**UNIVERSITY OF THE WEST INDIES**

**OPEN CAMPUS**

**CRIMINOLOGY**

**Particular Crimes (Continued)**

**Abortion**

**Abortion in Trinidad and Tobago** is illegal under the Offenses Against the Person Act, except in case of threat to the life or health of the pregnant woman. The punishment for a woman who has an [abortion](http://en.wikipedia.org/wiki/Abortion) is four years in prison and the punishment for a doctor or other person who performs the procedure is the same. Aiding in the process of finding someone to perform an abortion or other preliminary steps is also illegal and subject to a two-year prison sentence.

In [Trinidad and Tobago](http://en.wikipedia.org/wiki/Trinidad_and_Tobago), there is a widely held perception that the majority of people oppose abortion rights yet this may not be the case according to a 2007 study. The study indicated that about half of the Trinidadian population were in favor of increased legal access to abortion.

See sections 56 and 57.

**Kidnapping**

Definition

A crime at common law consisting of an unlawful restraint of a person's liberty by force or show of force so as to send the victim into another country.  Under modern law, this crime will usually be found where the victim is taken to another location or concealed.

In some jurisdictions, kidnapping accompanied by bodily injury, sexual assault, or a demand for ransom elevates the crime to first-degree or aggravated kidnapping. Although the terms kidnapping and abduction are, at times, used interchangeably, abduction is broader, generally not requiring the threat or use of force.

Kidnapping is both an offence under the common law and an offence contrary to the Kidnapping Act where a ransom is demanded.

Kidnapping at common law has the following five elements:

* 1. The accused took or carried that person away;
	2. The accused deprived another person of his or her liberty
	3. The accused did this by force or fraud;
	4. The person taken or carried away did not consent to that conduct; and
	5. The accused acted without lawful justification or excuse (*R v D* [1984] AC 778; *R v Nguyen* [1998] 4 VR 394; *R v McEachran* (2006) 15 VR 615;*R v Hendy-Freegard*[2008] QB 57; *R v Vu* [2011] BCCA 112).

While it has been suggested that the element of taking or carrying away is the only matter that distinguishes kidnapping from false imprisonment, these notes refer to the traditional elements of kidnapping, rather than treating the offence as an aggravated form of false imprisonment (see *Davis v R* [2006] NSWCCA 392).

The elements of the offence are the same regardless of the victim’s age (*R v Nguyen* [1998] 4 VR 394; *Evans v His Honour Judge Shelton* [1998] VSCA 29).

Kidnapping is a continuing offence that begins when the victim is initially taken away, and ends when the victim is released. It is not necessary to separately charge false imprisonment when the is victim taken away and then detained at a fixed location. In addition, a co-offender may be liable for kidnapping by participating in the continued detention of the victim, even if he or she was not involved in initially taking the victim (see *Davis v R* [2006] NSWCCA 392; *R v Vu* [2011] BCCA 112).

**Taking or Carrying Away**

For the first element to be met, the jury must be satisfied that the accused took or carried the victim from one place to another (*R v Wellard* [1978] 1 WLR 921; *R v Reid* [1973] QB 299; *R v Hendy-Freegard* [2008] QB 57; *R v Vu* [2011] BCCA 112; *R v Pollitt* (2007) 97 SASR 332; *R v Fetherston* [2006] VSCA 278). For the accused’s conduct to amount to “taking away”, that conduct must be an effective cause of the victim accompanying the accused to another place. It is not necessary to prove that the accused physically “carried away” or otherwise physically “removed” the victim (*R v Wellard* [1978] 1 WLR 921; *Davis v R* [2006] NSWCCA 392; *R v Fetherston* [2006] VSCA 278). This can also be expressed as a requirement that the victim was taken away from the place s/he wished to be (*R v Wellard*[1978] 1 WLR 921). The victim does not have to be taken away any great distance, but there must be sufficient movement from where the victim wished to be for the conduct to amount to a “carrying away”. Where in issue, the sufficiency of the distance travelled is a jury question and to be decided on the facts of each case (*R v Wellard* [1978] 1 WLR 921; *Davis v R*[2006] NSWCCA 392; *R v Campbell and Brennan* [1981] Qd R 516). The offence is committed when accused takes the victim away from the place the victim wished to be. It is not necessary to show that the victim was taken to the place the kidnapper intended (*R v Wellard* [1978] 1 WLR 921).

