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FUNDAMENTAL ELEMENTS OF CRIME

CRIMINAL SCIENCE

The study of Criminal Law, Criminology and Penology is called *Criminal Science*. Criminology studies the causes of crime, Penology, punitive and preventive measures. Criminology nourishes penal policy and penal policy shapes criminal law and all the three combine to constitute criminal science.

CRIME

Crime is such a breach of the Act that there is a punishment for the act and not mere compensation.

INDIAN PENAL CODE, 1860

In this, there are 511 Sections in total and the major portion is from Section 121 to Section 510. In this, there are definitions and various punishments for crimes. However, the enforceability of these sections is subject to certain rules.

Definition of crime given in Sections (121-510) is considered according to the various doctrines and is also controlled by certain doctrines of criminal law.

- There must be a written penal record declaring it as a crime.
- Such an act which is defined as crime must be intentionally, knowingly or voluntarily committed (there can be some other mental elements as well).
- There has to be an act or conduct which causes harm to people. (This can include an illegal omission also.)

FUNDAMENTAL OR BASIC PRINCIPLES OF CRIMINAL LIABILITY

The doctrine of criminal law and fundamental or basic principles of criminal liability are called *General Principles of Criminal Law*. A large part of criminal law consists of specific rules which define various offences [Sections 121-510 of the IPC] but the enforcement of these specific rules is controlled by certain well-organised doctrines of criminal law which deal with various conditions relating to criminal liability, such as doctrines relating to mistake, accident, infancy, insanity, intoxication, necessity, compensation, attempt, solicitation etc. which are essential parts of every definition [Sections 1-120-A and 511]. These doctrines of criminal law have been derived from the fundamental principles relating to Criminology – the principle of legality, *mens rea* (guilty intention), *Actus reus* (conduct), harm and punishment. These fundamental principles of criminal liability and the doctrine of criminal law constitute Penal Law Theory. It is also called General Principles of Criminal Law.

The combined meaning of the fundamental principles and the doctrine can be stated in a single generation. Thus, "the harm prescribed by a Penal Law must be imputed to a normal adult who voluntarily commits it with a criminal intention and such a person must be subject to a legally prescribed punishment". Criminal Law Theory or Penal Law Theory is largely concerned with the elucidation of this generalisation.

DEFINITION OF CRIME

Section 40 of the IPC says that "any act or omission made punishable by the IPC is an offence". Similarly, Section 2(n) of the Criminal Procedure Code says that any act or omission made punishable by the IPC or any other law for the time-being enforced is an offence. Both these definitions only specify the consequences of committing a crime i.e. punishment. These definitions do not clarify anything about the nature of criminal law and therefore are not satisfactory.

Sir Stephen – History and Principle of English Criminal Law, Vol. III (IPC): Sir Stephen has said that "crime is an act not only punishable by law but is also revolting to the moral sentiments of the society". This definition is true only with regard to traditional and serious or heinous types of offences such as murder, theft, dacoity etc. but it is not true with regard to all types of offences because at the present time, there is no necessary connection between law and morality.

Kenny's outline of the Criminal Law: Kenny says that "crime is a punishable act and is in no way remissible by any private person and is remissible by the sovereign (state) if remissible at all." This definition points out the procedural difference between civil and criminal wrongs and is true only

with regard to various types of offences and is not true for all the offences. Even under the IPC and Cr. P. C., offences have been categorised as compoundable and non-compoundable offences.

Blackstone: In his commentaries in English Law (Vol. V), Blackstone has defined crime "as an act or omission in violation of a public law commanding or forwarding it". This definition also suffers from the defect, that any violation of any public law is designated as crime, which is not true.

Perhaps **Russel** has rightly remarked that "to define crime is a task which has not been satisfactorily accomplished by any writer".

Thus, this traditional approach of defining crime first and then to decide whether a particular act is a crime or not should be given up. The modern approach to crime is a **functional approach** which concentrates on the functions or purposes of criminal law in the society. This approach has been highlighted by the **Wolfender Committee** in England in 1967.

According to the Wolfender Committee, the purposes of criminal law are –

- i) To preserve public peace, order and decency.
- ii) To protect the citizens from what is offensive or injurious.
- iii) To provide sufficient safeguards against exploitation and corruption of others, particularly those who are weak or are in a state of physical or economic dependence.

The Committee also highlighted what is not the function of criminal law which is more important at the present time. The Committee said that it is not the function of criminal law to intervene in the private life of citizens or patterns of behaviour. The Committee further observed that the opinions will differ as to what is offensive or injurious, or what constitutes exploitation and corruption and those opinions will depend upon the prevailing social, moral and cultural standards.

Professor Sutherland has defined crime as:

"A criminal behaviour is a behaviour in violation of criminal law. However, no matter what its degree of immorality, reprehensibility and indecency be, the behaviour cannot be a crime unless prohibited by criminal law."

ESSENTIAL ELEMENTS OF A CRIME

- I. Human Being
- II. Guilty intention or *mens rea*
- III. Act/omission or *Actus reus*
- IV. Harm or injury

I. Human Being

Under Ancient Indian Law, animal tribes were prevalent and animals were tried and punished for committing crimes. With refinement in the idea of *mens rea* as an essential element of crime, it was realised that animals could not be convicted for committing crimes and since then it has been accepted that there must be a human-being to commit a crime. The human being must be able to understand the nature of punishment which he is going to suffer for committing the crime i.e. he must not be an infant or insane person. Thus, there must be a normal adult human being to commit a crime. The other requirement of a human being is that he must be under a legal obligation to obey the law. In ancient times, an out-law i.e. a person who has been exiled from society, could not be held guilty because he was not a member of the society. But the institution of out-laws, has now been abolished and now each and every member of the society is under a legal obligation to obey the law. But at the present time, certain persons are exempted from criminal liability, such as the President of India, Foreign Sovereigns visiting India and their Ambassadors visiting India.

Barring these specific exemptions each and every normal adult human being can be held guilty for committing a crime.

Criminal liability of a company or corporation

The following difficulties were felt in the beginning in holding a company or a corporation for committing a crime:

- i) Since the company was no body of its own, it could not be imprisoned or hanged and therefore it could not commit a crime.
- ii) Since a company had no mind of its own, it could never have a guilty intention or *mens rea* which is an essential element of a crime.
- iii) Since a company can act only through its agents or servants, the liability of a co. would be vicarious and there was no place for vicarious liability in criminal law.
- iv) A company can never authorise the commission of a crime because it would be beyond the legal capacity of a company.

However, during the course of time, all these difficulties were resolved. Firstly, it was held in ***R vs. Birmingham Railway Co. (1842) 3 QB 223***. The Railway Company was lined up for committing a public nuisance i.e. for obstructing a highway. In ***R vs. Great North of England Railway Company***, it was held that if a statutory duty was cast upon a company or corporation and it failed to do that duty penal liability be imposed and in this case, the Railway Company was held liable for not repairing a highway.

In the meantime, an important development took place in the Law of Torts. In ***Leeward Carrying Company vs. Asiatic Petroleum Company (1950)***, Viscount Haldane, J. made a distinction between superior officers and the servants or minor officers of a company and he said that the intention of the superior officers i.e. the directors can be attributed to the company itself because they are the directing minds of the company itself i.e. the very ego and centre of the personality of the company and the corporation. The **Alter Ego Doctrine** was extended to criminal law on 1944 in ***R vs. ICR, Haulage Ltd. Case*** and since then, companies have been held guilty even for the crimes which require specific guilty intention.

In ***Artisan Press Ltd. vs. State of M.P.***, the company was fined for entering false weight in the weight of the consignment in the transport papers. Similarly, a company was fined for filling false income-tax return. Thus a company can be guilty for the crime requiring criminal intentions.

But the Bombay High Court in 1965, in ***Messer Syndicate Transport Private Limited*** has clarified that a co. cannot be held guilty of those crimes which can be committed only by human individuals such as rape, bigamy, murder, burglary etc. Similarly, a company cannot be held guilty for those crimes which are punished by death or imprisonment but a company can be held guilty for those crimes which are punished exclusively or alternately with fine. The word human-being has not been defined in the IPC but the words man and woman have been defined. **Section 11 of the IPC** defines the word 'person' and it says that the word 'person' includes any company or association or body of persons whether incorporated or not.

II. Guilty intention or *mens rea* (separate notes are also being provided for this topic and *Actus reus*)

'***Actus non facit reum nisi mens sit rea***': The act itself does not make a man guilty of a crime unless his intention is also guilty. This maxim has been borrowed from '**Moral Theology**' by **Lord Edward Coke** and applied to common law crimes and since then, it has been uniformly applied in common law crimes.

Application of the doctrine of *mens rea* in crimes in England

The application of the doctrine of *mens rea* in statutory offences in England remained uncertain till 1946. In the very first case of ***R vs. Prince (1875)***, the accused was charged for taking away an unmarried girl Annie Phillips aged 14 years of age without the consent of her father. Under Section 55 of the 'Offences Against the Person Act, 1861', it was an offence to take away any unmarried girl below 16 years of age without the consent of her father or mother or lawful guardian. In this case, the girl herself told Prince that she was 18 years of age and she also physically appeared to be of 18 years of age. The jury also found upon evidence that the girl went with Prince willingly and Prince bona fide believed that she was of 18 years of age and such a belief was reasonable. It was argued on behalf of Prince that the common law doctrine of '*mens rea*' should also be applied under Section 55 and he should not be convicted because he had no intention to commit the offence. Only **J. Brett** accepted this argument and held that Prince was not guilty as he had no intention to commit the offence. **J. Beramwell** made a distinction between offences which are ***mahim in se*** (both legal as well as moral wrongs) and offences which are ***mahim prohibitum*** (only legal wrongs) and he said that for offences which

are '*mahim in se*' mens-rea would be presumed and need not be specifically proved by the prosecution and since Prince has committed an immoral act in taking away an unmarried girl, his *mens rea* under Section 55 would be presumed and he was guilty. J. **Demon** expressed the view that since Prince had knowingly committed a tort (seduction) this would be sufficient *mens rea* under Section 55 and he was guilty. But all other judges expressed the view that since the legislature have punished this act irrespective of *mens rea* according to the language of section, the accused was guilty and the doctrine of *mens rea* shall not be applied in this case.

This case has been criticised by many authors including Russel as unsatisfactory and in conflict with established principles of criminal law. However, Professor Jerome Hall has expressed view that the judges in this case were influenced by the concern for the protection of young girls from sex-offenders and they must be protected the indignation with the general public. In **R vs. Tolson (1889)**, Martha Ann Tolson was married to Kelly Tolson in 1880, and in 1881, he left for America. She and her father made enquiries about him and learned from his elder brother and from the general reports that Tolson had been lost in the ship bound for America. In January 1887, Mrs. Tolson supposing herself to be a widow, married another man. All these facts were known to the second husband and the second marriage was not a secret one. Kelly Tolson was alive and he returned from America in December 1887. Mrs. Tolson was then charged for the offence of committing bigamy under section 57 of the 'Offences Against the Person Act, 1861' which punished a person, who shall marry any other person during the life of the former husband or wife. Upon the words of the Section, it was apparently immaterial whether the parties or either of them knew or did not know that the former wife or husband as the case may be was or was not alive. The question again arose whether *mens rea* did form a part by implication in the definition of bigamy. At the trial, the court gave a direction to the jury that a belief in good faith and on reasonable grounds that her husband was dead would not be a defence to the charge of bigamy. The jury found her guilty and the judge sentenced her to one-day imprisonment.

The accused then appealed on the ground that the direction to the jury was wrong, as it involved the question of *mens rea*. The question before the court of appeal was whether the conviction could be upheld in face of the fact that she had made enquiries and she had every reason to believe that her husband was dead and that she had no intention to commit the offence of bigamy. The court of appeal quashed the construction of the trial court by a majority of 9-5 judges and held that a *bonafide* belief on reasonable ground in the death of the husband at the time of the second marriage was a good defence to the charge of bigamy.

J. **Cane** observed: "At common law, an honest and reasonable belief in the existence of circumstances which if true, would make the act an innocent one, would make the act an innocent one has always been a good defence. This doctrine is embodied in the maxim – *actus non facit reum nisi mens sit rea*. Honest and reasonable mistake in fact stands on the same footing as an absence of reasoning faculty as in case of lunacy. So far as I am aware, it has hence been suggested that these exceptions do not equally apply in cases of statutory offences unless they are excluded, either expressly or by necessary implication."

Thus, in this case it was held that the doctrine of *mens rea* shall apply to statutory offences as well, unless excluded either expressly or by necessary implication. Thus, in **R vs. Prince**, the doctrine of *mens rea* was not applied and in **R vs. Tolson**, it was applied.

Again in **R vs. Wheats and Stoks (1921)**, it was not applied. In this case, the accused Wheat, a man of little education instructed his solicitors to obtain a divorce from his wife and received a letter from the solicitors that he would receive necessary papers for signature. As soon as Wheat signed those papers, he thought that the divorce was complete and he married Stoks. He was tried for bigamy and was held guilty, as there was no sufficient evidence to show that he had reasonable grounds for believing that he had been divorced from his first wife. The court further observed that even a reasonable belief that the first marriage has been dissolved in the circumstances would be no defence to the charge of bigamy. The court also observed that the observations of J. Cane in **R vs. Tolson** were too wide for general application and the accused was guilty.

By the year 1936, the courts generally refused to look into the criminal intention in statutory offences and Prof. Stallybeas has remarked that the doctrine of *mens rea* in statutory offences in England has come under eclipse. But the doctrine of *mens rea* was again restored by the House

of Lords in 1946 in **Brend vs. Wood**. Lord Chief Justice Goddard observed, "It is of the utmost importance for the protection of the liberty of the subjects that the court should always bear in mind that unless a statute either expressly or by necessary implication rules out *mens rea* as a constituent part of crime no person should be found guilty unless he has the guilty mind". The court also approved the observation of Cane J. in **R vs. Tolson** and since then even in statutory offences the doctrine of *mens rea* has been applied.

Application of the doctrine of *mens rea* in India

The application of the doctrine of *mens rea* in other Penal Codes except the IPC is based upon the decision of House of Lords in **Brend vs. Woods**. That is unless the statute either expressly or by necessary implication rules out *mens rea* as a constituent part of a crime no person shall be guilty unless he has a guilty mind.

The Supreme Court has followed this decision in **State of U.P. vs. Hari Prasad Rao** in 1951 and since then there are a number of cases following this decision.

Dr. H.S. Gaur and Ratanlal have expressed the view that the maxim '*actus non facit reum nisi mens it rea*' has no application to the offences under the Indian Penal Code. This view was based on a distinction between common law offences and the statutory offences under English Law. The doctrine of *mens rea* has been incorporated into the Indian Penal Code in the following two ways:

- i) Care has been taken in defining offences under the Indian Penal Code so as to include the necessary criminal intention required for that offence in the definition itself. It has been done by using such words as intentionally, dishonestly, fraudulently, voluntarily, knowingly. This was not done in the definition of offences in English law which gave rise to conflict of judicial opinion from **R vs. Prince** to **Brend vs. Woods**. However, in certain sections, words defining *mens rea* have not been given but the nature of offences in those cases is such that no innocent person can commit them. For example, waging war against the government or counterfeiting of coins. (In such cases, *mens rea* is not required)
- ii) Chapter IV of the IPC [Sections 76 -106] lays down general exceptions which can be pleaded by an accused person as a defence in any criminal charge. These exceptions relate to mistake of fact, accident, infancy, insanity, intoxication, necessity, compensation, consent, right of private defence etc. These exceptions contain certain situations where law presumes absence of a guilty intention or the act is justified under the circumstances.

Thus, the doctrine of *mens rea* has been fully incorporated into the Indian Penal Code by these two methods. Mr. M.C. Setalwad in his book '**Common Law in India**' has termed it as a modification of common law worked into the IPC by Macaulay and the colleagues.

III. Act or omission

Act or omission i.e. the physical event (i.e. the external manifestation of *mens rea*) i.e. *Actus reus*. In the words of Prof. Easwar Jeram Hall "something more is required in addition to a *mens rea* to produce a criminal hurt i.e. there must be manifestation of '*mens rea*' in the external world". Professor Kenny for the first time used the word '*Actus reus*' and defined it as a **result of human conduct which the law seeks to prevent**. In this sense, the word '*Actus reus*' not only includes the act or omission but also the resulting harm and injury. Russel calls it the physical event but this third essential element requires that there must be some ordered act done or there must be illegal omission – which means that there must be some positive legal duty to do something and a person intentionally omits to do it. Section 32 of the IPC has clarified that the words which extend and refer to acts done includes illegal omissions. Section 33 further explains that the word 'act' denotes as well as a series of acts as single act and the word 'omission' denotes as well as a series of omissions as a single omission. Thus, an offence may be committed by means of a single act or by a single omission and partly by an act and partly by an omission. Similarly, an offence may be committed by a series of acts or partly by a series of omissions.

IV. Injury

The fourth essential element of crime is that as a result of the act or omission there must be some injury or harm to some person or to the society at large. A notion of harm has a very significant place because it represents certain values prescribed by Penal Law. If the notion of the harm is kept in view then it is easier to infer the intention of the accused person. Section 44

of the IPC has defined the word 'injury' as any harm whatever illegally caused to any person in body, mind, reputation or property.

WORDS DENOTING MENS REA IN THE IPC

1. Voluntarily

Section 39 of the IPC defines the word 'voluntarily' – "If he causes it with the intention to cause it or by means which he at the time of employing those means knows is likely to be caused it, or cause it, or has reason to believe that such act is likely to cause that effect." The word 'voluntarily' has been used in several sections of the Penal Code including Sections 186, 322, 321, 323.

2. Dishonestly

Section 24 says that, "If a person does anything with an intention to cause wrongful gain to one person and wrongful loss to another, acts dishonestly." Section 24 says that *wrongful gain* is a gain of property by unlawful means to which the person gaining is not legally entitled. Similarly, *wrongful loss* means loss by unlawful means of property to which the person losing is legally entitled. Gaining wrongfully means that a person either acquires wrongfully or the rightful owner is wrongfully kept out of any property or is wrongfully deprived of the property. Thus, the word dishonestly has been used in a technical sense, only in relation to property and that too when it causes with wrongful gain or wrongful loss and it has nothing to do with honesty.

If 'A' retains cattles of 'B' in order to compel 'B' to pay his debts he is guilty of theft because he has caused wrongful loss of property to 'B' and has acted dishonestly. (**A.L. Mehra vs. State of Rajasthan AIR 1957 SC**)

3. Fraudulently

Section 25 says that a person is said to do a thing fraudulently if he does that thing by which he intends to defraud but not otherwise. The word 'fraud' has not been defined in the IPC and it is not easy to define fraud exhaustively so as to include all possible cases of fraud. **Sir Stephen** has also remarked that there is great reluctance among the lawyers to define 'fraud', but if the term 'fraud' is analysed then two essential characteristics are always found:

1. Deception i.e. saying something as true when in fact it is not true. The deception need not always be expressed. It may be implied from the circumstances.
2. With the intent to cause an injury or infraction of the right of some other person. Thus, every deception *per se* is not fraud unless it is accompanied with an intention to cause an injury.

In **Dr. S. Dutt vs. State of U.P.**, the Supreme Court has explained that the intent to defraud in section 25 does not mean a bare intention to deceive. It means that as a result of the deception, a person does an act, or omits to do something resulting in loss or injury to him. A person forged a diploma of college of surgeons with the object of inducing a belief that the document was genuine and that he was a member of that college. He showed that diploma to one or two persons which intended to induce that belief in them. It was held that he did not intend to defraud, though he intended to deceive (**R vs. Hudgeen**). In **Sashibhushan vs. Emperor**, the accused applied for admission to the LL.B final class to the principal-Queens college, Banaras stating that he had attended the LL.B first year class in Canning College, Iko, he was admitted to the LL.B (final) class on condition that he produces a certificate from the principal, Canning College, (Iko), that he had attended LL.B (previous) class. He produced a forged certificate shown to have been signed by the Principal Canning College, Iko. It was held that he had committed forgery because he was saving on a year's fee illegally and causing a loss of one seat of Queens College, Banaras.

There is a distinction between fraudulently and dishonestly. Fraudulently necessarily involves deception while dishonestly does not. Dishonestly necessarily involves wrongful gain or wrongful loss of property, but fraudulently involves wrongful gain or loss and also injury of any other kind. The word 'fraudulently' has been used in Sections 206, 207, 208, 210, 239, 240, 242, 243, 250, 251, 252, 253, 261, 262, 263, 264, 265, 432 and 435. The words 'fraudulently' and 'dishonestly' have been jointly used in Sections 209, 246, 247, 415, 421, 422, 423, 424, 464, 471 and 496.

STAGES IN THE COMMISSION OF CRIME

In the crimes which are committed at the spur of the moment or in the heat of passion, the distinct stages in the commission of crime are not apparent. But in pre-meditated crimes there are four distinct stages –

- I. Contemplation
- II. Preparation
- III. Attempt
- IV. Accomplishment

I. Contemplation

In the Ancient English Criminal Law, a mere intention to commit a crime was punished like a completed crime. But after sometime, Burdick observed that the doctrine that a mere intention amounts to a crime passed long ago and now even in order to constitute an attempt there must be something more than an intention to commit it.

In **Re Seinfeld (1784)**, Lord Mansfield observed, "so long as an act rests in bare intention only it is not triable". Lord Chief Justice Brian also observed that a thought to a man is not triable because the devil himself knows not the thought of a person. However, the law takes notice of the intention to commit crime if it is verbally expressed without committing any act in some cases as e.g. an agreement between two or more persons to commit a crime amounts to criminal conspiracy [Section 120 (A)] and it is punished even if no act is committed in pursuance of the agreement. Similarly, are the offence of criminal intimidation and criminal insult [Sections 503 and 506].

II. Preparation to commit a crime

Preparation means devising means always necessary for the commission of a crime. Generally speaking, a preparation to commit a crime is not punishable. But certain dangerous types of preparations are punished. For example, preparation to wage war against the government (Section 122), preparation to wage war against any friendly foreign country (Section 126), to commit robbery or dacoity (Section 399). These preparations are such which totally preclude any innocent person committing them and, therefore, such preparations are punished. Criminal liability starts from this stage and the law allows opportunity to repent from the crime only upto the stage of preparation.

III. Attempt

The word 'attempt' has not been defined in the IPC. According to **Sir Stephen**, 'an attempt to commit a crime is an act done with intention to commit it and forming part of a series of acts which could constitute the offence if it were not interrupted'. **Kenny** describes certain crimes as incomplete crimes such as attempt, abetment, and criminal conspiracies. **J. Baron Park** has said, "Acts remotely leading towards the commission of an offence are not to be treated as an attempt to commit it. But acts immediately connected with it are". **Lord Bishop** has observed that an attempt is an intended, apparent and an unpunished crime. Thus, if an attempt is analysed, three characteristics or three essential documents are formed:

- a) An intention to commit a crime.
- b) Some overt act must be done towards the commission of the crime i.e. an attempt is not possible by an offence which is committed by an omission because such omission constitutes a completed offence. (This is not hundred percent correct).
- c) The act done must fall short of the completed offence.

The IPC deals with attempt in the following three ways –

1. In some cases, the completed offences and their attempts have been provided under the same section and same punishment is given for both. There are 26 such sections in the IPC. Sections 121, 124, 124(A), 125, 130, 131, 152, 153(A), 161, 162, 163, 165, 196, 198, 200, 213, 239, 240, 241, 251, 335, 337, 391, 397, 398 and 460.
2. In some other cases, the completed offence and its attempts are dealt with side by side in different sections and different punishments are provided for them. There are only four such types of attempts –

- a) Attempt to murder (Section 307) and murder punished (Section 302).
- b) Section 304 punishes culpable homicide. Section 308 punishes attempted culpable homicide.
- c) Section 392 punishes robbery and Section 393 attempted robbery.
- d) Section 309 punishes an attempt to commit suicide. (But 'suicide' as such is not punished anywhere; rather it cannot be punished also).

The Bombay High Court in 1986 had declared Section 309 of the IPC as unconstitutional in the case of **State of Maharashtra vs. Maruti Sripat Dubal**; because right to life under Article 21 of the Constitution includes the right to die. This view was accepted by the Supreme Court in 1994 but in 1996, the Supreme Court has reversed this view and has held in **Gyan Kaur vs. State of Punjab** that Section 309 is constitutional and right to life does not include a right to die under Article 21.

3. All the remaining cases of attempt are covered under Section 511 which is a residuary section. Section 511 says that if an attempt is not otherwise punished in the Penal Code, it shall be punished under Section 511 and the maximum punishment under this Section shall be one half of the maximum punishment prescribed for that offence. For the purpose of this Section, the half of 1 life imprisonment is computed as 10 years of imprisonment.

Distinction between preparation and an attempt

The courts have adopted several tests to distinguish between a preparation and an attempt to commit a crime.

1. Locus Penitentiae Test

If the accused has the opportunity to repent or give up the idea of committing the crime, he is in stage of preparation, but if he has lost this opportunity, he is in the stage of an attempt.

In **R vs. Taylor**, the accused purchased a matchbox from the market with the intention of setting fire to a haystack. It was held that he is in the stage of preparation, howsoever clearly, it might be proved that he intended to commit arson because he still has the opportunity to give up the idea of committing arson. Even if he goes near the haystack with the matchbox in this pocket he will be in the stage of preparation. But if he bends down near the haystack and lights the match and then extinguishes it on noticing that he is being watched he is guilty of an attempt to commit arson, because he has lost the opportunity to give up the idea of committing the crime.

In **Emperor vs. Dayal Bauri**, the accused was caught by villagers with a ball of rags fell down from his dhoti. It was held that the accused was still in the stage of preparation, as he still had the opportunity to give up the idea of committing arson.

In **Emperor vs. Ram Saran**, the accused in order to forge a document in the name of 'X' set his servant 'S' asking him to misrepresent himself as 'X' before the stamp window and procure the stamp paper in X's name. The servant was arrested and further progress was stopped. It was held that it is preparation.

In **Emperor vs. Ramakhor**, a woman on account of quarrel with her father and brother ran towards a well shouting that she would jump in it and commit suicide. She was caught when she reached the well. It was held that she is not guilty of an attempt to commit a suicide. She should have done something so that she may have fallen in it i.e. by trying to jump from the parapet wall.

In **Vasudev Shai vs. Emperor**, it was held that asking for a bribe amounts to an attempt to obtain bribe although the money asked may be refused.

In **Narayan Das Bhagwan Das vs. State of West Bengal**, the accused was caught carrying Rs. 25,000 in two secret pockets of his trousers at the Calcutta Airport and he was held guilty of attempting to smuggle Indian currency out of the country.

2. Proximity Test

Under this test, an act constituted an attempt if the accused has completed all or almost all important or necessary steps towards the commission of the crime, but falls short of the consequences desired.

In **R vs. White**, the accused put two grams of potassium cyanite (KPN) in his mother's drink intending her to take it and be killed. It was held that he was guilty of an attempt to murder even though the quantity was insufficient to cause death.

In **Bashir Bhai Mohammad Bhai vs. State of Bombay**, the three accused approached 'X' and told him that they were proficient in duplicating currency notes. 'X' mentioned it to 'Y' and both decided to trap them and inform the police. The three accused came and asked for currency notes. As soon as they had taken the money, police entered the room and arrested all the accused persons. It was held that they were guilty of an attempt to cheat.

3. *Mens rea* test

Salmond has advocated this test. Under this test, if the act itself is a clear evidence of *mens rea*, it is an attempt and if the act itself is not a clear evidence of *mens rea*, it is preparation e.g. going to the market and purchasing poison is not clear evidence that the person intended to commit murder by poisoning and therefore it is preparation.

In **State vs. Parasmal**, 'A' went to petrol-pump to purchase diesel. He was asked by the dealer to come on the next day. The accused stayed near the petrol-pump during the night. The dealer mixed kerosene oil in it, to which 'A' objected and reported the matter. It was held that the dealer was guilty of an attempt to sell adulterated oil.

4. *Social Alarm* Test

Prof. Sayre of USA has advocated this test. In **Common Wealth vs. Kennedy**, 'A' and 'B' agreed to place a bomb on the railway track. When 'A' left his home on a bicycle with a bomb in pursuance of the agreement and immediately in front of his house he was arrested, it was held that he was not in the stage of preparation but has attempted to commit arson i.e. if the act causes social alarm it would be regarded as an attempt howsoever remote, it may be from the completed offence. However, the Allahabad HC has not accepted this test.

In 1954, in **Emperor vs. Pannalal**, the accused took the girl on the roof of the house and tried to disrobe her and it was held that it was a mere preparation to commit rape and he was not guilty of an attempt to commit it.

Impossible Attempt

Under old English Law, impossible attempts were not punished and in **R vs. Collens**, it was held that if a person put his hand into the empty pocket of another, he would not be guilty of an attempt to commit theft.

Similarly, in **R vs. Macpherson** and in **R vs. Dodd**, the same principles were reiterated.

However, in **R vs. Bronen**, Lord Coleridge declared that these cases were decided on a mistaken view of law. In this case, the accused was found guilty of an attempt to commit an unnatural offence, even though on account of his physical defence, the completed offence by him was impossible.

And finally in **R vs. Ring (1897)**, the accused was convicted for an attempt to steal for putting his hand into the empty pocket of another. The same principle was followed in **R vs. Osborne (1901)**, **R vs. White (1910)** and **R vs. Spicer (1935)**.

According to **Professor Jerome Hall**, to sustain a conviction for an attempt every element constituting the crime be present. This is the rationale of empty-pocket decision. Once *mens rea* is proved, the remaining question concerns his conduct in relation to preparation attempt distinction, the promise being that the external situation was not what the accused believed it to be. There is no such problem under the IPC because the two illustrations under Section 511 make it clear that the impossible attempts would be punished. One illustration relates to the empty pocket and other to an empty box.

Sections 511 and 307 – Section 307 punishes attempted murder. In **R vs. Cassidy, J. Westroe** of the Bombay High Court expressed the view that Section 307 is not exhaustive of all cases of attempted murder and even if a person is acquitted of an attempt to commit murder under Section 307 he could still be guilty of an attempt to commit murder under Section 511. But the Allahabad Court in **R vs. Nidha, J. Straight** expressed the view that Section 307 is exhaustive with regard to all cases of attempted murder and if an accused is acquitted under Section 307, he would not be convicted under Section 511.

Section 511 applies to such cases only where there is no express provision under the Penal Code to punish the attempt. John D. Hayne has also observed that the view of Bombay HC is not logical. The Punjab HC in **J. Das vs. Emperor** has followed the Bombay view. However, the Bombay High Court has doubted its own view in **Vasudev Balwant Gogte vs. Emperor**. The own **Prakash Case (SC)** supports the **R vs. Nidha** decision.

IV. Accomplishment

The last stage in the commission of a crime is its accomplishment. If the accused succeeds in its attempt to commit the crime, he will be guilty of the offence (provided the other elements are proved).

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ELEMENTS OF CRIMINAL LIABILITY

There are *two* essential elements to establish penal liabilities: (a) *Actus reus* and (b) *Mens rea*. *Actus reus* is the physical aspect of the crime where as *mens rea* is the mental element involved in a crime.

ACTUS REUS

Actus reus is the physical result of conduct and defined as "such result of human conduct as the law seeks to prevent".

The term *Actus reus* derived from words, "*Actus*" meaning human conduct and "*reus*" meaning forbidden by law connotes, doing of an act which is legally prohibited.

Actus reus is the result of conduct and not the conduct itself which produced the result.

For example: In a case of murder, it is the death of the person which is *Actus reus*, and not the physical act of killing.

Requirements of Actus reus

Actus reus has three requirements:

1. Human action/conduct:

- a) *Conduct should be voluntary*: e.g., shooting done by an epileptic person under a fit of epilepsy, resulting in the death of a person is not a crime as it was done involuntarily.
- b) *The conduct can be one of commission or of omission*: commission can be any actual physical causative act. For e.g.: shooting, striking, etc. Omission can be the refraining of the accused from doing a certain thing/act (which he is bound to do by law) knowing that this would cause injury to someone. E.g.:
 - i) A jailor, who does not provide food to his prisoners and some of them are starved to death, commits a crime.
 - ii) A railway-crossing gatekeeper who does not close the gate and collision takes place, he is held guilty of negligence.
- c) *The Act is not limited*: rather, there can be a series of acts. Section 33, I.P.C, explains this, e.g., in a case of murder by shooting, the various acts, such as purchasing the gun, purchasing the cartridge, loading the gun, aiming, pulling the trigger... etc. together constitute the act.

2. The result of the act (under the given circumstances); generally called an injury

Crime is constituted by the event/result and not by the activity itself. E.g., X shoots at Y, intending to kill him but Y is not killed. The accused will not be charged of murder; rather he will be charged of attempt to murder. The question 'how' is important only for fixing the criminal liability.

3. Forbidden by law

E.g. X kills Y, but X is a hangman. His killing of Y is not forbidden by law; hence, he has not committed a crime here.

Omission can be put into two groups, viz, (1) those forbidden by law (jailor/gatekeeper examples), (2) and those not forbidden by law e.g. a gold medalist swimmer sees a child drowning but doesn't rescue, the child dies, here the person doesn't commit a crime as his omission was not forbidden by law.

MENS REA

Mens rea is the second essential ingredient in crime. The term *Mens rea* derived from words, "*mens*" meaning mental element and "*rea*" meaning forbidden by law connotes the mental or psychological element involved in an act prohibited by law.

It is generally referred to as "*guilty mind or evil intention*".

Granville Williams defines *mens rea* as follows: "*Mens rea* refers to the mental element necessary for the particular crime and this mental element may be either intention to do the immediate act or being about the consequence or recklessness as to such act or consequence".

Mens rea is thus, the attitude of mind which actuates the conduct which results in *Actus reus*.

Significance of *mens rea*

Significance of the concept of *mens rea* is that no act is *per se* criminal unless it has a guilty mind behind it.

Tips as to infer *mens rea* from evidences:

1. **Act should be voluntary:** E.g. some dacoits put a pistol on a blacksmith's temple and force him to break open the lock of a *godown* here the blacksmith is not guilty as he has done the act involuntarily. However, if he also had some intension of stealing things from the *godown* he would be held guilty.
2. **Foresight/knowledge:** If the knowledge is missing, the intension is missing, then there shall be no crime E.g. A shoots a tiger (in a jungle) but tiger escapes and B who was behind the bush is hit and is killed, as A did not have the knowledge of B's presence behind the bush, he did not intend to kill him and hence, no crime committed. However had the event occurred in a residential area or a park etc. the case would have been different in that case he would be presumed of knowing the co-incidental presence of someone.

Mens rea has not been defined in the IPC anywhere. However while defining the crimes, the court has incorporated the requirement of *mens rea*.

These two essential ingredients of a crime are generally inseparable, e.g. (1) when a child or insane person abuses one he is likely to get amused instead of retaliating, intentionally. Whereas when a same man does a same, one tends to reciprocate. Knowing that it was intentionally done. (2) A person under the influence of somnambulism crushes the eye of a person lying by the door. Yet, he cannot be prosecuted as he has done this unintentionally.

This is explained by the maxim "***actus non-facit reum, nisi mens sit rea***", which means "the intent and the act must both concur to constitute the crime".

This means that the two elements individually and separately cannot establish criminal liability. There has to be a concurrence of both at the same time and same place, to constitute a crime, e.g. if A intends to kill B, but never commits any act towards fulfilment of his desire, no matter, how evil intentions he might have, he cannot be held criminally liable.

Similarly, if A innocently and by mistake hurts B without any intention or knowledge he cannot be held liable for hurt.

Furthermore, if A had an intention to cause injury to B, but does not commit any act towards fulfilment of his desire at that time, and later on after a gap of long time, without any evil intention if he slaps B, he can't be held liable for culpable injury.

Similar, would be position in case an act is done long before an evil intention of causing such an act comes to the mind. Hence, it stands clear, that generally *Actus reus* and *mens rea* has to concur, to cause a crime.

There are certain exceptions to this general rule. For e.g. in case of strict liability and absolute liability or statutory offences, the requirement of *mens rea* is strictly done away with.

These are exceptions to the general rule of common law and natural justice, which requires that *mens rea* has to be established to prove the culpability of an act i.e. "there must be a mind at fault before there can be a crime".

The different degree and intensity of *mens rea* is represented as: intention, recklessness, knowledge, negligence, rashness, voluntarily etc.

- i) **Intention:** It indicates the mind of a man who desires the possible consequences of his conduct and also foresees such consequences i.e. such a mind has fixed purpose to produce a particular result e.g. if A shoots B with a pistol from an arms distance at his forehead, he not only intends but also foresees the possible consequences or the result of its conduct with certainty.

Intention is attributed the highest degree of *mens rea*, since the probability of the consequences of the conduct occurring is highest and the possibility of consequences desired is almost certain and hence intention is required in establishing the culpability of highly aggravated form of offences e.g. to establish murder under Section 300, intention has to be established.

ii) **Recklessness:** It is the state of mind where one is aware of the consequences of his act but remains indifferent to the consequences of his conduct. *Eve J.* describes recklessness, as "it is an attitude of a mental indifference to obvious risks" e.g. a man firing crackers in a crowded mela and thus injuring some people without the intention of causing injury is nonetheless reckless as he was aware of the consequences of his conduct but remaining indifferent to the risk. A reckless person does not intend the consequences but can foresee the possibility and consciously takes the risk but unlike intention the consequence is not intended and the consequences foreseen are only probable and not certain. Recklessness is although a degree lower to intention but for all legal purpose recklessness is classed with intention, the foresight of the consequence being the factor, which group them together.

Caldwell (1981) All ER 961 House of Lords

iii) **Negligence:** It is the state of mind which does not desire a particular consequence but remains indifferent and careless to the risk involved, such a risk is not foreseen. In negligence there is a lack of care and caution which a reasonable person must take to avoid such risk e.g. if A throws a stone out of his window in the street, he might not intend to hurt anyone but never the less it might injure a passer-by, here A is negligent. Negligence is blameworthy inadvertence, which means an unintentional failure to conform to the conduct of the reasonable man in respect of the consequence in question, and it involves both a subjective and objective inquiry.

Negligence is a lower degree of *mens rea* where the possibility of the risk involved, taking place is less.

iv) **Knowledge:** It is the state of mental realisation and it refers to the conscious awareness of facts which are the personal information of the person doing the act. Knowledge is of higher degree than negligence and rashness, here the foreseeability of the consequence is low, and the mind is witness to the physical act of the body and thus the culpability lies in the failure of the mind from stopping the crime to be performed.

Tests for *mens rea*

The prosecution must establish the following in order to establish the *mens rea*:

- i) The accused's conduct brought about or contributed in a substantial degree to the consequences which amount to the *Actus reus*.
- ii) Conduct was voluntary.
- iii) At the time he was so conducting himself he realised that he would or might bring about consequences of that kind.

Motive: It is an attitude of mind i.e. the emotion prompting the act. Motive is irrelevant to the concept of *mens rea*.

Objective Standard of *mens rea*:

Rule: A person always intends the natural consequences of his act.

Mens rea being mental element cannot be ascertained physically, thus, *mens rea* is ascertained by an objective standard of a reasonable man, placed in similar Situation.

The objective standard is supported by the legal presumption that a man is always deemed to have intended the natural consequences of his acts. *For example:* If X hits Y with an iron rod on Y's head, repeatedly, and causes Y's death, he shall be presumed to have intended that death will be the consequence of his act, and he shall not be allowed contend, that he just intended to cause minor injury.

Director of Public Prosecution vs. Smith, 1960 All ER 161

In this case, the Accused Stole a car, and was chased by a police officer, who hung by the car, the accused drove the car rashly and the police officer was grievously injured and consequently died.

The court, asked, whether he could, as a reasonable man, contemplate that grievous injury would follow, if yes, he would be liable for the death, because every person intends the natural and probable consequences of his acts.

The House of Lords approved this rule.

In **R vs. Faulkner, 1877: Parkes C. B.** said "The law imputes to a person who wilfully commits a criminal act, an intention to do every thing which is the probable consequence of the act constituting

the *corpus delicti* which actually ensues. This inference arises irrespective of the particular consequence which ensued being or not being foreseen by the criminal and whether his conduct is reckless or reverse."

This principle was affirmed in the **Public Prosecution vs. Smith case**

In **R vs. Lumley (1911)**: **Avery J.** also enunciated the same principle. This test of reasonable standard was modified in England by Section-8 of criminal Justice Act, 1967, which provides:

"A court or jury in determining whether a person has committed an offence,

- a) shall not be bound in law to infer, that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but,
- b) shall decide whether he intend or foresee that result by reference to all the evidence drawing such references from the evidence as appear proper in the circumstances.

Section was applied to decide the cases of:

In **R vs. Lipman 1969 WCR**, where the court held that the intention to create a dangerous situation which results in death, even if the latter was not intended or even anticipated is sufficient in manslaughter.

In **R vs. Mrs. Hyam (1979)**, the court held that knowledge or foresight of the probable result is sufficient to constitute criminal intention, whatever the motive or desire.

MENS REA IN STATUTORY OFFENCES

Cases

1. *Lim Chin Aik v. The Queen* (1963) (Privy Council)

Facts: By section 6 of the Immigration ordinance, 1952 of *the State of Singapore*, it was made unlawful for a person other than a citizen of Singapore to enter Singapore or having already entered, remain there, if he has been prohibited from entering the colony by an order made under Section 9.

Section 9 contained provisions as regards the publication or otherwise having attention of a class of persons against whom the order was made, but it did not contain any such provision against an individual.

The appellant used to visit Singapore (where his family resided) from Malaysia. An order was passed prohibiting his entry into Singapore. However, this order was neither published nor communicated to the appellant nor was there any source at the hand of the appellant to know of any such order. The appellant was arrested and prosecuted.

Judgment: It is not enough to label the statute as one dealing with a grave social evil and from that to infer that strict liability was intended. It is pertinent also to enquire whether putting the defendant under strict liability would assist in the enforcement of the regulations. There should be something that the defendant can do directly or indirectly, by supervision or inspection, by improvement of his business method or by exhorting those whom he may be expected to influence or control, which will promote the object of the regulation. Unless this is there, there is no reason for penalizing him, and it cannot be inferred that the legislation imposed strict liability merely in order to find luckless victim.

In the present case: The object of the statute was to prohibit the entry of certain people into Singapore. But this could be done only when such a prohibition order was brought to the notice of the person, or at least there was some scope for the person to himself know about it. But here the immigration officer kept on sitting on the order and also there was no other means (like a Gazette) for the defendant to know about the order.

It is true that *'Ignorantia lex non excusat'*, but this maxim is limited in its scope to the extent of the person having some means to know the law.

⇒ The appellant was not liable

Implications of the Judgment: Adds a new dimension to the rule of construction of a statute in the context of *mens rea* accepted by earlier decisions. While it accepts the rule that for the purpose of ascertaining whether a statute excludes *mens rea* or not, the object of the statute with its wordings must be weighed. It lays down that *mens rea* cannot be excluded unless the person or persons aimed at by the prohibition are in position to observe the law or to promote the observance of the law.

2. *State of Maharashtra v. M. H. George* (1965. S. C.)

Facts: The FERA, 1947, authorised the Central Government to notify order in the gazette prohibiting the bringing or sending of gold, silver, currency notes or bank notes into India except under a general or special permission from the RBI.

Subsequently the RBI issued a general permission subject to the conditions that the articles in transit to some other country is not removed from the carrying ships or aircraft except for, transit purposes.

The provision as to the punishment [Section 23 (1 - A)] did not mention any specific *mens rea* requirement, neither did they expressly rule out all *mens rea* requirement.

