

R. v. J. H. TROLLEY.

CRIMINAL APPEAL CASE NO. 1 OF 1938.

Kidnapping—Penal Code section 226—native servant conveyed beyond limits of Territory and thrashed beyond such limits—purpose of conveyance beyond limits of Territory not explained—question whether consent to such conveyance—conviction upheld on appeal.

The facts and the law appear from the judgment hereunder.

As to the procedure and form of a case stated see *The Town Clerk, Livingstone v. Jesse Field* p. 191 post.

Francis, C.J.: This is an appeal in the form of a stated case, by John Henry Trolley from a conviction before the Subordinate Court, Class III, Livingstone, of the offence of kidnapping under Penal Code section 226. The appellant was sentenced to one day's imprisonment with hard labour and a fine of £10 or in default fourteen days I.H.L.

The case was tried on the 6th January, and reserved judgment was delivered on the 11th January. The appeal came before this Court on the 10th March, and at the instance of the respondent an adjournment was granted until the 17th March. On the conclusion of the hearing judgment was reserved. Mr. Warner for appellant, and Mr. Williams for the respondent, Public Prosecutor.

The facts noted as proved before the Court below, may briefly be set out as follows:

On the morning of the 27th December last trouble arose between Mrs. Trolley and a native named Kuyu, employed as a lorry driver by the accused. From his evidence it would appear that during the dispute Mrs. Trolley smacked his face. A suggestion was put to Kuyu in cross-examination that he thereupon retaliated and hit Mrs. Trolley. He stoutly denied this, and it is curious to note that no evidence of this retaliatory assault was adduced by way of substantiating the suggestion; in fact no evidence at all was tendered on behalf of the appellant in reply to the charge.

After this incident, the appellant ordered Kuyu to get into his car, telling him that he was to be taken to the District Office, Livingstone. Kuyu entered the car willingly, which was driven to the Livingstone Motor Works, filled with petrol and then back to the appellant's house. Kuyu remained in the car, having been told not to leave it. The car was then driven by the appellant in the direction of the Falls. Kuyu asked the appellant where he was being taken, but received merely a signal to remain silent. The car crossed the bridge into Southern Rhodesia, and was halted temporarily at the Police Barrier. Kuyu did not leave the car

and made no complaint to the Southern Rhodesia Police. The car proceeded to a point beyond Matetsi (distance not stated) where all parties got out. From the record it would appear that Mrs. Trolley was also a passenger. The appellant then administered a thrashing to the native and drove back to Livingstone leaving him on the highway. On being questioned subsequently by the police, the appellant made admissions which correspond with the facts set out above.

The offence of kidnaping is defined in Penal Code section 223, as the conveyance of a person without his consent beyond the limits of the Territory; that is to say, out of the protection of the law.

With the admission of the fact of conveyance, the only question remaining for decision by the Magistrate was that of consent, but on this point he has quite unnecessarily involved himself in difficulty by the use of the expressions such as "active consent", "passive consent" and "lack of dissent". However, he appears to have come to the conclusion that there was no consent, and upon this finding convicted the accused.

In his application to the Magistrate to state a case, Counsel submitted that—

(1) The absence of consent being an integral part of the charge, the burden of proof is on the prosecution, and that it was insufficient to satisfy the Court that there was absence of some particular form of consent not specified in the charge.

(2) The introduction by the Court of the word "active" to qualify and reduce the ordinary meaning of the word "consent" contained in section 223 of the Penal Code is contrary to the rules of construction.

(3) The fact that the complainant made no complaint at the first opportunity, i.e., at the Falls Police Post, that he then made no attempt to leave the car when he was under no compulsion to remain, and his statements that he went willingly, and that he had no cause of complaint, negative that part of the charge constituted by the words "without the consent of that person", and that, therefore, the prosecution failed to establish the charge, and the conviction was wrong.

(4) That the fact accepted by the Court that, while in Livingstone, the complainant inquired as to the destination, is irrelevant to the issue, in view of the terms of section 40 of the Employment of Natives Ordinance.

