APPELLATE CRIMINAL.

Before Mr. Justice E Maung.

1947

Sept. 19.

TUN KYAING (APPELLANT)

v.

THE KING (RESPONDENT).*

Penal Code, ss. 366, 366A—"Seduced to illicit intercourse", meaning of—Whether conviction under s. 366 of Penal Code can be altered into one under s. 7 of Suppression of Brothels Act.

Held: Where a girl below the age of 18 years was living a life of prostitution in a brothel and she was induced, without any force or deceit, by the appellant to leave the brothel and live with him as his concubine, he could not be convicted under ss. 366 and 366A of the Penal Code.

Held further: "Seduced to illicit intercourse" is something different from "seduction" in its popular sense. It means induced to surrender or abandon a condition of purity from unlawful sexual intercourse. Where the girl was already living a life of prostitution, she could not be said to have been seduced to illicit intercourse.

Shaheb Ali v. *Emperor*, I.L.R. 60 Cal. 1457; *Emperor* v. *Baijnath*, 54 All. 756; *Nura* v. *Emperor*, 35 Cr.L.J. 1386, followed.

King-Emperor v. *Nga Ni Ta*, (1902-03) 1 U.B.R. (Penal Code) 15; *King-Emperor* v. *Nga Nge*, (1904—06) 1 U.B.R. (Cr.) 17; *Crown* v. *Chan Mya*, 1 L.B.R. 297, dissented from.

Bahadur v. *The Empress*, (1881) P.R. (Cr.) 7, referred to.

Held further: S. 7 of Brothels Act was the proper section but the conviction could not be altered into one under that section as this is a special law and s. 237, Criminal Procedure Code, is not applicable.

S. N. Sastry for the appellant.

Tin Maung (Government Advocate) for the respondent.

E MAUNG, J.—The facts, which are not in dispute in the case from which this appeal arose, are that Ma Tin Yi (P.W. 4), whose age has been estimated by the medical witness Dr. Matharu (P.W. 11) at about 16 years and who in her own deposition stated that she

*Criminal Appeal No. 1699 of 1947—appeal from the order of 5th Additional Magistrate of Rangoon, dated the 11th June 1947, in Criminal Regular Trial No. 739 of 1946.

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was born about April 1930, had, sometime prior to September 1946, been an inmate of what clearly was a brothel at No. 93, 22nd Street, Rangoon, maintained by a person named Hoke Kyu and that her position in that brothel was as a prostitute serving the visitors to it. The evidence of Ma Kyin Saing (P.W. 7), herself a prostitute and an inmate at one time of the same establishment, and that of Thein Maung (P.W. 8), clearly proves, these facts.

One day in September 1946 the appellant visited Ma Tin Yi at the establishment in 22nd Street and following that visit Ma Tin Yi was removed to a house in Sparks Street and from there to a house, No. 76, Fraser Street, which was in the occupation of the appellant. Ma Tin Yi remained in the house in Fraser Street till the 23rd November 1946 when U Hla Maung (P.W. 1), Officer-in-charge of Anti-Vice Squad, Rangoon, visited the premises, arrested the appellant and took her away from it.

It has been claimed on behalf of the prosecution that Ma Tin Yi was taken away by force from the establishment in 22nd Street and that after having taken her away first to Sparks Street and then to Fraser Street, the appellant forced her to continue a life of prostitution in the latter place for his pecuniary benefit. It is also alleged that before forcing the girl to continue a life of prostitution the appellant committed several acts of rape on her. On these allegations and also on the allegation that the appellant would not allow the girl to leave the premises in which he kept her after her removal from the 22nd Street establishment, the appellant was sent up for trial under sections 344, 366 and 376, Penal Code.

The 5th Additional Magistrate, Rangoon, in his Criminal Regular Trial No. 739 of 1946 found the appellant guilty of an offence under section 366 of the

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Penal Code and sentenced him to three years' rigorous imprisonment. The appellant appeals to this Court against this conviction and sentence.

I may say at once that if I had been able to confirm the conviction, I could not have seen my way to interfere with the sentence at all. I agree with the learned trial Magistrate that if the facts had been as were found by him, the appellant is deserving of at least three years' rigorous imprisonment.