On Nov. 8, 1962, the RBI published a new notification to the effect that a new clause was added: the article being carried was to be declared in the manifest for transit at the same bottom cargo or transshipment cargo.

This notification was published in the official gazette on 24 Nov. 1962, from which date it became effective.

The accused (a smuggler of gold, as established from facts) boarded a Swiss plane at Zurich on Nov 27, 1962. He was bound to Manila but the plane while in transit landed at Bombay. It is also established that the accused did not try to come out of the plane. On prior information the Custom Officers searched the accused and found him carrying 34 kilos of gold on his person hidden inside specially carved out pockets in his jacket. The gold he was carrying was not declared in the manifest. He was arrested and prosecuted.

Accused's Contentions:

- i) *Mens rea* was an essential ingredient of Section 23(1-A). Since knowledge was absent $\Rightarrow$ not liable
- ii) RBI notification was a delegated legislation $\Rightarrow$ Hence to be enforced from 24-11-62, when it was published in the gazette. Accused left on 27-11-62 $\rightarrow$ could not have known about the new notification.
- iii) The manifest requirement applied only to the gold handed over to the aircraft and not to the gold carried on the person of a passenger.

Judgment

As to contention 1: The rules of presumption and construction:

Absolute liability is not to be lightly presumed but has to be clearly established. "It is of the utmost importance for the protection of the liberty of the subject that a court should always bear in mind that, unless a statute, either clearly or by necessary implication rules out *mens rea* as a constituent part of a crime, a defendant should not be found guilty of an offence against the criminal law unless he has a guilty mind."

The rule as to constructing M. R. in Statutes

Starting with an initial prescription in favour of the need for *mens rea* one has to ascertain whether the presumption is overborne by the language of the enactment read in the light of the objects and purposes of the Act, and particularly where the enforcement of the law and the attainment of its purpose would not be defeated in the event of such an ingredient being considered necessary.

Present Case:

Absolute embargo on bringing or sending gold without permission:

$\rightarrow$ No *mens rea* could be imputed. The only qualification that can be made are:

- 1) It should be voluntary
- 2) In exceptional cases when *For example* the aircraft not land to land in India had to make an emergency landing.

If the bringing is voluntary and conscious $\rightarrow$ an offence proved $\rightarrow$ no further *mens rea* required.

The rule is 'Ignorantia lex non excusat' $\rightarrow$ and here (as opposed to Lim Chin Aik case), the notification was published in the Gazette and it was the duty (having an opportunity) of the accused to know the law of the Indian territory. (Else in India social milieu, there are area where people don't and cannot, know the new notifications even after several months) $\rightarrow$ acquitting the accused in the present case would lay down a wrong precedent and any one can come and claim that he did not know the new rule.

Subject matter/object of legislation:

$\Rightarrow$ In light of the object (see previous matter)

$\rightarrow$ Provision ought to be stringent

Precedents:

- a) **Regina/St. Margaret's Trust Ltd. (1958)**

Denvoian J. $\rightarrow$ There would be little point in enacting that no one should breach the defence against flood and at the same time excusing anyone who did it innocently.

- b) **In R. V. Tolson (1889), Wills. J** had held:

"Although *prima facie* and as a general rule, there must be a mind at fault before there can be a crime, it is not an inflexible rule, and a statute may relate to such a subject matter and may be so framed as to make an act criminal whether there has been any intention to break the law or otherwise to do a wrong or not."

Held: The very purpose of the Act would be furnished if a condition were to be read in Section 8 (1) OR section 23 (1 - A) as that the accused should be proved to have the knowledge that he was contracting the law.

⇒ Defendant liable.

LIM CHIN AIK CASE	M. H. GEORGE CASE
1. Notification against one particular individual person.	1. Not against any one. Is a general question?
2. Mala fide on the part of the immigration officer.	2. No question of <i>mala fide</i> .
3. No provision of publication + immigration officer kept sitting.	3. Published in the Gazette.
4. Object: To prohibit entry of certain people into Singapore.	4. Object: to curb smuggling → a social and eco-evil hampering the growth of the country
5. Entry lawful unless prohibited → knowledge of a prohibition is must.	5. Bringing of Gold totally unlawful unless permitted by the RBI + 'manifest' requirement → knowledge is must.
6. Acquittal does not amount to defeat of the maxim " <i>Ignorantia lex non excusat</i> "	6. Acquittal amounts to a defeat of the maxim ' <i>Ignorantia lex non excusat</i> '

3. *Indo China Steam Navigation Co. Ltd. v. Ranjit Singh.* (Add. Collector of Customs, Calcutta (1964, S.C.))

Section 52 - A of the sea customs Act, 1876 → No vessel constructed, adapted, attended or fitted for the purpose of concealing goods shall enter or be within the limits of any port in India or the Indian customs water.

The vessel (*Eartun safa*) entered Calcutta port → Search → hole covered and painted → large quantity of gold hidden → ship seized. Contention → knowledge *mens rea* is a must ⇒ No knowledge → no *mens rea* ⇒ Not Liable

Judgment: (Gajandra Gadkar C. J.)

Intention of legislature → to put an end to illegal smuggling which disturbs the national economy → absolute prohibition /Stringent measures

Carriers are agents of a wide spread racket of smugglers ⇒ defendant. Liable.

GENERAL EXCEPTIONS

As a general principal of law man is presumed to know the nature and consequence of his act and is, therefore held responsible for it. However, there are certain exceptions to this rule wherein a person may be excused of crime. In some cases, a person may be entirely excused from criminal responsibility by virtue of being head of sovereign state others may be excused from the consequences of punishment by reason of the absence of the requisite mens rea necessary for the commission of particular offence. This is based on the well known maxim *actus non facit reus, nisi mens sit rea* i.e the act itself does not make a man guilty unless his intentions are so. Such cases have been discussed elaborately under this chapter.

Act done by a person bound, or by mistake of fact believing himself bound, by law.

SECTION 76

Nothing is an offence which is done by a person who is, or who by reason of mistake of fact, and not by reason of a mistake of law in good faith, believes himself to be, bound by law to do it.

Illustrations

- i) A, a soldier, fires on a mob by the order of his superior officer, in conformity with the commands of the law. A has committed no offence.
- ii) A, an officer of a court of Justice, being ordered by that court to arrest Y, and, after due inquiry, believing Z to be Y, arrests Z. A has committed no offence.

This section excuses a person who has done what by law is an offence, under a misconception of facts, leading him to believe in good faith that he was commanded by law to do it.

Mistake of fact

'Mistake' is not mere forgetfulness. It is a slip "made not by design, but by mischance." Under Sections 76 and 79 a mistake must be one of fact and not of law. Honest and reasonable mistake stands in fact on the same footing as absence of the reasoning faculty, as in infancy, or perversion of that faculty, as in lunacy. It may be laid down as a general rule that an alleged offender is deemed to have acted under that state of facts which he in good faith and on reasonable grounds believed to exist when he did the act alleged to be an offence.

Ignorantia facti doth excuse, for such ignorance many times makes the act itself morally involuntarily.

Where a man made a thrust with a sword at a place where, upon reasonable grounds, he supposed a burglar to be, and killed a person who was not a burglar, it was held that he had committed no offence. [Contrast this case with *Ram Bahadur's Case*]. In other words, he was in the same situation as far as regards the homicide as if he had killed a burglar.

The accused while guarding his maize field shot an arrow at a moving object in the *bonafide* belief that it was a bear and in the process caused the death of a man who was hiding there. It was held that he could not be liable for murder as his case was fully covered by Section 79 as well as Section 80 IPC.

Mistake of law

Mistake on a point of law in a criminal case is no defence. Mistake of law ordinarily means mistake as to the existence or otherwise of any law on a relevant subject as well as mistake as to what the law is. If any individual should infringe the statute law of the country through ignorance or carelessness, he must abide by the consequences of his error; it is not competent to him to aver in a court of Justice that he was ignorant of the law of the land, and no court of Justice is at liberty to receive such a plea.

The maxim '*ignorantia juris non excusat*', in its application to criminal offences, admits no exception, not even in the case of a foreigner who cannot reasonably be supposed to know the law of the land. The legal presumption that everyone knows the law of the land is often untrue as a matter of fact. But why such a presumption subsists. The reason for this seems to be expediency,

otherwise, there is no knowing of the extent to which the excuse of ignorance of law might be carried. Indeed, it might be urged almost in every case. This rule of expediency has been put to use even in a case where the accused could not have possibly known the law in the circumstances in which he was placed. Thus a person who was on the high seas and as such could not have been cognizant of a recently passed law might be convicted for contravening it.

Whenever, the question of justification of an offence either due to mistake of fact or mistake of law arises, the guiding rules are –

- i) That when an act is in itself plainly criminal, and is more severely punishable if certain circumstances co-exist, ignorance of the existence of such circumstances is not answer to a charge for the aggravated offence.
- ii) That where an act is *prima facie* innocent and proper, unless certain circumstances co-exist, thus, ignorance of such circumstances is an answer to the charge.
- iii) That the state of the defendant's mind must amount to absolute ignorance of the existence of the circumstances which alters the character of the act, or to a belief in its non-existence.
- iv) Where an act which is in itself wrong is, under certain circumstances, criminal, a person who does the wrong act cannot set up as a defence that he was ignorant of the facts which turned the wrong into a crime.
- v) Where a statute makes it penal to do an act under certain circumstances, it is a question upon the wording and object of the particular statute, whether the responsibility of ascertaining that the circumstances exist is thrown upon the person who does the act or not. In the former case, his knowledge is immaterial.

Ignorance of a statute newly passed

Although a person commits an act which is made an offence for the first time by a statute so recently passed as to render it impossible that any notice of the passing of the statute could have reached the place where the offence has been committed, yet his ignorance of the statute will not save him from punishment.

For an Indian law to operate and be effective in the territory where it operates namely the territory of India, it is not necessary that it should either be published, or be made known outside the country.

In good faith believes himself to be, bound by law

In order to entitle a person to claim the benefit of this section it is necessary to show the existence of a state by facts which would justify the belief in good faith.

For illegal acts, however, neither the orders of a parent nor a master nor a superior will furnish any defence. Nothing but fear of instant death is a defence for a policeman who tortures anyone by order of a superior. The maxim respondeat superior has no application to such a case.

The net position appears to be that if superior order is in conformity with the law no further question arises and the subordinate officer is protected by section 76, IPC if he carries out that order.

It is only when the order is not in accordance with the law but the subordinate officer who carries out that order in good faith, on account of a mistake of fact and not on ground of mistake of law, believes himself to be bound by law to carry out such an order, that a further question arises as to whether the subordinate officer will not still get protection of section 76, IPC, because of his mistake of fact. For a manifestly illegal superior order, that is an order which is illegal on the face of it e.g. to kill an innocent by-stander or to torture an accused in custody or to fire on a group of people who have assembled for a lawful purpose, the superior order affords no protection to the subordinate.

Where, however, the order is not manifestly illegal and a soldier or a policeman carrying out that order honestly believes that it is legal, and then superior order would possibly be a good defence as was held in a **South African Case**.

The point has, however, not been clearly decided in any case including the decision of Supreme Court in **Sew Mangal Singh's Case**. There are, however, enough indications in **Sew Mangal's Case** and in section 76 and section 79 IPC that if the subordinate due to mistake of fact and not due to mistake of law honestly believed that he was bound or justified by law in carrying out the superior order which though not manifestly illegal was nevertheless illegal, perhaps he would still get the benefit of superior order. Obedience to an illegal order can only be used in mitigation of punishment but cannot be used as a complete defence.

ACT DONE BY A PERSON JUSTIFIED OR BY MISTAKE OF FACT BELIEVING HIMSELF JUSTIFIED BY LAW: SECTION 79

Nothing is an offence which is done by a person who is justified by law, or who by reason of a mistake of fact and not by reason of a mistake of law in good faith, believes himself to be justified by law in doing it.

Distinction between Section 76 and Section 79 IPC

The distinction between Section 76 and this section is that in the former a person is assumed to be bound and in the latter to be justified by law. In other words, the distinction is between a real or supposed legal obligation and a real or supposed legal justification in doing the particular act.

Under both sections, there must be a *bonafide* intention to advance the law, manifested by the circumstances attending the act which is the subject of charge, and the party accused cannot allege generally that he had a good motive, but must allege specifically that he believed in good faith that he was bound by law (Section 76) to do as he did, or that being empowered by law (Section 79) to act in the matter, he had acted to the best of his judgment exerted in good faith.

Mistake of fact

Where the accused while helping the police stopped a cart which they in good faith believed to be carrying smuggled rice but ultimately their suspicion proved to be incorrect, it was held that they could not be prosecuted for wrongful restraint under Section 341 as their case was covered by Section 79, IPC. Section 79 makes an offence as non-offence.

But where an act is clearly a wrong in itself, and a person, under a mistaken impression as to facts which render it criminal, commits to the act, then according to the ratio *decidendi* in, **Prince's Case**, he will be guilty of a criminal offence.

Act of State

An act of state is an act injurious to the person or to the property of some person who is not at the time of that act a subject of the Government; which act is done by any representative of the Government's authority, civil or military, and is either previously sanctioned or subsequently ratified by the Government.

Persons carrying out an act of state under proper orders will be protected by the Penal Codes in the same way as if they were carrying out a lawful order under the municipal law. To support a plea of this nature two things are essential:

- i) That the defendant had authority to act on behalf of the state in the matter, and
- ii) That in so acting, he was professing to act as a matter of policy outside the law, and not as a matter of right within the law.

Mistake of fact

The accused was convicted of bigamy, having gone through the ceremony of marriage within seven years after she had been deserted by her husband. She believed in good faith and on reasonable grounds that her husband was dead. It was held that a *bonafide* belief on reasonable grounds in the death of the husband at the time of the second marriage afforded a good defence to the indictment and that the conviction was wrong (**Tolson**).

The accused took an unmarried girl under the age of sixteen years out of the possession, and against the will, of her father. The defence of the accused was that he *bonafide* and unreasonably believed that the girl was older than sixteen. It was held that as the taking of the girl was unlawful, the defence was bad. (**Prince**)

This case may be distinguished from **Tolson's Case**, in which a woman married believing her husband to be dead: There the conduct of the woman was not in the smallest degree immoral, but was, on the other hand, perfectly natural and legitimate.

ACCIDENT IN DOING A LAWFUL ACT: SECTION 80

Nothing is an offence which is done by accident or misfortune and without any criminal intention or knowledge in the doing of a lawful act in a lawful manner by lawful means and with proper care and caution.

Illustration

A is at work with a hatchet; the head flies off and kills a man who is standing by. Here, if there was no want of proper caution on the part of A, his act is excusable and not an offence.

This section exempts the doer of an innocent act or lawful act in an innocent or lawful manner and without any criminal intention or knowledge from any unforeseen evil result that may ensue from accident or misfortune.

Accident

An effect is said to be accidental when the act by which it is caused is not done with the intention of causing it, and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, under the circumstances in which it is done, to take reasonable precautions against it. An accident is something that happens out of the ordinary course of things. The idea is something fortuitous and unexpected is involved in the word 'accident'.

In *R vs. Clarke*, a woman was charged with theft from a super market. Her defence was that she had taken the goods in a state of absent mindedness resulting from depression. Accepting medical evidence, her mental condition and her conduct in her house, the defence was accepted.

Where the accused fired a shot at his assailant who escaped but four other persons were injured and one of them unfortunately expired, it was held that the accused was not liable for the fatal injury to an innocent person as his case fell within the scope of Section 80 read with Section 96 and 100, IPC.

ACT LIKELY TO CAUSE HARM, BUT DONE WITHOUT CRIMINAL INTENTION/INTENT, AND TO PREVENT OTHER HARM: SECTION 81

Nothing is an offence merely by reason of its being done with the knowledge that it is likely to cause harm, if it be done without any criminal intention to cause harm, and in good faith for the purpose of preventing or avoiding other harm to person or property.

Explanation: It is a question of fact in such a case whether the harm to be prevented or avoided was of such a nature and so imminent as to justify or excuse the risk of doing the act with the knowledge that it was likely to cause harm.

An act which would otherwise be a crime may in some cases be excused if the person accused can show that it was done only in order to avoid consequences which could not otherwise be avoided, and which, if they had followed, would have inflicted upon him or upon others whom he was bound to protect inevitable and irreparable evil; that no more was done than was reasonably necessary for that purpose, and that the evil inflicted by it was not disproportionate to the evil avoided. As in self-defence so in the prevention of a harm the accused is faced with two choices both resulting in some harm and of sheer necessity to avoid a greater harm, he has to commit an act which would otherwise be an offence.

The test is really like this: There must be a situation in which the accused is confronted with a grave danger and he has no choice but to commit the lesser harm, may be even to an innocent person, in order to avoid the greater harm. Here the choice is between the two evils and the accused rightly chooses the lesser one.

Without any criminal intention

Under no circumstances can a person be justified in intentionally causing harm, but if he causes the harm without any criminal intention, and merely with the knowledge that it is likely to ensue, he will not be held responsible for the result of his act, provided it be done in good faith to avoid or prevent other harm to person or property.

'Criminal Intention' simply means the purpose or design of doing an act forbidden by the criminal law without just cause or excuse. An act is intentional if it exists in idea before it exists in fact, the idea realizing itself in the fact because of the desire by which it is accompanied. The motive for an act is not a sufficient test to determine its criminal character. By a motive is meant anything that can contribute to give birth to, or even to prevent, any kind of action. Motive may serve as a clue to the intention; but although the motive is pure, the act done under it may be criminal. Purity of motive will not purge an act of its criminal character.

Where an offence depends upon proof of intention the court must have proof of facts sufficient to justify in coming to the conclusion that the intention existed. No doubt one has usually to infer intention from conduct, and one matter that has to be taken into account is the probable effect of the conduct.

Where the positive evidence against the accused is clear, cogent and reliable, the question of motive is of no importance.

English Cases

A man, in order to escape death from hunger, kills another for the purpose of eating his flesh, is guilty of murder, although at the time of the act, he is in such circumstances that he believes and has reasonable ground for believing that it affords the only chance of preserving his life. At the trial of an indictment for murder, it appeared that the prisoners D and S, seamen and the deceased, a boy between seventeen and eighteen, were cast away in a storm on the high seas, and compelled to put into an open boat, that the boat was drifting on the ocean and was probably more than 1000 miles from land; that on the eighteenth day, when they had been seven days without food and five days without water. D proposed to S that lot should be cast as to who should be put to death to save the rest, and that they afterwards thought it would be better to kill the boy, that their lives should be saved, that on the twentieth day, D with the assent of S, killed the boy, and both D and S fed on his flesh for four days, that at the time of the act there was no sail in sight nor any reasonable prospect of relief; that under these circumstances there appeared to the prisoners every probability that unless they then or very soon fed upon the boy, or one of themselves they would die of starvation.

It was held that upon these facts there was no proof of any such necessity as could justify prisoners in killing the boy and that they were guilty of murder. **[Dudley and Stephens]**

A and B, swimming in the sea after a shipwreck, got hold of a plank not large enough to support both, A pushes off B, who is drowned. This, in the opinion of Sir James Stephen, is not a crime as A thereby does B no direct bodily harm but leaves him to his chance of getting another plank.

The court has established the following *three* principles:

- a) The law does not recognise a defence of necessity whether arising from wrongful threats of violence to another or from 'objective dangers' (conveniently called duress of circumstances), threatening the defendant or others.
- b) Secondly, the defence is available only if the defendant can be objectively said to be acting reasonably and proportionately to avoid the threat of death or serious injury.
- c) It is for the jury to determine whether because of what the defendant reasonably believed he had good cause to fear death or serious injury, and if so, whether a person of reasonable firmness, sharing the characteristics of the defendant, would have responded as the defendant did.

ACT OF A CHILD UNDER SEVEN YEARS OF AGE: SECTION 82

Nothing is an offence which is done by a child under seven years of age.

Under the age of seven years, no infant can be guilty of a crime, for under that age an infant is, by presumption of law, *doli incapax*, and cannot be endowed with any discretion. If the accused were a child under seven years of age, proof of that fact would be ipso facto an answer to the prosecution.

In **Makhulshah**, the accused purchased for *one anna*, from a child aged six years, two pieces of cloth valued at *fifteen annas*, which the child had taken away from the house of a third person.

It was held that, assuming that a charge of an offence of dishonest reception of property, (Section 411) could not be sustained owing to the incapacity of the child to commit an offence, the accused was guilty of criminal appropriation, if he knew that the property belonged to the child's guardians and dishonestly appropriated it to his own use.

ACT OF A CHILD ABOVE SEVEN AND UNDER TWELVE OF IMMATURE UNDERSTANDING: SECTION 83

Nothing is an offence which is done by a child above seven years of age and under twelve, who has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion.

Where the accused is a child of above seven years of age and under twelve, the incapacity to commit an offence only arises when the child has not attained sufficient maturity of understanding to judge of the nature and consequences of his conduct, and such non-attainment would have apparently to be specially pleaded and proved, like the incapacity of a person who, at the time of doing an act charged as an offence, was alleged to have been of unsound mind. Under this section,

it has got to be shown that the accused is not only under twelve but has not attained sufficient maturity of understanding. If no evidence or circumstance is brought to the notice of the court, it will be presumed that the child accused intended to do what he really did.

Where a child of twelve or so used a sharp sword in killing a person along with his two brothers and no evidence either of age or immaturity of understanding was led on his behalf, it was held that he committed an offence at least under Section 326, IPC.

What the section contemplates is that the child should not know the nature and physical consequences of his conduct. The circumstances of a case may disclose such a degree of malice as to justify the maxim *malitia supplet aetatem*. Where the accused, a boy over eleven years but below twelve years of age, picked up his knife and advanced towards the deceased with a threatening gesture, saying that he would cut him to bits, and did actually cut him, his entire action can only lead to one inference, namely, that he did what he intended to do and that he knew all the time that a blow inflicted with a *kathi* (knife) would effectuate his intention.

Though under the English law, a child under fourteen cannot be charged with an offence of rape or buggery, in India a child of twelve can be convicted of rape. In England, even if a child under fourteen is found to have actually committed rape, he cannot be found guilty of rape though he can be convicted of common assault or indecent assault.

Theft by child

Where a child of nine years of age stole a necklace worth Rs. 28,000 and immediately sold it to the accused for *five annas*, the accused could be convicted of receiving stolen property, because the act of the child in selling the necklace showed that he had not attained a sufficient maturity of understanding to judge of the nature and consequences of his conduct on that occasion within the meaning of this section.

ACT OF A PERSON OF UNSOUND MIND: SECTION 84

Nothing is an offence which is done by a person who, at the time of doing it, by reason of unsoundness of mind, is incapable of knowing the nature of the act, or that doing what is either wrong or contrary to law.

The section lays down the legal test of responsibility in cases of alleged unsoundness of mind. Under it a person is exonerated from liability for doing an act on the ground of unsoundness of mind, if he, at the time doing the act, is either incapable of knowing –

- a) The nature of the act or
- b) That he doing what is either wrong or contrary to law.

The accused is protected not only when, on account of insanity, he was incapable of knowing the nature of the act, but also when he did not know either that the act was wrong or that was contrary to law, although he might be knowing the nature of the act itself.

He is, however, not protected if he knew that what he was doing was wrong, even if he did not know that it was contrary to law, and also if he knew that what he was doing was contrary to law even though he did not know that it was wrong.

Though the onus of proving unsoundness of mind is on the accused, yet it has been held that where during the investigation previous history of insanity is invalid, it is the duty of an honest investigation to subject the accused to a medical examination and place the evidence before the court and if this is not done, it creates a serious infirmity in the prosecution case and the benefit of doubt has to be given to the accused. This onus may, however, be discharged by producing evidence as to the conduct of the accused shortly prior to the offence and his conduct at the time or immediately afterwards, also by evidence of his mental condition, his family history and so forth.

Every person is presumed to know the natural consequences of his act. Similarly, every person is also presumed to know the law.

There are four kinds of person who may be said to be *non compos mentis* (not of sound mind).

- i) **An idiot:** An idiot is one who is of non-sane memory from his birth, by a perpetual infirmity, without lucid intervals and those are said to be idiots who cannot count twenty, or tell the days of the weeks or those who do not know their fathers or others, or the like.

- ii) **One made non compos by illness:** A person made non compos mentis by illness is excused in criminal cases from such acts as are committed while under the influence of his disorder.
- iii) **A lunatic or a madman:** A lunatic is one who is afflicted by mental disorder only at certain periods and vicissitudes, having intervals of reason. Madness is permanent; lunacy and madness are spoken of as acquired insanity, and idiocy as natural insanity.
- iv) **One who is drunk:** As to persons who are drunk and are in the state of intoxication at the time of doing the act.

At the time of doing it – it must be clearly proved that at the time of the committing of act, the party accused was labouring under such a defect of reason, from disease of the mind, as not to know the nature of the mind, as not to know the nature and quality of the act he was doing, or, if he did know it, that he did not know he was doing what was wrong. If he did know it, he is responsible. A plea of insanity at the time of trial will not avail the accused.

The crucial point of time for deciding whether the benefit of this section should be given or not is the material time when the offence takes place. If at that moment, a man is found to be labouring under such a defect of reason as not to know the nature of the act he was doing or that, even if he knew it, he did not know it was either wrong or contrary to law when this section must be applied. In coming to that conclusion, the relevant circumstances, like the behaviour of the accused after its commission of the offence, should be taken into consideration.

Where the accused was examined by two doctors who certified him to be schizophrenic and his abnormal behavior was also apparent from the evidence on record, the Supreme Court held that the acquittal of the accused by the High Court was proper. (*State of Punjab vs. Mohinder Singh*)

In other words, to get the benefit of Section 84, IPC, it must be shown that at the time of the commission of the act, the accused by reason of unsoundness of mind was incapable of either knowing the nature of the act or that the act was either morally wrong or contrary to law and for determining this, his state of mind before and after the commission of the offence is most relevant.

Unsoundness of mind, whether the want of capacity is temporary or permanent, natural or supervening, whether it arises from disease or exists from the time of birth, it is included in this expression. It is only 'unsoundness of mind' which naturally impairs the cognitive faculties of the mind that can form a ground of exemption from criminal responsibility. The nature and extent of the unsoundness of mind required being such as would make the offender incapable of knowing the nature of the act, or that he is doing what is wrong or contrary to law.

Agitation of mind does not necessarily lead to an influence that it had affected his mental capacity.

Where the father and his relatives sacrificed a four year old son to propitiate the deity, the Supreme Court held that this does not by itself constitute insanity. Such primitive and inhuman actions must be punished severely so as to deter others from resorting to such barbaric practices. (*Paras Ram vs. State of Punjab*)

In *Ashiruddin Ahmed's Case*, where the accused on being commanded in his dream by someone in paradise to sacrifice his own son took his five year old child to a mosque and killed him there by thrusting a knife in the child's throat and thereafter went straight to his uncle but seeing a *chowkidar* there took his uncle aside and told him in a low voice as to what he has done, it was held that the accused was still entitled to the benefit of Section 84, IPC, as even though he knew the nature of the act he did not know that it was wrong.

Laxmi v. State, The Allahabad High Court expressed its disagreement with the Calcutta Court's view in above mentioned case and observed that it will be open to an accused in every case to plead that he had dreamt a dream enjoining him to do a criminal act, and believing that his dream was a command by a higher authority, he was impelled to do the criminal act and therefore he would be protected by Section 84.

Partial delusion

Whether a person who, under an insane delusion as to the existing facts, commits an offence in consequence thereof, is to be, therefore, excused depends upon the nature of the delusion. If he labours under a partial delusion only, and is not in other respect insane, he must be considered in the same situation, as to responsibility as if the facts, with respect to which the delusion exists, were real. If a person afflicted with insane delusion, in respect of one or more particular subjects or

persons, commits a crime, knowing that he was acting contrary to law, but did the act complained of with a view, under the influence of insane delusion, of redressing or revenging some supposed grievance or injury, or of producing some public benefit, he is nevertheless punishable according to the nature of the crime committed.

Insanity brought on by drunkenness

Drunkenness is not excuse, but delirium tremors caused by drinking and differing from drunkenness, if it produces such a degree of madness, even for a time, as to render a person incapable of distinguishing right from wrong, relieves him from criminal responsibility. If habitual drunkenness has created fixed insanity, whether permanent or intermittent, it is the same as if insanity had been produced by any other cause and the act is excused.

"Alcoholism may constitute a disease for the purposes of this section provided it has damaged the brain to an extent as to grossly impair the ability to make rational judgments and emotional responses. A killing attributable to alcoholism is one thing but killing attributable to the taking of alcohol is quite another and a line must be drawn between the two though it may be a fine one in some cases."

DRUNKENNESS (SECTION 85-86)

Section 85 and 86 of the IPC contain law relating to intoxication. These sections make it clear that if a man chooses to get drunk, it is his own voluntary act and he does so at his risk. As the result of drinking a man may become a totally different person all of a sudden, but still it is no excuse. Under Section 84, unsoundness of mind producing incapacity to know the nature of the act committed or that it is wrong or contrary to law is a defence to criminal charge, but by Section 85 such incapacity is no defence if produced by voluntary drunkenness. If, however, voluntary drunkenness causes a disease which produces such incapacity then Section 84 applies, though the disease may be of a temporary nature.

As per Section 85, a person will be excused only if the thing which intoxicated him was ~~administered to him without his knowledge or against his will.~~

Section 86 talks of those cases where a specific knowledge or intention is requisite to constitute the offence. In such cases, knowledge would be imputed to the accused if he voluntarily gets intoxicated.

Cases

Director of Public Prosecution vs. Beard (1920) – Therein the accused in a drunken state, tried to have carnal knowledge of a girl aged 13 years by force. He pressed her mouth and she died of suffocation. It was pleaded on the authority of **R vs. Meade (1909)** that the accused was not liable as no intention could be imputed to him and also as he was incapable of knowing that what he was doing was likely to inflict serious injury.

Earlier in the case of **R vs. Meade (1909)**, the accused had brutally beaten the deceased woman in a drunken state. **Lord Coleridge, J.** held that as he was drunk, he could not have the intention requisite for the crime of murder. The Court of Criminal Appeal (**Darling, J.**) laid down three rules:

- i) The presumption that a man intends the natural consequences of his acts can be rebutted in the case of a sober man in many ways.
- ii) In case of a drunken man, it can be rebutted if it can be shown that the man was incapable of knowing that what he was doing was likely to inflict a serious injury.
- iii) Meade's conviction for murder was affirmed as he was not shown to be drunk to that extent.

Lord Birkenhead, L.C. in the present observed:

- i) Before Meade's Case –
 - a) Intoxication in England was always considered to be an aggravation than a defence.
 - b) Insanity has always been a defence (whether by intoxication or otherwise).
 - c) For intoxication to be a defence there should be an evidence to show that the intoxication was to such an extent so as to incapacitate the mind of the accused to form the requisite intent.
- ii) Meade's case does not have a universal application.

- iii). In Meade's case, the charge was of murder and for that intention requisite is a must/but in the present case no intention need to be shown as it is a charge of rape resulting into death.
- iv) In the present case, for intoxication to be an excuse it has to be shown that the accused was so drunk so as to be incapable of forming the intent to commit rape, which is actually not proved. The murder cannot be taken to be a separate act. It is not a case of death *per se* but a case of rape resulting into death. Therefore, accused guilty of murder. The rule of Meade's case not altered as the present case was different. Where a particular intent is a must, only in those cases will intoxication be an excuse and not in all cases.

Attorney General for Northern Ireland vs. Gallachen (1961): Therein the accused, a psychopath, after forming the intention to kill his wife, took to drinking (also bought a knife) and killed her.

Denning, J. (House of Lords): He reiterated the general presumption and then laid down the two exceptions:

- i) Cases of specific intent.
- ii) Cases of disease of mind.

He held that the present case does not fall within the exceptions as the intention was formed prior to the intoxication. *Held:* Liable for murder. If he had changed his mind before drinking, he could be excused.

In **Director of Public Prosecution vs. Majewski (1976)**, it has been held that voluntary intoxication is no defence even in cases of assault.

Indian Authority

Basudev vs. State of Pepsu (AIR 1956 SC 488) – Therein, in a wedding party, the accused in an intoxicated state, asked a young boy to leave the seat for him to which the boy refused. The accused took out a pistol and shot him dead. The observations of **Chandrashekhar Aiyer, J.** who delivered the judgment are as follows:

1. The first part of Section 86 speaks of both knowledge and intention whereas the latter part speaks only of knowledge. Are we at liberty to treat intent at par with knowledge with respect to the latter part? He held that motive, knowledge and intent have to be distinguished. Motive is something that induces intention whereas knowledge is an awareness of the consequences of the act. Though knowledge and intention usually merge with each other, there is a thin dividing line between the two. If a man has gone too deep in drinking, he cannot form the requisite intent but if from the facts we can infer that he knows what he was doing, knowledge can be imputed to him. Some degree of knowledge can always be imputed to an intoxicated man but intent depends on the degree of intoxication.
2. a) Actual insanity → complete excuse.
 b) Intoxication short of insanity → degree of intoxication (to be gathered from facts) → whether necessary intent was there/if not, knowledge must have been there.
 c) Such intoxication as he merely gives way to violent passion → always liable.

In the present case, the accused was not intoxicated to such an extent so as to be incapable of forming the necessary intent → liable for murder.

Some Cases:

- i) **Mc Naughten's Case (1843)** – In England, after a series of complaints against the acquittal of the accused on grounds of irresistible impulse. Therein, A had murdered B in mistake for C. A was under the delusion that C had injured him. A took the plea of insanity. The HOL formulated five questions and delivered the answers, speaking through **LCJ Tindall** as follows:
 - a) Every man is presumed to be sane and to possess a certain degree of reason to be responsible for his crimes unless the contrary is proved.
 - b) The defect of mind/knowledge should be seen at the point of time when the crime was committed.
 - c) The test is in the power of distinguishing between right and wrong, not in the abstract, but in regard to the particular act committed.

- d) If a man commits a crime under an insane delusion, he would be responsible only to the extent he could have been if the supposed facts had existed.
- e) Notably, the knowledge of the law of the land is not a must, knowledge merely of the wrongfulness of that act is sufficient and coupled with the fact that it is contrary to law, it renders the accused liable.

With respect to section 84, two questions have to be asked:

- a) The accused did not know, on account of the disease of his mind, the nature and quality of his act.
 - b) Even if he knew the nature and quality of the act, he did not know because of the unsoundness of mind that it was wrong or contrary to law.
- ii) **Jai Lal vs. Delhi Administration (AIR 1969 SC 15)** – The Supreme Court has categorically stated that to establish that the acts done are not offences under Section 84, it must be proved clearly that at the time of the commission of the act the appellant by reason of unsoundness of mind was incapable of knowing that the acts were either “*morally wrong*” or “*contrary to law*”.

ACTS DONE WITH CONSENT (SECTIONS 87-92)

The principle

The rules of liability in cases of acts done with consent are primarily based on ***volenti non-fit injuria***. In offences against state or the public in general, the question of consent is immaterial. The offences against property (alienable rights) consent are a valid defence in both civil and criminal law. In offences against body, the right is alienable only to a certain extent but where it comes to a question of death or grievous hurt these are inalienable rights as everyone is under a duty to live for the state in full capacity. In these two cases, consent is not a defence.

Sections 87, 88 and 89 of the IPC deal with the law of consent in criminal cases. These sections apparently talk of bodily harm and not of property as the very idea of a loss or injury to property negates the element of consent. ‘*Dishonestly*’ means a ‘*wrongful loss*’ or ‘*wrongful gain*’ and fraudulently also involves an element of deception. Thus in both these cases consent should not be there. Notably all the offences against property involve either of the two elements.

Meaning of ‘Consent’

‘*Consent*’ has not been defined in the IPC. However, it can be said to be a positive act of assent of the mind and is different from a mere submission, want of dissent or acquiescence. **Coleridge, J.** in **R vs. Day** observed that the mere submission of a child in the hands of a strong man is not consent. In **R vs. Nichol**, it has been held that mere approbation does not amount to consent. If a master takes indecent liberties with a female scholar, without her consent though she does not resist, he is guilty of assault.

Section 90, IPC defines legal consent in a negative way: “Consent is not a consent in the legal sense if given under fear of injury or misconception of fact plus the person acting knows or has reason to believe the same, or given by a person of unsound or intoxicated mind incapable of understanding the nature and consequences, or by a person <12 years of age.”

Consent in criminal law is different from consent in civil law. Indian Contract Act, free consent requires the absence of coercion, undue influence, fraud, misrepresentation, etc. In criminal cases, consent has a restricted meaning. Fraud, undue influence etc. generally do not vitiate consent in criminal cases. In rape cases, fraud does not vitiate consent. But in cases of misconception, misrepresentation, misconception of fact vitiates consent e.g.

- a) A → quack → represents as a doctor → consent of B → operates for piles with single knife → consent vitiated.
- b) Snake charmer → people bitten by snakes → misbelief caused by the snake charmer → consent vitiated.

SECTION 87

The section gives immunity to a person who causes harm to another (>18 years) who takes the risk of it or gives consent to it, provided that the act is not known to be likely to cause death or grievous hurt neither is intended to cause the same.

Illustration

Fencing with each other for amusement.

In **Tunda vs. R (1950 All)**, two persons agreed to wrestle with each other and an accidental injury was caused to one. The court held that when they agreed to wrestle these was implied consent on their part to suffer consequential injuries

Held: Not liable (in the absence of foul play on his part).

SECTION 88

Extends the operation of consent to all cases except intentional causing of death provided the act is done for the benefit of the person who has given the consent. Good faith is a must plus consent can be express or implied.

Illustrations

- i) A → surgeon → operates B knows → likely to cause death/but in good faith to cure B.
- ii) Headmaster inflicting moderate and reasonable corporal punishment on student → Not liable as it is for the benefit of the student.

Section 88 vs. Section 87

- i) Section 88 – for the benefit of the person.
- ii) Section 88 – only intentional causing of death excluded/whereas in Section 87 – likelihood of death/grievous hurt also excluded.
- iii) Section 87 – grievous hurt also included.

SECTION 89

Extends the operation of Section 88 to minors below 12 years of age and persons of unsound mind when consent is given by the guardian. Good faith plus benefit of person plus consent either express or implied plus intention or likelihood.

Restrictions:

- a) Does not extend to the intentional causing of death or attempting to cause death.
- b) Only for the purpose of preventing death/grievous hurt/causing grievous disease/infinity – risk of death allowed.
- c) Above with respect to causing grievous hurt.
- d) Not to the cases of abetment of an offence, to the committing of which offence it would not extend.

Illustration

Surgeon – cuts a child for stone – no intention to cause death plus good faith plus guardian's consent. → Not liable.

With respect to school punishments, it was held in **M. Natesan vs. State of Madras (AIR 1962 Madras 216)** that "where a teacher exceeds the authority and inflicts such harm to the pupil as may be considered to be unreasonable and immoderate, he could naturally lose the benefit of exceptions. Whether he is entitled to the benefit of the exceptions or not in a given case will depend upon the particular nature, extent and severity of the punishment inflicted."

SECTION 91

Lays down that the exceptions in Sections 87, 88 and 89 do not extend to acts which are offences independent of any harm which they may cause or be intended to cause or be known to be likely to cause to the person giving the consent or on whose behalf the consent is given.

Illustration

Miscarriage of a child *en ventre sa mere* is an offence independent of the harm caused to the woman → woman or guardian's consent does not exempt liability except in good faith for saving the woman's life.

Incest in India – with consent – no offence but in England – an offence even if consent is there.

CASES OF IMPLIED OR INFERRED CONSENT: SECTION 92

Where harm is caused in good faith to a person without his consent where circumstances are such as to render the person incapable (or it is impossible for him) to give consent. Restrictions

same as Section 89 except that it extends to voluntary causing of simple hurt also (except to prevent death or hurt).

Illustrations

- i) A – falls from horse – surgeon – need to be trepanned - does so without consent. → Liable.
- ii) Z – carried off by tiger – A fires in good faith.
- iii) Surgeon – child – accident.
- iv) House on fire – A drops a child on a blanket held by men.

Situation: A surrounded by robbers who make a criminal assault on his daughter. A kills her to save her from disgrace → liable. (Exception 1 to Section 92)

The four exceptions to Section 92 demand that the interference shall be to 'save life and not to imperil it'. Explanation to Section 92 provides that mere pecuniary benefit is not benefit for the purposes of Sections 88, 89 and 92.

In **Shimbu Narain vs. King Emperor (AIR 1923 All 546)**, the accused kept his insane brother (who had fits of insanity with lucid intervals) tied in chain for 10 days instead of taking him to a doctor. He was held liable and his plea of benefit to his brother was rejected.

COMMUNICATION IN GOOD FAITH: SECTION 93

"No communication made in good faith is an offence by reason of any harm to the person to whom it is made, if it is made for the benefit of the person."

Illustration

A surgeon, in good faith tells his patient that he is going to live no more. The patient dies of shock → surgeon not liable if good faith plus benefit (e.g. opportunity to execute his will) is there. Even if he knew that the communication is likely to cause death.

In **X V. Hospital Z**, in a trend setting judgment the supreme court held that the respondent Hospital Z and doctors were protected under section 93 IPC for disclosing to the prospective bride of the fact that the appellant was found to be suffering from "AIDS" (HIV+) that led to the cancellation of the marriage. A disclosure is neither violative of rule of confidentiality nor a patient's right of privacy.

SECTION 94

This section exempts a man from criminal liability in respect of an act committed by him under compulsion or duress. But the defence is subject to two exceptions namely (i) murder and (ii) waging war against the Government of India which is punishable with death where compulsion can not be pleaded as a defence to a criminal charge. The exemptions are based on the ground that no one has a right to take another's life in order to save his own.

It is not every threat of injury that will excuse a man from punishment. The threat to attract the benefit under this section must be of instant death to the person compelled to commit the offence and that the person so threatened should not have placed himself in that situation of his own accord. For example (i) a man on the point of starvation can not plead his hunger as an excuse for committing theft. (ii) A smith seized by a gang of dacoits and forced by threat of instant death to take his tools and to open the door of a house for the thieves to enter and plunder it is entitled to the benefit of this section (explanation 2).

ACTS CAUSING SLIGHT HARM: SECTION 95

Based on the doctrine of *de minimus non curat lex* (no reasonable man complains of mere trifles), Section 95, IPC says: "Nothing is an offence by reason that it causes, or that it is intended to cause, or that it is known to be likely to cause any harm, if that harm is so slight that no person of ordinary sense and temper would complain of such harm."

As has been declared by the Supreme Court in **Mrs. Veeda Meneyes vs. Yusuf Khan (AIR 1966 SC 1773)**, "Section 95 is intended to prevent penalisation of negligible wrongs or of offences of negligible character." The same view was reiterated by the Supreme Court in **Bindeshwari Prasad Singh vs. Kali Singh (AIR 1977 SC 2432)**.

In **Philip Rangel vs. Emperor (AIR 1932 Bom 193)**, the accused uttered abuses to the people present in a meeting.

Held: Not liable under Section 504 (for intentional insult) as protected by Section 95.

In *Sadananda Fash vs. Shibakali Hayra (AIR 1954 Cal 288)*, the accused had told the complainant that he was telling a lie.

Held: Not liable under Section 504.

In *Mrs. Veeda Meneyes Case (1966 SC)*, the Supreme Court held that the 'harm' cannot be judged solely on the basis of physical or other injury the act causes. The relation of the two parties with each other is important. A soldier assaulting his colonel is a heinous crime and it cannot be judged merely on the basis of the physical injury. In that case, in a heated quarrel, the respondent threw a file of papers which caused a mere scratch to the appellant.

Held: Not liable.

However, in *Kishore Mohan vs. State of Bihar (1976)* wherein the accused had taken a photograph of the complainant with a garland of shoes around his neck. But the photograph was neither published nor shown to him. Nevertheless the court held that the complainant has been subjected to indignity and the exception of Section 95 was not available.