**Deprivation of Liberty**

For the second element to be met, the jury must be satisfied that the accused deprived the victim of his or her liberty (*R v Hendy-Freegard* [2008] QB 57; *R v Tremblay* (1997) 117 CCC (3d) 86. See also *R v D* [1984] AC 778; *R v Wellard* [1978] 1 WLR 921). A misrepresentation to the effect that the accused has lawful authority to direct a person’s movements may be sufficient to deprive the person of their liberty. However a misrepresentation that induces the other person to choose to go to or stay at a particular place will not establish this element (*R v Hendy-Freegard* [2008] QB 57).

**By force or by fraud**

The third element of kidnapping requires the prosecution to prove that the accused committed the conduct constituting the first and second elements “by force or fraud” (*R v Wellard* [1978] 1 WLR 921; *R v D* [1984] AC 778; *R v Nguyen* [1998] 4 VR 394; *R v McEachran* (2006) 15 VR 615; *R v Hendy-Freegard* [2008] QB 57). It has been questioned whether this should be treated as a separate element or simply as part of the fourth element requirement that the “carrying away” be without consent. However, it currently remains a separate element (*R v Nguyen*[1998] 4 VR 394).[3].

**Kidnapping by Force**

Force may be understood to mean “a hostile intent calculated to cause apprehension in the mind of a complainant, together with the acts that caused the complainant to apprehend immediate and unlawful violence” (*R v Pollitt* (2007) 97 SASR 332 at 346). There is no legal standard for the minimum physical contact capable of constituting a “use of force”. If placed in issue, it is for the jury to determine whether a particular physical contact amounts to a “use of force” (*R v Dawson & James* (1976) 64 Crim App R 170). It is not necessary to show that the accused physically carried the victim off. For the purpose of kidnapping, force includes a threat of force (*R v Wellard* [1978] 1 WLR 921; *R v Pollitt* (2007) 97 SASR 332).

**Kidnapping by Fraud**

The form of fraud relied upon must be a kind of fraud which vitiates the consent of the victim, as the prosecution must show that the conduct was against the will of the victim (*R v Gallup* [2002] ABQB 638; *Go v R* (1990) 73 NTR 1; *R v Awang* [2004] 2 Qd R 672). Where fraud is relied upon, it must be a positive misrepresentation rather than just the suppression of the truth (*R v Cort*[2003] 3 WLR 1300). Kidnapping by fraud can raise difficult issues associated with other elements of the offence in particular circumstances. Judges will need to consider whether the fraud affects the issue of whether the victim was deprived of his or her liberty and whether the fraud vitiates consent.

**Absence of Consent**

The fourth element of the kidnapping requires that the deprivation of liberty and the taking away were against the will of the victim (*R v D* [1984] AC 778; *R v Nguyen* [1998] 4 VR 394; *R v McEachran* (2006) 15 VR 615; *R v Hendy-Freegard* [2008] QB 57). The prosecution must prove that there was not informed consent which was freely and voluntarily given. Submission, or consent that is vitiated by fraud, does not disprove this element (*R v Gallup* [2002] ABQB 638). Regardless of the age of the *alleged victim*, in all cases the jury must consider whether the alleged victim consented to the kidnapping. Consent of the parent of a child under the age of discretion is relevant only to the extent that it may separately provide a lawful excuse (*R v Hendy-Freegard* [2008] QB 57; *R v D* [1984] AC 778; *R v Nguyen* [1998] 4 VR 394; *Evans v Shelton* [1998] VSCA 29; c.f. *R v Gallup* [2002] ABQB 638). Even if consent is vitiated by fraud, the jury *must* still consider whether the taking away involved a deprivation of liberty. In some cases, a fraudulent ruse that leads someone to go to another place does not involve a deprivation of liberty (*R v Hendy-Freegard* [2008] QB 57).