On the facts, however, I find myself unable to agree with the learned trial Magistrate. Indeed it is difficult to discover from his judgment what definitely he found the appellant did so far as getting the girl Ma Tin Yi to remove herself from 22nd Street to Sparks Street is concerned. It appears to me that the learned Magistrate was unable to make up his mind whether the girl was made to leave the 22nd Street establishment under a threat, as alleged by her, of physical injury or by an act of deceit which, however, appears to be nobody's case. The learned Magistrate relied for his decision on the case of *Bahadur* v. *The Empress* (1). A study of that case would appear to suggest that the learned Magistrate rejects the prosecution story of the girl Ma Tin Yi being compelled by force to go away from the 22nd Street establishment and go with the appellant to Sparks Street and later to Fraser Street house. There the accused, concealing from the parents of the girl and herself that he was a ***kanjar***, and falsely representing himself to be subedar of his brother's regiment, induced the girl to marry him and to leave her home and accompany him to Kohat and on arrival there he instigated her to prostitute herself. The circumstances of that case also were such that the learned Judges of the Punjab Chief Court could have drawn a fair inference that the accused intended, when

(1) (1881) P.R. (Cr.) 7

he married the girl, to make her a prostitute. It is not a correct interpretation of the decision in that case to say, as the learned trial Magistrate by implication said, that where a person on the promise to make a girl his wife induced her to go away with him, he would be guilty of an offence under section 366 of the Penal Code if, though he made her his wife, he intended nevertheless to induce her to continue to live a life of prostitution after the marriage with him.

In the present case, as I have already said, the prosecution case is not that there was any concealment of facts or misrepresentation which operated on the girl's mind so as to make her come away from the 22nd Street establishment. The prosecution case was quite plain and unequivocal : it is that the appellant, armed with an open clasp knife and threatening to use it on the girl, forced her to come away with him from that establishment. It is therefore necessary to consider if that story, and that story alone, is substantiated in this case.

Ma Tin Yi (P.W. 4) says that the abduction took place at about 10 a.m. while she was in Hoke Kyu's lodging rooms in 22nd Street. According to her there was in the premises at the time a Chinese cook known to her as "lumbar". The man's proper name appears to be Wan Law and he is the 5th witness for the prosecution. Ma Kyin Saing (P.W. 7) who, as I have already said, was another prostitute living in that establishment, claimed that she was in the room next to that occupied by Ma Tin Yi. These three witnesses speak to Ma Tin Yi being taken away under threats of physical injury to be done to her if she did not comply. Ma Tin Yi's story is that while she was in her room the appellant came in and raped her but that as he had a dagger with him she did not shout for help as she was afraid of physical injury at his hands. She then goes

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on to say that after the act of rape the appellant took her out by force to a trishaw which was waiting outside the house. There she saw another trishaw occupied by two other persons, one of whom was Thein Maung (P.W. 8). She says the appellant was holding the dagger all the time in one hand and with the other he held her. She got into the same trishaw as the appellant, the appellant taking the front seat and she the back seat. The two trishaws then moved off and as it was raining then, the appellant put a rain coat over her head and body while they were travelling. She says that she was crying all the time.

Wan Law (P.W. 5), who calls himself a tea-shop assistant but who obviously was actively engaged in the management of the brothel kept under the euphemistic name of lodging rooms by Hoke Kyu, says that the appellant entered Ma Tin Yi's room and stayed there for about one hour before he took her away "embracing her body with his hands." He said that he did not interfere as he was afraid of the appellant and his companions one of whom was Thein Maung (P.W. 8). From this man's evidence it appears that the appellant was no stranger to the lodging house kept by Hoke Kyu for he says: "I have seen Tun Kyaing one or two times before the occurrence. He used to come once or twice to Hoke Kyu's lodging room."

Ma Kyin Saing (P.W. 7), who on the same day and soon after Ma Tin Yi was removed from Hoke Kyu's lodging rooms shifted to the appellant's house in the company of one Maung Thein and his wife, claims that she heard Ma Tin Yi saying: "I do not want to go with you" and that when she peeped through the door of the room where Ma Tin Yi was then, she saw the appellant taking her out of the room pointing a dagger at her.