RIGHT OF PRIVATE DEFENCE: SECTION 96

Nothing is an offence which is done in the exercise of the right of private defence. Mere use of abusive language does not give rise to private defence. Giving a general view of all the provisions of these rights in *Munney Khan vs. State*, the Supreme Court observed, "The right of private defence is codified in Section 96 to 106 IPC, which have all to be read together in order to give a proper grasp of the scope and limitations of this right".

Availability and non-availability of private defence – factors to be kept in view

In order to find whether right of private defence is available or not, the entire incident must be examined with care and viewed in its proper setting. The injuries received by the accused, the imminence of threat to his safety, the injuries caused by the accused and the circumstances whether the accused had time to have recourse to public authorities are all relevant factors to be considered on a plea of private defence.

The following limitations have been imposed on the right of private defence of person or property.

- a) That if there is sufficient time for recourse to public authorities, the right is not available.
- b) That more harm than that is necessary should not be caused.
- c) That there must be a reasonable apprehension of death or grievous hurt or hurt to the person or damage to the property concerned.

Duty to retreat, if any

In determining what reasonable force was, the common law courts insisted if the accused could prevent the commission of the crime against him by retreating. On this rule of retreat, one would like to ask if a person is attacked by an armed burglar in his own room, is he expected to run away leaving the burglar to act as he liked.

In *Jai Dev's Case*, *Gajendragadkar J.* specifically held that in India there is no rule which expects a man first to run away or atleast try to do so before he can exercise his right of private defence. Rather he has every right to stand his own ground and defend himself if there is no time to have recourse to official help. Law does not expect a citizen to be a rank coward or leave his own house at the mercy of the burglar.

No private defence in a free fight

Where two parties come armed with determination to measure their strength and to settle a dispute by force and in the ensuing fight, both sides receive injuries, no question of right of private defence arises. In such a case of free fight, both parties are aggressors and none of them can claim right of private defence.

Injury on accused – if makes out private defence

Non-explanation of injuries on the person of the accused is a factor of great importance and this fact may induce the court in judging the veracity of the prosecution witnesses with considerable

care. In a given case, it may strengthen the plea of private defence set up by the accused or may create genuine doubt regarding the prosecution case. At the same time, it cannot be laid down as an invariable proposition of law that as soon as it is found that the accused had received injuries in the same transaction in which, the complainant party was assaulted, the plea of private defence would stand *prima facie* established and burden would shift on to the prosecution to prove that those injuries were caused to the accused in self-defence by the complainant party.

RIGHT OF PRIVATE DEFENCE OF THE BODY AND OF PROPERTY: SECTION 97

Every person has a right, subject to the restrictions contained in Section 99 to defend first his own body, and the body of any other person, against any offence affecting the human body. Secondly, the property, whether movable or immovable of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery mischief, or criminal trespass, or which is an attempt to commit theft, robbery, mischief or criminal trespass.

It broadly specifies the offences against which the right of private defence can be exercised. Section 99 provides the limitations. Aggressor has no private defence – right of private defence arises to those who in the face of imminent peril act in good faith and in no case can this right be conceded to a person who stage manages a situation wherein the right can be used as a shield to justify an act of aggression.

If a person goes with a gun to kill another, the intended victim is entitled to act in self defence and if he so acts, there is no right in the former to kill him in order to prevent him from acting in self-defence. In other words, there is no private defence against private defence.

Right of private defence to be pleaded

The accused must plead the right of private defence. The Supreme Court – "It is well settled that even if an accused does not plead self-defence it is open to the court to consider such a plea if the same arises from materials on record. A mere bald assertion without any evidence of facts and circumstances does not make out a case of private defence."

Defence of property

Every person in possession of land is entitled to defend his possession against anyone who tries to eject him by force or to steal from it, or to do an act, which will have the effect of causing injury to it, e.g. cutting of a tree.

Exceeding private defence

The father of the accused was attacked by or with a *lathi* and suffered a simple injury on his head, whereupon the accused in order to protect his father administered a fatal blow on the chest of the deceased with a ballam. It was held that though the accused had the right of private defence, he had obviously exceeded it and was therefore liable under Section 304 Part I IPC.

A somewhat contrary view has however been taken by the Supreme Court in a later case where too, the accused had exercised his right of private defence against a *lathi* blow on the head. Thus, in **Deo Narain's Case**, it has been held that the accused was justified in using his spear though the other party had aimed only a *lathi* blow on the head, which being a vulnerable part even a *lathi* blow could prove dangerous. It thus appears that the part of the body against which the attack is directed is more important than the weapon used.

RIGHT OF PRIVATE DEFENCE AGAINST THE ACT OF A PERSON OF UNSOUND MIND ETC.: SECTION 98

When an act, which would otherwise be a certain offence, is not that offence, by reason of the youth, the want of maturity of understanding, the unsoundness of mind or the intoxication of the person during that act, or by reason of any misconception on the part of that person, every person has the same right of private defence against that act which he would have if the act were that offence.

The right of private defence would have lost most of its value if it was not allowed to be exercised against persons, suffering from the incapacities mentioned in this section.

ACTS AGAINST WHICH THERE IS NO RIGHT OF PRIVATE DEFENCE: SECTION 99

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under the colour of his office, though that direction may not be strictly justifiable by law.

There is no right of private defence in cases in which there is time to have recourse to public authorities for protection.

Extent to which the right may be exercised

The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1: A person is not deprived of the right of private defence against an act done, or attempted to be done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 2: A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe that the person doing the act is acting by such direction, or unless such person states that authority under which he acts, or if he has authority in writing, unless he produces such authority, if demanded.

First Clause: This clause applies to those cases in which the public servant is acting in good faith under colour of his office, though the particular act being done by him may not be justifiable by law. The clause applies to a case where an official has done wrongly, what he might have done rightly, but not to cases where the act could not have been done rightly at all by the official concerned.

The clause applies where a public servant acts irregularly in the exercise of his powers and not where he acts outside the scope of his powers. If the act of a public servant is ultra vires the right of private defence may be exercised against him.

Second Clause: The first clause speaks of acts done by a public servant, this clause, of acts done under the direction of a public servant.

Third Clause: The third clause of this section must be read with the first clause of Section 105. It places an important restriction on the exercise of the right of private defence. The right of private defence being granted for defence only, it must not and cannot legally be exercised when there is time to have recourse to the protection of public authorities. But the law does not intend that a person must run away to have recourse to the protection of public authorities when he is attacked instead of defending himself.

A person in possession cannot be expected to leave his property at the mercy of armed trespassers where there is imminent danger to the property and the person in possession apprehends substantial damage thereto, he is entitled to raise his own arms in defence and retaliate to keep away the attack without applying for state aid.

The important considerations which always arise in order to determine whether the action of the accused is caused by the right of private defence are, firstly, what is the nature of the apprehended danger and secondly, whether there was time to have recourse to the police authorities, always remembering that when both the parties are determined to fight and go up to the land fully armed in full expectation of an armed conflict in order to have a trial of strength the right of private defence disappears.

Fourth Clause: The right of private defence is restricted to not inflicting more harm than it is necessary to inflict for the purpose of defence. The amount of force necessarily depends on the circumstances of the case; and there is no protection if the harm is caused by excessive violence quite unnecessary to the case.

The measure of self-defence must always be proportionate to the quantum of force used by the attacker and which is necessary to repel.

The means which a threatened person adopts or the force which he uses should not be weighed in golden scales. Though a person exercising his right of private defence is not expected to modulate his defence step by step or tier by tier, yet it is necessary to see that it is not totally disproportionate to the injury sought to be averted e.g. to ward off a slap one cannot fire a gun.

Where at the same time it should be remembered that if a man has real justification to exercise his right of private defence, he cannot be held liable if he slightly exceeds his right of private defence e.g. where face to face with a murderous attack he fires two shots in quick succession, for these things cannot be weighed in golden scales.

The right of private defence should not be allowed to be pleaded or availed of as pretext for a vindictive, aggressive or retributive purpose.

All these authorities lay down the rule that even if the accused were to cause more harm than is absolutely necessary in repelling the attack, it cannot be said that he exceeded the right given to him by the law. The boundary between attacks which may legally be repelled by causing death and those which may not, is to some extent arbitrary and may very well be outside the knowledge of the offender.

Where the accused caused death in order to repel an attack by a party armed with lethal weapons and which had already caused injuries to the accused it was held that the accused did not exceed his right as it was not possible for him to have weighed in golden scales in the heat of the moment the number of injuries required to overcome the attack.

WHEN THE RIGHT OF PRIVATE DEFENCE OF THE BODY EXTENDS TO CAUSING DEATH: SECTION 100

The right of private defence of the body extends, under the restrictions mentioned in Section 99, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right be of any of the descriptions hereinafter enumerated, namely:

First: Such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault.

Secondly: Such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault.

Thirdly: An assault with the intention of committing rape.

Fourthly: An assault with the intention of gratifying unnatural lust.

Fifthly: An assault with the intention of kidnapping or abducting.

Sixthly: An assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

— The law authorises a man who is under a reasonable apprehension that his life is in danger or his body in risk of grievous hurt to inflict death upon his assailant either when the assault is attempted or directly threatened; but the apprehension must be reasonable and the violence inflicted must not be greater than is reasonably necessary for the purpose of self-defence. It is the reasonable apprehension of death or grievous hurt that gives rise to the right of private defence under clauses (1) and (2) of Section 100 IPC and it has got nothing to do with the actual injury that the person exercising the right of private defence has suffered; which may or may not be grievous where the accused fails to make out a case of reasonable apprehension, he cannot claim the right of private defence.

The Supreme Court has emphasised that the mere fact of the accused sustaining some injuries in the course of the same transaction does not make it out conclusively that the accused had the occasion to cause death in private defence.

Abducting

◆ All that the clause requires is that there should be assault which is an offence against the human body and that assault should be with the intention of abducting, and whenever these elements are present the clause will be applicable.

Thus, a woman could not be taken away by force even by her own husband from a paramour's house and if in these circumstances the paramour and his brother killed the husband to prevent her abduction by the husband, they would be protected by the sub-clause (5) of Section 100 IPC. Here, the law seems to be contrary to our social conscience, but this interpretation is perfectly in accord

with the language of Section 100 IPC and the decision of the Supreme Court in **Vishwanath's Case** where too, the husband was put to death by a clean stab by his brother-in-law as he was trying to take away his wife by force from his father-in-law's house and in the process had merely dragged his unwilling wife to some distance.

WHEN SUCH RIGHT EXTENDS TO CAUSING ANY HARM OTHER THAN DEATH: SECTION 101

If the offence be not of any of the descriptions enumerated in the last preceding section, the right of private defence of the body does not extend to the voluntary causing of death to the assailant, but does extend, under the restrictions mentioned in Section 99, to the voluntary causing to the assailant of any harm other than death.

Any harm short of death can be inflicted in exercising the right of private defence in any case which does not fall within the provisions of Section 100.

COMMENCEMENT AND CONTINUANCE OF THE RIGHT OF PRIVATE DEFENCE OF THE BODY: SECTION 102

The right of private defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence though the offence may not have been committed, and it continues as long as such apprehension of danger to the body continues.

This section indicates when the right of private defence of the body commences and till what time it continues. It commands and continues as long as the danger to body lasts. The extent to which the exercise of the right will be justified will depend not on the actual danger but on whether there was reasonable apprehension of such danger. There must be an attempt or threat and consequent thereon an apprehension of danger, but it is not a mere idle threat, or every apprehension of a rash or timid mind, that will justify the exercise of the right. Reasonable ground for the apprehension is requisite. Present and imminent danger seems to be meant. For exercising right of private defence it is not necessary that the party exercising the right must have suffered some injury at the hands of his attackers. The right arises as soon as a reasonable apprehension arises and continues till the threat continues. The right of defence ends with the necessity for it.

WHEN THE RIGHT OF PRIVATE DEFENCE OF PROPERTY EXTENDS TO CAUSING DEATH: SECTION 103

The right of private defence of property extends under the restriction mentioned in Section 99 to the voluntary causing of death or of any other harm to the wrong doer if the offence, the committing of which, or the attempting to commit which, occasions the exercise of the right, be an offence of any of the description hereinafter enumerated namely –

- a) Robbery.
- b) House-breaking by night.
- c) Mischief by fire committed on any building, tent or vessel, which building, tent or vessel is used as a human dwelling, or as a place for the custody of property.
- d) Theft, mischief, or house-trespass, under such circumstances as may reasonably cause apprehension that death or grievous hurt will be the consequence, if such right of private defence is not exercised.

Section 100 enumerates the cases in which the right of private defence of the body extends to the causing of death; this section enumerates the cases in which it extends to the causing of death in defence of property.

A person employed to guard the property of his employer is protected by Sections 97, 99, 103 and 105 if he causes death in safeguarding his employer's property when there is reason to apprehend that the person whose death has been caused was about to commit one of the offences mentioned in this section or to attempt to commit one of those offences.

WHEN SUCH RIGHT EXTENDS TO CAUSING ANY HARM OTHER THAN DEATH: SECTION 104

If the offence, the committing of which or the attempting to commit which occasions the exercise of the right of private defence, be theft, mischief, or criminal trespass, not of any of the descriptions enumerated in the last preceding Section (Section 103), that right does not extend to the voluntary causing of death, but does extend, subject to the restrictions mentioned in Section 99, to the voluntary causing to the wrong doer of any harm other than death.

This section applies in cases where injury (but not death) is inflicted on the offender in the course of his committing the offences of theft, mischief, or criminal trespass, by the person exercising the right of private defence. But this section does not apply to a case where death has been caused in exercise of the supposed right of private defence.

Where the accused had killed a person by exceeding his right of private defence of property under this section, his case would fall within the ambit of Exception II of Section 300 IPC and his offence would amount to culpable homicide not amounting to murder.

COMMENCEMENT AND CONTINUANCE OF THE RIGHT OF PRIVATE DEFENCE TO PROPERTY: SECTION 105

The right of private defence of property commences when a reasonable apprehension of danger to the property commences.

The right of private defence of property against theft continues till the offender has effected his retreat with the property or either the assistance of the public authorities is obtained, or the property has been recovered.

The right of private defence of property against robbery continues as long as the offender causes or attempts to cause to any person's death or hurt or wrongful restraint, or as long as the fear of instant death or of instant hurt or of instant personal restraint continues.

The right of private defence of property against criminal trespass or mischief continues as long as the offender continues in the commission or criminal trespass or mischief.

The right of private defence of property against house-breaking by right continues as long as the house-trespass which has begun by such house-breaking continues.

First Clause: The right of private defence of property commences when a reasonable apprehension of danger to property commences. Before such apprehension commences the owner of the property is not called upon to apply for protection to the public authorities. The right commences not when the actual danger to the property commences but when there is a reasonable apprehension of danger.

Second Clause: The right of private defence of property against theft continues till (1) the offender has effected his retreat with the property or (2) the assistance of public authorities is obtained, or (3) the property has been recovered.

An offender is said to be considered as having effected his retreat when he has once got off having escaped immediate pursuit not having been made. A recapture of the plundered property, while it is in course of being carried away, is authorised, for the taking and retaking is one transaction. But when the offence has been committed and the property removed, a recapture after an interval of time by the owner or by other persons on his behalf, however justifiable, cannot be deemed an exercise of the right of defence of property. The recovery which the section contemplates seems to be a recovery either immediate or made before the offender has reached his final retreat.

Fourth Clause: In the case of criminal trespass and mischief, the right of private defence ceases to exist as soon as the commission of these offences ceases.

Fifth Clause: The right of private defence against house-breaking continues so long as the house-trespass continues, hence where a person followed a thief and killed him in the open, after the house trespass had ceased, it was held that he could not plead the right of private defence.

RIGHT OF PRIVATE DEFENCE AGAINST DEADLY ASSAULTS WHEN THERE IS RISK OF HARM TO INNOCENT PERSON: SECTION 106

If, in the exercise of the right of private defence against an assault which reasonably causes the apprehension of death, the defender be so situated that he cannot effectually exercise that right without risk of harm to an innocent person, his right of private defence extends to the running of that risk.

For instance, as given in illustration appended to the section. If A is attacked by a mob intending to murder him and he can not effectively exercise his right of private defence without firing on the mob and he can not fire without the risk of harming young children who have mingled with the mob, he commits no offence if by so firing, he injures any one of the children. A had no option under the circumstances of the case for protecting himself except to fire at the mob and so his action is justified. (*Ishak v. State of M.P.*)

JOINT LIABILITY OR GROUP LIABILITY: SECTION 34

"When a criminal act is done by several persons in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as if it were done by him alone."

The object of this section is intended to meet cases in which it may be difficult to distinguish between the acts of the individual members of a party or to prove exactly what part was taken by each of them in furtherance of the common intention of all. This reason why all are deemed guilty in such cases is that the presence of an accomplice gives encouragement, support, protection and confidence to a person engaged in the commission of an illegal act.

This section is only a rule of evidence and does not create a substantive offence. This section really means that if two or more persons intentionally do a thing jointly, it is just the same as if each of them had done it individually.

It is a well recognised principle of the canon of criminal jurisprudence that the courts cannot distinguish between co-conspirators, nor can they inquire, even if it were possible, as to what part was taken by each in the crime where parties go with or common purpose to execute a common object. Each and everyone becomes responsible for the acts of each and every other in execution and furtherance of their common purpose; as the purpose is common, so must be the responsibility. All are guilty of the principal offence, not of abetment.

In combinations of this kind a mortal stroke, though given by one of the party, is deemed in the eye of the law to have been given by every individual present and abetting.

But a party not cognizant of the intention of his companion to commit murder is not liable, though he has joined his companion to do an unlawful act. If the criminal act was a fresh and independent act springing wholly from the mind of the doer, the others are not liable merely because when it was done they were intending to be partakers with the doer in a different criminal act.

PARTICIPATION/PRESENCE

The Supreme Court had earlier held that it is the essence of the section that the person must be physically present at the actual commission of the crime. He need not be present in the actual room, he can, for instance, stand on guard by a gate outside, ready to alarm his companions about any approach of danger, or wait in a car on a nearby road to facilitate their escape, but he must be physically present at the scene of the occurrence and must actually participate in the commission of the offence in some way or the other at the time the crime is actually being committed. The leading feature of this section is the element of participation in action. The essence of liability under this section is the existence of a common intention animating the offenders and the participation in a criminal act in furtherance of the common intention.

However, the participation need not in all cases be by physical presence. In offences involving physical violence normally presence at the scene of offence may be necessary, but such is not the case in respect of other offences when the offence consists of diverse acts which may be done at different time and places. The physical presence at the scene of offence of the offender sought to be rendered liable under this section is not one of the conditions of its applicability in every case. Even in regard to an offence involving physical violence it is not necessary that every accused must take active part in the attack on the victim.

The Supreme Court has reiterated that even though the other accused persons stand acquitted and even though there is no evidence that the convicted accused caused one of the fatal injuries, he cannot escape conviction under Section 302 read with Section 34 of IPC when his participation with the other three assailants in the attack on the deceased has been established beyond all reasonable doubt. Even if injury No. 1 and 2 which are the fatal injuries had been inflicted by the accused No. 1 and not by the accused No. 2, the latter would be as much guilty of the offence of murder as the former because of the common intention forged between the law.

Mere presence of the offender at the scene of murder without any participation to facilitate the offence is not enough. By merely accompanying the accused one does not become liable for the crime committed by the accused within the meaning of Section 34 IPC.

Ingredients

Before a man can be held liable for the acts done by another, under the provisions of this section, it must be established that:

- a) There was common intention in the sense of a pre-arranged plan between the two,
- b) The person sought to be so held liable had participated in some manner in the act constituting the offence.

Unless common intention and participation are both present, this section cannot apply.

This section deals with the doing of separate acts, similar or diverse, by several persons, if all are done in furtherance of a common intention, each person is liable for the result of them all, as if he had done them himself, for that act and 'the act' in the latter part of the section must include the whole action covered by 'a criminal act' in the first part, because they refer to it. It does not refer to cases where several persons intend to do an act and some one or more of them do an entirely different act. In the latter case, Section 149 may be applicable if the no. of the persons be five or more and the other act was done in prosecution of the common object of all or was known to be likely to be caused.

The importance of the word "all" in Section 34 lies in the fact that irrespective of the number of members present at the time of the commission of the act, only those of them will be put under the cover of Section 34 who have shared the intention. *For example*, if 20 people were present but only 10 of them shared the intention, then only those 10 persons will be considered to be "all" within the meaning of Section 34. Within these 10 people, the liability will fall as if, it was done by each of them alone. This also implies that mere presence is not sufficient for the applicability of Section 34.

COMMON INTENTION

Barendra Kumar Ghase v. King Emperor:- Privy council said that even if the appellant did nothing as he stood outside the door he is liable.

Common intention implies a **pre-arranged plan** and acting in concert pursuant to the plan. It must be proved that the criminal act was done in concert pursuant to the pre-arranged plan. Common intention comes into being prior to the commission of the act in point of time, which need not be a long gap. The common intention to bring about a particular result may well develop on the spot as between a number of persons, with reference to the facts of the case and circumstances of the situation. Though common intention may develop on the street, it must, however, be antecedent in point of time to the commission of the crime showing a pre-arranged plan and prior concert.

The essence of the liability is to be found in the existence of a common intention animating the accused leading to the doing of a criminal act in furtherance of such intention.

It must be shown that the criminal act complained against was done by one of the accused persons in furtherance of the common intention of all; if this is shown, then liability for the crime may be imposed on any one of the persons in the same manner as if the act were done by him alone.

Several persons can simultaneously attack a man and each can have the intention to kill, and each can individually inflict a separate fatal blow and yet none would have the common intention required by the section because there was no prior meeting of minds to form a pre-arranged plan. In a case like that, each would be individually liable for whatever injury he caused but none could be vicariously liable/convicted for the act of any of the others, and if the prosecution cannot prove that his separate blow was the fatal one he cannot be convicted of the murder however clearly an intention to kill could be proved in his case.

Care must be taken not to confuse **same or similar intention**. The partition which divides their bounds is often very thin; nevertheless the distinction is fine and real and substantial, and if overlooked will result into miscarriage of justice. The plan need not be elaborate, nor is a long interval of time required. It could arise and be formed suddenly. But there must be a pre-arranged and premeditated concert. It is not enough to have the same intention independently of each other. The crucial circumstance is that the pre-arranged plan must precede the act constituting the offence.

Before a court can convict a person for any offence read with Section 34, it should come to a definite conclusion that the said person had a prior concert with one or more other persons, named or unnamed, for committing the said offence.

Common intention does not mean similar intention of several persons. To constitute common intention it is necessary that the intention of each of them be known to the rest of them and shared by them.

What to speak of similar intention even same intention without sharing each other's intention is not sufficient. In a case like this, each will be liable for whatever injury he caused but none could be

vicariously convicted for the act of any of the others. (**Mahboob Shah v. Emperor**)

Undoubtedly, it is a difficult thing to prove even the intention of an individual and, therefore, it is all the more difficult to show the common intention of a group of persons. However, difficult the task, the prosecution must lead evidence of facts, circumstances and conduct of the accused from which their common intention can be safely gathered.

This inference can be gathered by the manner in which the accused arrived on the scene and mounted the attack, the determination and concert with which the beating was given or the injuries caused by one in some of them, the acts done by others to assist those causing the injuries, the concerted conduct subsequent to the commission of the offence, for instance all of them left the scene of the incident together and other acts which all or some may have done would help in determining the common intention. The totality of circumstances must be taken into consideration in arriving at the conclusion whether the accused had a common intention to commit an offence of which they could be committed.

Distinction between Section 34 and Section 149 IPC

Though both sections relate to the doctrine of vicarious liability and sometimes overlap with each other, there are substantial points of difference:

- a) Section 34 does not itself create any specific offence whereas Section 149 IPC does so.
- b) Some active participation, especially in a crime involving physical violence is necessary under Section 34 but Section 149 IPC does not require it and the liability arises by reason of mere membership of the unlawful assembly with a common object and there may be no active participation at all in the preparation and commission of the crime.
- c) Section 34 speaks of common intention but Section 149 contemplates common object which is undoubtedly wider in its scope and amplitude than intention. If the offence committed by a member of an unlawful assembly in prosecution of the common object of the unlawful assembly or such as the members of that assembly knew to be likely to be committed in prosecution of the common object, all other members of the unlawful assembly would be guilty of that offence under Section 149 IPC although they may not have intended to do it or participated in the actual commission of that offence.
- d) Section 34 can be invoked even if two persons share the common intention whereas Section 149 IPC requires that there must be at least five persons who must have the same common object.

Substitution of conviction from Section 149 to Section 34

The Supreme Court has laid down the following: "It is true that there was no charge under Section 302 read with Section 34.... but the facts of the case are such that the accused could have been charged alternatively either under Section 302 read with Section 149 or under Section 302 read with Section 34 and one of the accused having been acquitted, the conviction under Section 302/149 can be substituted with one under Section 302/34, provided that it is proved that the accused had not only common object but also the common intention."

When such an act is criminal by reason of its being done with a criminal knowledge or intention section 35

Section 35 is complementary to section 34 in as much as it supplements the principle of joint liability embodied in section 34. However the two sections differ in scope under section 35 if several persons join in an act, each having a different intention or knowledge from others, the liability will be fixed only according to the intention and knowledge of individual concerned and not further.

For Example:- It is proved that only one accused i.e A intended to murder and another i.e. B wanted to plunder the crop while third C had no particular intention and merely joined the assembly to see the fun, the guilt of each will differ according to the criminal intention or knowledge of each of participants. Thus A could not be charged with robbery and the B and C for murder because the three accused did not possess a common intention. All the three acted with different intention or knowledge.

EFFECT CAUSED PARTLY BY ACT AND PARTLY BY OMISSION: SECTION 36

"Wherever the causing of a certain effect, or an attempt to cause that effect, by an act or by an omission, is an offence, it is to be understood that the causing of that effect partly by an act and partly by an omission is the same offence."

Illustration

A intentionally causes Z's death; partly by illegally omitting to give Z food, and partly by beating Z. A has committed murder.

The section follows as a corollary from Section 32. The legal consequences of an "act" and of an "omission" being the same, if an act is committed partly by an act and partly by an omission, the consequences will be the same as if the offence was committed by an "act" or by an "omission" alone. This section also does not create a substantive offence.

This section shows that when an offence is the effect partly of an act and partly of an omission, it is one offence only.

CO-OPERATION BY DOING ONE OF SEVERAL ACTS CONSTITUTING AN OFFENCE: SECTION 37

"When an offence is committed by means of several acts, whoever intentionally co-operates in the commission of that offence by doing any one of those acts, either singly or jointly with any other person, commits that offence."

Illustration

A and B, joint jailors, and as such, have the charge of Z, a prisoner, alternatively for six hours at a time. A and B, intending to cause Z's death, knowingly co-operate in causing that effect by illegally omitting, each during the time of his attendance, to furnish Z with food supplied to them for that purpose. Z dies of hunger. Both A and B are guilty of the murder of Z.

This section provides that when several acts are done so as to result together in the commission of an offence, the doing of any one of them with an intention to co-operate on the offence [which may not be the same as an intention common to all], makes the actor liable to be punished for the commission of the offence.

This section follows a corollary from Section 35. It overlaps Section 34, but applies also to acts which are separate and which are not necessarily part of series.

In Section 34, it requires a common intention for a criminal act done by several persons, in which case each actor becomes liable as if that act were done by him alone. Section 37 deals with intentional cooperation in an offence committed by means of several acts and punishes such co-operation as if it constituted the offence itself.

The words 'several acts' in this section read with Section 38 may mean 'several series of acts'.

This Section (Section 37) requires the intentional co-operation in offence which has resulted from several acts, each of which standing by itself is not the offence with which the accused is charged. Section 37, therefore, has no application to a case where the accused are charged with causing simple and grievous hurt by use of *lathis* as it cannot be said that there were several acts which resulted in the offence.

PERSONS CONCERNED IN CRIMINAL ACT MAY BE GUILTY OF DIFFERENT OFFENCES: SECTION 38

"Where several persons are engaged or concerned in the commission of a criminal act, they may be guilty of different offences by means of that act."

Illustration

A attacks Z under such circumstances of grave provocation that his killing of Z would be only culpable homicide not amounting to murder. B having ill-will towards Z and intending to kill him, and not having been subject to the provocation, assists in killing Z. Here, though A and B are both engaged in causing Z's death, B is guilty of murder, and A is guilty of only culpable homicide.

This section provides for different punishments for different offences as an alternative to one punishment for one offence, whether the person engaged or concerned in the commission of a criminal act are set in motion by one intention or by the other.

Whereas Section 34 deals with acts done with 'common intention', this section deals with acts done with different intentions.

Section 38 covers two different situations:

- i) Where several persons act together as in furtherance of a common intention, as in the illustration to the section. In such a situation, the section provides that the court may convict each person of a different offence, according as circumstances operate to create legal extenuation in individual cases.
- ii) The other situation, where there is action in common but a difference in the several intention of the participants. In that case, the section is a converse to Section 34, and each person is to be found guilty of the particular offence constituted by his individual act.

In the first case, however, the section is a supplement to Section 34, not a converse.

This section applies where a criminal act is jointly done by several persons and those persons have different intention or states or knowledge. It provides that the responsibility for the completed criminal act, may be of different grades according to the share taken by the different accused in the completion of the criminal act, and this section does not mention anything about intention, common or otherwise, or knowledge.

Unlawful Assembly – Section 149 (offence against public tranquillity)

If an offence is committed by any member of an unlawful assembly in prosecution of the common object of that assembly, or such as the members of that assembly knew to be likely to be committed in prosecution of that object, every person who, at the time of the committing of that offence, is a member of the same assembly, is guilty of that offence.

This section creates a specific and distinct offence.

Ingredients

- a) Commission of an offence by any member of an unlawful assembly.
- b) Such offence must have been committed in prosecution of the common object of the assembly, or must be such as the members of the assembly knew to be likely to be committed.

Section 34 and Section 149

~~Section 149 is wider than Section 34.~~ In it the joint liability is founded on 'common object', in Section 34 on 'common intention'. Both sections deal with liability for an offence not committed by the person charged. Section 149 creates a specific offence and deals with the punishment of that offence alone.

Section 149: It postulates an assembly of five or more persons having a common object – namely one of those named in Section 141 and then doing of acts by members of it in prosecution of that object.

There is a difference between object and intention, for though their object is common, the intentions of the several members may differ and indeed may be similar only in respect that they are all unlawful, while the element of participation in action, which is the leading feature of Section 34, is replaced in Section 149 by membership of the assembly at the time of the committing of the offence. Both sections deal with combinations of persons, who become punishable as sharers in an offence. Thus, they have a certain resemblance, and may to some extent overlap, but Section 149 cannot at any rate relegate Section 34 to the position of dealing only with joint action by the commission of identically similar criminal acts, a kind of case which is not in itself deserving of separate treatment at all. A common object is different from a common intention in that it does not require prior concert and a common meeting of minds before the attack, and an unlawful object can develop after the people get there. In a case under Section 149 there need not be a prior meeting of minds. It is enough that each has the same object in view and that their number is five or more and that they act as an assembly to achieve that object. Section 34 refers to cases in which several persons, both do an act and intend to do that act; it does not refer to cases where several persons intend to do an act and some one or more of them do an entirely different act. In the latter class of cases, Section 149 of the code may be applicable but Section 34 is not.

Once the court find that an offence has been committed by some member or members of an unlawful assembly in prosecution of the common object, then whether the principal offender has been convicted for that offence or not, upon the plain wording of this section, the other members may be constructively convicted of that offence, provided they are found to have had the necessary intention or knowledge.

Members of an unlawful assembly may have a community of object only upto a certain point, beyond which they may differ in their objects, and the knowledge possessed by each member of what is likely to be committed in prosecution of their common object will vary, not only according to the information at his command, but also according to the extent to which he shares the community of object, and as a consequence of this the effect of this section may be different on different members of the same unlawful assembly.

In prosecution of the common object

This phrase means that the offence committed was immediately connected with the common object of the unlawful assembly, of which the accused were members. The act must be one which must have been done with a view to accomplish the common object attributed to the members of the unlawful assembly where the common object is established, the unlawful assembly does not cease to be so by merely splitting itself into two groups for launching the attack.

Where the common object of the unlawful assembly was to beat the men of the opposite party and one of them thrust a spear in the abdomen of a member of the opposite party and killed him and his act was unpremeditated and not contemplated by any member of the unlawful assembly, the other members of the assembly could not be held guilty of murder.

The words "in prosecution of the common object" do not mean "during the prosecution of the common object of the assembly". It means that the offence committed was immediately connected with the common object of the assembly or the act is one which upon the evidence appears to have been done with a view to accomplish the common object attributed to the members of the assembly. The words "in prosecution of the common object" have to be strictly construed as equivalent to "in order to attain common object". There must be a nexus between the common object and the offence committed and if it is found that the same was committed to accomplish the common object, every member of the same will become liable for the same.

Even where the common object is not developed at the initial stage, it may develop on the spot, *co instanti*.

Unlawful Assembly – Section 141 (offence against the public tranquillity)

"An assembly of five or more persons is designated an 'unlawful assembly' if the common object of the persons composing that assembly is –

- a) To overcome by criminal force, or show of criminal force, the Central or any State Government or Parliament or the legislature of any State, or any public servant in the exercise of the lawful power of such public servant; or
- b) To resist the execution of any law, or of any legal process; or
- c) To commit any mischief or criminal trespass, or other offence; or
- d) By means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of matter or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or
- e) By means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

Explanation: An assembly, which was not unlawful when it assembled, may subsequently become an unlawful assembly."

The essence of an offence under this section is the combination of five or more persons, united in the purpose of committing a criminal offence, and the consensus of purpose is itself an offence distinct from the criminal offence which these persons agree and intend to commit.

Ingredients

An 'unlawful assembly' is an assembly of five or more persons if their common object is:

- a) To overawe by criminal force
 - i) The Central Government, or
 - ii) The State Government, or
 - iii) The Legislature, or
 - iv) Any public servant in the exercise of lawful power.

- b) To resist the execution of law or legal process.
- c) To commit mischief, criminal trespass, or **any other offence**.
- d) By criminal force
 - i). To take or obtain possession of any property, or
 - ii) To deprive any person of any incorporeal right, or
 - iii) To enforce any right or supposed right.
- e) By criminal force to compel any person –
 - i) To do what he is not legally bound to do, or
 - ii) To omit what he is legally entitled to do.

1. Five or more

The assembly must consist of five or more persons having one of the five, specified objects as their 'common object'. The Supreme Court has endorsed the view that the number of injuries caused and the number of persons who were inflicted with those injuries (in this case three persons were attacked and they sustained 13, 12 and 7 injuries respectively) caused gives a clue to the fact that more than three persons must necessarily have participated in the attack.

If out of an unlawful assembly consisting of seven named persons, four are acquitted, the other three cannot be convicted of rioting as members of an unlawful assembly. They may, however, be convicted of the principle offence with the aid of Section 34, IPC.

2. Common object

The essence of the offence is the common object of the persons forming the assembly whether the object is in their minds when they come together or whether it occurs to them afterwards, is not material. But it is necessary that the object should be common to the persons who compose the assembly, that is, they should all be aware of it and concur in it. Mere presence in an assembly does not make a person a member of an unlawful assembly unless it is shown that he had done something or omitted to do something which would make him a member of the unlawful assembly or unless the case falls under Section 142.

Second Clause: Under this clause, the act resisted must be a legal act.

Third Clause: It specifies only two offences – viz, mischief and criminal trespass, but the words 'or other offence' sum to denote that all offences are included though only there are enumerated in a haphazard way.

Fourth Clause: The act in this clause is made punishable owing to the injurious consequences which are likely to cause to the public peace.

Fifth Clause: This clause is very comprehensive and applies to all the rights a man can possess, whether they concern the enjoyment of property or not.

Explanation: An assembly which is lawful in its inception may become unlawful by the subsequent act of its members. It may turn unlawful all of a sudden and without previous consent among its members.

Being Member of Unlawful Assembly – Section 142 shows that it is sufficient for the offence to be proved against an individual that the individual should remain in an unlawful assembly as soon as he is aware that the assembly is unlawful or joins it knowing the purpose of the assembly. The word 'continues' in the section means physical presence on a member of the unlawful assembly, that is, to be physically present in the crowd. It does not mean that mere presence as a curious onlooker or by-stander at the scene of the unlawful assembly without sharing its common object would make a person liable under Section 142 IPC for being a member of an unlawful assembly.

For being a member of unlawful assembly it is not necessary that a person must commit some overt act towards the commission of the crime. The test is whether he knows of its common object and continues to keep its company due to his own free will.

If a person gets hurt and retires from the assembly physically, then he will be liable for only those acts which were done while he was a member of the assembly but not for acts done after he retired.

Whether the person has retired or continued as a member of an unlawful assembly depends upon two things:

- i) Physical possibility of rejoining.
- ii) Intention to rejoin.

To determine these, we will have to make three tests:

i) *Physical part*

If he is physically present being aware of the facts and common object, then it can be said that he continued in it.

ii) *No physical part*

If the person is not physically present; means due to some hurt, he is outside or somewhere near the crowd of the unlawful assembly, then we have to see "did he disavow" to join. If it is yes, then the presumption is in favour of the accused.

iii) *Totally helpless*

If the person is totally in a helpless position or unconscious, then even if he did not disavow, the presumption is in favour of the that person i.e. accused.

SOME OTHER SPECIFIC POINTS

Common Intention:

Q. No. 1: Why it is not a substantive offence?

Answer: Section 34 runs as –

"When a criminal act is done by several persons, in furtherance of the common intention of all, each of such persons is liable for that act in the same manner as it were done by him alone."

Ingredients:

- a) Two or more persons.
- b) They must have a common intention to commit an offence.
- c) Participation by all the accused in doing act or acts in furtherance of that common intention.

If we see the words used in the Section the **actus** is 'act is done' and the **mens** being 'common intention of all' and the **reus** being that it is forbidden by law. (Therefore, the 'act' has to be an offence as defined by any specific section of the IPC. (Therefore, section 34 always has to be read with some substantive offence)

So, here the focus is on liability of other people because of the common intention and not on proving the criminality of the act because it is already presumed. The words used in the Section are 'when a criminal act is done' i.e. it is already proved that the act has been done and the criminality is to be proved on the basis of some other offences created by the IPC.

On the other hand, focus of Section 34 is on constructing the liability on other persons who are having the common intention upon the liability incurred by one person which has already been proved on basis of some substantive other offence. Section 34 is a procedural provision.

Q. No. 2: What is the difference between common intention and Section 35 (same intention) similar intention?

Answer: Section 34 talks about constructive liability of the offender who has not directly produced a result but has just partaken in a conjoint action along with the prime accused with the common intention to produce that result, once the intent is common there is no question looking into individual's **mens rea** because the same **mens rea** is to be imputed on each of them and therefore their liability will be the same.

Whereas there might be a situation where several persons conjointly commit an act which is criminal in nature but their intentions are not common. Since their intention is not common each of them will be having their own intention.

The maxim '**actus non facit reum nisi mens sit rea**' requires that without a guilty mind there cannot be a guilty act and the implication is also that the act will be that much guilty as much the mind was and therefore each individual would be liable for each of their **mens rea** which constitutes their individual **Actus reus** and such a situation has been given in Section 35 e.g. –

A → | → X
 B → | → X
 C → | → X

_____ agree to go together is common intention

A → X → A kills X
 B → X
 C → X

A has gone to kill X with intention to cause death.

B has gone with knowledge to likelihood of causing death.

C had intention to cause simple hurt.

- Here they have not met (*mens rea*) due to their conjoint action death of X is caused.
 A will be liable for 302, B and C to the extent of injuries they inflicted.

Q. No. 3: Is physical presence necessary for liability under Section 34?

Answer: Physical presence is not important, it is a mere participation that is required because the word used in Section 34 'is done' and it means and implies the production of that particular act by whatever means e.g. 'A' in Mumbai agrees with B and C who are in Delhi to kill D. D has very tight security at his place. In the front room a telephone is kept and the walls of the room are of glass. A asks B to go to the opposite building of D's house with a gun and A will call from Mumbai to D, as soon he comes to pick the phone B should shoot and C was supposed to keep the car start for absconding. Here for murder of D, B is liable under 302 and rest A and C are liable for 302 read with 34.

Case

Tukaram Ganpat Case (copper wire stolen → another accused was waiting near the weighing machine. Held: liable). (See any standard text book for the case)

Q. No. 4: What if all co-accused are acquitted?

Answer: If other co-accused have been acquitted on merits then a single accused cannot be held under a substantive offence read with Section 34 but if the other co-accused are absconding then a single person can be held liable for any substantive offence read with Section 34.

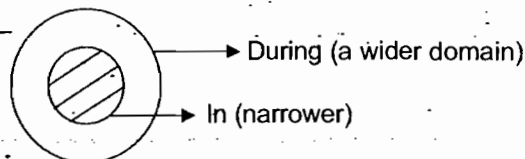
Q. No. 5: Interpretation of words: 'in furtherance of'.

Answer: The word common intention used in Section 34 is not to be seen as referring to the criminal act also used in Section 34. The object of common intention is the final desired consequence and in order to attain that result there will be several other acts which are essential. The liability read with Section 34 will arise with respect to –

- Commission of desired consequence.
- With respect to all other acts which were committed in order to attain or further the desired result provided those acts were criminal in nature.

The test has to be at three levels –

- What was desired consequence of common intention?
- Could the act in question be seen to be an act in furtherance of the common intention?
- It is not during but in furtherance of –



Whether the principle of transfer of malice is applicable in Section 34:

Yes. The liability under Section 34 lies in the fact that when several persons, in furtherance of common intention of all, commit a criminal act, each of such persons is liable for that act, as if he has alone done it.

Here, the criminality lies in the sharing of the intention and committing an act in furtherance of that intention. So, whenever, one of such persons, has done different act thinking that he is doing the intended act or by some supervening event. Some other result is caused, the prime offender will be liable for the result, by the application of the transfer of malice principle. As, he caused that result, in furtherance of the shared intention, his result is also shared between all. Thus, all will be liable. For example, if A, B, C and D had a common intention to kill X and executed that intention. D stabbed P with a knife, thinking that he is X and caused P's death. D will be liable for punishment under Section 302 read with Section 301. A, B and C will all be liable for punishment under Section 302 read with Section 301 read with Section 34.

- Every common intention will be a common object but every common object is not a common intention.
- If a totally different act is committed all will not be liable for that act e.g. D, B, C went to kill A and after killing A, B committed a theft. All will not be liable for that theft.
- If there is a mistake of fact committed by one of the co-accused in furtherance of the common intention, all will be liable.

RIOTING

COGNIZABLE, BAILABLE, ANY MAGISTRATE: SECTION 146

A riot is an unlawful assembly in a particular state of activity, accompanied by the use of force or violence. It is only the use of force or violence that distinguishes rioting from unlawful assembly.