**Consent by children**

The relevant state of consent is that of the person taken or carried away, even where that person is a very young child. At no point does this element depend upon the consent of a third party, such as the parent or guardian of a child (*R v D* [1984] AC 778). As the element concerns the absence of consent, proof that the victim is incapable of consenting will establish this element. In the case of a very young child, a jury may readily infer that the child was incapable of consenting. For older children, the jury must consider whether the child had sufficient understanding and intelligence in order to consent (*R v D* [1984] AC 778). The absence of consent may be a necessary inference from the age of a child who is very young and does not have the understanding or the intelligence to consent (*R v D* [1984] AC 778). If capacity to consent is in issue (for example, for older children) it is a jury question. If the jury is satisfied that the child does have capacity to consent the jury must then consider whether it is satisfied that the child did in fact give consent. There is no arbitrary “age of discretion” (*R v D* [1984] AC 778).

**Without lawful excuse**

The final element of the offence is that the offender acted without lawful excuse (*R v D* [1984] AC 778). Consent by the lawful guardian of a child may provide a lawful excuse, though there is little clear guidance on when consent of the guardian will be relevant.[5] As the parent of a child may be guilty of kidnapping the child, there are circumstances where consent of the parent is not a lawful excuse (See *R v Hendy-Freegard* [2008] QB 57; *R v D* [1984] AC 778; *R v Nguyen* [1998] 4 VR 394; *Evans v Shelton* [1998] VSCA 29). The relationship of husband and wife does not provide a lawful excuse for kidnapping (*R v Reid* [1973] QB 299; *R v C* (1981) 3 A Crim R 146).

**Obsolete Elements of the Offence**

While it is no longer an element of the offence that the victim is taken to a place outside the “country” (or jurisdiction), such conduct may be an aggravating feature for the purpose of sentencing (*R v D* [1984] AC 778; *R v Nguyen*[1998] 4 VR 394). “Secreting” the person is also no longer a further or alternative element of the offence (*R v D* [1984] AC 778; *R v Reid*[1973] QB 299).

## Aggravating & Mitigating Factors of Kidnapping

### Aggravating features include:

* victim degree of planning or premeditation
* number of perpetrators
* vulnerability of victim
* duration of loss of liberty
* using, brandishing, threatening with or possession of weapons
* other offence(s) committed
* sophisticated concealment
* unpleasant circumstances of detention, such as degradation
* effect upon victim
* effect upon persons other than the person kidnapped, particularly family
* other offence(s) committed
* sinister motive, such as terrorist background
* any ransom involved
* threats intended to discourage victim from reporting the offence

### The more common mitigating features are:

* absence of the above features
* offence at the bottom end of the scale, as described in **R v Spence and Thomas**

## Relevant Sentencing Guidelines

Guideline case **R v Spence and Thomas** (1983) 5 Cr.App.R.(S.) 413  There is a wide possible variation in seriousness between one instance of kidnapping and another.  At the top of the scale comes the carefully planned abductions where the victim is used as a hostage or where ransom money is demanded.  Such offences will seldom be met with less than 8 years' imprisonment or thereabouts.  Where violence or firearms are used, there are other exacerbating features such as detention of the victim over a long period of time, then the proper sentence will be very much longer than that.  At the other end of the scale are those offences which can perhaps scarcely be classed as kidnapping at all.  They very often rise as a sequel to family tiffs or lovers' disputes, and seldom require anything more than 18 months' imprisonment, and sometimes a great deal less.

## Relevant Sentencing Case Law

**R v Dzokamshure** [2009] 1 Cr. App. R. (S.) 112Appellant's relationship with a woman for six months had ended.  Months later he went to her home, broke his way in, punched her, dragged her out and forced her into her car. Another man was seated therein. The appellant drove the car on the motorway and prevented her from answering a call on her mobile phone. Eventually he stopped on a slip road and allowed her to get out.  Previous good character.  Guilty plea.  The victim had indicated that that she did not want him to serve a custodial sentence and was unwilling to give evidence.  Sentence of 18 months' imprisonment upheld.