It must be remembered that 22nd Street, Rangoon, at 10 a.m. in the morning is a very busy thoroughfare.

It must also be remembered that the route from 22nd Street to Sparks Street lies in a crowded area of the city where the girl could easily have sought assistance from the police or other persons on the road. Moreover, according to the girl, the appellant was seated in the front seat and she at the back seat and she could easily have dropped off from the trishaw. On the evidence of Ma Tin Yi, Wan Law and Ma Kyin Saing I cannot accept the story of her being compelled by threats of physical injury to accompany the appellant to the Sparks Street establishment.

But the matter does not rest there. It is admitted by Ma Tin Yi that she went to the cinema show at Kandawmeik Hall twice while she was living in Sparks Street with the appellant. The first visit to the cinema was soon after noon of the day she came away from the 22nd Street establishment. The evidence of Ma Bi (P.W. 9) is quite clear on this point. U Ohn Maung (D.W. 1) and Ma Hnin Yin (D.W. 2) his wife, against whom nothing whatsoever has been suggested, speak of the appellant and Ma Tin Yi visiting their house once as husband and wife during the rainy season of last year. Moreover, when the house in Fraser Street was visited by a party led by Bo Tin Maung (P.W. 2), who describes himself as a leader of P.V.O., Bagayataik, they met the girl Ma Tin Yi at the house and though this party was bent on rescuing girls who were reported to them as forced to earn their livelihood as prostitutes, they did not take away Ma Tin Yi then because both the appellant and Ma Tin Yi said that they were husband and wife. It was only on a subsequent raid by U Hla Maung (P.W. 1) that Ma Tin Yi for the first time reported to any person in authority that she had been kept unwillingly in the appellant's house. It is significant in this connection that U Hla Maung, though an Officer-in-charge of Anti-Vice Squad, allowed himself

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to be led by the P.V.Os. For instance he says: "I examined Yebaws Bo Tin Maung, Ko Nyunt Shein and Ko Hla Han on 26th November 1946. I examined Ma Tin Yi on 27th November 1946. When I went to examine Ma Tin Yi, Yebaw Bo Tin Maung handed over a statement made by her to the elders." Ma Tin Yi and Maung Nyunt Shein (P.W. 6) soon after the "rescue" of Ma Tin Yi began to live as husband and wife.

In these circumstances, the conviction under section 366 of the Penal Code cannot be sustained. I have, however, to consider whether the appellant has committed any other offence for which I can rightly convict him in respect of the acts disclosed from and established by the evidence at the trial Court. I have to do so because it appears to me that the police, when they sent up the case, had not been able to make up their mind what offence it was that they were to charge the appellant with, as many witnesses have been examined who would have been totally out of place if the trial had been in respect of an offence under section 366 of the Penal Code. Persons who claim to have visited the establishment in Fraser Street where Ma Tin Yi received male visitors in prostitution and persons who speak of several other girls being maintained in the same place to earn their living as prostitutes, were examined at the trial. I have therefore to consider if on this evidence it would be possible for me, whilst acquitting the appellant of an offence under section 366 of the Penal Code, to convict him either under section 366A of the Penal Code or one of the relevant provisions of the Suppression of Brothels Act

Section 366A of the Penal Code makes it an offence to induce a minor girl under the age of 18 years, by any means whatsoever, to go from any place with intent that such girl may be, or knowing that it is

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likely that she will be, forced or seduced to illicit intercourse. In this case the girl is clearly under 18. For reasons already given by me, I cannot believe that she was forced to live a life of prostitution in the house of the appellant, though I am prepared, on the materials before me, to hold that the appellant did connive at her living that life and profited by her earnings. If the law has been correctly laid down in *King-Emperor* v. *Nga Ni Ta* (1) it is clear that the appellant has committed an offence under section 366A. At page 16 of the report it has been said :

> " I am unable to hold that the words in section 366 ' seduced to illicit intercourse ' refer only to the first act of seduction or the surrender of chastity. To ' seduce ' as defined in Webster's Dictionary is to draw aside from the path of rectitude and duty in any manner, to entice to evil, to lead astray, to tempt and lead to iniquity. I think that it would be a monstrous proposition, and one that would strike at the very roots of social and moral rectitude to hold, that because a man had induced a girl while in the custody of her parents to surrender her chastity, he committed no further act of seducing to illicit intercourse, when he persuaded her to live with him in a condition of **concubinage** not sanctioned by marriage."