Ingredients:

- a) That the accused persons, being five or more in number formed an unlawful assembly.
- b) They were animated by a common object.
- c) That force or violence was used by the unlawful assembly or any members of it in prosecution of the common object.
 - The word violence is not restricted to force used against persons only, but extends also to force against inanimate objects. It is not necessary that the force or violence should be directed towards a particular person or particular property. Even the slightest use of force is constitutes to frame the offence under rioting. To constituting rioting there should be actual use of force. The offence of rioting is independent of the effect of force. *For example*, when a member of an unlawful assembly gives a blow to a person or throws a stone on a cow, he is said to use the force even the harm caused is a slight one. Even, the inducement to move is also a force. If a person by his act makes an animals to move or if he stops the bus, he is said to use force and such case of unlawful assembly comes under this section.
 - Resistance to the execution of an illegal warrant within reasonable bounds does not amount to rioting. *For example*, if a municipal commissioner with an illegal warrant comes to demolish the building, then, the resistance to such a demolition will not amount to rioting.
 - In a free fight there cannot be any formation of an unlawful assembly and common intention. Each individual will be responsible for his individual acts. Because, freefight is without premeditation.
 - Section 149 is broadly presented (likelihood) whereas Section 146 is more strict and narrow (only in prosecution of common object).
 - For rioting, the punishment is 2 years in cases where it cannot be ascertained about the quantum of force used by any individual but under Section 149 with any substantive offence punishment can be more.
 - The force or violence must be used in prosecution of the common object of the unlawful assembly. That means the force or violence is to be used in order to achieve the purpose or common object of any member of the unlawful assembly uses any force, which unknown to the members of unlawful assembly, then that person himself will be liable for that force and other members are not held liable for his act.

SECTION 148

Whoever is guilty of rioting, armed with deadly weapons or anything which is used as a weapon of offence is likely to cause death shall be punished with an imprisonment which may extend to 3 years or fine or with both. This is a cognizable offence and bailable and triable by Magistrate of 1st class.

This is an aggravated form of offence compared to rioting. Under this section the person who is armed even though a member of person, is punishable alone and for his having armed does not make other persons liable jointly. The punishment for this offence is 3 years. The weapon used or armed must be of such a nature that if it is used it is capable of causing death.

AFFRAY :

The word 'affray' is derived from the French word "affraies" to terrify and in a legal sense it is taken for a public offence to the terror of the people.

Ingredients:

- a) Two or more persons must fight.

b) Fight must be in a public place.

c) They must disturb the public place.

- Public place is a place where the public go, no matter whether they have a right to go or not.
- E.g. an omnibus, a railway station, a railway platform, a public urinal and a goods yard of a railway station are public places.
- A private chabutra adjoining a public thoroughfare, a railway station and platform at a time when no train is due, except a goods train are not public places.
- There must be clear evidence of fighting in a public place and mere words do not constitute fighting for less any assault or breach of the peace. And if one person uses force and other person if he remains passive, in such a case there is no fighting and hence no affray.
- In India for affray both parties should be fighting and both are held liable but in England only one party can be held liable.
- Even a single person in a public place constitute public. When two persons were fighting in a public and a third person defends himself, even in such cases the offence of affray is committed.

Affray and Riot:

i) Affray cannot be committed in a private place but a riot can be.

ii) An affray can be committed by two or more persons whereas a riot by five or more persons.

Affray and Assault:

i) Affray can be committed only at public place whereas assault can be committed anywhere.

ii) Affray is regarded as an offence against the public peace, whereas an assault is an offence against the person of an individual.

ABETMENT

Need for creating Abetment as an Offence

In English Law, there is a distinction between principals and accessories. The former take part in the actual commission of crime, while the latter assist offenders in shielding or protecting them from the consequences ensuing from such acts.

Though the Indian Penal Code statutorily does not make distinction between "*principals*" and "*accessories*", such recognition is clear if one reads sections 34 to 38 and 107 to 120.

Chapter V covers the cases of co-agency of less direct and immediate kind. Here, a person instigates, engages or aids another in commission of a crime.

It has been often said that many crimes would be impossible without co-operation of others. Indeed, it is not possible in many cases, to commit crimes without accomplices. The offender does not feel the same confidence as and when he has friends to consult, advice and assertion in his nefarious plan. As the rich man requires a sentinel to guard his riches, so does a thief in his plans to rob them. "The more there preparatory acts are stopped, the greater the chance of preventing the execution of the principal crime." [Jeremy Bentham's Works]

Hence, abetment has been made separate and distinct offence, provided the act abetted is an offence.

The creation of the offence of abetment also acts as a deterrent effect in stopping the abettor from repeating the same act of abetment in future.

Object of offence of Abetment in IPC or why abetment is created as a specific offence

Liability under this chapter for abetment is based on the principle that many crimes would be impossible but for the support and encouragement received from others who though not actively co-operating in the crime still prepare the ground and facilitate its commission. As such the code — — — penalizes all those who may have lent their support and assistance in one form or the other to the commission of crime.

When an offence is committed by several persons, each person may contribute in a manner and degree different from others in doing a committing that offence. So, it is necessary to know the nature and degree of the act of each person to impute criminal liability i.e. for the purpose of punishment.

Since the offence of abetment presupposes the presence of a third person in between the object of the offence and the offender i.e. abettor, it is difficult to know the degree of the offence committed by the abettor. It is normally difficult to prove the direct liability or the intention of the abettor. For example, if X goes and kills Y, it is easy to infer the intention of X to kill Y. But, if X goes to Y and tell him or instigates him to kill Z, it is difficult to infer the intention of both X and Y and to clearly demarcate the degree of criminal intention to commit the offence. Here, it is the covert act of the abettor that is to be inferred.

As it is actually the abettor who was behind the commission of the offence, the punishment should be same as if he himself had committed the offence.

As a result, the offence of abetment was created. In this offence, it is also the intention of law to move a step further and stop the commission of the offence, before it is actually committed.

ABETMENT AS DEFINED UNDER IPC

ABETMENT OF A THING: SECTION 107

"A person abets the doing of a thing who—

- a) Instigates any person to do that thing, or
- b) Engages with one or more other persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing, or
- c) Intentionally aids, by any act or illegal omission, the doing of that thing.

Explanation 1: A person who, by wilful misrepresentation or by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure, a thing to be done, is said to instigate the doing of that thing.

Illustration

A, a public officer, is authorised by a warrant, from a Courts of Justice to apprehend Z. B knowing that facts and also that C is not, Z, wilfully represents to A that C is Z, and thereby, intentionally causes A to apprehend C. Here, B abets by instigation the apprehension of C.

Explanation 2: Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act."

Abetment in General

When an offence is committed and several persons take part in the commission of it, each person may contribute in a manner and degree different from the others to the doing of the criminal act.

The act may be done by the hands of one person while another is present or is close at hand ready to afford help; or the actual doer may be a guilty agent acting under the orders of an absent person, and besides these participators, there may be other persons who contribute indirectly to the commission of the offence by advice, suggestion, conspiracy or aid.

Abetment under the Penal Code, involves the active complicity on the part of the abettor, at a point of time prior to the actual commission of the offence; and it is the essence of the crime of abetment that the abettor should substantially assist the principal culprit towards the commission of the offence. Here, the abettor gets or procures the acts by means of guilty agents. The agent being urged forward by a person who will not himself act, but who procures or instigates another to put in execution his criminal intention.

Some Cases:

1. *Jamuna Singh vs. State of Bihar (AIR 1967 SC 553):*

In this case, it was held that, it is not necessary for the offence of abetment that the act abetted must be committed. It is only in the case of a person abetting an offence by intentionally aiding another to commit that offence that the charge of abetment against him would be expected to fail, when the person alleged to have committed the offence is acquitted of that offence.

It was also held that, it was not desirable to hold that an abettor cannot be punished if the person actually committing the offence is acquitted. The court said that the abettor's guilt depends upon the nature of the offence abetted and the manner of abetment and not upon the commission of the abetted offences.

The court clearly pointed out that the offence of abetment is complete when the alleged abettor has instigated another or engaged with another in a conspiracy to commit the offence.

2. *Barendra Kumar Ghosh (AIR 1925 PC 1) and Trilok Chand Jain (AIR 1977 SC 666):*

In these cases, it was held that, abetment is a separate and distinct offence provided the thing abetted is an offence. Further, held that:

Abetment does not in itself involve the actual commission of the crime abetted, it is a crime apart.

3. *Faguia Kanta Nath (AIR 1959 SC 673) and Sri Ram (AIR 1975 SC 175):*

- a) Mere negligence does not amount to abetment.
- b) Concurrence in criminal acts without any participation, will not amount to abetment.

[Note: The Supreme Court has reiterated that before anybody can be punished for abetment of suicide; it must be proved that the death in question was a suicidal death.]

Ingredients:

Abetment is constituted by –

1. Instigating a person to commit an offence, or
2. Engaging in a conspiracy to commit it, or
3. Intentionally aiding a person to commit it.

For the purposes of the first two classes of this section (107), it is immaterial whether the person instigated commits the offence or not, or the persons conspiring together actually carry out the object of the conspiracy or not.

1. Abetment by Instigation – First Clause

A person is said to 'instigate' another to an act, when he actively suggests or stimulates him to the act by any means of language, direct or indirect, whether it takes the form of express solicitation, or of hints, insinuation, or encouragement.

The word '*instigate*' means to goad or urge forward or to provoke, 'incite,' urge or encourage to do an act.

Actus reus and mens rea in the offence of abetment by instigation

Section 107, clause (1) says "A person abets the doing of a thing who instigates any person to do that thing."

First, we may analyse the word any person, before entering into *Actus reus* and *mens rea*.

'Any person'

The section clearly says that instigation may be to any person. So, it may be to an unknown person. What is important is the act of instigation and not the object of instigation.

As to Actus reus

Actus reus is defined as 'the result of human conduct, which result is forbidden by law'.

The word "instigates" is the *actus* and the words 'to do a thing' are the *mens*. So, the result of that *actus*, i.e. human conduct is the 'communication of the instigation' and it is this communication that is prohibited by law.

For example, if X writes a letter to instigate Y to commit an act, then, writing of letter is one human conduct and the posting of that letter is another human conduct. The result of these conducts is the reaching of that letter to Y and obviously communicating the thing which he wanted.

So, it is this reaching or communication of letter to Y that is the result of his conduct that is prohibited by law. The law does not prohibit the writing or throwing the letter.

It is also important to observe that liability of the abettor i.e. in this case instigator is dependent upon the act of instigating and not upon the result or effect of that instigation. As the law forbids the "communication" itself, we have to see the conduct of the abettor upto the act of communication and not beyond that, to impute his liability.

It becomes important to see the effect of communication, only in respect of imputing liability of the person abetted.

For example, if X write a letter to Y, to kill Z and if it reaches his neighbour A and he instigated by that kills Z.

If the same letter reaches Y and he instead of killing Z kills P then.

In both cases, X will be liable for abetment. Because, *mens rea* for this *Actus reus* is to be seen, to be culpable vis-a-vis that particular *Actus reus*, and not the effect of that communication.

As to mens rea

Mens rea is defined as the mental or psychological element involved in an act prohibited by law.

So, in case of abetment by instigation, the *mens rea* is to be observed while the communication is made.

Mere intention or preparation to instigate is neither instigation nor abetment. For example, if X intends to write a letter to Y to instigate him to kill Z. It is not instigation and if X writes a letter to Y, and keeps it with him or thrown that letter to the dustbin, it is not instigation.

Because, in the first case, it is just mental preparation and in the second case, it is mental and physical preparation, which are not sufficient even to attribute attempt, which requires a final uninterrupted conduct to be successful as an offence.

So, it is the intention to instigate to do a thing, which is to be termed as *mens*, which becomes *mens rea*, when coupled with the *Actus reus* required for instigation.

So, *mens rea* is to be examined, as to what was the intention of the abettor, when he made the instigation and the result which he expected would be rather the motive for such instigation.

One more essential feature of the *mens rea* in case of abetment by instigation is that intention includes knowledge and the criminality of the act. For example, if X writes a letter to Y to instigate him to do an offence, in an open post card, it is definitely within his knowledge that the postman may read it. And, if that postman, is instigated by it, it is just sufficient to make him liable for the offence of abetment by instigation to the postman, and will also be liable for the offence of attempt to abet to Y.

As to *Actus reus* and *mens rea* observed in cases of –

- Suggestion
- Acquiescence
- Permission and
- Advice

Mere suggestion, acquiescence, permission or advice does not become abetment, by instigation. There are the *actus* or the human conducts. They are not forbidden by law. But, if the suggestion or advice etc. is active and positive towards the commission of the offence, then that is the *Actus reus*.

And, if this *Actus reus* is coupled with the guilty intention, then it is *mens rea* resulting in the offence of abetment by instigation. For example, if X goes to Y and tells him "Z is pestering me frequently". X replies "one ought to go and bash him". In this, it is only the passive or general suggestion. So, it is not instigation. But, if with the intention to instigate him, he by his strong gestures, asserts the same thing, then he will be said to abet by instigation.

So, it depends upon the facts and circumstances of each case. Advice, suggestion etc. *per se* is not necessarily instigation.

Advice *per se* does not necessarily imply instigation. Instigation necessarily connotes some active suggestion or support or stimulation to the commission of the act itself. Instigation may be of an unknown person.

Explanation 1 to this section says that a person who (1) by wilful misrepresentation or (2) by wilful concealment of a material fact which he is bound to disclose, voluntarily causes or procures, or attempts to cause or procure a thing to be done, is said to instigate the doing of that thing. Instigation by 'wilful concealment' is where some duty exists which obliges a person to disclose a fact.

Where one person instigates another to the commission of an offence by means of a letter sent through post, the offence of abetment by instigation is completed as soon as the letter reaches the addressee. If the letter never reaches him, the act is **only an attempt to abet**.

"Abets" whether restricted to actual words?

The word 'abets' has to be given wider meaning. It cannot be restricted to the actual words. Because, it is to be seen in the nature, manner and degree of the act of instigation is not merely by the exact words.

It is held in **Ram Kumar's (1998) case** as follows:

The word 'abets' has to be given wider meaning commensurate with the common experience of life. 'Instigation' in the context of conduct of husband towards wife, means creating a situation by conduct, whereby, a victim (wife), who is in complete dependence and at the mercy of the accused, sees not other way out, except to end her life.

Likewise, in **Prem Narain's (1957) case**, it was held that there has to be a reasonable certainty in regard to the meaning of the words used by the 'inciter' in order to judge whether or not there was an incitement, but it is not necessary in law to prove the actual words used for the incitement.

This can be supported by the facts of the following case:

Nazir Ahmad (1927), in this case, some persons were maltreating a tenant, for committing extortion. The accused, expressed his acquiescence for their conduct, by saying "the tenants ought to be beaten". As a result, he was beaten by them. In this case, it was held that accused's remarks stimulated the commission of the offence.

2. Abetment by Conspiracy – Second Clause

'Conspiracy' consists in the agreement of two or more (persons) to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only, it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, *actus contra actum*, capable of being enforced, if lawful, is punishable if for a criminal object or for the use of criminal means.

Section 107 (2) states as follows:

Section 107: A person abets the doing of a thing who

Clause (2): "Engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing;"

It is not necessary that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed.

Where the parties concert together, and have common object, the act of one of the parties done in furtherance of the common object and in pursuance of the concerted plan, is the act of all.

Examination of *Actus reus* and *mens rea*

The acts of engaging in any conspiracy for the commission of an offence are the *actus* in this provision. And, it becomes prohibited by law or *reus*, when in pursuance of that conspiracy and in order to the commission of the conspired offence, some act or illegal omission is committed.

Mens rea lies in the fact that the law prohibits a mind which engages in any conspiracy for the commission of the offence.

Abetment by conspiracy may be analysed in two parts:

- a) Engages with one or more other person or persons in any conspiracy for the doing of that thing.
- b) If an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing.

As to "engages with one or more other person or persons in any conspiracy for the doing of that thing":

If we break:

- i) **engages with one person in any conspiracy for the doing of that thing:** 'Engages' means employ or make somebody to do something. Here, if a person employs or makes another person to commit an offence, by conspiring or agreeing with him, then he is said to engage in conspiracy for the commission of an offence.
- ii) **engages with more persons in any conspiracy for the doing of that thing:** And, one more thing we can observe here is that the use of words "more other persons". The section does not use the words "with one or more persons", in which case it would have meant that simultaneously and concurrently with more persons, he has engaged in conspiracy.
- iii) **in any conspiracy for the doing of that thing:** It shows that there may be a single conspiracy or a number of conspiracies, in order to accomplish the desired offence. Among the more other persons, some may compile for one thing for the furthering/commission of that offence and some other among them may conspire for some other thing for the commission of the desired offence.

So, if we take together everybody is promising against a promise and is acting against an act. They are abetting everybody.

As to "if an act or omission takes place in pursuance of that conspiracy, and in order to the doing of that thing":

For an offence of an abetment by conspiracy some overt act or omission is necessary, in furtherance of that conspiracy. This overt act or omission must be done for the commission of the offence desired.

For example –

- i) If X goes and tells Y that if Y kills Z, then he will give Rs. 1 lakh. Here, if Y agrees, X is said to engage Y for the commission of an offence of murder.

- ii) If X goes to Y and Z and tells them to procure poison to kill P, here X has directly engaged both of them in conspiracy.
- iii) In the same case, if Y and Z instead of directing procuring the poison, tell A to bring the poison for killing P, then it is a conspiracy between Y, Z and A. Here, there is no direct concert between A and X. Even A is said to engage in a conspiracy, for the commission of P's murder by poisoning.

So, if some overt act or omission by any of X, Y, Z and A, is done, in pursuance of this conspiracy, *For example*, if A goes to a shop and asks for poisonous substance, this itself is sufficient to hold them all for abetment by conspiracy. Because, all of them have engaged in conspiracy, for the commission of murder of P.

[Note: For an offence, under section 107 (2), a mere combination of persons or agreement is not enough; an act or illegal omission must take place in pursuance of the conspiracy.

But for an offence under Section 120A a mere agreement is enough if the agreement is to commit an offence.

It is to be seen that in Section 107 (2) the word 'conspiracy' and not 'criminal conspiracy' is used; it is implied that Section 120A has not to be read in totality in Section 107 (2)].

3. Abetment by Intentional Aid – Third Clause

A person abets by aiding when by act done either prior to, or at the time of, the commission of an act, he intends to facilitate, and does in fact facilitate; the commission thereof. (*Explanation 2*)

For instance, the supplying of necessary food to a person known to be engaged in crime is not *per se* criminal, but if food were supplied in order that the criminal might go on a journey to the intended scene of crime, or conceal himself while waiting for an opportunity to commit crime, the supplying of food would be in order to facilitate the commission of the crime and might facilitate it.

Actus reus and mens rea in intentional aiding

The act or illegal omission is the *actus*. The aiding for the commission of the offence by any act or illegal omission is the *Actus reus*. The intention that by such act or illegal omission, he dominantly intends that the offence must be done. This is the *mens rea*.

The abettor must have intentionally aided the commission of the crime.

A person may invite another casually or for a friendly purpose and that may facilitate the murder of the inviter. But unless it is shown that the invitation was extended with a view to facilitate the commission of the offence, the inviter had abetted the murder.

For example, A, B and C are friends. A and B have fallen out so much so that A is determined to shoot B. A goes to the house of C and on some pretext or other induces C to call B to his house. C has not the least idea that A would shoot B on his arrival. B arrives and is murdered by A. A has committed murder.

Can it be said that C is guilty of abetment, cause he "intentionally aided" A? C did give aid in calling B to his place. But he never knew why A wanted him to send for B – whatever C did, he did intentionally, for his intention it was certainly; that B should come. But, it was not C's intention that a crime should be committed.

It was held in **Purushottam (1989) 2 Ker** and **Chief State vs. Sheikh Lallu 1992 (2) MP**, that if the person only knows or has only the reason to believe that his act would facilitate the commission of offence, it cannot be said that his dominant intention was that.

Purushottam (1989) 2 Ker –

Facts: Some students approached the first accused (a teacher) to suggest/advise them to meet the second accused who was a practical examiner and was thought to be thirsty of money. The first accused had an intention that deserving students should not suffer because of the thirsty nature of the second accused.

Held: This suggestion would not amount to abetment if the commission of the offence of giving illegal gratification by students to the second accused.

The language used in the section is "intentionally aids" and, therefore, active complicity is the gist of the offence of abetment under the third paragraph of Section 107, IPC.

Mere presence at the commission of a crime cannot amount to intentional aid unless it was intended to have that effect.

To prove abetment by "illegal omission" it is necessary to show that the accused intentionally aided the commission of the offence by his non-interference, and the omission involved a breach of legal obligation.

Final Commission of the Act

For the offence under this section, it is necessary that the final commission of the offence must be done. The words "the doing of that thing" makes it clear that the offence must be committed. (Definite article the)

Explanation 2 to Section 107 makes it clear that the final commission of the act must be there for the offence of abetment by intentional aiding.

Explanation 2 to Section 107: Whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Here, a person abets an offence by aiding either prior to or at the time of commission of the act. So, the commission of the act is a requisite. The words "thereby facilitates the commission thereof" clearly suggest that the person by facilitating further/helps the commission of the act. So, now it is clear that the final commission of the offence is a must to impose a liability on the person for abetment by aiding.

This view is also supported by case is **Jamuna Singh Case**. In this case, it was held that it is not necessary for the offence of abetment that the acts must be committed. It is only in the case of a person abetting an offence by intentionally aiding another to commit that offence, that final commission is required.

ABETTOR: SECTION 108

"A person abets an offence, who abets either the commission of an offence, or the commission of an act which would be an offence, if committed by a person capable by law of committing an offence with the same intention or knowledge as that of the abettor.

Explanation 1: The abetment of the illegal omission of any act may amount to an offence although the abettor may not himself be bound to do that act.

Explanation 2: To constitute the offence of abetment it is not necessary that the act abetted should be committed, or that the effect requisite to constitute the offence should be caused.

Explanation 3: It is not necessary that the person abetted should be capable by law of committing an offence, or that he should have the intention or knowledge as that of the abettor, or any guilty intention or knowledge.

Explanation 4: The abetment of an offence being an offence, the abetment of such an abetment is also an offence.

Explanation 5: It is not necessary to the commission of the offence of abetment by conspiracy that the abettor should concert the offence with the person who commits it. It is sufficient if he engages in the conspiracy in pursuance of which the offence is committed."

Abetment under the Penal Code involves active complicity on the part of the abettor at a point of time prior to the actual commission of the offence, and it is an essence of the crime of abetment that the abettor should substantially assist the principal culprit towards the commission of the offence.

Abettor

Under this section, 'abettor' means the person who abets (a) the commission of an offence, or (b) the commission of an act which would be an offence, if committed by a person not suffering from any physical or mental incapacity.

There must be abetment of the commission of an act. It does not contemplate any acts of subsequent abetment.

An act done after an offence is complete, which might help the offender, does not amount to abetment.

Explanation 1: If a public servant is guilty of an illegal omission of duty made punishable by the Code, and a private person instigates him, then he abets the offence of which such public servant is

guilty, though the abettor, being a private person, could not himself have been guilty of that offence if he had committed it directly.

Explanation 2: The offence of abetment is complete notwithstanding that the person abetted refuses to do the thing, or fails involuntarily in doing it, or does it and the expected result does not follow. The offence of abetment by instigation depends upon the intention of the person who abets, and not upon the act which is actually done by the person whom he abets.

An offence could be abetted though the means which are intended to be employed are such that it is physically impossible that the effect requisite to constitute the offence should be caused by them.

Explanation 3: It makes it clear that the person abetted need not have any guilty intention in committing the act abetted. Illustration (a) makes it clear that it is not necessary that the person abetted should have committed the offence.

The offence of abetment depends upon the intention of the person who abets and not upon the knowledge or intention of the person he employs to act for him.

Explanation 4: It should be read, "when the abetment of an offence is an offence the abetment of such an abetment is also an offence". The words "when the abetment of an offence is an offence" do not mean "when an abetment of an offence is actually committed", but that, when the abetment of an offence is by definition or description an offence under the Penal Code, that is, when an abetment of an offence is punishable under Section 109 or Section 116 or some other provision of the Code, then the abetment of such abetment is also an offence.

The offence of an abetment of an abetment of offence is no more and no less than abetment of that offence.

The abetment of an abetment is an offence though the second abetment is ineffective.

A person may make himself an abettor by intervention of a third person, without any direct communication between himself and the person employed to do the thing.

It is not necessary to an indictment for the offence of an abetment of an offence to show that such offence was actually committed.

A sought the aid of B with the intention of committing a theft of the property of B's master. B with the knowledge and consent of his master and for the purpose of procuring A's punishment, aided A in carrying out his object. It was held that though the offence of theft was not committed. Where a person is being prosecuted for the abetment of suicide, it must be proved that the death of the person abetted was due to suicide.

Abetment is Substantive Offence

The offence of abetment is a substantive one and the conviction of an abettor is, therefore, in no way abetment dependent on the conviction of the principal.

Principal cannot be abettor: A person who has been convicted of an offence as principal cannot also be punished for abetting it.

Abetment in India of offences outside India Section 108A

Section 108A is in substance another explanation of what constitutes an abetment as explained in section 108 IPC. The section states that a person would be guilty of an abetment, if he abets the commission of an act outside India which if done in India would constitute an offence. For instance as stated in illustration if A in India instigates B a foreigner in Nepal, to commit a murder in Nepal. A is guilty of abetting murder.

PUNISHMENT OF ABETMENT IF THE ACT ABETTED IS COMMITTED IN CONSEQUENCE AND WHERE NO EXPRESS PROVISION IS MADE FOR ITS PUNISHMENT: SECTION 109

"Whoever abets any offence shall, if the act abetted is committed in consequence of the abetment, and an express provision is made by this Code for punishment of such abetment, be punished with the punishment provided for the offence.

Explanation: An act or offence is said to be committed in consequence of abetment, when it is committed in consequence of the instigation, or in pursuance of the conspiracy; or with the aid which constitutes the abetment."

Under this section, the abettor is liable to the same punishment as that which may be inflicted on the principal offender; (1) if the act of the latter is committed in consequence of the abetment, and (2) no express provision is made in the Code for the punishment of such an abetment.

Section 109, IPC becomes applicable even if the abettor is not present when the offence abetted is committed provided that he has instigated the commission of the offence or has engaged with one or more other persons in a conspiracy to commit an offence and pursuant to that conspiracy some act or illegal omission takes place or has intentionally aided the commission of an offence by an act or illegal omission.

Case: Sheo Barhi (1930)

Facts: In this case it was found that the two accused and the approver conspired to commit theft and in pursuance of that conspiracy to kill, in order to enable them to commit theft.

But, there was no direct evidence as to who dealt the fatal blow.

Held: The accused were guilty of abetment of murder under Section 302 read with Section 109.

PUNISHMENT OF ABETMENT IF PERSON ABETTED DONE ACT WITH DIFFERENT INTENTION FROM THAT OF ABETTOR SECTION 110

Section 110 supplements the provision of section 109 by enacting the variation between the intention and knowledge of the abettor and those of the person abetted is of no significance for the purpose of fixing liability so long as the act done is same as the act abetted. In other words, variation in intention or knowledge of the persons abetted does not effect the liability of an abettor.

Explanation 3 to Section 108 has a relation to this section. Under Section 108 and this section, a person may be guilty of abetment though the person abetted may not be capable by law of committing the offence or has not the same guilty intention or knowledge as that of the abettor.

'Offence' under this section denotes a thing punishable under IPC or under any special or local law (Section 40).

LIABILITY OF ABETTOR WHEN ONE ACT ABETTED AND DIFFERENT ACT DONE SECTION 111

This section is based on the maxim that "every man is presumed to intend the natural consequence of his act". Under this section, the abettor may be liable for the commission of a different act, if that different act was a probable consequence of the act abetted.

In other words, the abettor is liable for the act committed if:-

- (i) It was a probable consequence of the abetment and
- (ii) It was committed:-
 - (a) Under the influence of abetment, or
 - (b) In pursuance of conspiracy which constituted abetment

Probable Consequence:- May be explained as an act which is likely or which can reasonably be expected to follow from another act.

Example:- A instigates a child to put poison in the food of Z and gives him poison for that purpose. The child in consequence of instigation by mistake puts the poison in the food of Y which is sitting next to Z. Hence, since the child was acting under the influence of A's instigation and the act done was a probable consequence of the abetment. A is liable in the same manner and to same extent as though A had instigated the child to put poison in the food of Y.

ABETTOR WHEN LIABLE TO CUMULATIVE PUNISHMENT FOR ACT ABETTED AND FOR ACT DONE SECTION 112

Section 112 extends the doctrine of constructive criminality and makes provisions for cumulative punishment in cases covered under section 111. The section states that the abettor would be liable to the punishment both for the offence abetted as well as for the offence he was the probable consequence of the abetment provided cumulative sentence should be passed in that particular case.

SECTION 113

When an act is abetted with the intention on the part of the abettor of causing a particular effect, and an act for which the abettor is liable in consequence of the abetment, caused a different effect from that intended by the abettor, the abettor is liable for the effect caused, in the same manner and to the same extent as if he had abetted the act with the intention of causing that effect, provided he knew that the act abetted was likely to cause that effect.

Illustration

A instigates B to cause grievous hurt to Z. B, in consequence of the instigation, causes grievous hurt to Z. Z dies in consequence. Here, if A knew that the grievous hurt abetted was likely to cause death, A is liable to be punished with the punishment provided for murder.

SECTION 114

Abettor present when offence is committed: Whenever any person, who is absent would be liable to be punished as an abettor, is present when the act or offence for which he would be punishable in consequence of the abetment is committed, he shall be deemed to have committed such act or offence.

This section says that, when a person commits an act which constitute the abetment, then, if the abettor is present at the place of commission of that offence, then, the abettor is deemed to have committed that offence.

It says the abettor is deemed to have committed and not that he committed it.

This in English law is called as "*principal in the second degree*" for the purpose of punishment.

This section deals with the cases where there has been offence of abetment committed and, the actual commission of the abetted offence is taken place in the presence of the abettor.

The completion of the crime of abetment must be there. The words "who if absent would be liable to be punished as an abettor" shows that before the commission of the offence abetted, the act of abetting must be completed. It is different from intentional aiding, which is done immediately before or at the time of commission of the final offence.

Mere presence: The mere presence as an abettor of any person will not make him liable for the offence committed. He must sufficiently near to give assistance and there must be a participation in the act.

Section 34, 149 and 114

Under Sections 34 and 149 of a criminal act is done by several persons, each is liable as if it were done by himself alone.

This section, refers to cases where a person by abetment, previous to the commission of the act, renders himself liable as an abettor, and is present when the act is committed, but do not take active part in the doing of it.

SECTION 115

Abetment of offence punishable with death or imprisonment for life – if offence not committed: Whoever abets the commission of an offence punishable with death or [imprisonment for life], shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

If act causing harm be done in consequence – and if any act for which the abettor is liable in consequence of the abetment, and which causes hurt to any person, is some, the abettor shall be liable to imprisonment of either description for a term which may extend to fourteen years, and shall also be liable to fine.

Illustration

A instigates B to murder Z. The offence is not committed. If B had murdered Z, he would have been subject to the punishment of death or [imprisonment for life]. Therefore, A is liable to imprisonment for a term which may extend to seven years and also to a fine; and if any hurt be done to Z in consequence of the abetment, he will be liable to imprisonment for a term which may extend to fourteen years, and to fine.

ABETMENT OF OFFENCE PUNISHABLE WITH IMPRISONMENT IF OFFENCE BE NOT COMMITTED: SECTION 116

Whoever abets an offence punishable with imprisonment shall, if that offence be not committed in consequence of the abetment, and no express provision is made by this Code for the punishment of such abetment, be punished with imprisonment of any description provided for that offence for a term which provided for that offence for a term may extend to one-fourth part of the longest term provided for that offence, or with such fine as is provided for that offence, or with both.

And if the abettor or the person abetted is a public servant whose duty it is to prevent the commission of such offence, the abettor shall be punished with imprisonment of any description provided for that offence, for a term which may extend to one-half of the longest term provided for that offence, or with such fine as is provided for the offence, or with both.

Illustrations

- i) A offers a bribe to B, a public servant, as a reward for showing A some favour in the exercise of B's official functions. B refuses to accept the bribe. A is punishable under this section.
- ii) A instigates B to give false evidence. Here, if B does not give false evidence, A has nevertheless committed the offence defined in this section, and is punishable accordingly.
- iii) A, a police officer, whose duty it is to prevent robbery, abets the commission of robbery. Here, though the robbery is not committed, A is liable to one-half the longest term of imprisonment provided for that offence, and also to fine.
- iv) B abets the commission of a robbery by A, a police officer, whose duty it is to prevent that offence. Here though the robbery be not committed, B is liable to one-half of the longest term of imprisonment provided for the offence of robbery, and also to fine.

This section provides for the abetment of an offence punishable with imprisonment. Thus different states of fact may arise after an abetment –

- i) No offence may be committed. In this case, the offender is punishable under Section 115 and Section 116 for the mere abetment to commit a crime.
- ii) The very act at which the abetment aims may be committed, and will be punishable under Section 109 and 110.
- iii) Some act different but naturally flowing from the act abetted may be perpetrated, in which case the abettor will fall under penalties of Section 111, 112 and 113.

SOME OTHER SPECIFIC QUESTIONS PERTAINING TO ABETMENT

Q. No. 1: What is the object of offence of abetment in IPC?

Answer: The offence of abetment presupposes the presence of a third person in between the object of the offence and himself i.e. the offender (abettor). Therefore, it will be normally difficult to prove the direct liability of abettor, and that too when it is also known that it was the abettor who was actually behind the offence and therefore the punishment should be the same as if he himself had committed the offence.

As a result the offence of abetment was created. In this offence it is also the intention of law to move a step further and stop the commission of the offence before it is actually committed. (For details, refer the notes in the beginning).

Q. No. 2: What is *Actus reus* and *mens rea* in the offence of Abetment?

Answer: **Actus** in case of abetment is the very communication made to the person abetted. Section 107 of IPC has specifically used the words instigates, engages and intentional aiding which are the *actus* in the offence of abetment and the element of *reus* lies in the fact the law prohibits this communication itself.

Mens rea is the intention and knowledge with which the communication was made. The words 'doing of that thing' used in all the three clauses of Section 107 show the intention in the offence of abetment. (For more details, refer the notes in preceding pages).

Q. No. 3: What is the meaning of the word 'thing' used in the Section?

Answer: The word thing has not been defined in Section 107 but 'abettor' has been defined in Section 108. An abettor can be an abettor only if he has abetted the commission of an

offence. Since the act of abettor is defined in Section 107 that is abets, therefore 'thing' has to be defined in light of Section 108 to be an 'offence'. Thus, abetment applies only with respect to 'offences' (whereas criminal conspiracy applies to both offence and civil wrongs).

Q. No. 4: Is there a requirement of some overt act or illegal omission in all situations of abetment?

Answer: If we analyse the three clauses of Section 107 independently, it would provide a clear picture.

1st Clause : A person abets the doing of a thing who instigates any person to do that thing. For the 1st clause, it is immaterial whether the person abetted commits the offence or not, e.g. A incites B to kill C and C refuses, here no overt act is committed by the person abetted, still A is liable for abetment of murder.

2nd Clause : Engages with one or more person or persons in any conspiracy for the doing of that thing; if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing. In clause 2 also, it is immaterial whether the person abetted commits any offence or not, but some overt act or illegal omission is a must.

In this clause, the word 'engages' means active suggestion which means physical involvement i.e. by words or other human conduct the abettor produces a consequence which is 'the engagement of two or more persons in any conspiracy'. There should be some overt act/illegal omission in pursuance of the conspiracy, to constitute the offence of abetment. Hence, it becomes immaterial that the persons conspiring together actually carry out the object of the conspiracy.

3rd Clause : Intentionally aids, by any act or omission, the doing of that thing. If we see Explanation 2 to Section 107, it provides whoever, either prior to or at the time of the commission of an act, does anything in order to facilitate the commission of that act, and thereby facilitates the commission thereof, is said to aid the doing of that act.

Here, the words 'thereby facilitates the commission thereof' are to be interpreted as an active complicity by intentional aiding i.e. it is not enough that an act on the part of the alleged abettor happens to facilitate the commission of crime.

So, in this case, a charge of abetment against a person abetting an offence by intentionally aiding another to commit that offence would be expected to fail when the person alleged to have committed the offence is acquitted of the offence. Therefore, it is required that the abetted act itself must be committed. It can be understood by an example – Y is going to kill B, while on the way to B's place A knowing that Y is going to kill B, gives him a pistol and Y ran away without killing B. Now, in this case, Y was having the *mens rea* to kill B and A facilitated him with a pistol for the commission of the offence. Now, if Y runs away or quits the act, A cannot facilitate the commission thereof therefore, he would be guilty of attempt to abetment only and not abetment as such.

Q. No. 5: Is it necessary that the person abetted should be capable by law or should have the same guilt or knowledge as that of abettor?

Answer: Explanation 3 to Section 108 deals with the cases where persons abetted (i) are not capable by law of committing the offence, or (ii) do not have any knowledge or guilty intention.

For offence of abetment, according to Explanation 3, it is not necessary that person abetted should be capable by law to commit the offence and also he need not have any guilty intention or knowledge.

Illustration

"A abets a lunatic or child to commit an offence; he would be guilty for abetment although a lunatic is not capable by law to commit the offence."

Section 110 also deals with the same situation.

Q. No. 6: "Abetment of illegal omission of an act may amount to an offence although the abettor may himself be not bound to do that act." Discuss.

Answer: Explanation 1 to Section 108 provides that the abetment of the illegal omission of an offence even though the abettor himself may not be bound to do that act.

Example: A police officer will be guilty of an illegal omission of his duty. However A private individual cannot be guilty of such offence but if he instigates a police officer for such illegal omission of his duty he will be liable as an abettor.

Q. No. 7: Can there be an abetment of abetment? (Explanation 4 to Section 108)

Answer: The abetment of an offence is an offence. So abetment of an abetment is also an offence.

Example: A instigates B to instigate C to murder D. B does so and C kills D. Here, both A and B are equally liable for the offence of abetment.

Q. No. 8: Can there be attempt to abetment?

Answer: Abetment of an offence is itself an offence and Section 40 of the Code provides abetment as an offence. The words used in Section 511 "to cause such an offence to be committed" make it clear that the Code provides for offence of attempt to abetment. So, attempt to abetment is provided under Section 511 of the Code.

Q. No. 9: What is liability of person who abets one offence and another offence is committed?

Answer: Section 111 of the Code provides that when an act is abetted and a different act is done or an additional act is done which is the probable consequence of the abetment, the abettor will be liable in the same manner and to the same extent as if he had directly abetted it.

Example: A instigates B to resist by force a distress made by public servant and B in consequence thereof causes grievous hurt to executing officer. A will be liable for both the offences committed by B.

CRIMINAL CONSPIRACY

Conspiracy under the Indian Penal Code originally was punishable only in two forms (i) Conspiracy by way of abetment and (ii) Conspiracy involved in certain offence. In the form or an act or illegal omission must take place in pursuance of conspiracy in order to be punishable while in latter membership suffers to establish the change of conspiracy.

Definition of Criminal Conspiracy – Section 120-A:

When two or more persons agree to do, or cause to be done –

- (1) An illegal act, or
- (2) An act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy.

Provided that no agreement except an agreement to commit an offence shall amount to a criminal conspiracy unless some act besides the agreement is done by one or more parties to such agreement in pursuance thereof.

Explanation – It is immaterial whether the illegal act is the ultimate object of such agreement, or is merely incidental to that object.

This chapter has introduced into the criminal law of India a new offence, namely the offence of criminal conspiracy. It came into existence by the Criminal Law (Amendment) Act, 1913.

Ingredients

- (1) That there must be an agreement between the persons who are alleged to conspire, and
- (2) That the agreement should be –
 - (a) For doing of an illegal act, or
 - (b) For doing by illegal means an act which may not itself be illegal.

Two or more persons needed

To constitute the offence of conspiracy there must be an agreement of two or more persons to do an act which is illegal or which is to be done by illegal means, for one cannot conspire with oneself.

In *Topandas vs. State of Bombay*, which has been cited by the Supreme Court with approval in *Haradhan Chakraborty vs. Union of India*, it was laid down that, "two or more persons must be parties to such an agreement and one person alone can never be held guilty of criminal conspiracy for the simple reason that one cannot conspire with oneself."

Under the Common law since husband and wife constitute one person there cannot be any conspiracy to commit an offence if husband and wife are the only parties to an agreement. This state of law does not exist in India, where husband and wife by themselves alone can be parties to a criminal conspiracy. Since conspiracy requires two persons at least, where two or more named persons were charged and all but one of them were acquitted, the remaining accused could not be charged/convicted under Section 120-B IPC as he could not have conspired with himself.

Section 5(8) of the Criminal Law Act, 1977 provides that unless conviction of one becomes inconsistent with the acquittal of the other even one of the two conspirators can be convicted e.g. where one was acquitted for want of sanction or on ground of being an exempted person.

The Bombay High Court has held the same view. Thus, where of the two accused one was a public servant and he had to be acquitted as he was prosecuted without obtaining sanction under Section 197 Cr.P.C., the other could still be convicted on a charge of conspiracy as the acquittal of the other accused was not on facts but on technical grounds.

A single person can also be tried and convicted for criminal conspiracy. It is not necessary that all should be brought to trial together. One person may be indicted alone, for conspiring with other persons who are not in custody, or who are even unknown to the

conspirators. Indeed, some of the conspirators may be unknown to the rest, provided all be acting under the directions of one leader. There need not be communication between each conspirator and every other, provided there be a design common to all.

Thus, a wife knowing that her husband was involved with others in a conspiracy agreed with him that she would join the conspiracy and play her part; it was held that she thereby became guilty of conspiracy notwithstanding that the only person with whom she actually concluded the agreement was her husband.

Agreement is gist of the offence

The gist of the offence is the bare engagement and association to break the law, whether any act be done in pursuance thereof by the conspirators or not.

A distinction is drawn between an agreement to commit an offence and an agreement of which either the object or the methods employed are illegal but do not constitute an offence. In the case of the former, the criminal conspiracy is completed by the act of agreement, in the case of the latter, there must be some act done by one or more of the parties to the agreement to affect the object thereof that is, there must be an overt act.

A criminal conspiracy may persist as long as the persons constituting it continue to act in furtherance of their objects. It is a **continuing offence**. It is committed not only when the agreement is first reached but continues as long as the agreement to effect the unlawful object continues. Thus, if the object of the conspiracy is accomplished and the conspirators disband themselves, the conspiracy comes to an end.

It is not an ingredient of the offence under this section that all the parties should agree to do a single illegal act. It may comprise of the commission of a number of acts.

Where the accused is charged with having conspired to do three categories of illegal acts, the mere fact that all of them could not be convicted separately in respect of each of the offences has no relevancy in considering the question whether the offence of conspiracy has been committed. They can all be held guilty of the offence of conspiracy to do the illegal acts, though for individual offences all of them may not be liable.

Where the agreement between the accused is a conspiracy to do or continue to do something which is illegal, it is immaterial whether the agreement to do any of the acts in furtherance of the commission of the offence do not strictly amount to an offence. The entire agreement must be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve. It is not necessary that each member of a conspiracy must know each other or all the details of the conspiracy. It is also not necessary that every conspirator must have taken part in each and every act done in pursuance of the conspiracy. It is, however, necessary for the charge that the place or places where it was hatched, persons hatching it, how was it hatched and what was the purpose of the conspiracy, etc. to be proved.

In the matter of the assassination of the then Prime Minister of India, Smt. Indira Gandhi, one of the actual killers and two conspirators were brought to trial. Both the conspirators were away from the scene of the crime.

One of them was acquitted by the Supreme Court. His movements after the incident were not properly proved. The documents recovered from his custody did not indicate any agreement between him and the other accused. They only showed his agitated mind which was in the grip of an avenging mood. This is not enough to establish an agreement with anybody.

On the other hand, about Kehar Singh, it was shown that he was having secret talks with one of the actual killers, that they were trying all the time to keep themselves away from their wives and children, they avoided the company of the other members of the family and on being asked what they were talking about, they remained mysterious. These facts were sufficient to show that they were planning something secret. This was enough to constitute a prima facie evidence of conspiracy within the meaning of Section 10 of the Evidence Act and to bring them within the jacket of punishment of all for the act of one.