(5) That evidence of the result intended to be caused by the accused, not being expressly declared to be an element of the offence constituted, is immaterial according to the terms of the second paragraph of section 10 of the Penal Code, and that the Court was wrong in finding that the consent of the complainant was necessary to an act outside the express words of the charge.

(6) That the Court has no judicial knowledge of the constitution of offences outside the Territory, and was therefore

wrong in finding that an "assault" took place in Southern Rhodesia, and that it constituted part of the continuous action covering the offence with which the accused was charged.

The seventh (and last) submission is not appended, as the question with which it deals was waived in the Court below. These submissions were subjoined to the statement of the Magistrate's case in fashion more in keeping with the transaction of departmental correspondence than practice at law.

The gravamen of the first three submissions is that the Magistrate misdirected himself on the question of consent. I agree that he has indeed allowed confusion to enter, for this is obvious from the manner in which he permitted the expression "active consent" and "passive consent" to creep into his judgment. These expressions are solecisms, and in my view should not be permitted to obscure the issue. I am satisfied from the latter part of his judgment, and from a note which appears on the record, that despite this diversion the Magistrate did apply his mind—tardily though it may have been—to the real question.

This being so I hold that the first three submissions must fail.

The fourth submission was not argued.

As regards the fifth submission, the complaint here is that the Magistrate was wrong in finding that consent was necessary to an act outside the express words of the charge. The thrashing was an important part of the whole transaction, and evidence regarding this was no doubt led, and I think properly admitted, to explain circumstances connected with the offence. It may be that here again the Magistrate has gone beyond useful discussion, but I am unable to hold that this has in any way vitiated the conclusion he arrived at.

I am afraid I do not see much substance in the sixth submission. The act of thrashing the boy under the circumstances admitted by the appellant would, had it taken place in this Territory, have been a penal offence; and in my view it is idle to suggest that the Magistrate, before using a term of art to describe that act, should have had proof that such an act was an "assault" under the law of Southern Rhodesia.

For the respondent it was argued that the question of consent was to be resolved on a finding of fact, and that there was sufficient material before the Magistrate to support the conviction.

On the facts, Mr. Williams submitted that the servant Kuyu had no knowledge of what was happening. He was first told that he was being taken to the District Officer. He never arrived there. Then he was ordered to remain in the car, and on inquiring where he was being taken when approaching the border, no reply was given. Without such knowledge no consent could be inferred from any action of his construable as a willingness to remain in the car.

Consent means an act of reason accompanied with deliberation: the mind weighing as in a balance the good or evil on either side. Consent supposes three things: a physical power, a mental power and a free and

serious use of them. Hence it is that if consent be obtained by meditated imposition, circumvention, surprise or undue influence, it is to be treated as a delusion and not as a deliberate and free act of the mind. (Cf. *Wharton*, 13th Ed., p. 204.)

Conveyance of a person from one place to another is not criminal. The act, however, becomes criminal if he is conveyed without his consent, and it is that which gives the act its essential elemental of criminality. From the definition above this consent, to be validly given, must be an intelligent consent, the result of a deliberate and free act of the mind fully cognizant of the course of proceedings.

Now, under the circumstances appearing in this case can it be said that the native boy Kuyu gave, either expressly or impliedly, his consent to be removed from the protection of the law of this country? He was not informed of the purpose of the journey to Matetsi, nor the implication attending his transfer beyond the jurisdiction of this Court. Without knowledge there can be no consent.

There is sufficient evidence to justify the conviction, and the determination of the Court below is hereby affirmed.

I regret finding it necessary to remark on the manner in which this case has been stated and presented, as it indicates an unfortunate disregard of the rules of practice in such procedure. This is a defect too frequently experienced in connection with records coming from many of the subordinate courts, and I would exhort lay Magistrates to pay more regard to such matters in future.

The requirements of the law regarding the statement of a case are set out clearly in Criminal Procedure Code, section 320, and as a guide to the correct practice to be followed and use of forms, it is very necessary to refer to one of the standard text books on the subject.

No order as to costs.