

THE INDIAN PENAL CODE

CHAPTER XVI OF OFFENCES AFFECTING THE HUMAN BODY OF OFFENCES AFFECTING LIFE

Of Kidnapping, Abduction, Slavery and Forced Labour

[s 360] Kidnapping from India.

Whoever conveys any person beyond the limits of ^{1052.}[India] without the consent of that person, or of some person legally authorised to consent on behalf of that person, is said to kidnap that person from ^{1053.}[India].

COMMENT.—

The offence under this section may be committed on a grown-up person or a minor by conveying him or her beyond the limits of India. If the person kidnapped is above 12 years of age and has given consent to his or her being conveyed beyond the limits of India, no offence is committed. ^{1054.} Now, the age limit for boys is 16 and for girls 18 under Act XLII of 1949.

[s 360.1] Ingredients.—

This section requires two things:—

- (1) Conveying of any person beyond the limits of India.
- (2) Such conveying must be without the consent of that person.

^{1052.} The words "British India" have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, sec. 3 and Sch. (w.e.f. 1 April 1951), to read as above.

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^{1054.} *Haribhai v State*, (1918) 20 Bom LR 372 : 42 Bom 391.

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[s 361] Kidnapping from lawful guardianship.

Whoever takes or entices any minor under ¹⁰⁵⁵[sixteen] years of age if a male, or under ¹⁰⁵⁶[eighteen] years of age if a female, or any person of unsound mind, out of the keeping of the lawful guardian of such minor or person of unsound mind, without the consent of such guardian, is said to kidnap such minor or person from lawful guardianship.

Explanation.—The words "lawful guardian" in this section include any person lawfully entrusted with the care or custody of such minor or other person.

Exception.—This section does not extend to the act of any person who in good faith believes himself to be the father of an illegitimate child, or 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.

State Amendment

Manipur.—*The following amendments were made by Act No. 80 of 1950, s. 3(2) (w.e.f. 16-4-1950) read with Act 81 of 1971, s. 3 (w.e.f. 25-1-1972).*

In its application to the State of Manipur, in Section 361 for the word "eighteen" substituted the word "fifteen".

COMMENT.—

The offence under this section may be committed in respect of either a minor or a person of unsound mind. To kidnap a grown-up person of sound mind, therefore, would not amount to an offence under it.

[s 361.1] Object.—

The object of this section is at least as much to protect children of tender age from being abducted or seduced for improper purposes, as for the protection of the rights of parents and guardians having the lawful charge or custody of minors or insane persons.

[s 361.2] Ingredients.—

This section has four essentials¹⁰⁵⁷.—

- (1) Taking or enticing away a minor or a person of unsound mind.
- (2) Such minor must be under 16 years of age, if a male, or under 18 years of age, if a female.
- (3) The taking or enticing must be out of the keeping of the lawful guardian of such minor or person of unsound mind.
- (4) Such taking or enticing must be without the consent of such guardian.

[s 361.3] 'Takes or entices any minor'.—

The Supreme Court considered the interpretation of expression 'takes or entices' in *S Varadarajan v State of Madras*,¹⁰⁵⁸ and *State of Haryana v Rajaram*.¹⁰⁵⁹ The purpose and object of [section 361 IPC, 1860](#) appears to be in dispute. In *Varadarajan*, the Supreme Court had occasion to consider this. In [section 498 IPC, 1860](#) we find identical expression 'takes or entices' employed by the legislature. That was of course for a totally different offence. While considering the object of [section 361 IPC, 1860](#), the Supreme Court in *Varadarajan*, took the view that the interpretation of the expression 'takes or entices' in [section 498 IPC, 1860](#) cannot be blindly and mechanically imported while considering the interpretation of the same expression in [section 361 IPC, 1860](#). It took the view that [section 498 IPC, 1860](#) is meant essentially for protection of the rights of the husband, whereas [section 361 IPC, 1860](#) and other cognate sections of the [IPC, 1860](#) are intended more for the protection of minors and persons of unsound mind than the rights of the guardians of such persons. But in *Rajaram*, the Supreme Court held that:

The object of this section seems as much to protect the minor children from being seduced for improper purposes as to protect the rights and privileges of guardians having the lawful charge or custody of their minor wards. The gravamen of this offence lies in the taking or enticing of a minor under the ages specified in this section, out of the keeping of the lawful guardian without the consent of such guardian. The words 'takes or entices any minor ... out of the keeping of the lawful guardian of such minor' in S. 361, are significant. The use of the word 'keeping' in the context connotes the idea of charge, protection, maintenance and control: further the guardian's charge and control appears to be compatible with the independence of action and movement in the minor, the guardian's protection and control of the minor being available, whenever necessity arises. On plain reading of this section the consent of the minor who is taken or enticed is wholly immaterial: it is only the guardian's consent which takes the case out of its purview. Nor is it necessary that the taking or enticing must be shown to have been by means of force or fraud. Persuasion by the accused person which creates willingness on the part of the minor to be taken out of the keeping of the lawful guardian would be sufficient to attract the section.

A person who allows such a minor who is already out of the keeping of the guardian to accompany him commits no offence under [section 361 IPC, 1860](#). That alone is the dictum in *Varadarajan*. It is no authority on the question whether consent of a minor (even a knowledgeable minor close to 18 years) is relevant or crucial in a prosecution under [section 361 IPC, 1860](#). Later a two-Judge Bench in *T D Vadgama v State of Gujarat*,¹⁰⁶⁰ ascertained the precise distinction in the dictum between the three-Judge Benches in *Varadarajan* and *Rajaram*. The dictum in *Varadarajan* turned on its own peculiar facts. It was held:

it would, however, be sufficient if the prosecution establishes that though immediately prior to the minor leaving the father's protection no active part was played by the accused, he had at some earlier stage solicited or persuaded the minor to do so. In our opinion, if evidence to establish one of those things is lacking, it would not be legitimate to infer that the accused is guilty of taking the minor out of the keeping of the lawful guardian merely because after she has actually left her guardian's house or a house where her guardian had kept her, joined the accused and the accused helped her in her design not to return to her guardian's house by taking her along with him from place to place. No doubt, the part played by the accused could be regarded as facilitating the fulfilment of the intention of the girl. That part, in our

opinion, falls short of an inducement to the minor to slip out of the keeping of her lawful guardian and is, therefore, not tantamount to 'taking'.

The intention with which kidnapping is effected can be ascertained from the circumstances of the offence at the time of occurrence or prior or subsequent to it. A kidnapping does not *per se* lead to any inference of intent or purpose of kidnapping.¹⁰⁶¹ Persuasion by the accused which created willingness on the part of the minor to be taken out of the keeping of the lawful guardian was held by the Supreme Court to be enough to attract section 361. The Supreme Court also restated the ingredients.¹⁰⁶²

Promise of marriage made to the minor girl for leaving the house of the lawful guardian was held to be an enticement.¹⁰⁶³

The word 'take' means 'to cause to go' to escort or to get into possession. It implies want of wish and absence of desire of the person taken. There is a distinction between taking and allowing a minor to accompany a person.¹⁰⁶⁴

[s 361.4] When 'taking' is complete.—

The offence of kidnapping from lawful guardianship is complete when the minor is actually taken from lawful guardianship; it is not an offence continuing so long as the minor is kept out of such guardianship. In determining whether a person takes a minor out of the lawful keeping of its guardian, the distance to which the minor is taken away is immaterial.¹⁰⁶⁵

[s 361.5] 'Enticing'

is an act of the accused by which the person kidnapped is induced of his own accord to go to the kidnapper. The word 'entice' involves an idea of inducement or allurement by exciting hope or desire in the other. It may take many forms difficult to visualise. It is not necessary that 'taking' or 'enticing' should be by means of force or fraud. The word 'entice' involves the idea of inducement or allurement.¹⁰⁶⁶

[s 361.6] 'Under sixteen years of age if a male, or under eighteen years of age, if a female'.—

In the case of a boy the age limit is fixed at 16 years; in the case of a girl at 18 by Act XLII of 1949. Before this amendment the age limit was 14 and 16 respectively. Where a girl under that age is kidnapped, it is no defence that the accused did not know the girl to be under that age, or that from her appearance he might have thought that she was of a greater age.¹⁰⁶⁷ Anyone dealing with such a girl does so at his peril, and if she turns out to be under 18 he must take the consequences,¹⁰⁶⁸ even though he *bona fide* believed and had reasonable ground for believing that she was over eighteen.¹⁰⁶⁹