Thus, a criminal conspiracy is an inference from circumstances. There cannot always be a direct evidence about it.

Sections 34 and 120-A, IPC

There is not much substantial difference between conspiracy as defined in Section 120 A and acting on a common intention; as contemplated in Section 34. While in the former, the gist of the offence is bare engagement and association to break the law even though the illegal act does not follow, the gist of the offence under Section 34 is the commission of a criminal act in furtherance of a common intention of all the members or offenders, which means that there should be a unity of criminal behaviour resulting in something for which an individual would be punishable; as if it were all done by himself alone.

Another point of difference is that a single person cannot be convicted under Section 120 A, and, therefore, where all the accused except one were acquitted, the Supreme Court ordered his acquittal also; whereas under Section 34, read with some other specific offence, a single person can be convicted because each is responsible for the acts of all others.

Section 107 (2) and Section 120 A

For an offence under this section, a mere agreement is enough if the agreement is to commit an offence. But for an offence under the second clause of Section 107, an act or illegal omission must take place in pursuance of the conspiracy and a mere agreement is not enough.

Secondly, Section 107 (2) speaks only to offence, in which case, some overt act or illegal omission must take place. Under Section 120A, it speaks of two cases, one as said earlier, conspiracy to do or cause to be done an offence.

Another, is the conspiracy to do a legal act by illegal means. So, it is in the second case that some overt act or illegal omission must be done.

Thirdly, under Section 107 (2), act or illegal omission in pursuance of the conspiracy may be done by any person apart from the persons conspired. In case of Section 120A, the overt act or illegal omission must be done by any one or more persons, who are parties to the agreement, in pursuance of that agreement.

For example, if X and Y agree to ask Z to commit a breach of contract and in pursuance of this agreement, Y writes a letter to do the same, then, it is said to be an overt act. But, by somehow knowing about this conspiracy, A who is not a party to the agreement asks Z to commit the breach, then, it is not said to be a criminal conspiracy. Because, he is not a party to the agreement and there is no direct connection between his act and the agreement.

Fourthly, in case of Section 107 (2), it is to be seen that how the conspiracy was formed i.e. by engagement.

Under Section 120A, it is seen that what was formed for what i.e. the agreement to do an illegal act or a legal act by illegal means (overt act) or illegal omission required which is punishable.

In case of abetment by conspiracy, it is not necessary that the abettor should concert the offence with the person who commits it.

In case of criminal conspiracy, two persons must concert the offence, whether it is a separate conspiracy or a general conspiracy (in which case the common design is known to every conspirator).

How to prove (Section 120 A, IPC and Section 10, Evidence Act)

Of sheer necessity, this section has to be read in conjunction with Section 10 of the Indian Evidence Act which says, "where there is reasonable ground to believe that two or more persons have conspired together to commit an offence or an actionable wrong anything said, done or written by any one of such persons in reference to their common intention, after the time when such intention was first entertained by any one of them is a relevant fact against each of the persons believed to be so conspiring, as well as for the

purpose of proving the existence of the conspiracy as for the purpose of showing that any such person was party to it."

Since conspiracy is often hatched in utmost secrecy, it is mostly impossible to prove conspiracy by direct evidence. It has, more often than not, to be inferred from the acts, statements and conduct of the parties to the conspiracy.

It should be remembered that where there is no direct evidence e.g. through the evidence of an approver, and the case for the prosecution is dependent on circumstantial evidence alone, it is necessary for the prosecution to prove and establish such circumstances as would lead to the only conclusion of existence of a criminal conspiracy and rule out the theory of innocence.

The onus is on the prosecution to prove the charge of conspiracy by cogent evidence, direct or circumstantial.

Some specific questions pertaining to Criminal Conspiracy:

Q1. What is the actus reus and mens rea in the offence of criminal conspiracy?

Ans. Agreement is the basis of criminal conspiracy and if we divide the agreement into various types, we see that it consists of two things –

- (a) The act of agreeing with each other;
- (b) The minds which have agreed to do an illegal act i.e. stipulated result of the agreement.

So, actus reus in this offence is the act of 'agreeing' of two or more persons with each other to do or cause to be done illegal act or legal act by illegal means and this very agreement is prohibited by law.

Mens rea is the agreeing 'to do an illegal act' which is the stipulated result of that agreement which is prohibited by law.

Q2. What are the requirements for criminal conspiracy to commit a civil wrong or an offence?

Ans. According to Section 120-A of the IPC

"When two or more persons agree to do or cause to be done (i) an illegal act or (ii) an act which is not illegal by illegal means, such an agreement is designated a criminal conspiracy."

From the above definition, it is clear that there are following requirements for a **criminal conspiracy to commit an offence** –

- (1) **Two or more persons** – Atleast two or more persons are required to constitute the conspiracy, one person cannot be held guilty of conspiracy as he cannot conspire with himself. (Under English law, husband and wife cannot be conspirators but under Indian law, they can be.)

There need not be a communication between each conspirator and every other if there is a design common to all.

- (2) **Agreement** – Section 120-A requires that there should be meeting of minds or unity of purpose and it is immaterial whether the illegal act is the ultimate object of such agreement or is merely incidental to that object.

Offence of criminal conspiracy to commit an offence is complete as soon the parties have agreed to do an illegal act although nothing is settled as to the means and devices to be employed for affecting it. (If the means and devices to be employed have also been agreed upon the agreement will amount to common intention). Mere agreement to commit the offence is enough even if nothing has been done in pursuance of this agreement. A person might be guilty of criminal conspiracy even though the illegal act which they have conspired to do or cause to be done had not been done.

Requirements for **criminal conspiracy to commit a civil wrong** –

- (1) **Two or more persons.**

- (2) **Agreement** – Provisions of Section 120-A provides that there should be some overt act or illegal omission in pursuance of the agreement to constitute a criminal conspiracy for committing a civil wrong. Condition being that civil wrong should have been committed **in pursuance of the conspiracy i.e. agreement**, e.g. A, B and C agree to hammer one wall of their neighbour while they were about to commit the offence C out of them started to hammer another wall. Here A, B cannot be liable for the act of C and neither there is a criminal conspiracy as the overt act done by C is not in pursuance to the committing of the conspiracy.

Q3. Can a single person be convicted for criminal conspiracy?

Ans. According to the words used in Section 120-A of the Code at least two persons are required to constitute the conspiracy. One person cannot be held guilty of conspiracy as he cannot conspire with himself.

The accused cannot be convicted unless there be proof that he had conspired with person or persons other than his co-accused. If all the other accused have been acquitted of the charge of conspiracy a co-accused alone cannot be held guilty but if there were some more persons who are absconding or are unknown, a single person can be convicted of the offence of criminal conspiracy.

Q4. Why do we say criminal conspiracy is a continuing offence?

Ans. An agreement to do an illegal act which amounts to a criminal conspiracy will continue as long as the members of conspiracy remain in agreement and as long as they are acting in accord and in furtherance of the object for which they entered into the agreement. 'Some may join or go out of the association, but each of them is a conspirator.' If the agreement is to do something which is illegal all the acts done in furtherance of the object i.e. every set of act is an offence. From the act of agreement to the commission of the offence it is a continuing offence. The entire agreement must be viewed as a whole and it has to be ascertained as to what in fact the conspirators intended to do or the object they wanted to achieve.

Q5. Is an overt act or illegal omission required for liability under criminal conspiracy?

Ans. In a criminal conspiracy to commit an offence it is immaterial whether any overt act or illegal omission is committed or not; mere agreeing of the parties i.e. the meeting of minds is sufficient for liability under criminal conspiracy to commit an offence.

But to make one liable for a criminal conspiracy to commit a civil wrong some overt act or illegal omission is required to be done in pursuance of the agreement to commit legal act by illegal means by any one or more parties to agreement.

Q6. What is the difference between criminal conspiracy and abetment by conspiracy?

Ans.

- (1) Section 107 of the Code uses the word conspiracy and not criminal conspiracy therefore everything that is mentioned in Section 120-A will not fall under Section 107(2).
- (2) Abetment is abetment only of an offence therefore the conspiracy stipulated under Section 107(2) should be only a conspiracy to commit an offence.
- (3) In a criminal conspiracy to commit an offence no overt act or illegal omission is required but in abetment by conspiracy to commit an offence an overt act or illegal omission is necessary.

Q7. Why has criminal conspiracy been created to be an offence and has been made punishable per se?

Ans. At times, law does not only punish the commission of an offence but also rise to prevent the commission of an offence. Particularly in the cases of grave offences or civil wrong which are hatched in secrecy, the offence of criminal conspiracy tries to punish the

mere act of agreement in order to prevent the intended offence or civil wrong from being finally committed.

Q8. Analysis of the sentence: "The gist of the offence is the bare engagement and association to break the law, whether any act is done in pursuance thereof by the conspirators or not"/ "agreement is the gist of the offence."

Ans. In the cases of an agreement to commit an offence, the mere agreement, engagement and association is punishable. But in the cases of an agreement to commit a civil wrong, the above given statement is not hundred percent correct because in such cases, some overt act or illegal omission, apart from the mere agreement is required.

Q9. What is the element of criminality in criminal conspiracy?

Ans. (1) In case of criminal conspiracy to commit or cause to be done an offence, the criminality lies in the very fact of agreement coupled with mens rea.

(2) In case of criminal conspiracy to commit or cause to be done a civil wrong, the criminality lies in the fact of agreement coupled with some overt act or illegal omission by anyone or more parties to the agreement and in pursuance of that agreement.

Q10. When a minor is acquitted in case of criminal conspiracy, can the only remaining single person be convicted for criminal conspiracy?

Ans. The basis of criminal conspiracy lies in the agreement. But, a minor cannot enter into an agreement which is to be treated as void. So, the charge of criminal conspiracy fails.

Yet, the remaining person can be held for the offence of abetment under Section 107 (1).

OFFENCES AGAINST STATE

The following are classifications of the offences against state:-

1. Waging, or attempting or conspiring to wage, or collecting men and ammunition to wage war against the Government of India. [Sections 121, 121A, 122, 123]
2. Assaulting President, or Governor of a State with intent to compel or restrain the exercise of any lawful power. [Section 124]
3. Sedition. [Section 124A]
4. War against a power at place with the Government of India (Section 125) or committing depredations on the territories of such power. [Sections 125-126]
5. Permitting or aiding or negligently suffering the escape of, or rescuing or harbouring a State prisoner. [Sections 128, 129 and 130]

Section 121:

"Whoever wages war against the Government of India or attempts, to wage such war, or abets the waging of such war, shall be punished with death or imprisonment for life, and shall also be liable to fine."

Illustration

A joins an insurrection against the Government of India, A has committed the offence defined on this section.

Ingredients:

1. Waging war against the Government of India, or
2. Attempting to wage war against the Government of India, or
3. Abetting the war against the Government of India.

On an observation of this section, it is clear that the law punishes, a person or group of persons for waging war means actually beginning a war, attempting to wage war and abetment to wage war, at equal footing. So, it can be said that the offence of waging war is a harsh one.

1. Waging war against the Government of India:

Waging war means beginning a war or battle or continuing battle. The section contemplates that such waging of war must be against the Government of India.

The actus reus is the deciding factor in this offence. It is the act of waging war itself, which is punishable by law. This waging war per se is prohibited by law. Notably, this section does not require mental element or mens rea. It does not specify what type of or what degree of mens and should be present. So, the result of human conduct itself is made punishable.

On the other hand, we can say that the words 'waging war' themselves speak that there is an intention to wage war.

Even, the act of waging war involves the concept of mens rea, and is manifested by their act.

But, where the people have assembled and committing riot, and they does not manifest any sign of waging war, then it cannot be said that their object was to wage war. So, object or motive of assemblage becomes relevant here.

Waging war requires that there should be insurrection or invasion on the Government of India. This may be by force or violence, and the object of such force or violence must be of a general nature.

2. Attempting to wage war against Government of India:

Attempting is an act just before the actual commission of the final offence. So, attempt to wage war may be taken to be any act or series of act, which constitute, all the essentials of

a waging of war, and its accomplishment was failed due to some supervening event or extraneous matter. Attempting to wage war against the Government of India, is also, punishable in the same manner and at the same foot as if there is commission of the waging war.

3. Abetment of waging war:

Abetment means any instigation, or any conspiracy or aiding the waging of war. Abetment of waging war means, instigating to wage war, or aiding in the actual waging of war or conspiring to wage-war by engagement.

Abetment of waging war is created as a special offence and is also punishable like the principal offence.

The act of abetment requires just an act of instigation or stimulation, and it does not depend on the fact whether there was actual commission of waging war or not, to make a person liable.

The sole purpose of this offence is to curb the activities against the Government, at all stages possible. The reason, why abetment and attempt also are punishable on the same foot may be that these are factors which actually aggravate the potential offenders to commit the offence and even the social harmony and social anticipation requires such indication of punishments.

Section 121A:

"Whoever within or without India conspires to commit any of the offence punishable by Section 12; or conspires to overawe, by means of criminal force or the show of criminal force, the Government of India or any State Government, shall be punished with imprisonment for life, or with imprisonment of either description which may extend to ten years, and shall also be liable to fine."

Explanation:

To constitute a conspiracy under this section, it is not necessary that any act or illegal omission shall take place in pursuance thereof.

The section deals with the offence of conspiring by criminal force or by show of criminal force, and to prescribe severe punishment for those who actually conspires to wage war. Because, the conspirators are the persons who actually set the motion of the offence.

Ingredients:

This section provides for two types of conspiracies:

1. Conspiring within India or without India to commit any of the offences punishable under Section 121.
2. Conspiring to overawe by means of criminal force or the show of criminal force, the Central Government or the State Government.

1. The first ingredient, specifically, deals with a conspiracy i.e. combination of two or more persons, either to wage war or attempting to wage war or to abet waging of war, made within or without India.

Actually, this part is already implicit in Section 121, where it says abetment of waging war in which case it also involves clause (2) of Section 107 and also when read with explanation to Section 121A, it will be more clear. But, as the intention of the legislature was to create a specific offence of conspiracy to wage war etc., this section has been created manifestly.

2. Conspiring to overawe the Government, by means of criminal force or show of criminal force.

Here, it deals with two aspects:-

- (1) Conspiring to overawe the Central or State Government, and
- (2) The means:-

- (a) Criminal force, or
- (b) Show of criminal force.

It is the means that distinguishes this section and the Section 121 and also part I of Section 121A and this part II of Section 121A.

The word 'overawe' means something more than a mere apprehension or alarm or even fear. This is a situation where the Central Government or State Government feels that they are forced to use force on the people overawing them or makes them to expose or the public to expose to a serious danger. The danger may be a danger for public property, or persons etc.

In case of **Aravindan (1985)**, it was held that a slogan that Government can be changed by an armed revolution does not mean that there is a conspiracy to change the Government by criminal force. At best, it means that the petitioner want to educate the people that by force only the Government could be changed.

Section 122:

"Whoever collects men, arms or ammunitions or otherwise prepares to wage war with the intention of either waging or being prepared to wage war against the Government of India shall be punished with imprisonment, for life or imprisonment of either description for a term not exceeding ten years, and shall also be liable to fine."

This section aims at punishing the preparatory act itself. This also speaks about the mens rea i.e. the intention to wage war or intention to prepare for waging war.

Section 123:

"Whoever, by any act, or by any illegal omission, conceals the existence of a design to wage war against the Government of India, intending by such concealment to facilitate, or knowing it to be likely that such concealment will facilitate, the waging of such war, shall be punished with imprisonment of either description, for a term which may extend to ten years, and shall also be liable to fine."

Ingredients:

1. Any act or any illegal omission.
2. concealment of the existence of a design to wage war against the Government of India.
3. Intention to facilitate the waging of war by such concealment or knowledge that it is likely that such concealment will facilitate the waging of war.

Section 124:

"Whoever, with the intention of inducing or compelling the President of India, or the Governor of any State, to exercise or refrain from exercising in any manner any of the lawful powers of such President or Governor, assaults or wrongfully restrains, or attempts wrongfully to restrain, or overawes, by means of criminal force or the show of criminal force, or attempts so to overawe, such President and Governor, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

Ingredients:

1. Intention to induce or compel the President of India or the Governor of any State.
2. Such intention must be to make the President or Governor to exercise or to refrain from exercising in any manner any of the lawful powers of such President or Governor.
3.
 - (a) Assaulting or wrongfully restraining the President or Governor, or
 - (b) Attempting to restrain President or Governor, or

(c) Overawing by means of criminal force or the show of force, the President or Governor, or

(d) Attempting to overawe by means of criminal force, the President or the Governor.

The (1) and (2) ingredients are the mens rea part of the offence under this section. The (3) ingredient is the actus reus part of this section.

When the ingredients under (3) (a), (b), (c) or (d) is committed or satisfied, that is punishable if coupled with the intention to induce or compel the President or the Governor and also with the intention that by such inducement or computation the President or the Governor are made to exercise or to refrain from exercising their lawful powers.

Ramul's IAS

"Whoever by words, either spoken, or written, or by signs, or by visible representation, or otherwise, brings or attempts to bring into hatred or contempt, or excites or attempts to excite, disaffection towards, the Government established by law in India, shall be punished with imprisonment for life, to which fine may be added, or with imprisonment which may extend to three years, to which fine may be added, or with fine.

Explanation 1 – The expression 'disaffection' includes disloyalty and all feelings of enmity.

Explanation 2 – Comments expressing disapprobation of the measures of the Government with a view to obtain their alteration by lawful means, without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section.

Explanation 3 – Comments expressing disapprobation of the administrative or other action of the Government without exciting or attempting to excite hatred, contempt or disaffection, do not constitute an offence under this section."

The provisions of this section are not unconstitutional as being violative of the Fundamental Right of freedom of speech and expression under Article 19(1) (a) of the Constitution. It is only when the words have the tendency or intention of creating public disorder or disturbance of law and order that the law steps in.

Ingredients

- (1) Bringing or attempting to bring into hatred, contempt, or exciting or attempting to excite disaffection toward the Government of India.
- (2) Such act or attempt may be done (i) by words, either spoken or written, or (ii) by signs or (iii) by visible representation.

(1) Bringing or attempting to bring into hatred or contempt, or exciting or attempting to excite disaffection towards the Government of India

The offence does not consist in exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small, whether any disturbance or outbreak was caused by the publication of seditious articles is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within other sections of the IPC. If he tried to excite feelings of hatred or contempt towards the Government, that is sufficient to make him guilty under this section.

The **essence of the crime of sedition consists in the intention**, with which the language is used. The intention of a speaker, writer or publisher, may be inferred from the particular speech, article or letter. The intention is gathered from the articles.

If on reading the articles or speeches the reasonable, natural and probable effect of the articles or speeches on the minds of those who read them, or to whom they were addressed appears to be that feelings of hatred, contempt or disaffection, would be excited towards the Government, the offence is committed. Earlier view was that it is not an essential ingredient of sedition that the act done should be an act which is intended or is likely to result into public disorder. But this view of the law no longer seems to be correct, in view of the decision of the Supreme Court in **Kedar Nath's Case**; where it was held that 'comments however strongly worded expressing disapprobation of actions of Government, without exciting those feelings which generate the inclination to cause public disorder by acts of violence, would not be penal.'

It is not necessary in order to bring the case within this section that it should be shown that the attempt was successful. Attempt does not imply success. An attempt is intentional preparatory action which fails in object – which so fails through circumstances independent of the person who seeks its accomplishment. Whoever tries to excite, attempts to excite he is held to come within this section. **Whether the intention has achieved the result is**

immaterial. If the accused tried to excite hatred or contempt, the fact that he failed to do so will be no justification for him.

Government established by law in India

This expression means 'ruling authority' and its representatives as such, the existing political system as distinguished from any particular set of administrators. It means the various Governments constituted by the statutes relating to the Government of India and denotes the person or persons authorised by law to administer executive government in any part of India. It includes the state government as well as the Central Government of India.

Government does not mean the person or persons for the time being. It means the person or persons collectively, in succession, who are authorised to administer government for the time being. An attempt to remove from power, the Ministers in office in any State, or any agitation for the repeal of an Act of Parliament cannot be seditious if no unlawful means were employed.

Such act, attempt etc. may be done by words, either spoken or written or by signs or by visible representation.

Not only the writer of seditious articles but whoever uses in any way words or printed matter for the purpose of exciting feelings of disaffection to the Government is liable under the section, whether he is the actual author or not.

For everything that appears in his paper, the editor, printer, or publisher is as much responsible as if he had written the article himself. Whoever the composer might be, whosoever wrote or caused it to be written, the person who used it for purposes of exciting disaffection is guilty of sedition.

Disaffection may be excited in a thousand different ways. A poem, an allegory, a drama, a philosophical or historical discussion, may be used for the purpose of exciting disaffection. Seditious writing, while it remains in the hands of the author unpublished, will not make him liable. Publication of some kind is necessary. — — — —

Sending of seditious matter by post addressed to a private individual not by name but by designation as the representative of a large body of students amounts to publication if it is opened by anybody. Sedition does not necessarily consist of written matter, it may be evidenced by a wood-cut or engraving of any kind.

Explanations 2 and 3 — Both these explanations have a strictly defined and limited scope. They have no application unless the article in question criticises "the measure of government" or "administrative or other action of the Government" without exciting or attempting to excite hatred, contempt, or disaffection.

The object of the Explanations is to protect bonafide criticism of public measures and institutions with a view to their improvement, and to remedying of grievances and abuses.

Changes in policy and changes in measures are liable to criticism, and to criticise and urge objections to them is a special right of a free press in a free country. Every liberty is given to all men to express their opinions, so long as they do not misuse or abuse that power to the injury of others, including among injuries to others, injury to the State.

It is not sedition merely to criticise Government however bitterly or forcibly that may be done, or to seek its overthrow by constitutional means in order that another Government, equally constitutional, may be substituted in its place in a constitutional way.

Disapprobation

This means simply disapproval. It is quite possible to disapprove of a man's sentiments or actions and yet to like him. It does not amount to sedition.

Liability for copies from other papers:

The law does not excuse the publication in newspapers or writings which are themselves seditious libels, merely because they are copied from foreign newspapers as items of news.

Liability for letters of correspondents

The editor of a newspaper is liable for unsigned seditious letters appearing in his paper.

Publication of seditious exhibits

Republication of a seditious article used as an exhibit in a case of sedition is not justifiable.

Section 125:

"Whoever wages war against the Government of any Asiatic power in alliance or at peace with the Government of India or attempts to wage such war, or abets the waging of such war, shall be punished with imprisonment for life, to which fine may be added, with imprisonment of either description for a term which may extend to seven years, to which fine may be added, or with fine."

This section restrains a person from making the base of intrigues and enter price for the restoration of deposed rulers or other like purposes. The fulfilment of the obligations of the State to allies and friendly powers requires that the abetment of such be forbidden.

One sovereign power is bound to respect the subjects and the rights of all other sovereign powers outside its own territory.

This section, however, does not affect India's right as a sovereign nation to offer political asylum to a deposed ruler.

Section 126:

"Whoever commits depredation, or makes preparations to commit depredation, on the territories of any power in alliance or at peace with the Government of India, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property used or intended to be used in committing such depredation, or required by such depredation."

Committing depredation:

Means something more than a mere outrage against the property of an individual seems to have been contemplated.

Section 127:

"Whoever receives any property knowing the same to have been taken in the commission of any of the offences mentioned in sections 125 to 126, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine and to forfeiture of the property so received."

Ingredients:

1. The property was obtained by waging war against any Asiatic power or by commission of depredation.
2. Such war or depredation was punishable under Section 125 or 126.
3. Accused received property.
4. When he so received such property, he knew that it had been obtained as mentioned in ingredient (1).

Section 128:

"Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, voluntarily allows such prisoner to escape from any place on which such prisoner is confined, shall be punished with imprisonment for life, or imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Ingredients:

1. The accused being a public servant.
2. He had the person in question in his custody.
3. Such person was a state prisoner or prisoner of war.
4. The public servant allowed the prisoner to escape from the place where he was confined, voluntarily.

Section 129:

"Whoever, being a public servant and having the custody of any State prisoner or prisoner of war, negligently suffers such prisoner to escape from any place of confinement in which such prisoner is confined; shall be punished with simple imprisonment, for a term which may extend to three years, and shall also be liable to fine."

Ingredients:

1. The accused a public servant.
2. He had the custody of a state prisoner or prisoner of war.
3. Negligently allows the person to escape from the place of confinement.

Section 130:

"Whoever knowingly aids or assists any state prisoner or prisoner of war in escaping from lawful custody, or rescues or attempts to rescue any such prisoner or harbours or conceals any such prisoner who has escaped from lawful custody, or offers or attempts to offer any resistance to the recapture of such prisoner shall be punished with imprisonment or life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine."

Explanation:

A state prisoner or prisoner of war, who is permitted to be at large on his place within certain limits in India, is said to escape from lawful custody if he goes beyond the limits within which he is allowed to be at large.

Ingredients:

1. The person is a prisoner of war or state prisoner.
2. That person was at the time in lawful custody, or that such prisoner had escaped from lawful custody.
3. The accused had knowledge that such person was in lawful custody as a prisoner of State or of war, or had knowledge that such prisoner was escaped from the lawful custody.
4. Accused aided or assisted such prisoner in escaping, or that he rescued such prisoner or attempted to rescue or harboured or concealed such prisoner or he offered resistance to recapture.

MURDER AND CULPABLE HOMICIDE

Issues:

1. Distinction between the punishment between 302 and 304 Para I and 304 Para II $\Rightarrow$ Mens rea
2. Comparison between Section 299 and Section 300
 - The brief analysis $\rightarrow$ words
 - Except in cases hereinafter excepted
 - Culpable homicide or murder
 - Case Laws
3. Issue of causes or causation [Explanation II, 299]
4. Issue of killing a child in the mother's womb as compared with miscarriage
5. Issue of supposed circumstances
6. Issue of transferred malice
7. Killing a person for exercising evil spirit
8. Exceptions:
 - a) Grave and Sudden provocation
 - b) Exceeding private defence/as compared with the right to private defence [96-106]
 - c) Public Servants
 - d) Sudden fights
 - e) Consents /Sections 87-92
9. Punishments
 - Theories
 - Rationale of capital punishments/Pillai
 - English Law.

Homicide:

Homicide is derived from Latin words "homo" [man] and "cido" [cut]. Homicide is the killing of human being by a human being. [Stephens Digest, Nanavathi K.H.'s Case 1962]

Types

- i) Lawful – (a) Excusable (b) Justifiable [General Exceptions]
- ii) Unlawful – (i) Section 299 (ii) Section 300 (iii) Section 304 A (iv) Section 304 B (v) Section 305, 306

Unlawful Homicide:

Culpable homicide is the first kind of unlawful homicide. When there is a homicide, there arises a question of culpability or this result of human conducts i.e. *actus* in this case killing punishable/culpable which is forbidden by law i.e. *reus*. Actus is culpable only if there is a *reus* coupled with *mens rea*. The reus of actus depends on the presence or absence of mens rea. It is mens rea that determines whether the actus is reus or not.

Under the Scheme of the Code, Culpable homicide is genus and murder is species. Every murder is culpable homicide but not vice-versa.

The Code recognizes three degrees of culpable homicide:

1. Culpable homicide of the first degree

This is the gravest form of culpable homicide which is defined in Section 300 as murder, punishable under Section 302.
2. Culpable homicide of the second degree

This is lower or lesser form of homicide not amounting to murder as defined in section 299. This is punishable under the first part of section 304 [Except 299 (c)]

3. Culpable homicide of the third degree

This is the lowest type of culpable homicide. This is punishable under the second part of Section 304.

State v. Rayavarapee Punneya, AIR 1977 SD 45

"In the cases of culpable homicide, the punishment varies not according to acts but according to mind" – Examine.

The above degrees + actus reus + mens rea.

The reason behind the classification of culpable homicides provided under Section 299, 300, 300 exceptions, 304 A, 304 B, 305, 306, is that they vary in degrees of mental element. As the mental degree increases the punishment increases. It is clear by the punishment provided under Section 304 part I and part II. There it is amply clear that there is a distinction between the part I, where intention is the main criteria and punishment more, and in the part II, knowledge is the criteria where punishment is quite less. But, the actus is same i.e. death which is the result of the human conduct. But here 'reus' is varied according to the degree of mens rea.

So → 304 A → Two years of fine or both

→ 304 B → 7 years < imprisonments for life

305 → < 10 years 4 fine

306 → < 10 years 4 fine

[Explain 304 and 302]

Punishment:

The punishments for murder is specifically given in Section 302.

Culpable homicide

Culpable homicide not amounting to murder are of two kinds:

- i) - Culpable homicide which never became murder. It felts short of murder. Section 299.
- ii) Culpable homicide which actually would have become murder but for the exceptions, reverts back to culpable homicide. [Section 300, Exceptions].

So, Section 304 deals with both these kinds of situations. It contains two parts, giving importance to specific kind of mens rea, providing different punishments for different mens rea.

Section 304: Punishments for culpable homicide not amounting to murder:

"Whoever commits culpable homicide not amounting to murder,

- shall be punished with imprisonment for life, or imprisonment of either description for a term which may extends to ten years and shall also be liable to fine,
- if the acts by which the death is caused is done with intention
 - of causing death or
 - of causing such bodily injury as is likely to cause death;or
- with imprisonment of either description for a term which may extend to ten years, or with fine, or with both,
- if the acts done is with knowledge – that it is to cause death but without intention
 - to cause death or
 - to cause such bodily injury as is likely to cause death.

So, we can now divide which para punishes which acts and under which section.

i) Para I

a) Intention to cause death – 299 (1) or 300(1)

b) Intention to cause bodily injury – Section 299 (2) or Section 300 (2)(3)

ii) Para II

- a) Knowledge of likelihood of causing death – Section 299 (3) or Section 300(4) Exceptions falling under Section 300.

COMPARISON BETWEEN SECTION 299 AND SECTION 300

In *Reg v. Govinda* (1876)

SECTION 299 (Culpable Homicide)	SECTION 300 (Murder)
A person commits culpable homicide if the act by which the death is caused is done.	Subject to certain exceptions, culpable homicide or murder, if the act by which the death is caused is done.
INTENTION	
1. With the intention of causing death; [Illustration (a)] 2. With the intention of causing such bodily injury as is likely to cause death; [Illustration (b)]	1. With the intention of causing death; [Illustration (a)] 2. With the intention of causing such bodily injury as the offender knows be likely to cause the death of the person to whom the harm is caused; [Illustration (b)] 3. With the intention of causing bodily injury to any person, and bodily injury intended to be inflicted or sufficient in the ordinary course of nature to cause death [Illustration (c)]
KNOWLEDGE	
3. with the knowledge that the act is likely to cause death [Illustration (c)]	4. With the knowledge that the act is so imminently dangerous that it must, in all probability cause death, or such bodily injury as is likely to cause death. [Illustration (d)]

From the above chart, it becomes clear that—

Clause (1) of Section 299 corresponds to clause (1) of Section 300

Clause (2) Section 299 corresponds to clause (2) and (3) of Section 300

Clause (3) Section 299 corresponds to clause (4) of Section 300

"Except in the cases herein after excepted"

Section 300 begins with these words. It means that culpable homicide is not murder if the case falls within any of the exceptions.

Kishore Singh, [SIR 1977 SC 2267],

"Culpable homicide is not murder when the case is brought within five exceptions to Section 300, IPC. But even though none of the said five exceptions are pleaded or *prima facie* established on the evidence on record, the prosecution must still be required under the law to bring the case under any of the four clauses of Section 300 to sustain the charge of murder. If the prosecution fails to discharge this onus in establishing any one of the four clauses of Section 300, the charge of murder would not be made out and the case may be one of culpable homicide not amounting to murder as described under Section 299, IPC."

CULPABLE HOMICIDE IS MURDER

Section 300 deals with murder. It does not define 'murder'. Section 299 explains "culpable homicide. Section 300 sets out circumstances when culpable homicide amounts to murder and when it does not amount to murder.

Hidayatullah J. in *Anda* (1966), Said; "Murder is an aggravated form of culpable homicide."

The existence of one of the four conditions turns culpable homicide into murder while special exceptions reduce the offence of murder again to culpable homicide not amounting to murder. [*State v. Rayavarappu Punneya, AIR 1977 SC 45*]

An offence cannot amount to murder, unless it falls within the definition of culpable homicide; for, this section merely points out the cases in which culpable homicide amounts to murder. But an offence may amount to culpable homicide and yet may not amount to murder.

In **Pasput Gope v. Ram Bhagan Ojha [1897]** it was held that "in deciding the question whether culpable homicide amounts to murder, it will be erroneous to convict the accused of murder, simply because there is nothing to being him under any of the exceptions reducing the offence to one not amounting to murder, and it is the duty of the Court to consider, in the first place, whether the elements or elements which constitute the offence of murder, as defined in the Section".

In **Queen v. Sheikh Bexu, (1867) Peacock C. J.** observed:

"It does not follow that a case of culpable homicide is murder, because it does not fall within any of the exceptions in section 300. To render culpable homicide murder, the case must come within the provisions of clause 1, 2, 3, and 4 of Section 300."

Culpable Homicide is genus and murder is specie:

In the scheme of the Penal Code 'Culpable homicide' is genus and 'Murder' is specie. All murders are culpable homicides but not vice-versa. Speaking generally, 'culpable homicide' sans 'special characteristics of murder' is 'culpable homicide not amounting to murder'.

For the purpose of fixing punishment, proportional to the gravity of this generic offence, the code practically recognizes three degree of culpable homicide [299, 300, 300(exceptions)]

In the leading case of

State v. Rayavarappu Punneya, [AIR 1977] SC, Sarkaria J. Stated:

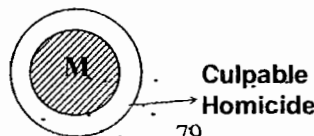
"It emerges [from the scheme] that whenever a Court is confronted with the question whether the offence is 'murder' or 'culpable homicide not amounting to murder', on the facts of a case, it will be convenient for it to approach the problem in three stages. The question to be considered at the first stage would be, whether the accused has done act by doing which he has caused the death of another. Proof of such a casual connection between the act of the accused and the death leads to the second stage for considering whether that act of the accused amounts to 'culpable homicide' as defined in Section 299. If the answer to this question is *prima facie* found in the affirmative, the stage for considering the operation of Section 300 is reached. This is the stage of which the Court should determine whether the facts proved by the prosecution brings the case within the ambit of any of the four clauses of the definition of 'murder' contained in Section 300. If the answer to this question is in the negative the offence would be 'culpable homicide not amounting to murder', punishable under first or the second part of Section 304, depending, respectively on the second or the third clause of Section 299 is applicable. If this question is found for the positive, but the case comes within any of the exceptions enumerated in Section 300, the offence would still be "culpable homicide not amounting to murder; punishable under the first parts of Section 304, Penal Code".

The Court, however, rightly added;

"The above are only broad guidelines and not last iron imperatives. In most cases, their observance will facilitate the task of the Court. But sometimes, the facts are so intertwined and the second and the third stages so telescoped into each other, that it may not be convenient to give a separate treatment to the matters involved in the second and third stage".

Both culpable homicide and murder fall under the broad category of unlawful homicide. Whenever a homicide is committed, it becomes unlawful under a few conditions. The actus reus for all unlawful homicides is the same, i.e. the killing of a human being by a human being. It is basically on the basis of the difference in the degree of the mental involvements that a homicide might amount to a mere culpable homicide not amounting to murder or murder. The difference between there two lies in the difference in the degree of mens rea as compared to culpable homicide.

For every murder, it has to be proved that there is a culpable homicide. This is quite evident from the starting phrase "except in the cases hereinafter excepted, culpable homicide is murder". It may be depicted by the figure as



A brief comparison of Section 299 and 300 would suffice to prove that culpable homicide is the genus and murder is specie.

1. Intention to cause death Cl. (1) of Section 299 and Cl. (1) of Section 300

The first clause of Section 300 enacts that culpable homicide is murder of the act by which the death is caused is done with the intention of causing death. This clause thus reproduces the first clause of Section 299. Intention is one of the essential elements of murder. An intention to kill a person brings the matter so, clearly within the general principle of mens rea as to cause no difficulty.

The presumption of law is that a man intends the natural and inevitable consequences of his own acts. It is, therefore, not necessary to take into consideration the accused's state of mind, at the time of committing the act in question, for the purpose of determining whether he intended to cause death or not. What he intends can only be judged by what he does or says, and if he says nothing, then his act alone must guide the decision. To determine what the intention of the offender is, each case must be decided on its own merits. Where it is proved that the accused fired a gun shot at such a close range that it could not have had other than a fatal effect and it is indicative of the intention of the accused that after firings at one person he reloaded the gun and fired another person there is a clear indication of his intention to commit murder.

The first clause in Section 299 is added only as a technical matter of the intention to cause death has not been put under section 299, then it would have resulted into something falling under section 300 via Cl. (1) without falling under section 299 that is to say something would have amounted to the offence of murder without first becoming a culpable homicide. This would have been a violation of the starting words of section 300 and the scheme of the code and also the principle on which they are based.

2. Intention to cause bodily injury likely to cause death: Cl (2) of Section 299 & Cl (2) of Section 300

So, 299 Cl (2) has following ingredients:

- a) Intention to cause a particular bodily injury.
- b) The bodily injury likely to cause death.
- c) The offender's knowledge about this likelihood.

Here, the knowledge to be read with respect to the likelihood of the injury causing death.

Drawing clue from the fact that in every murder culpable homicide is implicit, it can be said that whatever be the requirements for any clause of Section 299, they have to be read as implicit in the corresponding clauses of Section 300, plus something more has to be read in that clause under Section 300. Accordingly, culpable homicide falling under clause (2) of Section 299 may amount to murder under Cl (2) of 300, if two more additional requirements are fulfilled, viz.,

- i) the offender knows of the likelihood of causing death &
- ii) such likelihood of causing death is to the person to whom the harm is caused.

The distinguishing feature of the mens rea required under clause (2) is the knowledge possessed by the offender regarding the particular victim being in such a peculiar condition or the state of health that the internal harm caused to him is likely to be fatal, notwithstanding the fact that such harm would not in the ordinary course of nature be sufficient to cause death of the person in normal health or condition.

3. Intention to cause bodily injury likely to cause death: Clause (2) of Section 299 & clause (3) of Section 300

The difference between clause (2) of Section 299 and clause (3) of Section 300 is one of degree of probability of death resulting from the intended injury. It is the degree of probability of death which determines whether the culpable homicide is of the gravest, medium or the lowest degree. The word 'likely' in clause (2) of Section 299 conveys the sense of 'probable' as distinguished from a mere possibility.

In *State v. Rayavarapu Punayya (1977)* it was stated that: "The destination is fine but real, and if overlooked may result in miscarriage of justice". The words, "bodily injury sufficient in

the ordinary course of nature to cause death" mean that death will be the "most probable" result of the injury having regard to the ordinary cause of nature. The emphases here is on the sufficiency of the injury in the ordinary course of nature to cause death. So, this sufficiency is to be observed objectively and not subjectively.

It is important to note that in the comparison between Cl (2) of Section 299 and Cl (3) of Section 300, the difference does not lie in mens rea. Because the difference lies the degree of actus reus and under clause (3) of Section 300, objectively it has to be proved that a particular injury was sufficient. In the ordinary course of nature and not likelihood.

It is also very important to note that in Section 3, Cl (3), the knowledge should be regarding only the likelihood of causing death, and not regarding the sufficiency of causing death, because, other wise, it will amounts to an intention to cause death & will fall under Clause (1) of Section 300.

Intention to cause a bodily injury + known that it is sufficient to cause death = Intention to cause death.

The would not have been the intention of the legislature. The legislature would never want to give the same meaning to two clauses in the same Section and therefore, there has to be a harmonious constitution between Cl (1) and Cl (3) of Section 300. Cl (1) of Section 300 has got a purely subjective test and Cl (3) of Section 300 has got subjective and objective tests.

In **Rajwant Singh [AIR 1966]**, the Supreme Court stated:

"The third clause discards the test of subjective knowledge. It deals with acts done with the intention of consign bodily injury to a person and the bodily injury to a person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. In this clause the result of the intentionally caused injury must be viewed objectively. If the injury that the offender intends causing and does cause is sufficient to cause death in the ordinary way of nature, the offence is murder whether the offender intended causing death or not and whether the offender has subjective knowledge of the consequences or not."

When there are several injuries, and even of none of the inquires is sufficient in the ordinary course of nature to cause death of the deceased but cumulatively they are sufficient in the ordinary course of nature to cause death, the offence will be murder and not culpable homicide not amounting to murder.

4. Knowledge of probability of death: Cl. (3) of Section 299 & Cl. (4) of Section 300

Cl. (1) of Section 29 and Cl (4) of Section 300 both require knowledge of the probability of the act causing death. Cl. (3) of Section 299 takes about the knowledge of likelihood of causing death irrespective of the fact whether a bodily injury is caused or not.

The requirements of Cl. (3) of Section 299 are –

- a) some act or illegal omission by the offender &
- b) knowledge of the offender that he is likely by his act to cause death.

Clause (4) of Section 300, apart from the above two points, the knowledge should require –

- i) that the act is imminently dangerous;
- ii) that in all probability it will cause death or such bodily injury as is likely to cause death, or such bodily injury as is likely to cause death, and
- iii) that the act is done without any excuse for incurring the risk.

"Usually it applies to cases in which there was no intention of causing death or of causing any bodily injury".

As regards Cl. (3) of Section 299, Peacock C. J. observes in Gora Chand Gopee (1866): "there are many cases falling within the words of Section 299 or with knowledge that he is likely by such act to cause death that do not fall within the 2nd, 3rd or 4th clauses of Section 300, such for instance as the offences described in Sections 279, 280, 281, 282, 284, 285, 286, 287, 288 & 289. If the offender knows that his act or illegal omission is likely to cause death, and if in fact it does cause death. But, although he may know that the act of illegal omission is so dangerous that it is likely to cause death, it is not murder, even if death is caused thereby, unless the offender knows that it must in all probability cause death, or such bodily injury as is likely to

cause death, or unless he intends thereby to cause death or such bodily injury as is described in clause 2 and 3 of section 300"

Case: Emperor v. Ht. Dhiragla in AIR 1940 All 486

Facts: A village woman of twenty was ill treated by her husband. There was a quarrel between the two and the husband had threatened that he would beat her. All night time the woman, taking her six months old baby in her arms, slipped away from the house. After she had gone some distance she heard somebody coming up behind her, and when she turned round and saw her husband was pursuing her she got a panic and jumped down a well nearby with the baby in her arms. The result was that the baby died and the woman recovered. She was charged with murder of the child.

Held: An intention to cause the death of the child could not be attributed to the accused, though she must be attributed with the knowledge. However, primitive or frightened she might have been that such an imminently dangerous act as jumping down the well was likely to cause the child's death, but culpable homicide did not amount to murder because, considering the state of panic she was in, there was "excuse for incurring the risk of causing death within the preview of this clause."

SUPPOSED CIRCUMSTANCES:

Sometimes the death is caused under circumstances, the accused where gives a blow, the person becomes unconscious. The accused thinking that he is dead, in order to hide the things hangs him and the person died because of the strangulation.

The position may be understood in light of the following cases.

1. Queen v. Khandee (1950) Bom.

Facts: A man struck another on the head with a stick, and believing him not be dead set fire to the hut with a view to remove all evidence of the crime and it was found that the blow only stunned the deceased and the death was really caused by the injuries from the burning when the accused set fire to the hut.

Held: the offence committed was that of attempt to murder. Parsons J. [Dissent]: Offence of murder.

