

**APPELLATE CRIMINAL.***Before Young C. J.*

DIN MOHAMMAD—Appellant,

*versus*

THE CROWN—Respondent.

Criminal Appeal No. 07 of 1938.

*Indian Penal Code (Act XLV of 1860), SS. 361, 366 — Person made unconscious by poisoning — Whether a person of unsound mind within the meaning of S. 361.*

Kidnapping is defined in Section 361 of the Indian Penal Code, as follows:—

“Whoever takes or entice away.....any person of unsound mind, out of the keeping of the lawful guardian of such.....person of unsound mind without the consent of such guardian is said to kidnap such..... person from lawful guardianship.”

Where a girl of 20, as in the present case, had been made unconscious from *dhatara* poisoning when she was taken away, she cannot be said to be a person of unsound mind within the meaning of S. 361 of the Indian Penal Code, and the person taking her away cannot be guilty of the offence of kidnapping under S. 366 of the Indian Penal Code.

*Appeal from the order of Sardar Gandhrab Singh, section 30, Magistrate, Lahore, dated 29th September, 1938, convicting the appellant.*

*Nemo*, for Appellant.

MOHAMMAD MUNIR, Assistant to the Advocate-General, for Respondent.

YOUNG C. J.—In this case, Din Muhammad has been found guilty under sections 366 and 328, Indian Penal Code, and has been sentenced to four years' rigorous imprisonment under each charge, the sentences to run consecutively. YOUNG C. J.

It appears that the accused has been proved to the hilt to have given some relatives of his *dhatara* and

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taken away a girl Rabian, aged twenty, and robbed her. One of the persons to whom he gave *dhatūra*, named Maula Bakhsh, died sixteen days later in the hospital. The accused was charged under section 302, Indian Penal Code, but the medical witness said that Maula Bakhsh's death was due not to *dhatūra* poisoning but to *lobar* and *lobular* pneumonia and that it was a natural death. I think the accused has been extremely lucky to have escaped the charge under section 302 and with great respect to the medical opinion I doubt very much whether it can be said that the *dhatūra* poisoning had nothing to do with the death of Maula Bakhsh. Pneumonia frequently terminates injuries and I dare say the same may happen with poison. In any event, I have now to consider the charges under sections 328 and 366, Indian Penal Code.

There is only one point concerning which I have a doubt and that is the conviction under section 366. The girl was 20 years of age. 'Kidnapping' is defined in section 361 of the Indian Penal Code as follows:—

“Whoever takes or entices any minor under fourteen years of age if a male, or under sixteen 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.”

The only part of section 361 under which this girl can come is the part concerning a “person of unsound mind.” The girl was unconscious from the poisoning when she was taken away. It may be that section 361

ought to include persons who have been made unconscious, but I do not think that an unconscious person can be said to be of unsound mind. For example, a person under an anæsthetic for an operation can hardly be said to be of unsound mind.

I, therefore, have to set aside the conviction and sentence under section 366.

The accused having been acquitted under section 302, Indian Penal Code, he has been found guilty of administering poison with intent to facilitate the commission of an offence, that is, theft. For that he has got four years. This offence has been proved. I, therefore, allow the appeal as regards the conviction under section 366 and dismiss the appeal against conviction under section 328, Indian Penal Code.

A. K. C.

*Appeal partly accepted.*

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