[s 361.7] 'Any person of unsound mind'.—

If the person kidnapped is normally of sound mind but is made unconscious from poisoning, such a person cannot be said to be of unsound mind. For example, a person

under an anaesthetic for an operation can hardly be said to be of unsound mind. Where a girl aged 20 years had been made unconscious from *dhatara* poisoning when she was taken away, it was held that she could not be said to be a person of unsound mind, and the person taking her away could not be guilty of kidnapping.^{1070.}

[s 361.8] 'Out of the keeping of the lawful guardian'.—

The Legislature has advisedly preferred the expression 'the keeping of the lawful guardian' to the word 'possession'. The word 'keeping' is compatible with the independence of action and movement in the object kept.^{1071.}

Persuasion by the accused is sufficient to constitute 'taking' within the meaning of this section. Consent of the minor is wholly immaterial. It is only the guardian's consent that takes the case out of the purview of this section.^{1072.}

In *Vipin Menon v State of Karnataka*,^{1073.} it was held that the father, in the absence of divestment of right of guardianship, cannot be guilty of kidnapping his minor child.

[s 361.9] Explanation.—'Lawful guardian'.—

The Explanation is intended to extend the protection given to parents to any person lawfully entrusted with the care or custody of the minor.^{1074.}

Where the order in favour of the mother was passed by the lower Court but it was stayed by the High Court, it was held that the father who had custody of the minor child would continue to be in lawful custody until further orders. The Supreme Court clarified that the law in India is to be governed by the provisions of [IPC, 1860](#) and not the US International Parental Kidnapping Crime Act, 1993.^{1075.}

[s 361.10] 'Entrustment'.—

Entrustment, which this section requires, may be inferred from a well-defined and consistent course of conduct governing the relations of the minor and the person alleged to be the lawful guardian.^{1076.}

^{1055.} Subs. by Act 42 of 1949, sec. 2, for "fourteen".

^{1056.} Subs. by Act 42 of 1949, sec. 2, for "sixteen".

^{1057.} Restated in *Biswanath Mallick v State of Orissa*, [1995 Cr LJ 1416](#) (Ori).

^{1058.} *S Varadarajan v State of Madras*, [AIR 1965 SC 942](#) [[LNIND 1964 SC 223](#)] : [1965 \(2\) Cr LJ 33](#).

1059. *State of Haryana v Rajaram*, AIR 1973 SC 819 [LNIND 1972 SC 508] : 1973 (1) SCC 544 [LNIND 1972 SC 508] : 1973 Cr LJ 651 .
1060. *T D Vadgama v State of Gujarat*, AIR 1973 SC 2313 [LNIND 1973 SC 187] : 1973 (2) SCC 413 [LNIND 1973 SC 187] .
1061. *Badshah v State of UP*, (2008) 3 SCC 681 [LNIND 2008 SC 310] : 2008 Cr LJ 1950 : (2008) 3 All LJ 524.
1062. *Prakash v State of Haryana*, (2004) 1 SCC 339 [LNIND 2003 SC 1045] : AIR 2004 SC 227 [LNIND 2003 SC 1045] : 2004 Cr LJ 595 .
1063. *Moniram Hazarika v State of Assam*, (2004) 5 SCC 120 [LNIND 2004 SC 476] : AIR 2004 SC 2472 [LNIND 2004 SC 476] : 2004 Cr LJ 2553 .
1064. *Biswanath Mallick v State of Orissa*, 1995 Cr LJ 1416 (Ori).
1065. *Chhajju Ram*, AIR 1968 P&H 439 .
1066. *Biswanath Mallick v State of Orissa*, 1995 Cr LJ 1416 (Ori).
1067. *Robins*, (1844) 1 C&K 456; *Krishna Maharana*, (1929) 9 Pat 647. *Biswanath Mallick v State of Orissa*, 1995 Cr LJ 1416 (Ori).
1068. *Christian Olifier*, (1866) 10 Cox 402.
1069. *Prince*, (1875) LR 2 CC R 154; *Krishna Maharana*, *sup.* Where the prosecution produced the school leaving certificate for proof of age and not the horoscope though available and two doctors testified on behalf of the accused that the girl was major, the accused acquitted under benefit of doubt, *Pravakar v Ajaya Kumar Das*, 1996 Cr LJ 2626 (Ori). *Vishnu v State of Maharashtra*, 1997 Cr LJ 1724 (Bom), evidence of mother of prosecutrix and that of her school head master showed her to be below 16. This was also corroborated by medical evidence. This fact was not challenged by the defence. Finding as to her age as below 16 was held to be proper. *Mohan v State of Rajasthan*, 2003 Cr LJ 1891 (Raj), failure of the prosecution to prove that the prosecutrix was under 18 years of age at the relevant time, offence under the section not made out.
1070. *Din Mohammad*, 1939 20 Lah 517.
1071. *Lakshmidhar Misra*, (1956) Cut 546. *Biswanath Mallick v State of Orissa*, (1995) 2 Cr LJ 1416 (Ori), kidnapping from custody of guardian without the intention of forced marriage, offence under section 361, not under section 366.
1072. *State of Haryana v Raja Ram*, 1973 Cr LJ 651 (SC); See also *Rasool v State*, 1976 Cr LJ 363 (All).
1073. *Vipin Menon v State of Karnataka*, 1992 Cr LJ 3737 (Kant).
1074. *Jagannadha Rao v Kamaraju*, (1900) 24 Mad 284, 291; *Baz v State*, (1922) 3 Lah 213. A girl living in a rented room for the purpose of an examination where her father visited her once is in the custody of the guardian. *Bhagban Panigrahi v State of Orissa*, 1989 Cr LJ (NOC) 103 (Ori).
1075. *Bhavesh Jayanti Lakhani v State of Maharashtra*, (2009) 9 SCC 551 [LNIND 2009 SC 1646] .
1076. *Nageshwar*, AIR 1962 Pat 121 .