2. Queen v. Dalu Sardar (1915) Cal.

Facts: The accused assaulted his wife and gave her kicks, blow and slaps. The kicks were given below the navel. The woman fell down and became unconscious. In order to create an appearance that the woman had committed suicide, the accused took up the unconscious body of his wife, thinking it to be a dead body, and hung it by a rope. The post mortem examination showed that death was due to hanging.

Held: The accused could not have intended to kill his wife, if he thought that she was already dead, and he could not be convicted of murder, and that the offence committed was one under Section 325 for having given her kicks, blows, and slaps before she fell down.

3. Palani Goundan Case [1920] Mad.

Facts: The accused struck his wife a blow on her head with a ploughshare which, though not shown to be a blow likely to cause death, did in fact render her unconscious and, believing her to be dead, in order to lay the foundation of a false defence of suicide by hanging, he handed her on a beam by a rope and thereby caused her death by strangulation.

Held: Guilty of grievous hurt.

So, by looking at these cases, it is clear that none of these cases have given solution to the problem, whether the person is to be made liable by looking at the initial intention or final intention or initial actus reus or final actus reus.

In fact Palani Goundan case seems to uphold the contentions of the accused. Had the facts of Palani Goundan case been different, had the initial mens rea of the accused denied to cause death of the victim, then on the reasoning of the decisions of the Palani Goundan, the accused would still have been liable for grievous hurt which would not have been a correct decision.

After perusal of all relevant case laws, in light of basic elements of criminal liability the following principles come out in order to govern such situations

- i) The initial actus reus and the subsequent actus reus are said to be a part of the same transaction i.e., the subsequent actus reus is an extension of the initial actus reus. It can be said that owing to the circumstances the initial actus reus is aggravated to a higher degree by the subsequent actus reus.
- ii) The mens rea also accordingly get extended to the subsequent actus reus, that is to say, the presence or absence of the mens rea at the time of hanging is immaterial. What is important to be examined is what was the mens rea initially.

Thus, the conclusion is

Initial Mens rea	Initial actus reus	Subsequent actus reus	Liability
To cause hurt	+ less than death	+ death	= Hurt
To cause Grievous hurt	+ less than death	+ death	= Grievous hurt
To cause Culpable Homicide	+ less than death	+ death	= Culpable Homicide
To Cause Murder	+ less than death	+ death	= Murder

Transferred Malice (Section 301)

Section 301 of the IPC says: "If a person, by doing anything which he intends or knows to be likely to cause death, commits culpable homicide by causing the death of any person, whose death he neither intends nor knows himself to be likely to cause, the culpable homicide committed by the offender is of the description of which it would have been if he had caused the death of the person, whose death he intended or knew himself to be likely to cause."

This section incorporates with respect to the offence of culpable homicide what is known as the doctrine of transferred malice or transmigration of motive or transferred intention in English law. Mens rea is ordinarily an essential ingredient of proof of crime. It cannot be used on a plea to escape punishment when due to entirely fortuitous circumstances the actus reus with mens rea brings a result not foreseen by the criminal.

A shoots at B with the intention to kill him but misses B and kills C. Here C would not have been killed had the fatal shot prompted by malice towards B not been fired. Therefore, the malice towards B is said to have been transferred to C.

However, the doctrine has to be taken **cum grano salis**. The actus reus and mens rea must be of the same crime. Thus:

- (a) A shoots B (human being) – mistakes C for B and kills C ⇒ liable.
- (b) A shoots B (human being) – misses – kills C – A liable only when C is a human being.
- (c) A shoots B (a dog) – misses – kills C (a human being) – not liable as he had the mens rea to kill a dog.
- (d) A shoots B (human being) – kills D (a dog) – not liable as the actus reus for culpable homicide not there (a human being is not killed).

Illustrations from cases:

- (1) **Regina vs. Faulkner (1877)** – The appellant, intending to steal some rum caused destruction of the complete ship by fire which flared up when he lit a match to light up the dark hole in which the rum was stored.

Held: Arson was not the mens rea for theft. There was no mens rea for arson ⇒ not liable.

- (2) **Karan Singh's Case (1965)** – A hit B, a man, with a 9 month old infant in his lap, with a stick – infant hit and dead.

Held: Intention to teach B a lesson – not culpable homicide as the mens rea and actus reus must be for the same offence. Here, the mens rea was just to hit with a

stick to teach a lesson and not to kill. The likely effect for which the accused is to be held liable has necessarily to be judged with respect to the intended and not the unintended victim.

- (3) **Chaturmath Case** – Chaturmath swung a stick at A – wife of A came in between – a child in her arms hit and killed.

Held: Only as much of malice can be transferred as is actually there against the intended victim. Here, Chaturmath was liable only for simple hurt.

Karan Singh Case and **Chaturmath Case** also go on to illustrate the rule on the quantum of transferred malice: only as much malice is to be transferred as intended with respect to the intended victim.

- (4) **Queen vs. Latimer** – There was a quarrel in a public house kept by Ellen Rolston between Latimer and one Thomas Evanchappel. Latimer swung a belt and hit Thomas. The belt rebound and hit severely on the face of Ellen Rolston.

Held: Liable for hurt (transferred malice).

- (5) **Ballan vs. The State (AIR 1955 All 626)** – A person wanted in 3 dacoity cases on being challenged by the police, fired at a Sub-Inspector who ducked. The bullet hit and killed a constable standing behind the Sub-Inspector.

Held: Benson, J.'s observations in **S.N. Moorthy Case** quoted with approval. The need for Section 301 was by way of mere caution as the rule was already deducible from Sections 299 and 300. These sections use the words 'cause death' and 'any person' and not any particular person ⇒ liable.

- (6) **Gyananda Kumar vs. State of U.P. (AIR 1972 SC 502)** – The Supreme Court held that even if a person knowingly participated in a potentially dangerous situation and tried to interfere in a dispute in which process he got killed by a bullet aimed at one disputant by another.

- (7) **Public Prosecutor vs. Suryanarayana Moorthy (Madras HC)** – Benson, J. (see subsequent notes).

Other points:

- No difference where injury intended for one falls on another by accident. A makes a thrust at B and C jump in between and receives the thrust and dies ⇒ A liable.
- If the mischief falls either on a person not intended or on the intended person but in a different manner due to a mistake of a person not a party to the criminal design ⇒ liable. (See discussion on causation).
- Section 301 talks of only culpable homicide and not murder but impliedly cases of murder are included.
- Doctrine of transfer of malice applies also in cases of hurt etc. (even if death is caused) – **Chaturmath Case**.

Causation

Both sections 299 and 300 use the word 'cause' with respect to the intention as well as the bodily injury. A question arises as to what is cause? It is the reason that brings about the effect or consequences. But more often than not the consequences are brought about by a chain of causes. Only the real/proximate/efficient/dominant/cause of causes can be held liable. Such a cause is called '**causa causans**'. The other cause or causes can be called '**causa sine qua non**'.

Illustrations –

- (1) X pushes Y who falls on a stone and is hit. Who is to be held liable? X or the person who kept the stone over there or no one?
- (2) On a bright sunny day, the room is quite lighted. The doors and windows are bolted and it becomes dark. Which can be said to be the cause of light in the room – the sun or the doors and windows?

In the above cases (1) Z (who kept the stone) is 'causa sine qua non' and X is the causa causans (he is liable). In case (2) the sun is the causa causans and the doors and windows

are the causa sine qua non. Causa causans is the cause without which the effect would not have been there: liability is based only on the causa causans.

In the case of **The Public Prosecutor vs. Mushumooru Suryanarayana Moorthy**, the accused gave A poisoned halwa to eat (with the intention to kill him) which A threw after eating a part of it. B (a child) picked it up and ate it and also gave some to C (also a child). The two children died whereas A survived. The question was whether the accused is to be liable or A is liable or B is liable?

In this case, three causes act together:-

- (1) Accused mixed poison into the halwa and gave it to A to eat.
- (2) A threw away the halwa.
- (3) B picked it up and ate herself and gave it also to C.

Through out the web of criminal jurisprudence, no one can be held liable for the acts of others. No cause can be held liable until it is alone capable of causing the death. In the present case only the accused (cause 1) could cause the death independently ⇒ Accused liable (causa causans).

Explanation 2 to Section 299 says: "Where death is caused by bodily injury, the person who causes such bodily injury shall be deemed to have caused the death although by resorting to proper remedies and skilful treatment the death might have been prevented.

It basically refers to cases where the primary cause is set by the accused but the death occurs due to some ensuing cause or causes e.g.

- (1) A causes a minor injury to B but B dies due to Gangrene. Here A is liable as the primary cause initiated by A, which resulted into gangrene. [Vide: **Nagar Paro Case (AIR 1936 Rangoon 643)**]

- (2) **Mc Intyre Case (1847 Vol. II Cox's Criminal Cases, 379)** – A hits wife who is rendered unconscious. A doctor B gives her brandy through a pipe while she is unconscious. Unfortunately, some brandy enters her lungs and she dies.

Here the cause of death was the entering of brandy into lung pipe but the primary cause was set by A which necessitated the saving of brandy ⇒ A liable.

- (3) **Davis' Case [(1883), 15 Vol. Cox, 174]** – A injures B who was allergic to anesthesia. D, a doctor, serves anesthesia to B in order to operate upon him. B dies of this ⇒ A liable.

- (4) A causes a slight scratch to B. B is negligent and does not have it attended by a doctor. Later B dies of gangrene.

Here the secondary cause is more prominent then the primary cause ⇒ A not liable.

- (5) **Sobha vs. Emperor (AIR 1935, Oudh HC 446)** – A hits B and runs away. C takes unconscious B to a quack who renders a wrong treatment and B dies of that. Here, A is liable and not C as A set the primary cause plus C did have no mens rea.

However, such cases can be distinguished from cases where C deliberately takes the deceased to a quack, i.e. malice or intention can be attributed to C.

Thus, in cases relating to Explanation II the primary cause and the secondary cause have to be seen. If the secondary cause is more prominent the secondary cause only is to be held liable.

CULPABLE HOMICIDE V. MURDER

1. *R.V. Govinda (1876) ILR 1 Bom. 342*

Facts:

- (a) Govinda, a young man knocked his wife down. Put one knee on her chest, and struck her two or three violent blows on the face with closed fist.
- (b) The wife died shortly after.
- (c) Medical evidences show that the death occurred due to the effusion of blood on the brain.

Procedural facts:

- (a) Kemball, J. – murder.
Nanabai Haider, J. – culpable homicide.
- (b) The matter was referred to Melville, J. for his opinion.

Melville, J.'s opinion:

Section 299(a) and Section 300(1) – Same – intentional killing is always murder.

Section 299(c) and Section 300(4) – These are intended to apply to cases in which there is no intention to cause death or bodily injury, e.g. furious driving, firing at a mark near a public place etc. whether culpable homicide or murder, depends on the degree of risk to human life. Death likely => culpable homicide.

Death most probable => Murder.

Section 300(2) – The offence is murder if the offender knows that the particular person injured is likely, either from peculiarity of constitution, or immature age or other special circumstances, to be killed by an injury which would not ordinarily cause death.

Section 299(b) & Section 300(3) – Decision of most of the doubtful cases depends on this comparison.

Culpable homicide – if the bodily injury intended to be inflicted is likely to cause death.

Murder – if the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death.

Difference – degree of probability, e.g. nature of the weapon used – fist, stick on a vital part => likely => culpable homicide.

Sword or iron rod on a vital part – sufficient – murder.

In the present case:

The accused had (a) no intention to cause death, (b) there was no peculiarity about the deceased, of which the accused was aware of, (c) the bodily injury intended to be inflicted was not sufficient in the ordinary course of nature to cause death, rather it was likely (see Taylor's Medical Jurisprudence, 4th ed. p. 294) to cause death due to extravasation of blood.

Judgment:

The accused is guilty of culpable homicide not amounting to murder and not murder.

Some other cases:

- (a) *Rajwant Singh vs. State of Kerala AIR 1966, SC 1874.*
- (b) *State of A.P. vs. Punnyaya and Another, AIR 1977, SC 45.*

2. *State of Andhra Pradesh vs. R. Punnyaya, AIR [1977] SC 45*

Facts:

- (a) On the morning of the fateful day, the deceased, along with two, boarded a bus for Nekanikal. Some minutes later, the two accused along with the others got into the bus. They took tickets for Narasaraopet.
- (b) But seeing the deceased and his companion get down at Nekanikal, the five accused also got down.
- (c) The deceased, with PW 2 went towards a choultry, whereas PW 2 went to the roadside to ease himself.
- (d) The two accused picked heavy sticks from a coffee hotel and went after the deceased into the choultry.
- (e) PW 1 ran away but the deceased, being an old man, was not able to escape and he pleaded with folded hands for mercy.

- (f) The accused pounded the legs and arms of the deceased and started beating him indiscriminately till he became unconscious. Then, they ran away.
- (g) There were a total of 19 injuries of which 9 were grievous.
- (h) The deceased died the next morning due to shock and haemorrhage resulting from multiple injuries.
- (i) Dr. P.S. Sarojini conducted the autopsy and in her opinion, the injuries found on the deceased were cumulatively sufficient to cause death in the ordinary course of nature.
- (j) Evidences show that there was a political dispute between the deceased and the accused. And the deceased had lodged a complaint against the accused on the previous day. And at the time of the incident, the deceased along with his party men was going to the police station regarding the same.

Analysis:

Step 1: Whether homicide?

The deceased died due to the injuries caused by the beatings of the two accused. Hence, killing of a human being by a more human being (s) – homicide.

Step 2: Whether culpable homicide?

(a) **Actus reus:** The accused got down at Nekanikal bus stop, went to the coffee shop, picked up heavy sticks, walked upto the deceased and beat him up indiscriminately until he became unconscious. This series of acts of the accused constitutes the requisite actus. The 'actus' lies in the fact that the consequences (of death) can be manifestly related to the series of acts of the accused. The 'reus' lies in the fact that the causing of such a death is prohibited by law. And also, none of the 'general exceptions' apply in the given case.

(b) **Mens rea:** Though the accused beat the deceased indiscriminately with heavy sticks on legs and arms, no blow was given on any vital part of the body. This goes to point out that the accused did not have the intention to kill Punneyya, or even if they had the intention, it is not clear beyond all doubts.

However, from the evidences, it is clearly proved that the accused had the intention to cause the bodily injuries that were actually found. And moreover, the accused being not insane persons, must have known that such bodily injuries were likely to cause death. Hence, culpable homicide is proved beyond all doubts. (Section 299, clause (b) applies).

Step 3: Whether murder?

The presence of the actus reus has already been proved. Also, clause (1), Section 300 does not apply as the intention to cause death cannot be proved beyond all reasonable doubts. Clause (2), Section 300 does not attract in this case. Clause (4), Section 300 would be applicable only to that class of cases where the act of the offender is not directed against any particular individual but there is in his act that recklessness and risk of imminent danger, knowingly and unjustifiably incurred, which is directed against man in general and places the lives of many in jeopardy. Thus what remains to be examined is whether clause (3), Section 300 applies to the present case: **Two questions have to be discussed for that purpose:**

1. Whether the bodily injuries found on the deceased were intentionally inflicted by the accused? (subjective question)
2. If so, were they sufficient in the ordinary course of nature to cause death? (objective question)

There was bitter hostility between the warring factions to which the accused and the deceased belonged, criminal litigation had been going on. This constitutes the motive of the accused to beat the deceased. They had made a premeditated and a planned attack on the deceased, although the interval between the conception and execution of the plan was not very long. Their merciless pounding upon the legs and arms of the accused causing 19-20 injuries, their callous conduct in persisting in the assault even against two protest of feeling by a by-stander, all viewed against the previous animosity point out that the injuries were not accidental but intentional.

As to the second question, Dr. Sarojini, who conducted the autopsy, makes it very clear that the injuries were cumulatively sufficient in the ordinary course of nature to cause death. The injuries were the direct cause of the death and no secondary factor such as gangrenes, tetanus etc. supervened.

The expression "bodily injury" in clause (3), Section 300, includes also its plural, so that the clause would cover a case where all the intentionally caused by the accused were cumulatively sufficient to cause the death in the ordinary course of nature.

Thus, clause (3), Section 300 applies to the present case – it is a case of murder. The examples of another case also are cited: "*Auda vs. State of Rajasthan*" (AIR 1966 SC 148)

SOME OTHER CASES:

Culpable homicide not amounting to murder:

1. *Inder Singh Bagga Singh vs. State of Pepsu* (AIR 1955 S.C. 439)

Facts:

- (a) Bachittar Singh, a young man of strong built made overtures to the sister-in-law of Inder Singh who expressed resentment.
- (b) A few days later, Inder Singh saw, on one night, Bachittar Singh and his friend before his house.
- (c) Inder Singh came out with a lathi and gave six blows to Bachittar Singh. One of the blows fell on Bachittar Singh's head who became unconscious.
- (d) Bachittar Singh died of concussion of the brain, three weeks after the occurrence.

Judgment:

Homicide proved as it was Inder Singh's lathi blows that ultimately killed the deceased => Actus proved. Reus also proved as it was an unlawful homicide. (no general exception applies).

Culpable homicide:

1. Intention to kill – not proved.
2. Inder Singh came out of the house with a lathi and gave the deceased six blows indiscriminately; one of the blows hit him on the head. Their earlier dispute constitutes the motive of the accused to beat the deceased. From the above facts, the accused can be said to have intended to cause the bodily injuries. Hence, culpable homicide is proved.

For Section 300, clause 3 – Though he intended the injuries, it was not sufficient in the ordinary course of nature to cause death – lathi and not iron rod. He survived for three weeks and the doctor admits that an injury of that kind is not incurable – Section 300 not attracted. Therefore, culpable homicide not amounting to murder.

2. *Kapur Singh vs. State of Pepsu* [AIR 1956 SC 654]

Facts:

- (a) Bachhan Singh, son of the deceased had caused a severe injury on the leg of Pritam Singh, son of the appellant resulting in the amputation of his leg.
- (b) One year later the accused inflicted 18 injuries on the arms and legs of the deceased with a gandasa along with one Chand Singh, who held the deceased by his head.

Judgment:

Homicide is proved. For culpable homicide and murder:

- a. Actus reus is there.
- b. Intention to kill is not there. This is also clear from the motive to wreak his vengeance on the family of Bachhan Singh. It appears that the accused intended to inflict on the arms and legs of the deceased such injuries as would result in their amputation. No injury was intended on any vital part of the body.

At the same time, the accused must have known that the injuries they intended to inflict were likely to cause death – clause (b); Section 299. As no vital part of the body was hit, the injuries were not sufficient in the ordinary course of nature to cause death. Hence, it is not a case of murder but culpable homicide not amounting to murder.

In the above case two cases, the accused had no intention to kill; rather they were **reckless. (discuss this word).**

Recklessness: A state of mind in which a person foresees the possibility and not the certainty of the happening of certain consequences. He does not desire them and yet goes on.

3. **Kishore Singh and another vs. State of Madhya Pradesh [AIR 1977 SC 2267]**

Facts: The accused attacked two deceased with 'sabbal' and an 'axe'. Deceased died one month later.

Murder: 'Intention' (Section 300, clause 1): "Foreseeability of consequences for certainty and desiring them."

Judgment: Liable for murder.

Other relevant cases:

- a. **Rawalpenta Venkalu and another vs. The State of Hyderabad (AIR 1956 SC 171).**
- b. **Ran Chima Chougule vs. State of Maharashtra [AIR 1977 SC 2407]**

4. **Virsa Singh vs. State of Punjab [AIR 1958 SC 465]**

Facts:

- (a) Virsa Singh caused only one injury in the stomach of Khem Singh by a spear thrust.
- (b) The doctor who conducted the postmortem said that the injury was sufficient in the ordinary course of nature to cause death.
- (c) Khem Singh died the next day.

Analysis: The death of Khem Singh, a human being, has been caused by the spear thrust caused by Virsa Singh, a human being. Hence, it is a case of homicide.

For the homicide to be culpable the two requirements, viz. actus reus and any one of the mental elements (i.e. mens rea) under Section 299 must be present.

Actus reus: Virsa Singh causes a spear thrust in the stomach of Khem Singh and causes his death – this constitutes the requisite actus. 'Reus' lies in the fact that the consequence of death is forbidden by law and does not fall in any 'General Exceptions.'

Mens rea:

- (a) As there was only one blow, though fatal, it is not clear beyond all doubts that Virsa Singh had the intention to kill Khem Singh. Moreover, the deceased died only one day after the occurrence.
- (b) The accused must have known that the injury be inflicted was likely to cause death. As he gave only one blow with the spear, it is clear that the injury was intended one – culpable homicide proved.

For murder: In the present case, one has to examine whether clause 3, Section 300 applies.

Clause 3, Section 300: "If it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death."

If there is an intention to inflict an injury that is sufficient to cause death in the ordinary course of nature, then the intention is to kill and in that event, clause 3 would be unnecessary because the act would fall under clause 1.

Clause 1 vs. Clause 3: For clause 1, the intention to kill should be there, whereas for clause 3, the intended bodily injury need not be intended also to be sufficient in the ordinary course of nature to cause death; rather it should be (though not intended to be) so. And this is to be established quite objectively.

"Intention of causing the bodily injury" – subjective to the offender, "and the bodily injury intended....to cause death" – the first part of this is descriptive of the earlier parts of the section. The second part is objective. **General rules for clause 3:**

- a. Prosecution must establish, quite objectively, that a bodily injury is present.
- b. The nature of the injury must objectively be proved.
- c. The intention to inflict that particular bodily injury must be proved. For this, the enquiry proceeds on broad lines as e.g. whether there was an intention to strike at a vital or a dangerous spot, and whether with sufficient force to cause the kind of injury found to have been inflicted etc.
- d. The injury caused is sufficient in the ordinary course of nature to cause death – objective enquiry.

In the present case, the accused's intention to inflict the bodily injury found to be there is clear. And the injury is sufficient in the ordinary course of nature to cause death, as the doctor said. Thus, it is a case falling under Section 300, IPC.

5. **Harjinder Singh vs. Delhi Administration [AIR 1968 SC 867]**

Facts:

- (a) A fight took place between Dalip Kumar and the Harjinder Singh.
- (b) Harjinder Singh ran away, threatening Dalip Kumar to teach a lesson.
- (c) After a while, he came with his brother, dragged Dalip out of his house and beat him up.
- (d) Dalip's brother, Kewal comes to rescue Dalip.
- (e) Then Harjinder held Dalip by his collar by his left hand and took out a knife and stabbed Kewal in the thigh.
- (f) Kewal died because of the cutting of the femoral artery and veins.
- (g) Evidence show that Kewal was in a crouching position when Harjinder Singh made the knife blow but suddenly Kewal stood up and the blow landed on his thigh.

Judgment:

Clause 3, Section 300, IPC – Intention to cause that particular bodily injury was not there (see fact no. 7), although the injury caused was sufficient in the ordinary course of nature to cause death. Hence, Section 300 not proved.

Clause 4, Section 300, IPC – Clause 4 would be applicable where the knowledge of the offender as to the probability of death of a person or person in general – as distinguished from a particular person or persons – being caused from his imminently dangerous act, approximates to a practical certainty. Such knowledge of the offender must be of the highest degree of probability, the act having been committed by the offender without any excuse for incurring the risk of causing death or such injury as aforesaid.

6. **Emperor vs. Dhirajia [AIR 1940 All. 486]**

Facts:

- (a) Dhirajia was not treated well by her husband.
- (b) One day, she had a quarrel with her husband regarding her going to her parent's place and he threatened to beat her.
- (c) In the night, she left to home with her six month old baby in her arms.
- (d) When chased by her husband, she became panicky and started running.
- (e) Finding no other escape, she jumped into a well with the child.
- (f) The child died whereas she herself was rescued.

Judgment: Homicide proved.

For culpable homicide: Actus reus is there. Mens rea:

- a. Intention to cause death cannot be attributed to Dhirajia having regard to the panic that she was in.
- b. "Bodily injury" – not applicable.
- c. "Knowledge" – knowledge stands on a different footing from intention. Even though the capacity to form intention/to reason has been unseated by some extraneous force, some degree of knowledge can always be attributed to every sane person. Although, the degree of knowledge varies from person to person (viz. educated, uneducated etc.)

Dhirajia could not be taken to be ignorant of the fact that the act of jumping into a well with a baby in the arms was likely to cause that baby's death – culpable homicide proved.

For murder [clause 4, Section 300]: Dhirajia had an excuse viz. reasonable fear of husband and the panic in which she was thrown when she saw her husband, the court acquitted her of the charge of murder.

7. **Gyarsibai vs. The State of Madhya Bharat [AIR 1953, Madhya Bharat 61]**

In this case, Gyarsibai did not have any excuse to incur the risk of causing the death. In no way, she would have been able to avoid a greater evil by doing/committing the lesser evil. Hence, it is murder. (clause 4, Section 300, IPC).

CRIMINAL LAW: PRINCIPLES OF LIABILITY

Doctrine of Transferred Malice/Transferred Intention (Section 301, IPC)

A shoots at B with the intention to kill him. He misses. The bullet passes over the head of B and kills C. Can A plead the lack of mens rea in the case of killing C?

Solution

The actus reus is there. Malice/criminal intent towards B is accepted. Unless the malice existed the fatal shot would not have been fired. C would not have been killed had the fatal shot prompted by the malice towards B had not been fired. Therefore, the malice towards B is said to have been transferred to C. This is called the doctrine of transferred malice.

Definition

So long as there was malice aforethought if some one other than the original object was the victim of it even without the criminal intending this it is to be held that the malice aforethought was transferred to the victim. However, the doctrine has to be taken cum grano salis. The actus reus and mens rea must be of the same crime. Thus:

1. A shoots B (human being) – mistakes C for B and kills C – liable.
2. A shoots B (human being) – misses – kills C – A liable only when C is a human being.
3. A shoots B (a dog) – misses – kills C (human being) – not liable, as he had the mens rea to kill B, a dog and not a human being.
4. A shoots B (human being) – kills D (a dog) – not liable as the actus reus for culpable homicide not there (a human being is not killed).

Illustrations from cases:

1. **Regina vs. Faulkner:** The appellant, intending to steal some rum, caused the destruction of the complete ship by fire which flared up when he lit a match to light up the dark hold in which the rum was stored.

Judgment: Arson was not the actus reus of theft. There was no mens rea of arson. Acquitted.

2. **Karan Singh's case:** A hits B, a man with a 9 month old infant in his lap, with a stick – infant hit – dead.

Judgment: Intention – to teach B a lesson – not culpable homicide as the mens rea and the actus reus must be for the same offence. Here, mens rea was just to hit with a stick to teach a lesson and not to kill.

- The language of the Acts relating to statutory offences sometimes creates problems, viz. in Section 11 of Offences Against The Person Act, 1828 (England) – "such person". This was later changed to "any person" by the legislature.

However, in India, Section 30 of IPC leaves no ambiguities in this regard.

DEATH PENALTY/CAPITAL PUNISHMENT

Punishment for murder: Section 302

"Whoever commits murder shall be punished with death or imprisonment, and shall also be liable to fine."

The issue of death penalty has to be examined in two perspectives:

1. The rationale behind the death penalty.
2. The test for a matter falling under the category of capital punishment.

I. As to rationale of death penalty

Death penalty has been objected to from two perspectives:-

- (a) As being violative of the Indian Constitution.
- (b) From the jurisprudential perspective in light of the reformatory theory.

As to the objection with respect to the violation of Indian Constitution, the objection has been that the capital punishment is –

- (a) An instance of unreasonable classification (Article 14)
- (b) Violation of Article 21 i.e. taking away of the life of the person.

As to the violation of Article 14:

Regarding the first objection, it has been said that in light of the Article 14 of the Indian Constitution and the doctrine of reasonable classification, what has to be examined is the goodness of the purpose of the law, as well as the passing of the reasonable differentia test by the classification. The purpose of capital punishment is to punish a person with death penalty in the cases of murder, where the socio-psychological effect of the crime is to grave upon the society. This is quite a good purpose of the law.

As far as the second objection is concerned, the classification as such in light of the point no. 1, the purpose not are allowed rather what has to be examined is the reasonableness of this classification.

Before **Bachhan Singh Case**, there was a sort of vacuum as to which matters shall fall under the domain of capital punishment and which shall not. But the Bachhan Singh Case (1980), the criteria of "exceptional and rarest of rare cases", have also set the sufficient guidelines for the same. Therefore, the classification, if those guidelines are not violated, will always be a reasonable classification.

As to the violation of Article 21:

Article 21 disallows the state from depriving a person of his life. Even if a person is a murderer, he ought not to be deprived of his life, as per the mandate of Article 21. However, Article 21, itself provides for such a deprivation, where it says "Except in accordance with the procedure established by law".

Moreover, this procedure has to be a reasonable procedure, as is evident from the decision of **Maneka Gandhi Case**. This, in the ultimate analysis, Article 21 also allows for a deprivation of a person's life in accordance with a reasonable procedure by (reasonable) law.

If at all anything has to be examined, it has to be examined in light of the reasonableness of the procedure and the justness (reasonableness) of the law. The reasonableness of the law has already been discussed. As far as reasonableness of procedure is concerned, Section 354 (3) of Code of Criminal Procedure states that "if death sentence is awarded, then, special reasons have to be given for the same." This is sufficient enough for guideline to examine the reasonableness of the procedure".

As to reformatory theory:

There are various theories which advocate the purpose of punishment. The retributive theory, which believes in tit for tat, an eye for an eye, is inadequate, because it does not serve any purpose either to the persons punished or to the society. the deterrent theory

mainly emphasises the deterrent effect on potential offenders. The deterrent theory in case of death penalty is examined not in the deterrent effect on the potential offenders but, whether it deters more effectively, than the other penalties, i.e. the quality of punishment and not the purpose. Likewise, the reformatory theory, advocates that the purpose of penology is to reform the offenders, but, the case of death penalty, does not give a room for any reformation. So, the abolitionists have contented that death penalty is inhumanistic.

In **Ramdev Chauhan vs. State of Assam (2000)**, the Supreme Court observed: "Though it is time that in a civilized society, a tooth for tooth, and a nail for nail and a death for death, is not the rule, it is equally true when a man becomes a beast and menace to the society, he can be deprived of life, according to the procedure established by law, as the constitution itself has recognised the death sentence, as a permissible punishment for which sufficient constitutional provisions such as an appeal, reprieve etc. have been made."

Of course, earlier the retributive theory was followed. And, now, the State's duty is social engineering, but still there are certain areas where reformation is not possible. The reasons why the community as a whole does not endorse the humanistic approach reflected in "death sentence-in-no-case" doctrine are not for to seek. In the first place, the humanistic edifice is construed on the foundation of "reverence for life" principle when a member of the community isolates this very principle by killing another member.

The society may not feel itself bound by the shackles of this doctrine. Secondly, it has to be realised that every member of the community, is able to live with safety without his or her own life being endangered because of the protective arm of the community and on account of rule of law enforce by it when ingratitude is shown instead of gratitude by 'killing' a member of the community which protects the murderer himself from being killed, or when community feels that for the sake of self-preservation the killer has to be killed, the community may well withdraw the protection by sanctioning death penalty. Even, the community does not feel that the reformation is possible in that person. There will be constant and persistent fear in the society. So, the community, in rarest of rare cases, when its collective conscience is shocked, it will expect the holders of the judicial power to inflict death penalty irrespective of their personal opinion as regards desirability or otherwise of retaining death penalty.

II. As to matters falling under the category of capital punishment

This matter was decided emphatically, for the first time, in **Bachhan Singh vs. State of Punjab (1980)** and certain guidelines were laid down in this case for a particular test. As far as the validity of death penalty is concerned, the court said that even Article 6 (1) and (2) of the International covenant on Civil and Political Rights, does not require India or any country to abolish death sentence in all circumstances. What they require at all is –

- (a) Death penalty should not be arbitrarily inflicted.
- (b) It shall be imposed only for the most serious crimes in accordance with law and such a law cannot be a *ex post facto* legislation.

After that the court said, "the present legislative policy is discernible from Section 235 (2) and Section 352 (3) of the Code of Criminal Procedure. It is that in fixing of the degree of punishment or making the choice of the sentence for various offences in which capital punishment can be awarded. The court shall not confine its consideration, principally the crime, but also due consideration must be given to the circumstances of the criminal. It is only when the culpability assumes the proportion of extreme depravity that special reasons can legitimately be said to exist. Judges must not be blood thirsty."

Guidelines as can be inferred from this case are:-

1. Extreme penalty of death need not be inflicted except in gravest cases of extreme culpability.
2. Before opting for the death penalty, the circumstance of the offender also required to be taken into consideration, along with the circumstances of the crime.
3. Life imprisonment is the rule, death sentence is an exception, i.e. to say, death sentence must be awarded only when life imprisonment altogether seems to be

inadequate or insufficient having regard to the circumstances of the crime and criminal.

4. A balance sheet of aggravating and mitigating circumstances should be drawn up and the mitigating circumstances should be given full weightage.

After that the court formulated two questions:

1. Is there something uncommon about the crime, which renders sentence of life imprisonment inadequate and calls for death sentence?
2. Are the circumstances of the crime such that there is no alternative but to impose death sentence even after giving the maximum weightage to the mitigating circumstances in favour of the offender?

Macchhi Singh vs. State of Punjab (1983) elaborated the test provided in the **Bachhan Singh Case**. It was observed that in respect of rare cases, when collective conscience of the community is shocked, that it will expect the holders of the judicial power centre, to inflict death penalty irrespective of their personal opinion as regards the desirability or otherwise of retaining death penalty.

Now, the court laid down the various situations, by way of examples which will fall under rarest of rare cases:

1. Murder has been committed in an extremely brutal, grotesque, diabolical manner
2. The motive of the crime e.g. hired criminals
3. Large scale massacres – killing people of one community, bride-burning cases, multiple murders.
4. Killing a small child, killing old aged woman in a brutal manner.
5. Killing of a person who bestowed a lot of trust upon the murderers
6. Victim being a public figures, being killed for some political reasons.

Krishna Mochi & Others vs. State of Bihar (2002) – This case was related to massacre. The question in this case was that, could a person be awarded death sentence by way of Section 302 read with Section 149, that means a person who has not himself shared the common object and shown rather has just shared the common object and shown his physical presence; can he be given death sentence. In this case, it was held that the death sentence can be awarded to such person.

The court referred another case **Masalti (1965)** in which Gajendragodkar, C.J. had given the judgment. He observed: "As a matter of proposition of law, it would be difficult to accept the argument that where the death penalty should be awarded and where not." Because, it is a matter which has to be decided on the facts and circumstances of each case.

In **Krishna Mochi Case**, 10 persons came to kill male members of a family. Among them 5 were having deadly weapons. It was held that all the remaining persons are also to be imposed with death penalty.

So, it is clear that when the offender offers a traumatic threat to the survival of the social order, the death penalty may be justified. For example, if an economic offender who intentionally mixes poison in drugs professionally or wilfully adulterates intoxicating substances injuriously and knowingly or intentionally and causes death for the sake of private profit, such trader is a menace to social security and, is a violator of social justice whose extinction becomes necessary for society's survival.

Some other cases:

1. **Suresh (2007)** – in this case, the accused, killed his own brother and family members, including minor children at night when they were all asleep. The accused with axe and chopper, cut the children, and a one-year old child was cut into two pieces and his brain was torn asunder. This was done for the purpose of acquiring a bit of land which the accused's brother claimed to be his.

This, court held that, this is the rarest of rare cases which deserves death sentence.

2. **Shiv Ram (1998)** – In this case, the accused persons formed an unlawful assembly to take revenge for murder of A-1's brother whose head was severed by the assailants, committed five murders in an extremely brutal, diabolical, revolting and dastardly manner, severed three heads and roasted alive an innocent boy of 10 years and took out a victory procession with three heads raising slogans.

The court held that the case falls within the ambit of rarest of rare cases and extreme death penalty was given.

DEATH BY RASH OR NEGLIGENT ACT

Section 304 A: Causing death of negligence

"Whoever causes the death of any person by doing any rash or negligent act not amounting to culpable homicide shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both."

This section deals with causing of act by rash or negligent act. This section is provided to cover those cases, which does not fall under Section 299 or Section 300. The object of this section is to make criminally liable a person, by whose act the death is covered. The cause of death must be the direct cause of the act and it should not be too remote in causing death.

Actus reus and mens rea

The act of causing death is the actus reus and causing such death by the rash or negligent attitude is the mens rea. The act to be prohibited by law must be that very act of the accused which is the direct cause of the death. The act should prima facie indicate the death. And if there is slight deviation is the cause and is quite remote then that act is not culpable. Another important aspect is that the act should be the result of the rash or negligent attitude. The rashness or negligence should be in existence at the time of the commission of the act. If the guilty mind of rashness or negligence is absent at the time of the commission of the act then that act will not come under this section. So both actus reus and mens rea, i.e. the act of causing death and rashness or negligence must concur to each other.

For example, a person A, is driving a car, and while negligently driving he hits a person on the road, causing hurt, immediately he reverse the car, and becomes conscious, then the car moves itself and without subjection to his control, and even without his intention, causes the death of the person. — —

In this example, the accused, when he caused hurt was negligent and that act of causing hurt is culpable under this section. But, when he took the car back and became conscious, he was not negligent and even beyond his control, it caused the death of the person. Here, his act rather his unintentional act was not coupled with mens or rashness or negligence. Moreover, the death was caused due to some supervening act independent of his control. So, he will not be liable for causing death, he will only liable for causing hurt.

Ingredients:

1. Death is caused by an act of the accused.
2. The act was caused or committed rashly or negligently.
3. The death must not be culpable homicide or murder.

1. The death is caused by the act of the accused

Firstly, there should be a death of a human being. The act of the accused must cause the death and not any other act or any supervening act. The word "act" is very important because the actus reus and the mens rea both have to be examined vis-a-vis this very 'act'. Example is that of car driver.

2. The act must be caused negligently or rashly

Rashness – Rashness is hazarding a dangerous or wanton act with the knowledge that it is so that it may cause injury; but without the intention to cause injury or knowledge that injury will probably caused, with positive hope that it will not be caused. It is a faint awareness and not a direct knowledge. The positive hope that if anything unusual happens, then he will definitely manage such a situation. Culpability in the matters of Section 304 A in rashness lies in the fact that one acted despite the consciousness. It is an over hasty act as opposed to a deliberate act.

For example, when a person is moving in a car, he sees a person standing in the middle of the road. Even then he moves his car and causes his death. This is the direct knowledge that death is possibly going to occur. So, the knowledge is imputed upon him. Because, any reasonable man, will not dare to take his car; and there is acknowledge that he is likely by is act to cause death. So liable under Section 299 clause (3).

But, when a person is moving in a car and another person in the pavement is trying to move downwards and even the car driver takes his car and causes death of that person, he will be liable for (negligently) or rashly causing death. Because, any reasonable man can think that it is manageable, bend chance of managing — is more whereas in the earlier case it was less, and risk involved was more. So, here it was only a faint knowledge of causing hurt or any other harm. So, he will be liable for having faint knowledge of causing death and will be liable under this Section 304 A and not under Section 299 clause (3).

Negligence – Negligence is the failure to exercise proper care and caution, to guard against injury to public in general or to a particular individual. Consciousness is absent but duty to take care has been neglected.

Negligence in tort and negligence under this Section:

1. In tort, the scope of examination of negligence is a bit broad. The test is very rigid. But, in IPC, negligence has to be very strictly examined at the point of time when the death was committed.
2. In tort, even passive negligence might amount to a tortious negligence. Whereas in IPC, an active negligence has to be seen, as was observed in **B. P. Ram vs. State of M. P. (1991 SC)**.

For example, if a boy enters into the swimming pool without the knowledge of the chowkidar and creeps into it and dies. Here, the chowkidar is imputed with passive knowledge, and will be liable for tort of negligence. But, if a chowkidar throws the child so that he teaches swimming, thinking that if the child would not swim, he will catch him. Here, the negligence is active negligence.

Section 304 A does not apply to the cases of voluntary commission of an offence as in that case, either intention or knowledge is involved.

3. The act must not come under culpable homicide or murder

Section 299 states that if a person causes the death, with the knowledge that he is likely by his act to cause death, is punishable for culpable homicide not amounting to murder. Section 300 clause (4), states that the culpable homicide is murder if the person causes death with the knowledge that, it is imminently dangerous and in all probability will cause death.

This, Section 304 A, expressly excludes the cases falling under Section 299 (3) and Section 300 clause (4). So, it is said that, Section 299 involves direct knowledge, whereas Section 304 A requires faint awareness of causing death, of direct knowledge is proved then Section 304 A must give way to Section 299 (3).

One more point that strengthens the fact that the mens rea required in Section 304 A than that of Section 299 clause (3) is punishable under Section 304 Part II, Section 304 A itself provides for punishment. Section 304, Part II provides for maximum 10 years of imprisonment and Section 304 A provides for maximum 2 years of imprisonment. So, there is 8 years of difference in punishment. This clearly shows, that the mens rea should be less than that is required for Section 299 clause (2). Because, the purpose of criminal law is to punish not only the mens rea but also the degree of mens rea.

Question – “The rash or negligent act must be the direct or proximate cause of the death and not any remote cause.” Examine.

Answer – The purpose of criminal law to punish a person is to punish the act and mind which resulted in death. One of such act is the rash or negligent act which caused death. The given statement involves two aspects:-

1. The rash or negligent act which causes death.
2. The direct or proximate cause and not remote cause, which caused the death.

As to 1 point:

The death must be caused by an act which is committed negligently or rashly. The act must be the direct cause of rashness or negligence. The act must be when committed directed by the rashness or negligence. There should be concurrence of rashness or negligence and the act, that has caused death, and that act is punishable for causing death coupled with required mens rea.

As to the direct or proximate cause and not remote cause of death:

The rashness which is said to cause the death should be a direct or proximate i.e. the pointed cause, which has caused the death. If the death is not caused by such rashness or negligence it is not possible. Because, the negligence here is the active negligence and not passive negligence. Rashness is the direct rashness and not too remote rashness. The active negligence and direct rashness is punished under IPC and not remote negligence or remote rashness.

For example, when a truck driver is driving the truck, of which the truck has been failed and he is driving that truck without any fault from many days, if he causes death by driving as he was driving usually, he cannot be held liable for rash or negligent act of causing death. Because, here, his rashness or negligence which has resulted to his act of driving is not the immediate rashness or immediate and direct negligence. This rashness/negligence is their from many days before. So, that act which is the result of remote rashness/negligence cannot be punished. But, this act is no doubt tortious act.

Case – Cherubin Gregory vs. State of Bihar (1962) – The accused set live electric naked wire on the passage to his latrine so that no trespasser should come and use the latrine, there was no warning that the wire was live. The deceased, a trespasser, managed to pass into the latrine without contracting the wire and while she was coming out, her hand happens to touch the wire and she got a shock as a result of which she died soon after.

It was held by the Supreme Court that the knowledge was not direct and proximate, and therefore not liable for culpable homicide but liable under Section 304 A.

Hussain S. N. vs. State of A. P. (1972) – The appellant, a bus driver, had tried to pass through a level-crossing on finding the gates open, but before he could clear the crossing, a goods train had come and dashed against the rear side of the bus with the result that the bus was thrown off causing serious injuries to passengers, of whom some died.

It was held that where a level-crossing was protected by a gate-man as in this case, and a gate-man had negligently kept the gates open at a time when an unscheduled train was passing by, there was no duty cast upon the driver to stop the vehicle and look out before crossing the level crossing. The knowledge constituting negligence or rashness was too remote and is not direct cause for death. So, the driver was held not liable.

