

REVISIONAL CRIMINAL.

Before Adami and Scroope, JJ.

REKHA RAI

v.

KING-EMPEROR.*

1927.

Feb., 18.

Penal Code, 1860 (Act XLV of 1860), section 363—kidnapping, whether is a continuous offence—question of fact.

Whether the offence of kidnapping under section 363, Penal Code, is complete as soon as the minor is removed from the custody of the guardian is a question of fact to be determined according to the circumstances of each case.

Where *L* enticed a minor girl to come out of a gachhi to the road and then to the motor car in which *R* was sitting, so that the latter might drive away with her, held, that the offence of kidnapping was complete only when *R* drove away with her.

Rakhal Nikari v. Queen-Empress (1), *Nemai Chattoraj v. Queen-Empress* (2) and *Nanhak Sao v. King-Emperor* (3), referred to.

The petitioner was sentenced to rigorous imprisonment for two years on a charge under section 366 of the Indian Penal Code. The conviction and sentence passed by the trial court were upheld by the Sessions Judge.

The facts found by the courts below were that a little girl, Kailasia, aged about eleven years, went out with some other girls and a man and a woman to a gachhi to gather mahua fruit on the 8th July. Kailasia and her sister went from this gachhi to another gachhi, and there one Latu Dusadh came to Kailasia and told her that he would show her another place where she could get good fruit; and she went alone with him. He took her to a road where a motor

* Criminal Revision no. 51 of 1927, from a decision of J. A. Saunders, Esq., i.c.s., Sessions Judge of Muzaffarpur, dated the 4th December, 1926, affirming a decision of Maulavi Wali Mohammad, Assistant Sessions Judge of Motihari, dated the 1st October, 1926.

(1) (1897) 2 Cal. W. N. 81. (2) (1900) I. L. R. 27 Cal. 1041, F. B.

(3) (1926) 7 Pat. L. T. 812.

1927.
 RUKHA RAI
 v.
 KING-
 EMPEROR.

car was standing in which the present petitioner was sitting. The little girl was forced into the car and the petitioner drove away the car. It is not necessary to mention here her subsequent movements further than to say that, after travelling some distance in the motor car, the girl was transferred to a cart and in it was taken to a ghat on the river bank, and at the ghat the girl begged the cartman to rescue her saying that she was being abducted by the petitioner. The girl's cries attracted the notice of some people with the result that she was questioned and thereafter taken to the Kesaria police station where she gave information; and on that same night her father, having missed the girl, gave information also at the Segauli police station.

The courts below found Latu Dusadh, who brought the girl to the motor car, guilty under section 366 and also the petitioner.

S. P. Varma and *Bhagwan Prasad*, for the petitioner.

ADAMI, J. (after stating the facts set out above, proceeded as follows): Before us it is argued that the offence of kidnapping is not a continuing offence and that the offence was complete when the girl was enticed out of the gachhi and taken to the motor car. It is urged that the petitioner in fact committed no offence. Mr. Varma, on behalf of the petitioner, relies on the cases of *Rakhal Nikari v. Queen-Empress* ⁽¹⁾ and *Nemai Chattoraj v. Queen Empress* ⁽²⁾. He has also called our attention to *Nanhak Sao v. King-Emperor* ⁽³⁾. In the first of these cases it was laid down that the offence of kidnapping a person is complete when such person has actually been taken out of the custody of the lawful guardian. In that case a girl was enticed away from her parents' house to the house of a prostitute and in the house of the prostitute the accused met her and cohabited with her. It was held that the accused was not shown by any evidence to have

(1) (1897) 2 Cal. W. N. 81. (2) (1900) I. L. R. 27 Cal. 1041, F. B.

(3) (1926) 7 Pat. L. T. 812.

done anything before the offence was completed, and, therefore, he could not be said to have abetted the offence. In the second case it was held that the offence of kidnapping is not an offence continuing so long as the person kidnapped is kept out of guardianship. Rampini, J. in that case held that kidnapping under section 363 is not necessarily or in all cases complete as soon as the minor is removed from the house of the guardian; whether the act of kidnapping is complete is a question of fact to be determined according to the circumstances of each case. There too the girl kidnapped was taken from her husband's house to another house and was taken kept there for two days and then taken to another house where she was kept for twenty days. After that she was taken to the house of the accused in the case. Those two cases are clearly very different in their circumstances from the present case.

In the case of this court it was held that whether the kidnapping is complete or not it is a question of fact and must in each case be decided upon the particular evidence of each particular case. Where the finding is that the accused took part in the actual removal of the girl immediately after she was taken out of the house of her guardian, his conviction under section 363 read with section 114 is correct.

Now what happened in this case was that Latu Dusadh enticed the girl to come out of the gachhi to the road and then to the motor car in which the present petitioner was sitting. It is not a case of enticing the little girl out of her parents' house but of enticing to enter into the motor car, so that the petitioner might drive away with her. There is no doubt that the petitioner took the car to the village in order that he might kidnap her and Latu was only employed in order to enable the petitioner to kidnap the girl. In my opinion the kidnapping was not already completed at the moment when the girl entered the car. It was completed by petitioner driving her off in the motor car. The circumstances of the present case are not

1927.

REKHA RAI

v.

KING-
EMPEROR.

ADANI, J.

1927.

REKHA RAI
v.
KING-
EMPEROR.
ADAMI, J.

like those cited by the learned Counsel for the petitioner. The courts below, in my opinion, have rightly held that the petitioner did kidnap the girl and that it was he who took her out of the lawful guardianship of her father. Until she was put into the car she could still be said to be under her father's guardianship.

The only other question raised on behalf of the petitioner is that the sentence is too severe. It is represented that the prosecution case was that the purpose of the kidnapping was that the petitioner might marry the girl, and there is no insinuation that he was taking her away for any improper purpose. It is also pointed out that his companion Latu received a punishment of one year's rigorous imprisonment only. Under the circumstances of the case we are of opinion that the sentence of two years is somewhat severe considering that the petitioner had honourable motives and that no eventual harm had happened to the girl.

We think that a sentence of one year's rigorous imprisonment would be sufficient and reduce the sentence accordingly. The conviction is upheld.

SCROOPE, J.—I agree.

Order modified.

APPELLATE CIVIL.

Before Adami and Scroope, JJ.

MUSAMMAT BODHIA

v.

RAM CHANDRA MARWARI.*

Code of Civil Procedure, 1908 (Act V of 1908), Order IX, rule 13 and Order XLIII, rule 1(d)—Application to set aside ex parte decree, dismissal of—whether appeal lies.

* Appeal from Original Order no. 108 of 1926, from an order of Rai Bahadur Amrita Nath Mitter, Subordinate Judge of Dhanbad, dated the 27th March, 1926.