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[s 362] Abduction.

Whoever by force compels, or by any deceitful means induces, any person to go from any place, is said to abduct that person.

COMMENT.—

This section merely gives a definition of the word "abduction" which occurs in some of the penal provisions which follow. There is no such offence as abduction under the Code, but abduction with certain intent is an offence. Force or fraud is essential.

[s 362.1] Ingredients.—

The section requires two things:—

- (1) Forceful compulsion or inducement by deceitful means.^{1077.}
- (2) The object of such compulsion or inducement must be the going of a person from any place.

"The expression "deceitful means" includes a misleading statement. It is, really speaking, a matter of intention. The intention of the accused is the basis and gravamen of the charge. The volition, the intention and conduct of the woman do not determine the offence.^{1078.} The offence of abduction under section 362 of the Code involves use of force or deceit to compel or induce any person to go from any place.^{1079.}

[s 362.2] Abduction and kidnapping.—

- (1) 'Kidnapping' is committed only in respect of a minor under 16 years of age if a male, and under 18 years if a female or a person of unsound mind; 'abduction', in respect of a person of any age.
- (2) In 'kidnapping', the person kidnapped is removed out of lawful guardianship. A child without a guardian cannot be kidnapped. 'Abduction' has reference exclusively to the person abducted.
- (3) In 'kidnapping', the minor is simply taken away. The means used may be innocent. In 'abduction', force, compulsion, or deceitful means are used.
- (4) In kidnapping, consent of the person taken or enticed is immaterial; in abduction, consent of the person moved, if freely and voluntarily given, condones abduction.

(5) In kidnapping, the intent of the offender is a wholly irrelevant consideration: in abduction, it is the all-important factor.

(6) Kidnapping from guardianship is a substantive offence under the Code; but abduction is an auxiliary act, not punishable by itself, but made criminal only when it is done with one or other of the intents specified in section 364, *et seq.*¹⁰⁸⁰.

¹⁰⁷⁷. *Suresh Babu v State of Kerala*, [2001 Cr LJ 1483](#) (Ker), where a girl of about 16 years old was in love with the accused and the evidence showed that she left her home on her own accord and joined the accused for getting their marriage registered and lived as husband and wife thereafter. Conviction of the accused was set aside because it could not be said that he kidnapped her. *Ram Chandra Singh v Nabrang Rai Burma*, [1998 Cr LJ 2156](#) (Ori), on the same point.

¹⁰⁷⁸. A Pasayat, J in *Rabinarayan Das v State of Orissa*, [1992 Cr LJ 269](#) , 273 (Ori), **citing** *Re Khalandar Sahab*, [AIR 1955 SC 39](#) , Edn (Sic) "or AIR 1955 59 (AP)".

¹⁰⁷⁹. *Subhash Krishnan v State of Goa*, [\(2012\) 8 SCC 365](#) [[LNIND 2012 SC 480](#)] : [AIR 2012 SC 3003](#) [[LNIND 2012 SC 480](#)] .