Hurt (Section 319) and Grievous Hurt (Section 320)

Section 319 – Whoever causes bodily pain, disease or infirmity to any person is said to cause hurt. Act neither intended nor likely to cause death is hurt even though death is caused – where there is no intention to cause death or knowledge that death is likely to be caused from the harm inflicted, and death is caused, the accused would be guilty of hurt only if the injury caused was not serious.

Section 320 – The following kinds of hurt only are designated as "grievous":-

- (1) Emasculation.
- (2) Permanent privation of the sight of either eye.
- (3) Permanent privation of the hearing of either ear.
- (4) Destruction of any member or joint.
- (5) Destruction of permanent impairing of the powers of any member or joint.
- (6) Permanent disfiguration of the head or face.

(7) Fracture or dislocation of a bone or tooth.

(8) Any hurt which endangers life or which causes the sufferer to be during the space of twenty days in severe bodily pain, or unable to follow his ordinary pursuits.

Grievous hurt is a hurt of a more serious kind. To make out the offence of voluntarily causing grievous hurt, there must be some specific hurt, voluntarily inflicted; and coming within any of the eight kinds enumerated under this section.

The line between culpable homicide not amounting to murder and grievous hurt is very thin line. In the one case, the injuries must be such as are likely to cause death, in the other the injuries must be such as endanger life.

The mere fact that a man has been in hospital for twenty days is not sufficient. It must be proved that during that time he was unable to follow his ordinary pursuits. A disability for twenty days constitutes the offence of grievous hurt, if it continues for a smaller period, then the offence is hurt.

Act neither intended nor likely to cause death may amount to grievous hurt even though death is caused. Where there is no intention to cause death or no knowledge that death is likely to be caused from the harm inflicted, and death is caused, the accused would be guilty of grievous hurt if the injury caused was of serious nature, but not of culpable homicide.

Emperor v. Indu Beg:- The husband while engaged in a verbal wrangle with his wife struck her a blow on the left side of the face with great force as a result of which she bled from the nose and died within an hour. Held, the accused was liable for voluntarily causing grievous hurt and not of culpable homicide not amounting to murder. Since he had no culpable intention to cause death.

Voluntarily causing hurt

Section 321 – Whoever does any act with the intention of thereby causing hurt, to any person, or with the knowledge that he is likely thereby to cause hurt to any person, and does thereby cause hurt to any person, is said "voluntarily to cause hurt".

Voluntarily causing grievous hurt

Section 322 – Whoever voluntarily causes hurt, if the hurt he intends to cause or knows himself to be likely to cause is grievous hurt, and if the hurt which he causes is grievous hurt, is said "voluntarily to cause grievous hurt".

Explanation – A person is not said voluntarily to cause grievous hurt except when he both causes grievous hurt and intends or knows himself to be likely to cause grievous hurt. But he is said to cause grievous hurt, if intending or knowing himself to be likely to cause grievous hurt of one kind, he actually causes grievous hurt of another kind.

ASSAULT (SECTION 351)

FRAMEWORK SHEET

BARE ACT ANALYSIS

SECTION INVOLVED – SECTION 351 TO 358 OF I.P.C.

DEFINITION

Section 351 of I.P.C. defines Assault as follows: – "Whoever makes any gesture, or any preparation intending or knowing it to be likely that such gesture or preparation will cause any person present to apprehend that he who makes that gesture or preparation is about to use criminal force to that person is said to commit an assault".

EXPLANATION: – Mere words do not amount to an assault. But the words which a person uses may give his gestures or preparations such a meaning as may make those gestures or preparations amount to assault.

ILLUSTRATIONS

- (a) A shakes his fist at Z, intending or knowing it to be likely that he may thereby cause Z to believe that A is about to strike Z. A has committed an assault.
- (b) A begins to unloose the muzzle of a ferocious dog, intending or knowing it to be likely, that he may thereby cause Z to believe that he is about to cause the dog to attack Z, A has committed an assault upon Z.
- (c) A takes up a stick, saying to Z, "I will give you a beating". Here, though the words used by A could in no case amount to an assault, and though the mere gesture, unaccompanied by any other circumstances, might not amount to an assault, the gesture explained by the words may amount to an assault.

INGREDIENTS: – This Section requires two things:

1. Making of any gesture or Preparation by a person in the presence of another
2. Intention or knowledge of likelihood that such gesture or preparation will cause the person present to apprehend that the person making it is about to use criminal force to him.

LEADING CASES AND REFERENCES

1. **Stephens Vs. Myers, (1830) 4. C & P, 349:** - It is not every threat, which constitutes an assault, there must be the means of carrying the threat into effect.
2. **Rupabati Vs. Shyama (1958), cut 710,** "A threat Constitutes assault".
3. **Swadesh Mahato, 1979 Cr. LJ 1275 (Pat),** "pointing a loaded pistol at another is an assault".
4. **Muneshwar Bux Singh (1938) Lucknow:** - The apprehension of the use of Cr. Force "must be from the person making the gesture or preparation".
5. **Nazir Uddin Vs. Emperor AIR 1933 All:** - "offence of assault is committed against a person and not against Public though it involves a breach of peace".

ISSUES

1. Does every threat constitute Assault.
2. Assault under English law.
3. What is the degree of *mens rea* involved
4. Does a threat from a third person, other than the accused, amount to assault.
5. Is the offence of assault, always committed towards an individual.
6. **Actus reus and mens rea in assault** – The act of using gestures or the act of preparation by a person against another person, is the actus part. The intention to make such gesture or preparation accompanied by the intention or knowledge that by such gestures, he is going to cause an apprehension in the mind of the other person, that, the person making such gestures

or preparation is about to use criminal force, is the mens rea past. So, the actus of using gestures or preparation is prohibited when coupled with mens rea required under this section.

For example, when a person takes a stone and shows another person, with saying that "I will throw this stone on you" directing the stone to him by rising his hand, this is assault. Here, the person showing the stone is causing an apprehension in the mind of that other person that he is about to use criminal force on him by thrown the stone on him. So, the act of showing stone coupled with statement is the actus part, and the intention thereby to cause apprehension in the mind of that other person is the mens rea.

The mens rea part is to be examined objectively. Because, actual apprehension is not required. It is to be seen that, when such gesture or preparation is made, is it has the effect of causing apprehension in the mind of a reasonable man.

For example, when a strong huge man is told by a thin, lean weak man, that the weak man will kill the strong man and that weak man was unarmed, any reasonable man, can expect that the weak man will not be able to kill him. So, there is no chance of causing apprehension and no assault.

1. **Analogous Law:** – The term "assault" is defined in this Section. It is defined to consist in those overt Acts of preparation, indicating an intention to use criminal force, which of themselves are intended or known to warn the other of its approach. The explanation excludes mere words of braggadocio which are intended to frighten another by threats of terrible pains and penalties, but which, the speaker as well as the listener knows, are not intended to be put in exclusion. As **Tindal, C. J.**, said: "It is not every threat, where there is no actual personal violence, that constitutes an assault; there must, in all cases, be the means of carrying the threat into effect. If, therefore, a party be advancing in a threatening attitude e.g. with his fist clenched, to strike another, so that his blow would almost immediately have reached such person, and he then stopped, it is an assault at law, if his intent were to strike such person, though he was not near enough at the time to have struck him".

ASSAULT UNDER ENGLISH LAW: - UNDER THE ENGLISH LAW, "AN ASSAULT, AS DISTINCT FROM BATTERY IS AN THREAT BY ONE MAN TO INFLECT UNLAWFUL FORCE (WHETHER LIGHT OR HEAVY) UPON ANOTHER; IT CONSTITUTES A CRIME OF COMMON LAW WHEN THE THREATENER, BY SOME PHYSICAL ACT, HAS INTENTIONALLY CAUSED THE OTHER TO BELIEVE THAT SUCH FORCE IS ABOUT TO BE INFLECTED UPON HIM. THE MENS REA CONSISTS IN THE REALISATION BY THE OFFENDER THAT HIS DEMEANOUR WILL PRODUCE THAT EXPECTATION. THE CRIME CONSTITUTED NOTWITHSTANDING THAT THE THREATENER DID NOT INTENDED TO APPLY THE THREATENED FORCE. THE ANTICIPATED CONTACT NEED NOT BE DANGEROUS; A THREAT TO KISS OR STRIKE A PERSON UNLAWFULLY WOULD BE ENOUGH; BUT WORDS, HOWEVER PROVOKING, CANNOT OF THEMSELVES AMOUNT TO AN ASSAULT; THEY MAY, HOWEVER, HAVE THE OPPOSITE EFFECT, FOR THEY MAY SO QUALIFY ACTS OR GESTURES WHICH THEY ACCOMPANY AS TO EXPLAIN TO THE OTHER PARTY THAT FORCE IS NOT ABOUT TO BE APPLIED TO HIM".

2. **Scope:** In the case of attacks on human beings, mere preparation by itself may amount to an offence (under Section 351, I.P.C.); but preparation for the slaughter of an animal is no offence.
3. **Assault:** An assault is, then, nothing more than threat of violence exhibiting an intention to use criminal force, and the present ability and intention to carry the threat into execution.
Offence is against one person: - A perusal of the Section clearly shows that the offence of assault is committed against a person and not against the public, though it does involve a breach of the peace.

Before an act could amount to assault under Section 351, I.P.C., it is necessary that a gesture, or preparation should be made by the person who would cause another to apprehend that the person was about to use criminal force to him then and there and the preparation taken with the words, must cause him to apprehend that criminal force would be used to him if he persisted in the particular course of conduct, and there would be no assault if he desisted from that conduct.

An Assault is constituted by any attempt to apply unlawful force to another or any threat which is accompanied by or consists of an Act or gesture showing a present intent to use unlawful force, and also accompanied by "present ability to carry the threat into execution". Thus:

- (i) A being in B's workshop and refusing to leave, B and his workmen surrounded him, bucking up their sleeves and aprons, and threatened to break his neck if he did not go out. Held, an assault.
- (ii) A advanced towards B in a threatening attitude and with the intent of striking B, but was stopped B another person just before he reached B. held, that as A's blow would almost immediately have reached B. If he had not been stopped had committed an assault.
- (iii) A, the master of board of a board school, detained a child after school hours for not doing home lessons which, under the Elementary Education Acts, 1870 and 1876, he had no power to set. Held, that he was guilty of an unlawful detention of the child and therefore of an assault.

But a mere threat "not in the slightest degree executed" does not constitute an assault, nor will even acts or gestures if done under such circumstances or at such a distance that the threat cannot possibly be carried into effect. Nor can mere words constitute an assault.

Battery: - A battery "includes every touching and laying hold (however trifling) on another's person or clothes in an angry, revengeful, rude, insolent, or hostile manner", or even an act such as striking a horse on which a man is riding so that he is thrown.

Difference between assault and battery:

Assault does not involve bodily contact with another. But, battery always involves bodily contact. Every battery is assault but not vice-versa.

Defence: -

The accused may prove either:

- (a) that the facts of the case do not constitute an assault or battery, e.g. that it was an accident or done by consent; or
- (b) that he was justified or excused. He may, also, where the circumstances permit, specially plead the defence that the matter has already been disposed of by a Court of summary jurisdiction.
 - (1) The defence of accident has already been considered. As a general rule, "want of consent is an essential element in every assault, and that which is done by consent is no assault at all". But consent is no defence if "the injury is of such a nature or is inflicted under such circumstances that its infliction is injurious to the public as well as to the person injured". It is no defence, therefore, when the act is itself illegal, as a prize fight. Consent moreover means active consent, and not the mere absence of resistance or positive dissent. Mere submission does not, therefore, amount to consent where it is not voluntary, but is the result of fear or coercion or ignorance of the nature of the act submitted to.
 - (2) The same facts which would make homicide a killing by misadventure will also be an excuse upon an indictment for a battery.

The use of force is justified —

- (i) In correction which is lawful, i.e. by a person who has authority to correct, and "moderate in the manner, the instrument, and the quantity".

Thus a father "has the right to inflict reasonable personal chastisement on his son and he may delegate this right to the "schoolmaster". And in such a case the authority of the schoolmaster is not limited to the punishment of acts committed upon the school premises.

- (ii) In self-defence or defence of a wife, husband, parent, child master, or servant, provided that force used is not more than is necessary for defence, and is actually used for defence and not in revenge "when all the danger is past".

(iii) In defence of property, "If a person enters another's house with force and violence, the owner of the house may justify turning him out (using no more force than is necessary) without a previous request to depart; but if the person enters quietly, the other cannot justify turning him out with a previous request to depart". If the owner of the house is then resisted or assaulted, the use of force which causes actual bodily harm may be justified. The use of reasonable force is also justifiable in defence or for the recovery of the possession of goods.

(iv) In execution of a legal duty e.g. recovery of the possession of goods

4. **Assault and criminal force, difference between:** – the difference between an assault and criminal force is, therefore, as marked here as the difference between criminal force and hurt. As such, there is nothing in English law to correspond with them. For, there the offence is battery as soon as there is anything more than an attempt to do a corporal hurt to another, how smallsoever may be the injury caused. So even touching another in anger or spitting in his face, or violently jostling him out of the way is a battery, though these are all cases of the use of criminal force as defined in the last Section. In England, it is said that the law cannot draw the line between different degrees of violence, and, therefore, totally prohibits the first and lowest stage of it, every man's person being sacred, and no other having a right to meddle with it in any the slightest manner. But the Code makes nice distinctions between what are mere acts of preparation, and what is criminal force without being hurt, and what is hurt, though it is also necessarily criminal force.

5. **Gestures and threats:** – The last requisite of an assault is words, gesture or any preparation indicative of the use of criminal force which it is intended that the other person should see or hear. The intention is to frighten him by the menacing words and attitude without resorting to force. If force becomes necessary, the offence ceases to be an assault, but is then the use of criminal force. In this sense there is considerable difference between the popular and the legal use of criminal force, but in its legal conception the act must fall short of the use of force. It may then be said that popular assault beings where the legal assault ends.

Mere intention to use force: – Mere utterance of a threat without any gesture of preparation indicating an intention to use force does not constitute an offence under this Section, but pointing a gun at a person is an assault. So also the lifting of a *lota* to hit another or throwing of brickbats as it is a gesture which would cause the complainant to apprehend that criminal force was about to be used against him.

Threat of an assault: – From the fact that the words, gesture or the preparation are intended or known to be likely to cause another to apprehend that the person uttering the words or making the gesture or the preparation is about to use criminal force, it follows that if the words or attitude was to use criminal force not immediately but in a certain contingency dependent upon the volition of the other, there can be no assault, though it is the threat of an assault, which is not by itself an offence. This may be illustrated by an example. A abuses B; the latter warns A that if he persisted in abusing him he should strike him. Here B's attitude may be menacing and he may be prepared and ready to strike A, but his words and gesture do not amount to an assault within the contemplation of this Section inasmuch as A has no reason to apprehend that the other is about to use criminal force if he keeps his own mouth shut.

So, in the case of the accused, who was registered as a bad character by the police, a Sub-Inspector paid him a domiciliary visit in order to ascertain if he was at home. He called to the accused who came out, whereupon the former wished to take an impression of his thumb. The accused objected to it, but on the other extending his hand, the accused went into his house and brought out a *lathi*, saying that he would not allow the impression to be taken and that he would break the head of any one who asked for it. He was convicted under Section 353, but it was held that the threat being conditional did not amount to an assault within the meaning of this Section and that, therefore, the accused could not be convicted under Section 353. This view is entirely in harmony with English law, where it was held that if A were to lay his hand upon his sword and say: "If it were not assize time; I would not take such language from you," it was held not to be an assault on the ground that he did not design to do the other party any corporal hurt at the time, and that a man's intention must operate with his act in constituting an assault.

This case was followed in Bombay in a case in which the defendant had run up to the plaintiff in a violent rage, and making a copious use of bad language there times threatened that if the plaintiff was any more impertinent he (the defendant) would strike him. The defendant's vision of the affair was that he had told the plaintiff that if he were not such a miserable little snob or brute he would knock his head off his shoulders, upon which the Court remarked: "The only question is, whether the 'if either or the plaintiff's version of it, or on the defendants makes any real difference in the case, and tends to show that the plaintiff could have reasonably apprehended that the defendant was then and there about to use criminal force. How was the plaintiff to know what a violently incensed man might or might not regard as impertinence? — a look, a gesture a word even silence, might be construed as such. The condition of the threat would be held fulfilled and the momentarily suspended violence would become actual criminal force. On these grounds, and because we think that in interpreting the law it is better to go on grounds of plain good sense than on any subtleties or refinements, we have come to the conclusion that the circumstances of this case are such as to show that the plaintiff, at the time of the acts complained of had reasonable ground to apprehend that the defendant was about to use criminal force to him, and that, therefore, the acts complained of amount in law to an assault".

Test of assault: — The question whether a certain act amounts to an assault, then depends upon the reasonable apprehension which a person entertains about criminal force being imminent. The actual words used are useful only so far as they enable this question to be decided. The complainant, a police constable, was patrolling a town at night when he met the four accused leaving the town the constable advised them not to travel at night as there was danger of being robbed if they went at dead of night. The accused insisted and one of them, a Dasari, said that he knew his way about whereupon the constable retorted, "Dasaris are all thieves". Thereupon one of the accused hit the constable on the face, and the rest surrounded him "in a threatening attitude". The High Court held this insufficient to constitute assault within gesture was the prelude to an assault. This case is not unlike one in which saying he was authorised to evict him by force, and in reply to the passenger's question whether he was prepared to use force, answered, "Yes" with a can in hand. The Court held that it did not amount to assault as defined in this Section inasmuch as it was merely a verbal threat to use force if the passenger did not vacate his seat.

For this purpose, regard must be had not only to the actual words used but also to the surrounding circumstances. Take for instance, the English case cited above. There, too, the threat was qualified, but the chances of its being carried into effect were remote because, as the defendant said, it was assize time and the consequence of drawing a sword on another during assize time involved in those days not only the certain infliction of a heavy fine, but also the possible chopping off of the hand by which the sword was drawn.

6. **Explanation:** — The scope of the explanation has been already indicated. It merely declares what is the present English law, that though mere words *unaccompanied* by threatening gesture or preparation do not amount to assault, they may explain the gesture or preparation so as to make them amount to an assault, which, but for them they may not be.
7. **Coercion as defence:** — The extent to which a person who commits a crime when influenced by threats or "moral force", or by the confinement of his person, or by violence not amounting to actual compulsion, is excused from responsibility for his crime is uncertain. The nature of the crime committed must be considered in relation to the nature of the duress. No duress, therefore, excuses the taking of an innocent life. Certain acts amounting to treason, as providing rebels with food or joining with them if done under fear of death and not continued longer than the time when the duress ceases to operate, may be excused but not if the acts are done only from fear of suffering damage to property. In appropriate circumstances evidence of threats and violence to the accused may rebut the presumption that the accused intended the probable consequences of this act, and, where the offence is proved by the proof of the doing of an act, it seems that a plea of duress may be set up, not to show that no offence has been committed but to excuse from punishment.

Force (BATTERY — English law)

Section 349 of IPC defines force. The salient points are:-

- (1) Causes motion, change of motion or cessation of motion to another, or to any substance which comes into contact with the other's body, or his dress or something that he is carrying or with anything so situated that it affects the other's sense of feeling.
- (2) It can be caused in the following ways:-
 - (a) Using own body power.
 - (b) Deposits a substance such that the motion etc. takes place without any further act on his part.
 - (c) By inducing any animal to move, change its motion or cease to move.

In **Bihari Lal (1934 Lah)**, it has been held that the two persons should both be present there. The criminal force may be so slight that it may not amount to an offence (Section 45) and it does not include anything that the doer does by means of another person.

Section 350, IPC defines criminal force. Its ingredients are as follows:-

- (1) The intentional use of force to any person.
- (2) Such force must have been used without the person's consent.
- (3) The force must have been used –
 - (a) In order to the committing of an offence, or
 - (b) With the intention to cause or knowing it to be likely, to cause injury, fear or annoyance to the person to whom it is used.

Thus, A may be said to have used criminal force when he cut the mooring of a boat in which a man is sitting to set it adrift down stream or he whips a horse of a chariot with a princess in it to quicken its pace or he simply stops the chariot. He causes fear, among force or injury in the above cases and therefore is liable for the use of criminal force.

In **Chandrika Sao and Hazari Lal vs. The State of Bihar (AIR 1967 SC 170)**, the Supreme Court held that when A snatches books from the hands of B, he causes jerk to the hands of B and thus uses force (as per Section 349); if the intention or knowledge requisite is accompanied, it amounts to the use of criminal force.

As per illustration (e) to Section 350, if A throws stone into water which dashes up against B's clothes, it is a use of criminal force if the other requisites of Section 350 are there.

Also illustration (g) – boiling water to a tub of water with which A is bathing ⇒ criminal force.

Section 95 based on the maxim **de minimis non curat lex** (i.e. the law takes no account of trifles) exclude from the purview of criminal liability an offence that cause such a slight harm as no person of ordinary sense and temper would complain of.

Assault or use of criminal force to outrage the modesty of a woman

Section 354 of IPC says: "Whoever assaults or uses criminal force to any woman, intending to outrage or knowing it to be likely that he will thereby outrage her modesty, shall be punished with imprisonment of 2 years or fine or both."

In **Ram Das vs. The State of West Bengal (AIR 1954 SC 711)**, the Supreme Court held that in order to hold a person liable under Section 354, there must be clear and unimpeachable evidence that the accused not only assaulted, be assaulted with intent to outrage the woman's modesty. There in, Ram Das, who embraced two women and was naked (not totally) in front of the two women in a train compartment, was held not liable as the intention to outrage the modesty was absent. The presence of two women and the fact that he was not totally naked were instigating factors.

'Outraging the modesty' has been explained in **Major Singh Case (1967)** by Mudholkar J., as follows:-

"When any act done to or in the presence of a woman is clearly suggestive of sex according to the common notions of mankind that act must fall within the meaning of Section 354." As per Section 10, woman means "a female human being of any age." As per **Bachawat, J.**, the culpable intention of the accused is the crux of the matter; the reacting of

the woman is not always decisive. In that case, Major Singh who had caused injuries to the vagina of a 7½ months old child by fingering was held liable under Section 323. The contention that a 7½ months old child does not have a developed sense of modesty and hence is incapable of reacting was rejected.

The offence under Section 354 is of less gravity than rape (Section 376). A person guilty of attempting rape is liable under Section 354.

The indecent or culpable intention has to be proved and for this the accused's admission can be the sole basis. Where a man touches a woman's belly in a bus and no culpable intention is shown ⇒ No Section 354. But where the same man accepts his culpable intention ⇒ Liable.

In **People's Union for Democratic Rights vs. Police Commissioner, Delhi Police Headquarters & Another (1989 SC)**, some women were stripped bare and thrashed ⇒ Liable under Section 354.

In **Rafi Uddin Khan vs. State of Orissa (1992)**, the essentials of rape were not made out but those of outraging modesty were made out.

CRIMINAL FORCE (SECTION 350)

FRAMEWORK SHEET

BARE ACT ANALYSIS

SECTIONS INVOLVED: – Section 350, 349, 95

DEFINITION

Section 350: – Criminal Force – Whoever intentionally uses force to any person, without that person's consent, in order to the committing of any offence or intending by the use of such force to cause, or knowing it to be likely that by the use of such force he will cause injury fear or annoyance to the person to whom the force is used, is said to use criminal force to that other.

ILLUSTRATIONS

- (a) Z is sitting in a moored boat on a river. A unfastens the moorings, and thus intentionally causes the boat to drift down the stream. Here, A intentionally causes motion to Z, and he does this by disposing substances in such a manner that the motion is produced without any other action on any person's part. A has, therefore, intentionally used force to Z; and if A has done so without Z's consent, in order to the committing of any offence, or intending or knowing it to be likely that this use of force will cause injury, fear or annoyance to Z, A has used criminal force to Z.
- (b) Z is riding in a chariot. A lashes Z's horses and thereby causes them to quicken their pace. Here A has caused change of motion to Z by inducing the animals to change their motion. A has, therefore, used force to Z; and if A has done so without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy Z, A has used criminal force to Z.
- (c) Z is riding in a palanquin. A, intending to rob Z, seizes the pole and stops the palanquin. Here A has caused cessation of motion to Z, and he has done this by his own bodily power. A has, therefore, used force to Z; and as A acted thus intentionally, without Z's consent, in order to the commission of an offence, A has used criminal force to Z.
- (d) A intentionally pushes against Z in the street. Here A has by his own bodily power moved his own person so as to bring it into contact with Z. He has therefore intentionally used force to Z; and if he had done so without Z's consent, intending or knowing it to be likely that he may thereby injure, frighten, or annoy Z, he has used criminal force to Z.
- (e) A throws a stone, intending or knowing it to be likely that the stone will be thus brought into contact with Z, or with Z's clothes, or with something carried by Z, or that it will strike water and dash up the water against Z's clothes or something carried by Z. Here, if the throwing of the stone produces the effect of causing any substance to come into contact with Z, or Z's clothes. A has used force to Z; and if he did so without Z's consent, intending thereby to injure, frighten or annoy Z, he has used criminal force to Z.
- (f) A intentionally pulls up a woman's veil. Here, A intentionally uses force to her and if he does so without her consent, intending or knowing it to be likely that he may thereby injure, frighten or annoy her, he has used criminal force to her.
- (g) Z is bathing, A pours into the bath water which he knows to be boiling. He A, intentionally by his own bodily power causes such motion in the boiling water as brings that water into contact with Z, or with other water so situated that such contact must affect Z's sense of feeling. A has, therefore, intentionally used force to Z; and if he has done this without Z's consent intending or knowing it to be likely that he may thereby cause injury, fear or annoyance to Z, A has used criminal force.
- (h) A incites a dog to spring upon Z, without Z's consent. Here, if A intends to cause injury, fear or annoyance to Z, he uses criminal force to Z.

INGREDIENTS

1. The intentional use of force to any person
2. Such force must have been used without the person's consent

3. The force must have been used: -

- i) in order to the committing of an offence; or
- ii) with the intention to cause, or knowing it to be likely that he will cause, injury, fear or annoyance to the person to whom it is used.

COMMENT

The intentional use of force to any person:

Definition of force: Section 349:

'Criminal force' is called as battery in English Criminal law. This section is wider in its scope.

Actus reus and mens rea in criminal force:

The act of using force against the person in order to the doing of any offence or by that act, causing fear, injury or annoyance is the actus.

Intention to use the force on the person against the consent or without the consent of such person, and intending thereby to commit an offence or intending to cause injury, fear or annoyance by the use of such force or the knowledge that by such force he is going to cause fear or injury or annoyance to that person, the guilty mind under this section. And that guilty mind is punishable by law when it is coupled with the actus. And also, the actus in this section is punishable or becomes reus when coupled with the mens rea.

Section 349 defines "force"

Definition of "force" as in Section 349: - A person is said to use force to another if he cause motion, change of motion, or cessation of motion to that other, or if he causes to any substance such motion, or change of motion, or cessation of motion as brings that substance into contact with any part of that other's body, or with anything which that other is wearing or carrying, or with anything so situated that such contact affects that other's sense or feeling. Provided that the person causing the motion, or change of motion, or cessation of motion causes that motion, or change of motion in one of the three ways hereinafter described:

First : - By his own bodily power

Secondly : - By disposing any substance in such a manner that the motion or change or cessation of motion takes place any further Act on his part, or on the part of any other person.

Thirdly : - By inducing any animal to move, to change its motion, or to cease to move.

This ingredient involves two aspects:

(a) The intentional use of force, and

(b) Such use of force must be against the person.

As to second aspect:

The person when he uses the force must by his own bodily power use it and with the intention to use, while using force he must intend to use such force against any person and not any substance or animals etc. Even, if he uses force through some substance or animal, but such force must be against any person, and it shows that such person must be present. For example, when a person breaks a lock of a house and takes the possession of that house, he is not said to use the criminal force, because the person owning the house is absent therefrom.

According to Section 350 "Force becomes criminal:

1. when it is used without constant and in order to the committing of an offence, or
2. when it is intentionally used to cause injury, fear or annoyance to another to who the force is used.

So, the force used must be by the person and by his bodily power he has to use such force.

Such force must have been used without the person's consent:

So, when a person intentionally uses force with consent of such person against whom he has used it, it is not said to criminal force. Sometimes, the consent may be expressed or implied. For

example, when two persons play boxing or wrestling, the consent is express or implied in such cases. When a person uses force in a friendly relationship, it is presumed that there is implied consent. so, this consent negates the criminality of force. Because, to be a criminal force, it should be inflicted without consent of the person against whom it is used.

So, when the force is used against a person intentionally, such intention must also accompany an intention to do an offence by such force or knowledge that by such force he is likely to cause fear, injury or annoyance. It is also explicit that the commission of offence or the actual fear or injury or annoyance is caused or not. It is sufficient that when he intentionally uses force, he was also intended or known that he is thereby going to cause fear, annoyance or injury.

For example, in a Kabbaddi play, a player pulls the leg of a player of opposite team in order to make him out. Here, there is intention to use force and has actually used that force against the player, but, such use of force was not intended to cause fear or injury or annoyance to such person. So, it is not criminal force.

But, when a person goes to a farm of another and cuts his crop. This was used against the farmer of that crop, and with the intention to cause injury to that farmer. So, it is said to be a criminal force.

Actus reus and mens rea in criminal force:

The act of using force against a person is the actus reus. Mens rea consists in the fact that while he uses such force, he uses it intentionally and with the intention or knowledge that he is likely to cause injury or fear or injury. Mens rea also includes the intention to use force, for the doing of any offence, and also while such force is used that was used against the consent of the person. So, this mens rea coupled with the actus is prohibited by law.

LEADING CASES AND REFERENCES:

1. **Lakshmiammal V. Samiappa Goundar (1928) Mad** "Force refers to force to a person used either directly or indirectly causing injury, fear or annoyance to that person". This definition excludes force of violence to property."
2. **Bihari Lal (1934) Luck Both**, Accused as well as victim should be present at the place of incidence.
3. **Chandrika Sao Vs. State of Bihar (AIR 1967 SC)** Intention or knowledge must accompany the Act of using force to make it culpable.

WRONGFUL RESTRAINT AND WRONGFUL CONFINEMENT

The offences of wrongful restraint and wrongful confinement involve not a direct physical harm, but a restriction upon the right to movement of a person. The actus reus in three cases lies in the actual obstruction of the person by the accused from moving in a direction in which he had right to move. The mens rea lies in the causation of this effect of obstruction voluntarily by the accused.

Wrongful Restraint (Section 339):

"Whoever voluntarily obstructs any person so as to prevent that person from proceeding in any direction in which that person has a right to proceed, is said wrongfully to restrain that person".

Exception:

The obstruction of a private way over land or water which a person in good faith believes himself to have a lawful right to obstruct, is not an offence within the meaning of this section.

Illustration:

A obstructs a path along which Z has a right to pass, A not believing in good faith that he has a right to stop the path. Z is thereby prevented from passing. A wrongfully restrains Z.

General:

Wrongful restraint means keeping a man out of a place where he wishes to be, and has a right to be. Thus, 'wrongful restraint' implies abridgement of the liberty of a person against his will. Where he is deprived of his will-power by sleep or otherwise he cannot, while in that condition, be subjected to any restraint. (*Fateh Muhammad, 1928*)

Examples:

1. A builds a wall across a path along which Z has a right to pass. Z is thereby prevented from passing. A wrongfully restrains Z.
2. A illegally omits to take proper order with a furious buffalo which is in his possession, and thus voluntarily deters Z from passing along a road along which Z has a right to pass. A voluntarily restrains Z.
3. A threatens to set a savage dog at Z if Z goes along a path along which Z has a right to go. Z is thus prevented from going along that path. A wrongfully restrains Z.
4. In the last example, if the dog is not really savage, but if A voluntarily causes Z to think that it is savage and thereby prevents Z from going along the path. A wrongfully restrains Z.

From these illustrations, it will appear that a person may obstruct another by causing to appear to that other it to be impossible, difficult, or dangerous to proceed, as well as by causing it actually to be impossible, difficult, or dangerous for that other to proceed.

Thus, where the accused removed a ladder and thereby detained a person on the roof of a house, he was held to have committed 'wrongful restraint'.

Ingredients:

1. Voluntarily obstructing a person.
2. The obstruction must be such as to prevent that person from proceeding in any direction in which he has a right to proceed.

I. Voluntarily obstructs a person:

'Voluntarily' is defined in section 39 of I. P. C. as "a person is said to cause an effect 'voluntarily' when -

- (a) He causes it by means whereby he intends to cause it or
- (b) By means which, at the time of employing those means ⇒
 - i) He knew or
 - ii) Had reason to believe to be likely to cause it.

'Voluntarily' is defined in relation to causation of effects. When a person causes any effect intentionally by means or knowingly or had reason to believe at the time of employing the means that the means used by him are likely to cause that effect, is said to cause that effect voluntarily.

'Reason to believe' is defined in section 26 as "a person is said to have 'reason to believe', a thing if he has sufficient cause to believe that thing but not otherwise".

This section (339) voluntarily can be proved in any of the following three ways:-

1. Intention to cause obstruction.
2. He knew to be likely to cause obstruction.
3. Had reason to believe to be likely to cause obstruction.

The means by which the obstruction has been caused can be any kind of means that is a direct physical force or a psychological fear of apprehended danger. Even if there are more ways and he restrains all, but one is a wrongful restraint. The test for wrongful restraint is that the person is disallowed from moving in one or several directions but atleast at one direction he should be free to move. The moment the last option is closed this wrongful restraint amounts to wrongful confinement.

Person:

The obstruction should be to any person. Obstruction of a vehicle alone when no men are obstructed is not a wrongful restraint. Under this section, the criminal restraint to a person is punishable and not any obstruction whatsoever caused for plying/parking of a vehicle at a particular place. The Madras High Court held that, the voluntary obstruction of a vehicle in which persons are travelling would amount to restraint.

So, the obstruction should be caused to persons i.e. human beings and not to the vehicles or animals.

Prevents:

The section requires that the obstruction should be as complete and successful as to prevent the person obstructed from proceeding in any direction in which he has a right to proceed. In a case where the complainant was going in a cart and the passing of bullock cart was obstructed but there was no obstruction for him to pass. In this case, it was held that there was no wrongful restraint because there was no prevention.

Proceeding in any direction:

The Madras High Court has held that these words mean proceeding in that direction and not in any direction; much less in the reverse direction. The offence to be punishable under Section 341 need not necessarily constitute absolute prevention of one's personal movements but the slightest unlawful interference with his lawful movements would suffice. It must be established that the person was obstructed from proceeding along a particular direction.

The word "proceeding" in this section and Section 340 is not confined to the case of a person who can walk on his own legs or can move by physical means within his own power. It includes the case of proceeding by outside agency, which in the case of a baby; the agency is its natural guardian or protector.

Public streets:

All members of the public have rights in public streets and no one section of the community can interdict another section of it from the lawful use of such streets. Every citizen has a right to use public road in a lawful manner and will have a right to take a corpse along the public road. It would not be a valid defence to plead that the obstruction caused was only to the carrying of the corpse and not to the persons who carried it.

The persons who prevented processionists from proceeding along a high way were held to constitute an unlawful assembly and each member of that unlawful assembly was held under Section 341 read with Section 149.

Bonafide claim – When the person in good faith that it is justified by law, does an act, he will not be liable under this section.

Exception:

The section provides exception only in case of a private way. So, it is not an offence to erect a wall on front of one's premises to prevent other persons from passing over it.

WRONGFUL CONFINEMENT

Section 340:

"Whoever wrongfully restrains any person in such a manner as to prevent that person from proceeding beyond certain circumscribing limits, is said 'wrongfully to confine' that person".

Illustrations:

- (a) A causes Z to go within a walled space, and locks Z in. Z is thus prevented from proceeding in any direction beyond the circumscribing line of wall. A wrongfully confines Z.
- (b) A places men with fire arms at the outlets of a building, and tells Z that they will fire at Z if Z attempts to leave the building. A wrongfully confines Z.

Wrongful confinement is a species of wrongful restraint. Wrongful confinement can be distinguished from wrongful restraint in that whereas in wrongful restraint there is only a partial suspension of liberty of a person and he is restrained from proceeding in a particular direction, in wrongful confinement, such prevention is total and the person is restrained from proceeding in any direction. For completion of either offence, the period is immaterial.

Ingredients:

1. Wrongful restraint of a person.
2. Such restraint must prevent that person from proceeding beyond certain circumscribing limits.

Wrongfully restrains:

Wrongful confinement which is a form of wrongful restraint is keeping a man within limits out of which he wishes to go, and has a right to go.

Prevents:

The insistence by words of mouth or mere rotting around a person would not satisfy the requirements of wrongful confinement which requires that there must be voluntary obstruction to that person so as to prevent that person from proceeding in any direction in which that person has a right to proceed.

Proof of actual physical obstructions is not essential to support a charge of wrongful confinement. It must, in each case, be proved that there are atleast such an impression produced in the mind of the person detained as to lead him reasonably to believe that he was not free to depart and that he would be forthwith restrained if he attempted to do so.

The mere threat of future harm in case of departure would not suffice if he knew that it was open to him to go away and restrained from doing so lest he should suffer such harm. But if circumstances were such as to justify and to create the belief that he could not depart without being seized immediately, then it would be proper to hold that he was obstructed and confined.

From proceeding:

There can be no wrongful confinement where a desire to proceed has never existed, nor can a confinement be wrongful if it was consented to by the person affected, or if an escape is open to a person if he wished to avail himself of it.

For example, if a person is locked in a room, and there was a window through which he could have proceeded, it is never said that he was confined, even if he never chanced to pass.

When a person is sleeping in the night and the door was locked from outside. Here, if he did not have the knowledge that he was locked and even if he did not desire to open it, then it cannot be said that he was confined. Because, he was not prevented from proceeding. The retaining of a person in a particular place or the compelling of him to go in a particular direction by force of an exterior will overpowering or suppressing in any way his own voluntary action; is an imprisonment on the part of him who exercises that exterior will.

In a case, that is *Hamid & A. vs. Sudhirmohan Ghosh (1929)*, the accused, a District Traffic Superintendent, being under the bonafide impression that the complainant had travelled without ticket seized the hand of the complainant and dragged him to the ticket collector and ordered the ticket collector to realise the full fare. It was held that the accused was guilty of wrongful confinement.

Absence of desire to move on the part of the person confined no doubt detracts from it being an offence under this section but mere omission of an attempt to run away when there is no watch does

not mean the absence of desire. Proof of actual physical obstruction is not essential to support a charge of wrongful confinement. It must be proved that there was at least such an impression produced in the mind of the person detained as to lead that person reasonably to believe that he was not free to depart and that he would be forth with restrained if he attempted to do so. **[Joggayya (1951), St. vs. Keshavlal Magenbai Jogani (1993)]**

Physical presence of the obstruct is not necessary, nor any actual assault necessary and fear of immediate harm restraining a man out of as place where he wishes to be has a right to be is sufficient to constitute an offence.

Beyond certain circumscribing limits:

A prison may have its boundary large or narrow, visible and tangible, or though real, still in the conception only. It may itself be movable or fixed, but a boundary should be there. Confounding imprisonment of the body with mere loss of freedom also is a confinement.

Moral force:

Detention through the exercise of moral force, without the accompaniment of physical force or actual conflict i.e. sufficient to constitute this offence.

Malice:

Malice is not an essential ingredient in the offence of wrongful confinement. It is the actus reus which actually constitutes the offence. In case of wrongful confinement the actus reus required is higher than that of wrongful restraint.

Distinction Between Wrongful restraint and wrongful confinement:

1. Whereas wrongful restraint keeps a man out of place where he wishes to be or has right to go, wrongful confinement keeps him within limits out of which he cannot go.
2. In the wrongful restraint, a person is restrained from proceeding in a particular direction, while in the wrongful confinement; he is restrained from proceeding in any direction.
3. In wrongful restraint, the curtailment of liberty is partial but in wrongful confinement, curtailment of liberty is total.
4. Wrongful restraint is less serious offence, but the wrongful confinement is more serious offence. Because, the mens rea required for both is similar. But, the actus reus is higher in wrongful confinement.
5. Punishment is less in wrongful restraint – one month imprisonment or 500 rupees fine or both is more in wrongful confinement i.e. one year imprisonment (maximum) or Rs. 1000 fine or both.

KIDNAPPING AND ABDUCTION FRAMEWORK SHEET

Kidnapping:

Bare Act Analysis:

Sections involved: Section 359 to 361 and 364 to 369 of I.P.C.

Definition and Meaning:

The word 'Kidnapping' has been derived from the word 'Kid' meaning 'Child' and 'napping' to 'steal'. Thus kidnapping literally means child-stealing.

Section 359 of I.P.C. enlists two kinds of kidnapping:

1. Kidnapping from India (Section 360, IPC), and (Section 361, IPC)
2. Kidnapping from lawful guardianship.

Section 360:

Kidnapping from India – Whoever conveys any person beyond the limits of India, without the consent of that person, or of some person legally authorized to consent on behalf of that person, is said to kidnap that person from India.

Ingredients:

1. Conveying any person beyond the limits of any person.
2. Without the consent of the person or of some person who is legally authorised to give consent.
1. 'Conveys' means to take or carry or transport, from one place to another. So, it is the physical act of taking, a person beyond the limits of India i.e. the territory of India excluding the State of Jammu and Kashmir (Section 18 I: A. C.)
2. The person must be conveyed without the consent of the person who is conveyed or the consent of the legally authorised person of the person so conveyed.

So, it means that the conveyance may be of a major person or a minor or unsound person, beyond the limits of India.

Even when the persons are conveyed, by misrepresentation it is said that they are conveyed without consent. Consent must be free consent. In *Peria Swami Kangani (1910)*, where the person took woman saying that they will be married to his sons, in Ceylon and are made to work as colliers for tea estate, it is said that there is no consent and he was held liable for kidnapping.

Actus reus and mens rea in kidnapping from India:

The act of conveying is the actus part. The intention to convey coupled with the absence of consent is the mens part and when both are coupled they are prohibited by law.

Section 361:

Kidnapping from lawful guardianship – Whoever takes or entices any minor under sixteen years of age if a male, or under 18 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 includes any person lawfully entrusted with the care of 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 lawful custody of such child, unless such act is committed for an immoral or unlawful purpose.

Essential Ingredients:

1. "Taking or enticing."
2. Minor or person of unsound mind.
3. "Out of the keeping of lawful guardianship."
4. "Without his consent." (Consent of the guardian).

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 section 361.

Leading cases and References:

1. **Manketlow, (1835) 6 Cox 143** - "The taking need not be by force, actual or constructive, and it is immaterial whether the girl consent or not."
2. **Zahoor Ali vs. State of Uttar Pradesh, 1989 Cr. C.J. 1416 (Ori)** - "Helping a girl with shelter or taking her to a hospital for treatment is not a "taking" it requires some active role."
3. **Varadarajan AIR 1965 SC** - "Difference between taking and allowing a minor to accompany a person."
4. **Robins (1844) 1 Car Kir 456** - "Minor's consent is no consent, the offence of kidnapping is primarily an offence against the lawful guardian, and it is his consent alone that matters."
5. **Chajju Ram, AIR 1968 Punjab 439** - "The distance to which the minor is taken away is immaterial while determining the taking of such a minor."
6. **Nemai Chattoraj, (1900) 27 Cal 1091 - Biswanath Mallick vs. St. Oforisea, 1995 Cr. L. J. 1418 (Ori)** - "The Act of kidnapping is not a continuous offence." The offence is completed as soon as the minor is actually taken out of the custody of his or her guardian."
7. **Prince, (1875) LR 2 CC R 154** - "Where a girl under the age of 18 is kidnapped, it is no defence that the accused did not know the girl to be under that age, even though he bona fide believed and had reasonable ground for believing that she was over 18 years of age."
8. **Israr Hussain (1941) 17 Luck 128** - "Where a minor abandons the house of her guardian of her own accord and has no intention of returning to the house, she cannot be held to continue in the keeping of her lawful guardian."
9. **State of Haryana vs. Raja Ram, 1973 Cr. LJ 651** - "Consent of the minor is wholly immaterial, the guardian's consent is required to negate the charges of kidnapping."
10. **Hardeo (1879) PR NO. 7 of 1880** - "If the minor is not in the custody of a lawful guardian; the offence cannot be committed."
11. **Ganesh (1909) 31 All 448** - "Consent given by the guardian after the commission of the offence is no consent."
12. **Prankrishna Surma (1882) 8 Cal 969** - "Abetting of kidnapping."
13. **Nathu Singh, (1942) Neg. 34** - "Distinction between lawful guardian and legal guardian."