**R v Shah and Khan**[2009] 2 Cr. App. R. (S.) 103 The victim, a woman, was working as a prostitute. In response to a phone call she went to an address where she had consensual sex with Shah. When she got up to leave, he pushed her onto a bed.  Khan entered the room, sat on her stomach, made sexual threats to her and assaulted her.  When she tried to escape through a window, he dragged her back by her hair and her phone was snatched. She was crying and Khan punched her again.  He had taken a more prominent role and had relevant previous convictions.  Convicted of false imprisonment. Several previous decisions cited.  Sentences of 3 and a half years' imprisonment (Shah) and 4 and a half years' imprisonment (Khan) upheld.

**R v Xiao Bo Yan and Sin Jung Lin** [2010] 2 Cr. App. R. (S.) 25 Sentences of 11 and a half and 11 years' imprisonment upheld for false imprisonment and kidnapping.  A group of men kidnapped and detained a university student.  Details included their entering the house where he and other students were living, threatening him with guns and making him transfer £14,000 from his bank account to his current account by an online transaction.  The appellants pleaded guilty to having an imitation firearm with intent, false imprisonment, blackmail, robbery and kidnap.  The Court of Appeal considered other decisions upholding or reducing sentences to a range of 10 to 13 years.

**R. v Stephens and others** [2011] 1 Cr. App. R. (S.) 5Businessman bundled into a car, shown a handgun, a blanket was put over his head, told that he would be killed if he did not co-operate, punched and wrists tied, driven to another city, taken into three flats in succession and detained for over 48 hours.  £1.5 million was transferred by the victim's family to an account which the kidnappers were unable to access. They released the victim, who was told that they knew where he lived and that they would kill him and/or his family if he went to the police. Guilty pleas to conspiracy to kidnap, conspiracy falsely to imprison and conspiracy to blackmail.  Sentences from 12 years to eight years imprisonment upheld.

**R v Rusha and Bucpapa** [2011] 2 Cr. App.R. (S.) 20Appellants convicted of conspiracy to kidnap, conspiracy to rob and conspiracy to possess a firearm.  Manager of a security depot and his family kidnapped.  14 members of the night staff held captive by men wearing balaclavas and holding firearms.  Depot raided and £53 million stolen.  Both sentenced to imprisonment for public protection with a minimum term of 15 years.  Appeal of one dismissed and sentence of the other (who had no convictions) varied to 30 years' imprisonment.

**R v Syed Ahmed and others** [2011] 2 Cr.App.R. (S.) 35 16-year old schoolboy kidnapped on his way home one evening, bundled into van, driven away, taken to a house, bag placed over his head, his phone used to call his brother and money demanded, threat made to cut off a finger, trousers removed, scalding water poured over his legs, leg burnt with hot iron, driven around in the van. Back at the house, knife held to his throat, victim made to phone his brother and tell him that they were going to kill him and that they wanted £20,000.  Police became aware.  Victim held for just over 5 hours.  Offences apparently committed to recover or enforce a drugs debt.  Sentences on the two appellants who had pleaded guilty pleas to conspiracy to kidnap and conspiracy to blackmail reduced to 10 and a half and 9 and a half years imprisonment.

**R v Saker** [2012] 1 Cr.App.R. (S.) 16 Appellant discovered that her 18-year-old daughter was taking drugs and that property had gone missing.  Her daughter told her that she had been obtaining drugs from an older man, who was putting her under pressure to give him sexual favours in exchange for drugs.  The appellant and the victim's former boyfriend tied up the victim and detained her in her room for about 25 minutes. The appellant encouraged her co-defendant to hurt the victim. Appellant, of previous good character, pleaded guilty to false imprisonment.  Sentence of 12 months imprisonment upheld.

