[COURT OF CRIMINAL APPEAL]

1966 *Present :* **H. N. G. Fernando, S.P.J. (President), T. S. Fernando, J., and Tambiah, J.**

THE QUEEN *v.* V. V. BRAMPY SINGHO

C. C. A. APPEAL NO. 24/1965, WITH APPLICATION NO. 27

S. C. 255—M. C. Avissawella, 53392

Kidnapping—Quantum of evidence—Misdirection—Penal Code, ss. 345, 355 to 360.

Kidnapping within the meaning of sections 355 to 360 of the Penal Code has to be " in order to " or " with intent to " the commission of some other act, so that the act of kidnapping must be completed before the other act is completed, and can be completed even if the other intended act is not actually committed.

In a prosecution for kidnapping a girl from lawful guardianship in order that she may be subjected to unnatural lust and, on a second count, for using criminal force on her with intent to outrage her modesty, it would be a misdirection to tell the jury that the restraint incidental to the offence of using criminal force would *per se* constitute kidnapping.

APPEAL against a conviction at a trial before the Supreme Court.

Miss Manouri de Silva, with *D. S. Jayalath* (Assigned), for the Accused-Appellant.

P. Colin Thome, Crown Counsel, for the Crown.

Cur. adv. vult.

June 21, 1965. H. N. G. FERNANDO, S.P.J.—

The Appellant was convicted on two counts, the first of kidnapping a girl under 16 from lawful guardianship in order that she be subject to unnatural lust, and the second of the offence under Section 345 of the Penal Code of using criminal force on her with intent to outrage her modesty. After hearing the arguments of counsel we set aside the conviction and sentence on count one. We now state our reasons.

On the day of the incident, the girl had left home with her little brother to bathe at a well some distance away. After the girl had bathed and worn her frock, the Appellant, who was quite well known to the girl, came to the well and told the little boy to go home with the bucket used for the bath ; thereafter he called the girl to go and pick firewood. The girl accompanied the Appellant to some land near an *ela*, and there both picked up firewood. After some little time, the Appellant placed a gunny sack on a rock, and having made the girl lie on the sack, he committed the offence charged in count two. In doing so, he held her down with hands, so that she was unable to prevent the assault on her person.

In directing the Jury as to the evidence relevant to the charge of kidnapping, the learned Commissioner did not suggest that the Appellant could be held to have enticed the girl away from the custody of her parents at the commencement of the incident, that is when the Appellant called the girl to go and pick firewood. The learned Commissioner thought perhaps rightly that the evidence did not suffice to establish a taking or enticement at that stage. Instead the Jury were directed as follows :—" If at any time she could have returned to her guardian, then there was no restraint with her freedom and there was no interference with the custody of the guardian, but if she was taken and if she did not

have the opportunity of returning to her guardian at any moment she wanted, then there was an interference and there was a taking away from the keeping of her guardian but it is not a matter for how long or short a time her freedom was restricted. The time may be ever so short, still if she was taken away even for a brief period of time, if her freedom to return to her guardian was interrupted or restricted, then there was a taking away from the keeping of her guardian."

According to this direction, any restraint, whatever may be its immediate purpose, and however momentary, which interrupts or restricts the capacity of a child freely to return to her guardian's custody would constitute kidnapping. The direction would cover a case in which a child is held by the hand or shoulder with the object that she may be slapped, or even reprimanded. It would perhaps also cover the example suggested by counsel for the Appellant, namely a case where a child is molested in her own home, and is momentarily restrained in the course of the molestation.

Such restraint as the Appellant did impose on the girl in this case was only incidental to the offence of using criminal force. The element of restraint in that sense would probably be present in nearly every case of an offence under Section 345 of the Code against a young child. But it does not follow that the offence of kidnapping is established in every such case. The latter offence is a distinct one requiring proof of facts different from those which are in issue on the charge under Section 345. The language of Sections 355 to 360 makes this distinction clear. The kidnapping has to be " in order to " or " with intent to " the commission of some other act, so that the act of kidnapping must be completed before the other act is committed, and can be completed even if the other intended act is not actually committed.

The distinction is very well illustrated by Section 356, which prescribes the punishment for kidnapping a person with intent to wrongfully confine that person. To establish the charge of kidnapping under that Section, it would not suffice to prove only the act of wrongful confinement already punishable under Section 333.

In our opinion the proper direction to the Jury in this case should have been that while the evidence relating to the actual criminal assault on the girl was relevant to establish the object which the Appellant may have had in mind, it was not relevant to the preliminary and distinct question whether he kidnapped the child in order to achieve his object. It is apparent that, in the Commissioner's own view of the evidence, the Appellant would probably have been acquitted if the proper direction had been given.

Conviction on 1st count set aside.