If the principle has been rightly stated in that case, the fact that the girl Ma Tin Yi was a prostitute and living in prostitution at the 22nd Street establishment when the appellant induced her to go away from that place with the intent that she should continue her life of prostitution in another place, would not make it any the less seduction to illicit intercourse within the meaning of section 366A. That decision, however, does not stand alone even as far as Burma is concerned. There is a decision, militating to some extent against that, in *King-Emperor* v. *Nga Nge* (2). There is also a

(1) (1902-03) 1 U.B.R. (Penal Code) 15. (2) (1904—06) 1 U.B.R. (Cr.) 17.

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decision of the Chief Court of Lower Burma in *Crown* v. *Chan Mya* (1). In my opinion, the decision of a Bench of the Calcutta High Court in *Shaheb Ali* v. *Emperor* (2) states the true rule. The head-note, which correctly sums up the decision of Lort-Williams J., may be reproduced here:

> "The phrase 'seduced to illicit intercourse' within the meaning of section 366 of the Indian Penal Code is intended to indicate something different from 'seduction' in its popular, usual or ordinary sense and cannot be restricted to inducing a girl to surrender her chastity for the first time. It means 'induced to surrender or abandon a condition of purity from unlawful sexual intercourse.' Therefore, an accused cannot be convicted of this offence unless the girl was leading a life pure from unlawful sexual intercourse at the time when the kidnapping took place. This does not mean that it is necessary to prove that the girl has never at any time surrendered her condition of purity from unlawful sexual intercourse. She may have surrendered it in the past, and thereafter have resumed a life of purity. On the other hand, if she is already leading a life of indulgence in unlawful sexual intercourse, it cannot be said that she was kidnapped 'in order that she might be seduced to illicit intercourse.'"

The Allahabad High Court's decision in *Emperor* v. *Baijnath* (3) is also in the same direction. The Lahore High Court in *Nura* v. *Emperor* (4) also supports the same view. A comparison of section 366 or 366A with section 498 of the Penal Code clearly supports the view taken by the Calcutta High Court in *Shaheb Ali* v. *Emperor* (2). When the Penal Code contemplates the continuation of illicit intercourse, which began prior to the enticement, it did not employ in the definition of the offence any word signifying seduction.

In these circumstances and holding as I do that Ma Tin Yi, who was living a life of prostitution in Hoke

(1) 1 L.B.R. 297.
(2) I.L.R. 60 Cal. 1457.
(3) 54 All. 756.
(4) 35 Cr.L.J. 1386.

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Kyu's lodging rooms, was induced, without force or deceit, to remove herself to the premises occupied by the appellant to live as his wife or concubine and at the same time to continue her life of prostitution, I cannot convict the appellant under section 366A of the Penal Code. Section 7 of the Suppression of Brothels Act appears, *prima facie*, the provision under which action should have been taken against the appellant on the allegations in this case. I cannot, however, alter the conviction in this case into one under that section It has been held that section 237 of the Code of Criminal Procedure is not applicable where of the two offences one is under the Penal Code and the other is under a special law.

Considering that the appellant had been in custody since the 26th November 1946, I do not propose directing his re-trial under the appropriate provisions of the law. It must be remembered that Ma Tin Yi, her present husband Maung Nyunt Shein, Ma Kyin Saing and Wan Law have greatly exaggerated the case against the appellant and because of this exaggeration the appellant has been in custody for nearly a year. On the record, assuming everything against the appellant, as far as an offence under section 7 of the Suppression of Brothels Act is concerned, is proved, this is not a case out of the ordinary and the appellant, if convicted, might not be sentenced to more than a year's rigorous imprisonment. That he has already suffered, in anticipation, under a wrong charge.

I accordingly allow the appeal and acquit the appellant. His bail bond will be cancelled.