**R v Yu Hang and others** [2012] 1 Cr.App.R. (S.) 91 The appellants became friendly with a Chinese student who was maintained generously by his parents.  He was persuaded to travel, met by one of the appellants, and taken to a house.  Whilst asleep, his hands and feet were tied and put tissue in his mouth. He was threatened with a knife, tied to a chair and interrogated about his parents.  A ransom demand and later instructions as to payment were communicated to his parents. The victim was detained for about six days, during which he was beaten, burnt with cigarette butts, and deprived of water.  Police raided the property.  Appellants pleaded guilty to conspiracy to kidnap and conspiracy to blackmail.  Sentences reduced to 12 years imprisonment.

**Vaz**[2012] 2 Cr.App.R. (S.) 80 A gang entered the home of an employee of a cash and carry business wearing dark boiler suits, gloves and balaclavas and in possession of two handguns, a knife and CS spray.  The employee, his wife, two daughters and two sons were tied up with cables and pillowcases were placed over their heads.  At one point the gas taps were turned on and the employee was told the house would be blown up if he did not assist them in opening the safe.  The appellant remained in the home guarding members of the employee's family, keeping in touch with the robbers through a walkie-talkie, whilst the employee was driven to the store.  The robbers persisted in their attempt to obtain money but finally ran off empty handed.  The appellant, of previous good character, pleaded guilty to five counts of false imprisonment and one count of attempted robbery.  Sentence of 9 and a half years imprisonment upheld.

**SB** [2012] 2 Cr.App.R. (S.) 71   The appellant abducted his 5-year-old son, who was living with his mother pursuant to a court order following their divorce.  He and a friend equipped themselves with a car seat to bring the child back, and a wig, work jacket and sunglasses for disguise while reconnaissance was carried out to find a suitable place to snatch the boy.  They discovered where the child was at school.  The appellant snatched the child as his mother was taking him home with a pram or buggy containing another child.  The boy was returned to his mother after 3 or 4 hours.  Appellant, a man of good character, pleaded guilty to kidnapping.  Sentence of 16 months imprisonment upheld.

**See the Kidnapping Act for kidnapping for ransom offenses.**

**Assaults**

An assault is used to describe both an assault and battery, and indeed, there is often confusion between the two offences.

### What is the Definition of Common Assault?

This is any act by which a person intentionally or recklessly causes another to apprehend immediate unlawful violence. Such an act must be with the intent being calculated in that persons mind to cause apprehension or fear in the mind of the victim. Therefore, where there is no intent, there will be not be an assault, UNLESS, that the person who assaulted another, ( and it was conclusive by way of evidence), that the person was indeed reckless as to the other person would in all probability have indeed apprehended that immediate unlawful violence would be used.

Common assault and battery are summary offences, which means that the matter may only be tried in a Magistrates Court. However, an offence of common assault (  to include battery ) may be tried on indictment, that is the High Court.

**Case example:**

* A person throwing a wine bottle at another, and misses, will be an assault.
* A person who uses a dog  as a threat only, being an intention that the dog bite, but does not do so, will be an assault.

What is the Definition of Battery?

Firstly, when assault is included to the term battery, this is defined as an act whereby a person intentionally or recklessly causes the other person to apprehend immediate unlawful personal violence or to sustain unlawful personal violence.

Battery is the act of intentionally or recklessly asserting unlawful force to another person.

**Case example:**

**Fagan .v. Metropolitan Police Commissioner  [ 1969 ]** The wheel of a car was driven onto, and allowed to remain on a person`s foot. This was an assault, as although unintentional, it became a continuing act, and so was unlawful, when it was known by the driver that the wheel was on the foot, and knowingly allowed the wheel to remain in position.

What is the Definition of Recklessness?

This is common assault, which involves the FORESIGHT of the POSSIBILITY that a person would fear immediate and unlawful violence, and that person takes the risk of doing the act. It is basically taking the risk, that is being reckless.

**Offensive Weapons**

An **offensive weapon** is a tool made or adapted for the purpose of inflicting either mental or physical injury upon another person. This is Governed by the Prevention of Crime (Offensive Weapons) Act and the Restriction of Offensive Weapons Act of the laws of Trinidad and Tobago.