21 that he did apply for the medical examination of the girl Rewa. As to the evidentiary value of such examination it was not for the Sessions Judge or for us to speculate. Accused had a right to claim that examination and, we regret to say, that the ground on which his claims were refused appear to us to fall very short of justifying the refusal. We think he must have that opportunity given to him, and we also think that the conviction under section 498, Indian Penal Code, must be set aside on the grounds stated above.

The case must now be returned to the Sessions Court in order that the evidence tendered and improperly excluded, and such other evidence as the Sessions Judge may admit, and as may be relevant to the points for decision, may now be taken and submitted to this Court with the views of the Sessions Court thereon.

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