¹⁰⁸⁰. Restated in *Biswanath Mallick v State of Orissa*, [1995 Cr LJ 1416](#) (Ori).

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[s 363] Punishment for kidnapping.

Whoever kidnaps any person from ¹⁰⁸¹[India] or from lawful guardianship, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

State Amendment

Uttar Pradesh.—The offence *u/s. 363 IPC* is non-bailable, vide U.P. Act, No. 1 of 1984.

COMMENT.—

This section must be read with section 361. The offence of kidnapping from lawful guardianship penalised by this section is the offence which is defined by section 361. The person against whom the offence is committed must be under the age of sixteen, if a male, and under the age of eighteen, if a female.¹⁰⁸²

[s 363.1] Tribal Custom.—

Where a married girl of 17 years of age was forcibly carried away by the accused and his companions from a jungle where she had gone with others to collect mohua flowers with a view to marrying her according to their tribal custom, it was held that such a custom, if any, could apply only to the cases of young unmarried men and women and had no application to legalise the kidnapping of a married minor girl out of the keeping of her lawful guardian.¹⁰⁸³

[s 363.2] **Section 363 IPC** is not a minor offence of **Section 376 IPC, 1860**.—

Offence of kidnapping under *section 363 IPC, 1860* and of rape under *section 376 IPC, 1860* cannot be held to be cognate offences. Therefore, accused cannot be convicted for offence of kidnapping in absence of charge framed against him for the said offence.¹⁰⁸⁴

[s 363.3] Extradition offence.—

Offence under *section 363 of the IPC, 1860* is an extraditable offence, provided it is not a pure matrimonial dispute.¹⁰⁸⁵

1081. The words "British India" have successively been subs. by the A.O. 1948, the A.O. 1950 and Act 3 of 1951, sec. 3 and Sch. (w.e.f. 1 April 1951), to read as above.

1082. *Ismail Sayadsaheb*, (1933) 35 Bom LR 886 : 57 Bom 537 FB. *Anandham v State of TN*, (1995) 1 Cr LJ 632 (Mad), here the accused was acquitted under section 376 (rape) and section 366 (kidnapping for marriage), he was convicted under this section for simple kidnapping. *Omi v State of UP*, 1994 Cr LJ 155 (All), acquittal from charges of kidnapping and rape, story of the victim not reliable, medical evidence also not proving rape. *Kuldeep K Mahato v State of Bihar*, AIR 1998 SC 2694 [LNIND 1998 SC 714] : 1998 Cr LJ 1597 (Raj), the prosecutrix was below 18 years of age. She was taken away by the accused person to a particular place by means of a tempo. The court said that the offence of kidnapping from lawful guardianship was made out. But ingredients of the offence of rape not proved. Hence, no conviction for rape. *Bagula Naik v State of Orissa*, 1999 Cr LJ 2077 (Ori), a girl left home of her own, met by chance a person on the road who took her to his home and detained her for several days. The version given by the girl was truthful. The fact that there was no *mens rea* and he appeared before the police along with the girl was not sufficient to prove his innocence. His conviction was maintained. *Sumitra Bai v State of MP*, 1999 Cr LJ 2541 (MP), taken away by one person and deposited in the house of another, both liable. *Mahesh Kumar v State of Rajasthan*, 1998 Cr LJ 597 (Raj), gang rape after kidnapping, both accused helped each other in the satisfaction of their lust, either liable for act of the other. *Akeel v State of MP*, 1998 Cr LJ 4530 (MP) consenting party to sex, accused not liable for rape, but she being below 18 years, he was guilty of kidnapping. *Jitmohan Lohar v State of Orissa*, 1997 Cr LJ 2842 (Ori), the girl of consenting age going away voluntarily, conviction for kidnapping not proper.

1083. *Dutta Pradhan*, 1985 Cr LJ 1842 (Ori). See also *Tannu Lal v State of UP*, 1981 SCC (Cr) 675 : 1981 Supp SCC 47, conviction of the main accused along with his two companions who either stood by or helped him. *Prem Chand v State*, 1987 Cr LJ 910 (Del) no proof of allegations.

1084. *F Nataraja v State*, 2010 Cr LJ 2180 (Kar).

1085. *Bhavesh Jayanti Lakhani v State of Maharashtra*, (2009) 9 SCC 551 [LNIND 2009 SC 1646] : (2010) 1 SCC (Cr) 47.