Issues:

1. Who are lawful guardians and difference between lawful guardian and legal guardian.
2. What amounts to taking or enticing.
3. When is taking complete.
4. Is kidnapping a continuous crime.
5. Nature of consent.
6. Is the difference in age between male and female constitutionally valid?
7. Can the offence of kidnapping committed if the child is not in the custody of lawful guardian?
8. Can a child abandon her guardianship?

Purpose of Section 361:

The object of section 361 is to protect children of tender age from being taken away for wrongful purposes, such as sedition, beggary etc. And also to provide for the protection of the rights of parents or lawful guardians, who provide resources for their upbringing (and hence they have certain rights upon the children too).

Analysis of Section 361:

1. "Takes or entices":

Taking: Implies a physical taking. It does not imply that for such taking there should be some use of force or fraud. Taking simply means to cause to go or to escort or to get into possession. Act of the accused need not be the immediate cause; the child can come at any time, even after months or years:

Enticing: It involves an idea of allurements, inducement etc. giving rise to hope or desire in the mind of the minor. Expectations are aroused in the mind of the child. Enticing can be of many forms. Some may be subtle; others may be slow, not acting instantaneously but having sustained impact by continuous pestering. When a man gives chocolate regularly to a child, and after days, if the child on itself goes to a man, then it is called enticing.

Inducement depends upon the state of mind of the victim. A lot of effort may be required for some persons, whereas, even a single gesture may be sufficient for others. E.g. A girl living a troublesome life, being beaten up regularly by her step mother, and she is ready to commit suicide, taking advantage of her distress, if a man asks her to go to a movie, this would amount to inducement.

Either 'taking' or 'enticing' is sufficient. But at times both may be overlapping each other, taking some colour or content from each other. Even this is sufficient.

Taking need not be constituted by a single act. A whole series of acts might together constitute the process of taking and when actually the taking is complete is a question of fact.

Taking does not require the taking to a specific distance, the offence of kidnapping from lawful guardianship is complete when the minor is actually taken from lawful guardianship.

Kidnapping is not a continuous offence.

For example: If A takes away M from its lawful guardian "G" then B take it from A, later C takes M from B and then D takes him away from C, and so on and so forth. Here, only A can be said to have kidnapped M as G was the lawful guardian, whereas B, C and D don't take it from its lawful guardian. The offence of kidnapping here is complete as soon as A takes away M from lawful guardianship of "G". Therefore, kidnapping is not a continuous offence. B, C and D can be held liable for detention but not for kidnapping.

2. Minor and person of unsound mind:

Minor: For the purpose of this offence the age of minors in respect to a male and female varies, for male the age is 16 years and for female the age is 18 years. This difference is made in the light of the ~~Indian society, where girls~~ are thought to be more susceptible to being harassed and put to peril, and also because of the sexual construction of females.

In R.V. Prince (1857), L.R. – The accused had a bona fide belief that the girl was not a minor, but the girl being a minor, the accused was held to have kidnapped the girl.

In case the birth certificates of a girl prove that she is a major but, later on the parents prove it that the certificate was fake and she was actually a minor, the person taking such a girl would be held liable for kidnapping.

Unsound mind: People of unsound mind are the people who need the protection of law and guardians throughout their life irrespective of their age. Thus a person of unsound mind of any age can be kidnapped (there is no age limit as in for minors). Such people constitute a separate class of their own. For the purpose of this section, the unsoundness of the minds should be permanent, and not temporary. Temporary insanity produced due to alcoholic excess or other reasons are not covered under this section.

3. Out of the keeping of lawful guardian:

Note: In Section 361 the term "keeping" has been used and not "possession."

Keeping:

Keeping is compatible with the element of the freedom of movement. It implies maintenance, protection and some control. These elements are not continuously required. A girl who is staying in a hostel might not be in the possession of her parents but she might require their protections, maintenance, from time to time, thus she is under lawful keeping.

E.g. Where A girl gets a scholarship and stays in a hostel and maintains herself on her own, if she goes to Bombay fair with a person, and if she has been taking no money from home, rather she has been sending gifts to her parents from her scholarship. She is still within the keeping of her guardians. (Although she is not in their possession).

If a girl goes to her neighbour's place, or to a hostel, the hostel warden cannot get her married to someone. A girl who has gone to market is still under the keeping of her guardians.

A girl, who is emotionally starved, goes to a cinema hall without the permission of her parents and if a man takes her from there to some where else, the man shall be held liable, since she was still under the keeping of lawful guardians.

Can a girl (child) abandon her guardianship?

In a situation where a step mother severely beats a child, the girl cannot abandon the guardianship as she is a minor. But there is an exception to this rule: extreme cases where the girl has left with the intention to go back, and there is no evidence to show that the accused had played a role in her leaving her home i.e. there was no inducement etc. or where both are strangers to each other, the person taking shall not be liable.

In Israr Hussain (1941) 17 Luck, the court held that where a minor abandons the house of her guardian of her own accord and has no intention of returning to the house, she cannot be held to continue in the keeping of her lawful guardian.

In Gunder Singh [(1865) 4 WR (Cr.) 6] – Where a girl had run away from house in consequence of ill-treatment and on meeting the accused on the road, had agreed to take service as a coolie and went with him, it was held that this offence was not committed.

Lawful guardian: According to explanation of section 361, "lawful guardian" includes any person lawfully entrusted with the care or custody of such minor or other person. There is a difference between "lawful guardian" and "legal guardian". When a father of a girl sends her to school with his servant or a friend, here father is legal guardian and servant or friend is the lawful guardian. Similarly hostel warden, relatives etc. are lawful guardians. "Lawful guardianship" means lawful entrustment of the minor to whosoever, by the legal guardians."

Where though the custody of the minor stood entrusted factually and lawfully to the minor's maternal uncle, the natural father of the minor did not cease thereby as one of her lawful guardians. Consequently, it was held in court of its own motion vs. Ram Lubhaya 1985 cr. LJ 896, that an attempt made by the father to kidnap his minor child would not be an offence under Section 361. A girl under sixteen years of age, living under the guardianship of her mother, was sent by the mother, with another woman on a visit to her sister and on the way there the accused kidnapped her and took her to their own village and there she was married to one of the accused. The accused were convicted of an offence under this section (366) as it was immaterial whether the girl was kidnapped with the consent of the woman in charge, as she had no authority to give such consent. because, it is just a temporary guardianship, and that does not defeat the lawful guardianship of her mother.

4. Without the consent of such guardian:

The consent of the minor or person of unsound mind is immaterial. Consent of the guardian should be free and voluntary consent obtained through fraud is no consent.

Case: R.V. Williams (1923 K.B. 340) – The consent should be before the taking or enticing occurs and not ex post facto i.e. afterwards.

For ex.: If A and B run away without consent of B's lawful guardians, and they get married and thereafter return home. The guardians have pardoned them but yet cannot say that they have given their consent and hence A can still be held liable for kidnapping B.

Actus reus and mens rea in kidnapping:

The actus lies in the fact of taking or enticing and thereby, causing the child/unsound person, out of the keeping of law guardianship. The mens rea lies in the intention to take or intention to entice. But, this intention is imputed on the person. Because, kidnapping is a strict liability, and the intention whether good or bad is irrelevant. If the actus is proved, it is sufficient to make that criminally liable. Kidnapping per se is punishable.

Cases:

S. Vardarajan vs. State of Madras (1965 SC), Madhodkar J.:

This is an appeal by special leave from the judgment of the High Court of Madras affirming the conviction of the appellant under Section 363 of the Indian Penal Code and sentence of rigorous imprisonment for one year.

Savitri, P.W. 4, is the third daughter of S. Natarajan, P.W. 1, who is an Assistant Secretary to the Government of Madras in the Department of Industries and Co-operation. At the relevant time,

he was living on 6th Street, Lake Area, Nangumbakkam, along with his wife and two daughters, Rama, P. W. 2, and Savitri, P.W.4. The former is older than the latter and was studying in the Madras Medical College while the latter was a student of the second year B.Sc. class in Ethiraj College.

A few months before September 30, 1960 Savitri became friendly with the appellant Vardarajan who was residing in a house next door to that S. Natarajan. The appellant and Savitri used to carry on conversation each other from their respective houses. On September 30, 1960 Rama found them talking to each other in this manner at about 9.00 a.m. and had also seen her talking like this on some previous occasions. That day she asked Savitri why she was talking with the appellant. Savitri replied saying that she want to marry the appellant. Savitri's intention was communicated by Rama to their father when he returned home at about 11.00 a.m. on that day. There upon Natarajan questioned her. Upon being questioned Savitri started weeping but did not utter a word. The same day Natarajan took Savitri to Kodambakkam and left her at the house of a relative of his, K. Natarajan, P.W.6, the idea being that, she should be kept as far away from the appellant as possible for some time.

On the next day, i.e. on October 1, 1960 Savitri left the house of K. Natarajan at about 10.00 a.m. and telephoned to the appellant asking him to meet her on a certain road in that area and then went to that road herself. By the time she got there the appellant had arrived there in his car. She got into it and both of them went to the house of one P.T. Sami at Molapore with a view to take that person along with them to the Registrar's Office to witness their marriage. After picking Sami they went to the shop of Govindarajulu Naidu in Netaji Subhash Chandra Bose Road and the appellant purchased two gundus and Tirumangalyam which were selected by Savitri and then proceeded to the Registrar's office. Thereafter the agreement to marry entered into between the appellant and Savitri, which was apparently written there, was got registered. Thereafter the appellant asked her to wear the articles of jewellery purchased at Naidu's shop and she accordingly did so. The agreement which these two persons had entered into was attested by Sami as well as by one P.K. Mar, who was a co-accused before the Presidency Magistrate but was acquitted by him. After the document was registered the appellant and Savitri went to Ajanta Hotel and stayed there for a day. The appellant purchased a couple of sarees and blouses for Savitri the next day and then they went by train to Sattur. After a stay of a couple of days there, they proceeded to Sirukulam on October 4, and stayed there for 10 or 12 days. Thereafter they went to Coimbatore and then on to Tanjore where they were found by the police who were investigating into a complaint of kidnapping made by S. Natarajan and were then brought to Madras on November 3rd.

It is not disputed that Savitri was born on November 13, 1942 and that she was a minor on October 1st. The other facts which have already been stated are also not disputed. A two-fold contention was, however, raised and that in the first place Savitri had abandon the guardianship of her father and in the second place that the appellant in doing what he did, did not in fact take away Savitri out of the keeping of her lawful guardian.

The question whether a minor can abandon the guardianship of his or her own guardian and if so the further question whether Savitri could, in acting as she did, be said to have abandoned her father's guardianship may perhaps not be very easy to answer. Fortunately, however, it is not necessary for us to answer either of them upon the view which we take on the other question raised before us and that is that "taking" of Savitri out of the keeping of her father has not been established. The offence of "kidnapping from lawful guardianship" is defined thus in the first paragraph of Section 361, of the Indian Penal Code:

It will thus be seen that taking of enticing away a minor out of the keeping of a lawful guardian is an essential ingredient of the offence of kidnapping. Here, we are not concerned with enticement but what we have to find out is whether the part played by the appellant amounts to "taking" out of the keeping of lawful guardian of Savitri. We have no doubt that though Savitri had been left by S. Natarajan at the house of his relative K. Natarajan she still continued to be in the lawful keeping of the former but then the question remains as to what is it which the appellant did that constitutes in law "taking". There is not a word in the deposition of Savitri from which an inference could be drawn that she left the house of K. Natarajan at the instance or even a suggestion of the appellant. In fact she candidly admits that on the morning of October 1st, she herself telephoned to the appellant to meet her in his car at a certain place. The appellant by complying with her wishes can be no stretch of imagination be said to have taken her out of the keeping of her lawful guardian. She willingly accompanied him and the law did not cast upon him the duty of taking her back to her father's house or even of telling her not to accompany him. She was not a child of tender years who was unable to think for herself but, as already stated, was on the

verge of attaining majority and was capable of knowing what was good and what was bad for her. She was no uneducated or unsophisticated village girl but a senior college student who had probably all her life lived in a modern city, and was thus far more capable of thinking for herself and acting on her own than perhaps an unlettered girl hailing from a rural area.

The learned Judge of the High Court also referred to a decision in **Queen vs. Kumarasami, 2 Madras HCR 331** which was a case under section 498 of the Indian Penal Code. It was held there that if whilst the wife was living with her husband, a man knowingly went away with her in such a way as to deprive the husband of his control over her with intent stated in the section, and it would be a taking from the husband within the meaning of the section.

It must, however, be borne in mind that there is a distinction between "taking" and allowing a minor to accompany a person. The two expressions are not synonymous though we would like to guard ourselves from laying down that in no conceivable circumstances can the two be regarded as meaning the same thing for the purposes of section 361 of the Indian Penal Code. We would limit ourselves to a case like the present where the minor alleged to have been taken by the accused person left her father's protection knowing and having capacity to know the full import of what she was doing voluntarily joins the accused person. In such a case we do not think that the accused can be said to have taken her away from the keeping of her lawful guardian. Something more has to be shown in a case of this kind and that is some kind of inducement held out by the accused person or an active participation by him in the formation of the intention of the minor to leave the house of the guardian.

It would, however, be sufficient if the prosecution establishes that though immediately prior to 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 decision 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 fulfillment 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".

Then the court refer to two decisions relied on below;

It must be born in mind that while sections 497 and 498, I.P.C. are meant essentially for the protection of the rights of the husband, section 361 and other cognate sections of the Indian Penal Code are intended more for the protection of the minors and persons of unsound mind themselves than of the rights of the guardians of such persons. In this connection, we may refer to the decision in **State vs. Harbansing K. ansing, ILR (1954) Bombay 784: (air 1954 Bombay 339)**. In the case Gajendragadkar J. (as he then was) has, after pointing out what we have said above, observed.

"It may be that the mischief intended to be punished partly consists in the violation or the infringement of the guardians' right to keep their wards under their care and custody; but the more important object of these provisions undoubtedly is to afford security and protection to the wards themselves."

The court then discussed several other cases two of them English cases, the list of which is summarized in the quotation from one such case. "I am of opinion that if a young woman leaves her father's house without any persuasion, inducement, or blandishment held out to her by a man, so that she has got fairly away from home, and then goes to him, although it may be his moral duty to return her to her parent's custody, yet his not doing so is no violation of the English abduction law for the Act does not say he shall restore her, but only that he shall not take her away."

We are satisfied, upon the material on record, that no offence under section 363 has been established against the appellant and that he is, therefore, entitled to acquittal. Accordingly we allow the appeal and set aside the conviction and sentence posed upon him.

Appeal allowed.

In **State of Haryana vs. Raja Ram AIR 1973 SC 819** this Court considered the meaning and scope of section 361, I.P.C. It was said there.

"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 gravity 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 section 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."

[Reg vs. Roff (1864) 176 ER 466].

In the present case, facts clearly establish the guilt of the accused. The action of the accused was the proximate cause of the girl's going out of her father's keeping. But for this persuasion she would not have gone out of the house. He actively participated in the formation of her intention to leave the house. Her consent or willingness to accompany the accused would be immaterial.

Recent cases:

In **Satish Kumar vs. State (1988 Cr. L.J. 565)**, the court reiterated what do not amounts to "taking" as laid down in **S. Vardarajan Case**. In **Kumudini Padhi vs. Prasanta Kumar (1989 Cr. L.J. 1861)**, and **Sk. Yusuf vs. State (1989 Cr. L.J. 62)**, the court reiterated the principles laid down in **Thakorlal Vadgama Case**.

In **Zahoor Ali vs. State of U.P. (1989 Cr. L.J. 1177)**, held that the word "taking" used in section 361 requires that the accused must have played an **active** role in the minor leaving her lawful guardian's house or taking shelter in his house. Therefore mere **passive** role in helping a girl in giving shelter in the house or accompanying her to hospital for medical treatment cannot amount to 'taking'. The question whether there has been 'taking' must be decided with reference to the circumstances of the case including the question whether the girl was of sufficient maturity and intellectual capacity to think for herself and make up her own mind, the circumstances under which and the object for which she felt it necessary or worthwhile to go with the accused.

In **R vs. D (1984) 1 All ER 574; (1984) 3 SCC (Journal)**, held that the offence of kidnapping cannot be committed by a parent who takes away his unmarried minor child. However, a parent may be guilty of kidnapping his child if that child had attained majority or has lawfully married under that age, since in either case the child has passed out of the possession of his parents.

In **Rabinarayan Das vs. State (1992 Cr. L.J. 269, Orissa)**, on being persuaded by the accused the victim went inside the house and came properly dressed to accompany the accused. This will not amount to 'abduction' within the meaning of section 362, IPC.

In **Ganga Dayal vs. State of Bihar (AIR 1994 SC 859)**, the appellant and the complainant (girl's father) were doing together potato business. The accused used to go to the house of the complainant. In the eventful night, he stayed at the house of the complainant. In the morning he was seen taking the minor girl and thereafter the minor girl disappeared. Thus, circumstances brought on record established conclusively the guilt of the accused. It is contended by the learned counsel for the appellant that the appellant being aged about 55 years would not have developed fancy for a minor girl and therefore it is a false story that he had abducted the girl. The Court negated it as a fanciful defense, and convicted the accused under section 366-A.

1995 Cri. L.J. 1288 (Ori.) – The prosecutrix with her own free will join the accused. The incidence occurred while she was going to appear at M.A. exams. There was no mention in FIR that the girl was a minor. Held, mentioning about her inability to take a right decision does not make her person of unsound mind. The proceeding for kidnapping under section 361 is liable to be quashed.

ABDUCTION **FRAMEWORK SHEET**

Bare Act Analysis:

Sections involved – Sections 362, 364, 366, 367, 368, 369.

Definition:

Section 362 of I.P.C. defines abduction as follows: "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. Abduction per se not an offence.

Ingredients:

The essential ingredients of this section are:

- (a) Forcible compulsion or inducement by deceitful means;
- (b) The objects of such compulsion or inducement must be the going of a person from any place.

Leading cases:

1. *Ganga Dei (1914) 12 ALJR 91; Nanhna Dhimaie (1930) 53 All 140* – "Abduction is a continuing offence."
2. *Vishwanath vs. S.O.U.P. AIR 1960 SC* – "Abduction per se is not an offence."
3. *Chhote Lal vs. State of Haryana AIR 1979 SC* – "Abduction per se is not an offence and hence is not punishable."

Note – Abduction per se as defined under section 362 of I.P.C. is not an offence and hence is not punishable. Only if here abduction falls in the categories provided under sections 364, 365, 366, 367 and 369, will it amount to an offence. Thus, abduction is an offence only if it is done with intent to:

- (a) Murder (section 364)
 - (b) Secretly and wrongfully confine person (section 365)
 - (c) Induce woman to compel her marriage (section 366)
 - (d) Subject person to grievous hurt, slavery etc. (section 367)
 - (e) Steal from a person under 10 years (section 369).
- Force or fraud is an essential requirement for abduction.

English Law:

Under the English Law, there is no separate offence as "kidnapping" under the Indian Law and taking a minor out of possession of the guardian too is abduction.

Essential requirements:

1. **By force** – The term "force" as embodied in section 362, I.P.C. means the use of actual force and not merely show of force or threat of force. As held in *Gurcharan Singh vs. State of Haryana AIR 1972 SC*, where an accused threatened the prosecutrix with a pistol to go with him, it would amount to abduction under this section.
2. **'Deceitful' means** – The expression "deceitful means" includes a misleading statement. It is a matter of intention and the intention of the accused is the basis and gravamen of the charge. Under section 362, inducing a person by deceitful means to go from any place is an offence. Deceitful means is used as an alternative to "use of force". Thus, a person can use force to compel or in the alternative, deceive a person to leave a place. Either way, it amounts to abduction. "Deceitful" means, misleading a person by making false representation and thereby persuading the person to leave any place.
3. **To go from any place** – An essential element of abduction is compelling or inducing a person to go from any place. It need not be only from the custody of lawful guardian as in the case of kidnapping. The offence of kidnapping is complete, the moment a person is removed from India or from the keeping of lawful custody of guardian. But, in the case of abduction, a person is being abducted not only when he is first taken away from any place, but also when he is subsequently removed from one place to another. For example A kidnapped girl managed to escape from the kidnapper, when she met the accused, who misrepresented to her that he was a police constable and would take her to the police station. But instead, he took her to his house, kept her there, demanded and took a ransom of Rs. 600 from her mother, before he handed her back. It was held that his act amounted to abduction. (*Bahadur Ali vs. King Emperor AIR 1923 Lahore*).

In a landmark judgment, *AIR 1929 Lahore 713*, it was held that where a woman is passed from hand to hand, in several places, each of the people will be guilty of offence of abduction.

Continuing Offence:

The offence of abduction is a continuing offence and a girl is being abducted not only when she is first taken from any public place, but also when she is removed from one place to another.

Difference between Kidnapping and Abduction:

Kidnapping (From guardianship)

1. It is committed only in respect of a minor or a person of unsound mind.
2. The person kidnapped is removed from lawful guardianship. A child without a guardian can't be kidnapped.
3. The minor or the person of unsound mind is simply taken away or enticed to go with the kidnapper. The means employed may be innocent.
4. Consent of the person enticed is immaterial.
5. The intent of the offender is irrelevant.
6. It is not a continuing offence. The offence is completed as soon as the minor is removed from the custody of his or her guardian.
7. It is a substantive offence, punishable under Section 363, IPC.
8. In Kidnapping there must be taking or enticing from a lawful guardian.

Abduction

1. It is committed in respect of any person of any age.
2. Not necessary.
3. Force, compulsion or deceitful means are employed.
4. Consent of the person removed, if freely and voluntarily given, condones the offence.
5. It is very important. Abduction must be with certain intent.
6. It is a continuing offence. A person is being abducted both when she is first taken from any place and also when she is removed from one place to another.
7. It is an auxiliary act, not punishable by itself unless accompanied with some criminal intent. (specified in sections 364-366).
8. In abduction the question of taking or or enacting does not arise.

Actus reus and mens rea in the offence of abduction under sections 364 to 367 and 369:

The actus lies in the very act of abduction, i.e. compelling by force or by deceitful means to cause a person to move from one place to another. But, mens (guilty mind) differs in each case.

Under Section 364, when the actus of abduction is coupled with the intention to commit murder, it becomes reus and collectively punishable by law.

Under Section 364, when abduction is with the intention to wrongfully confining or secretly confining a person, it is the mens and is made punishable when both actus and mens rea are coupled.

Under Section 366, also the mens rea, is the intention to induce a woman to compel her to marriage and when such mens is coupled with the actus of abduction, that constitutes the reus under this section.

Under Section 367, when there is intention to subject a person to grievous hurt or slavery, it is the mens, part, and when is coupled with actus, then the mens and actus are punishable.

Under Section 369, the actus is the (kidnapping or) abduction of a child of 10 years. The guilty mind is the intention to take dishonestly any movable property from the person of such a child. So, this is the aggravated form of kidnapping a child (minor).

OFFENCES AGAINST PROPERTY

Theft – Section 378

Whoever intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

Explanation 1 – A thing so long as it is attached to earth not being movable property, is not subject of theft, but it becomes capable of being the subject of theft as soon as it is severed from the earth.

Explanation 2 – A moving affected by the same act which effects the severance may be a theft.

Explanation 3 – A person is said to cause a thing to move by removing an obstacle which prevented it from moving or by separating it from any other thing, as well as by actually moving it.

Explanation 4 – A person, who by any means causes an animal to move is said to move that animal, and to move everything which in consequence of the motion so caused, is moved by that animal.

Explanation 5 – The consent mentioned in the definition may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority, either express or implied.

Ingredients

- (1) Dishonest intention to take property.
- (2) The property must be movable.
- (3) It should be taken out of the possession of another person.
- (4) It should be taken without the consent of that person, and
- (5) There must be some moving of the property in order to accomplish the taking of it.

Intending to take dishonestly

Intention is the gist of the offence. The intention to take dishonestly exists when the taker intends to cause wrongful gain to one person or wrongful loss to another person. Taking without any dishonest intention is not theft.

The intention to take dishonestly must exist at the time of the moving of the property [illustration (h)]. The taking must be dishonest. It is not necessary that the taking must cause wrongful gain to the taker; it will be sufficient if it causes wrongful loss to the owner. It makes no difference in the accused's guilt that the act was not intended to procure any personal benefit to himself.

It is not necessary that the taking should be permanent or with an intention to appropriate the thing taken [illustration (i)]. There may be theft without an intention to deprive the owner of the property permanently. In this respect, the Penal Code differs from the English Law, where a bonafide claim of right exists; it can be a good defence to a prosecution for theft.

When a person takes another man's property believing under a mistake of fact and in ignorance of law, that he has a right to take it, he is not guilty of theft because there is no dishonest intention, even though he may cause wrongful loss.

A person can be convicted of stealing his own property if he takes it dishonestly from another [illustration (j) and (k)].

A creditor, who takes movable property out of his debtor's possession, without his consent, with the intention of coercing him to pay his debt, is guilty of theft.

Explanations 1 and 2 state that things attached to the land may become movable property by severance from the earth, and that the act of severance may of itself be theft [illustration (a)].

Human body whether living or dead (except bodies, or portions thereof, or mummies preserved in museums or scientific institutions) is not movable property. The property must be in the possession of the prosecutor. Thus, there can be no theft of wild animals, birds, or fish, while at large, but there can be a theft of tamed animals. Where property dishonestly taken belonged to a person who was dead, and, therefore, in nobody's possession, or where it is lost property without any apparent possessor, it is not the subject of theft, but of criminal misappropriation [illustration (g)]. A moving thing is said to be in the possession of a person when he is so situated with respect to it that he has the power to deal with it as owner to the exclusion of all other persons, and when the circumstances are such that he may be presumed to intend to do so in case of need.

The person from whose possession the property is taken may or may not be the owner of it and may have his possession either rightful or wrongful. Mere physical control of the person over the thing is quite enough [illustration (j) and (k)].

Where there are several joint owners in joint possession, and any one of them, dishonestly takes exclusive possession, he would be guilty of theft.

Animals found in reserve forests are *ferae naturae* and incapable of possession. The thing stolen must have been taken without the consent of the person in possession of it. Explanation 5 says that the consent may be express or implied, and may be given either by the person in possession, or by any person having for that purpose authority either express or implied [illustration (m) and (n)]. Consent obtained by a false representation which leads to a misconception of facts will not be a valid consent.

The offence of theft is completed when there is a dishonest moving of the property, even though the property is not detached from that to which it is secured.

Explanations 1 and 2 state that the moving by the same act which affects the severance may constitute theft. Carrying away of trees after felling them is theft but mere sale is not.

There is no presumption of law that husband and wife constitute one person in India for the purpose of criminal law. If the wife removes her husband's property with dishonest intention, she is guilty of theft. A Hindu woman who removes from the possession of the husband and without his consent, her *stridhan* (woman's property) cannot be convicted of theft because this species of property belongs to her absolutely.

Pyarelal Bhargava v. State of Rajasthan: - It is not necessary that the taking should be of a permanent character or that the accused should have derived any profit. A temporary removal of an office file from the office of a Chief Engineer and making it available to a private person for a day amounts to the offence of theft.

K.M.Mehta v. State of Rajasthan: - The offence of theft is committed if the property of another person is taken away from him without his consent with a dishonest intention. Even a temporary retention or deprivation is enough to show that the offence has been committed.

English and Indian Law on theft

- Under the English law, the property must be taken to deprive another permanently of his property but this is not so under the Indian law where removal of movable property with intent to deprive another temporarily of his property would also amount to theft.
- Under the Indian Law, a piece of land can never be a subject-matter of theft but this is possible at least in some cases under the English Law.

Extortion – Section 383

Whoever intentionally puts any person in fear of any injury to that person or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security of anything signed or sealed which may be converted into a valuable security, commits extortion.

The offence takes a middle place between theft and robbery.

Ingredients

- (1) Extortion is committed by the wrongful obtaining of consent. In theft the offender takes without the owner's consent.
- (2) The property obtained by extortion is not limited as in theft to movable property only. Immovable property may be the subject of extortion.
- (3) In extortion the property is obtained by intentionally putting a person in fear of injury to that person or to any other, and thereby dishonestly inducing him to part with his property. In theft, the element of force does not arise.

Puts any person in fear of any injury

The 'fear' must be of such a nature and extent as to unsettle the mind of the person on whom it operates and takes away from his acts that element of free voluntary action which alone constitutes consent.

The terror of criminal charges, whether true or false, amounts to a fear of injury. The guilt or innocence of the party threatened is immaterial.

Dishonestly induces the person – to deliver to any person any property

Delivery by the person put in fear is essential in order to constitute the offence of extortion, where a person through fear offers no resistance to the carrying of his property, but does not deliver any of the property to those who carry it off; the offence committed will be robbery and not extortion. The offence of extortion is not complete before actual delivery of the possession of the property by the person put in fear.

To any person

It is not necessary that the threat should be used, and the property received, by one and the same individual.

Points of distinction between theft and extortion:

Theft	Extortion
(1) Property in question is movable.	(1) Property in question may be movable or immovable.
(2) Property is taken without consent of its <u>owner</u> .	(2) Property is taken by putting the person in fear of injury to that person or to any other person, and thereby inducing the person so put in fear to deliver the property.
(3) Property is taken within knowledge of the owner.	(3) Property is taken by force.
(4) <u>Some</u> movement is essential for taking of the property.	(4) Movement of property is not essential.
(5) There is no delivery of property by the owner.	(5) There is delivery of property.

Robbery– Section 390

In all robbery there is either theft or extortion.

When theft is robbery

Theft is 'robbery' if, in order to the committing of the theft, or in committing the theft, or in carrying away or attempting to carry away property obtained by the theft, the offender for that end, voluntarily causes or attempts to cause to any person's death or hurt or wrongful restraint, or fear of instant death or of instant hurt, or of instant wrongful restraint.

When extortion is robbery

Extortion is 'robbery' if the offender, at the time of committing the extortion, is in the presence of the person put in fear, and commits the extortion, by putting that person in fear of instant death, or instant hurt, or of instant wrongful restraint to that person, or to some other person, and by so putting in fear, induces the person so put in fear then and there to deliver up the thing extorted.

Explanation – The offender is said to be present if he is sufficiently near to put other person in fear of instant death, or instant hurt, or of instant wrongful restraint.

Robbery is a special and aggravated form of either theft or extortion. The chief distinguishing element in robbery is the presence of imminent fear of violence.

There can be no case of robbery which does not fall within the definition either of theft or of extortion, but in practice it will perpetually be a matter of doubt whether a particular act of robbery was a theft or extortion.

It is by no means improbable that Z's right arm bracelet may have been obtained by theft and left arm bracelet by extortion, that the rupees in Z's girdle may have been obtained by theft and those in his turban by extortion. Probably in nine-tenths of the robberies which are committed, something like this actually takes place, and it is probable that a few minutes later neither the robber nor the person robbed would be able to recollect in what proportions theft and extortion were mixed in the crime, nor is it at all necessary for the ends of justice that this should be ascertained.

Carrying away

Even if death, hurt or wrongful restraint, or fear of any of these, is caused after committing theft, in order to carry away the property obtained by theft, this offence would be committed.

For that end

Death, hurt or wrongful restraint is a must, caused in committing theft, or in carrying away property obtained by theft. Where a person caused hurt only to avoid capture when surprised while stealing, it was held that theft, and not robbery was committed. The use of violence will not convert the offence of theft into robbery, unless the violence be committed for one of the ends specified in this section.

Voluntarily causes

An accidental infliction of injury by a thief will not convert his offence into robbery. But where in committing theft, there is undoubtedly an intention seconded by an attempt to cause hurt, the offence is robbery. In order to make an offence of theft, a robbery, there must be either theft and injury or threat of injury while committing theft.

Person

The word 'person' cannot be so narrowly construed as to exclude the dead body of a human being who was killed in the course of the same transaction in which theft was committed. A dead body is not a person. Removal of ornaments from a dead body is not taking ornaments out of the possession of a person.

Dacoity – Section 391

When five or more persons conjointly commit or attempt to commit a robbery, or where the whole number of persons conjointly committing or attempting to commit a robbery, and persons present and aiding such commission or attempt, amount to five or more, every person so committing, attempting or aiding, is said to commit "dacoity".

Dacoity is robbery committed by five or more persons, otherwise there is no difference between dacoity and robbery. The gravity of the offence consists in the terror it causes by

the presence of a number of offenders. Abettors who are present and aiding when the crime is committed are counted in the number.

Dacoity is perhaps the only offence which the legislature has made punishable at four stages. When five or more persons assemble for the purpose of committing a dacoity, each of them is punishable under Section 402, merely on the ground of joining the assembly. Another stage is that of preparation and if any one makes preparation to commit a dacoity, he is punishable under Section 399. The definition of 'dacoity' in this section shows that the other two stages, namely the stage of attempting to commit and the stage of actual commission of robbery, have been treated alike and same within the definition. Attempt to commit dacoity is also dacoity.

It is possible to commit the offence of dacoity by merely attempting to commit a robbery by five or more persons without being successful in getting any booty whatsoever. If in a case, the dacoits are forced to retreat due to stiff opposition from the inmates or villager without collecting any booty, and then it must be held that the offence of dacoity is completed the moment the dacoits take to their heels without any booty.

Conjointly

It refers to united or concerted action of the persons participating in the transaction. It is only when their individual action can be properly referred to their concerted action that the question of conviction under this section can arise. Fear of instant death or of hurt, or of wrongful restraint – imminent fear of death hurt etc. will be sufficient to bring the section into operation.

CRIMINAL MISAPPROPRIATION OF PROPERTY

Section 403: Dishonest misappropriation of property

Whoever dishonestly misappropriates or converts to his own use any movable property, shall be punished with imprisonment of either description for a term which shall extend to two years, or with fine or with both.

Illustrations

(1) A takes property belonging to Z out of Z's possession in good faith, believing, at the time when he takes it, that the property belongs to himself. A is not guilty of theft.

But, if A, after discovering his mistake, dishonestly appropriates the property to his own use, he is guilty of an offence under this section.

(2) A and B being joint owners of a horse, A takes the horse out of B's possession, intending to use it. Here, as A has a right to use the horse, he does not dishonestly misappropriate it.

But, if A sells the horse and appropriates the whole proceeds to his own use, he is guilty of an offence under this section.

Explanation 1:

A dishonest misappropriation for a time only is a misappropriation within the meaning of this section.

Illustration

A finds a Government promissory note belonging to Z, bearing a blank endorsement. A, knowing that the note belongs to Z, ~~pledges~~ it with a banker as a security for a loan, intending at a future time to restore it to Z. A has committed an offence under this section.

Explanation 2:

A person who finds property not in the possession of any other person, and takes such property for the purpose of protecting it for, or of restoring it to, the owner, does not take or misappropriate it dishonestly, and is not guilty of an offence; but he is guilty of the offence above defined, if he appropriates it to his own use, when he knows or has means of discovering the owner, or before he has used reasonable means to discover and give notice to the owner and has kept the property a reasonable time to enable the owner to claim it.

What are reasonable means or what is a reasonable time in such a case, is a question of fact.

It is not necessary that the finder should know who is the owner of the property, or that any particular person is the owner of it; it is sufficient if, at the time of appropriating it, he does not believe it to be his own property, or in good faith believe that the real owner cannot be found.

Illustration

A finds a rupee on the high road, not knowing to whom the rupee belongs. A picks up the rupee. Here A has not committed the offence defined in this section.

Ingredients:

1. Dishonestly misappropriates or converts to his own use.
2. Any movable property.
3. The property must belong to the person other than the accused.
4. There must be dishonest intention on the part of the accused.

1. Dishonestly misappropriates or converts to his own use

The first requirement is that there should be the act of misappropriating or converting to one's own use of the property belonging to the other person. The act of misappropriation or conversion must be done with the dishonest intention. The word "dishonestly" qualifies both misappropriation or conversion to his own use. That means to say, there should be an intention to cause wrongful gain to one person and wrongful loss to another, which is the mens rea constituting this offence, while committing the act of misappropriation or conversion to one's own use which constitutes the actus reus part. To be more clear, there should be intention to cause gain by unlawful means of property to which the person gaining it, is not legally entitled to; or the loss by unlawful means of property to which the person losing it is legally entitled to.

Notably, the offence under this section impliedly makes distinction between the gain or loss of property and the gain or loss of possession of property and this distinction is amply clear when the loss of possession is only temporary, and is intended by the person who causes such loss of to be temporary only. When there is no intention to cause loss or gain of property and merely an intention to deprive the person, temporarily the use of property, it is said that it is the dishonest intention as required under this section. The thing to be seen here is whether the accused was actuated by dishonest intention or not, which is to be seen in light of the acts he commits.

The section enunciates that there must be actual commission of misappropriation or conversion of the property to one's own use. So, the offence is complete as soon as the accused misappropriates or converts the property to this use, of course with dishonest intention. The offence does not depend on the consequence but only on the act that has been committed.

Dishonestly misappropriates:

The verb "misappropriate" means to set apart for or assign to the wrong person or a wrong use and must be done dishonestly. That means to say application of another's property to one's own use. This includes either to himself or to some else on his part. The explanation enunciates the words "appropriates to his own use" which means "setting apart for his own use to the exclusion of others".

Illustrations

- (1) If A, a clerk of B, keeps money with himself to make use of it, and does not give account of that money to B, misappropriates.
- (2) X takes away some food from Y's house and on the way he finds a beggar and gives him to eat. Here, X commits theft and criminal misappropriation. The motive is irrelevant. Here, X has caused wrongful loss to Y and wrongful gain to himself (on behalf of him to beggar).

Converts to his own use:

Converting meaning changing the term of the property, that is to say, appropriating and dealing with property of another without having any right, as if it is one's own property. Mere retaining of property is not converting or appropriating to his own use. For example, if X finds a purse in the crowd and keeps it in his pocket, he has not committed this offence.

In **Mahabir Prasad Garodia (1961)**. Certain bales of cloth which were in the custody of railway were found to be unloaded near the godown of the accused and were later on recovered from that godown. In this case, it was held that the mere fact that the property was once in the custody of the railway does not envisage misappropriation or conversion.

2. Any movable property

The section clearly enunciates that the property must be movable. Obviously, there cannot be any criminal misappropriation of immovable property. The offence is complete either when the property is misappropriated or converted to one's own use, permanently or temporarily misappropriated. It is to be observed as to how the property came to the offender. Whether innocently or obtained by some wrongful means, for example, stolen or found or given with consent. As the section is silent, the means how the property came, may be by theft, or lease, bailment or by innocent possession. But, it should not be entrusted property. So, innocent possession is not always necessary. In this case, a person having innocent possession of property, may subsequently change in intention to misappropriate or convert to his own use.

Explanation 1: Temporary misappropriation

The explanation deals with only dishonest misappropriation. It states that, misappropriation may be for a permanent period or temporary. It extends to both case of wrongful loss or wrongful gain of property and wrongful gain or wrongful loss of possession of property. For example, a person, working in an office, appropriates the property or money of the office to his own use, for some time with the intention to restore it back, commits the offence under this section, even though his dishonest intention to misappropriate is for a short period.

Explanation 2: Finder of goods

This explanation states that, when a person finds a property and takes it with the intention to protect it or to restore it, to the owner, he does not commit any offence. But, he should take some steps in order to find out the owner. Even then, if he does not find the owner and keeps it, it is justifiable. And he if does not take any step to find out the owner, which was within his reasonable reach, and makes use of it, he is guilty to this offence.

But, if the property is completely abandoned, he is not liable. For example, if a person finds a property on the highway, he cannot reasonably find out the owner, and uses it, it is not criminal misappropriation. But, suppose he afterwards came to know of the real owner and even then he retains it and misappropriates or converts his own use, then he is guilty under this section.

The illustrations and explanation 2 make it clear that criminal misappropriation can take place when possession was innocently come by, but by subsequent change of intention, or from the knowledge of some new fact with which the party was not previously acquainted, the retaining becomes wrongful.

Cases:

1. **Gadgaya vs. Guru Siddeshwar (1897)** – The property of an idol or a temple must be used for the purposes of that idol or temple and any other use will be a malversation of that property, and it coupled with dishonest intention, will amount to criminal misappropriation.
2. **Dwarka Das vs. Narasimhulu Naidu (1923)** – In this case, the accused had lost his buffaloes. After few days, he finds a buffalo coming inside his house which was very much resembling his own buffalo, and ties it in on an open verandah. This was overlooked by the complainant. The accused rejected him to permit to remove the same. In this case, it was held that, there was no dishonest intention and is not guilty of criminal misappropriation.
3. **Venkateswara** – The accused in this case was a servant in the postal department while he was helping in sorting out the letters, secretly, kept two letters with the intention of delivering them to the peon who delivers them so as to share the money that is to be obtained on them. It was held that he was guilty under this section.

Difference between English Law and Indian Law:

In English law, innocent taking of properties and then subsequently changing the intention to convert them and actually converting them, is treated to be a civil wrong and not an offence. The English law takes into consideration of an intention only at the time of taking and the property and not after it has been taken.

But, in India, the criminal law takes into account the intention even after taking the property.

Difference between theft and criminal misappropriation:

In case of theft, the sole design of the accused is to take away the property out of the possession of a person, and the offence of theft is committed as soon as the accused moves the property with dishonest intention to take it. But, in criminal appropriation, this does not essentially involve an invasion of the possession of another person. Here, the offender is already in possession of the property and that possession may be innocent or lawful, or unlawful and subsequently changes his intention to misappropriate or convert to his own use.

In theft, mere removal with dishonest intention from the possession attracts Section 379, but under Section 403, it does not attract, merely by taking possession and further, there must be overt act of commission of misappropriation or conversion.

Section 404: Dishonest misappropriation of property possessed by deceased person at the time of his death:

Whoever dishonestly misappropriates or converts to his own property knowing that such property was in the possession of a deceased person at the time that person's decease, and has not since been in the possession of any person legally entitled to such possession, shall be punished with imprisonment of either description for a term which may extend to three years, and shall also be liable to fine; and if the offender at the time of such person's decease was employed by him as a clerk or servant, the imprisonment may extend to seven years.

Illustration

Z dies in possession of furniture and money. His servant A, before the money comes into possession of any person entitled to such possession, dishonestly misappropriates it, A has committed the offence defined in this section.

Object:

The main purpose of providing this section is to protect the property which due to its peculiar placement, when, the person entitled to protect it, meets with death and the person subsequently entitled to it, has not yet reached or appeared. The word 'property' here is movable property and not immovable and if the immovable property is converted to movable and then misappropriated or converted, it attracts the section.

Case: State vs. Bishnu Charan Muduli (1985)

In this case, there was a murder. The accused removed the gold ring on the finger of the deceased and misappropriated it dishonestly. He was held liable under this section.

CRIMINAL BREACH OF TRUST

Section 405: Criminal breach of trust

"Whoever, being in any manner entrusted with property, or with any dominion over property, dishonestly misappropriates or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or if any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits criminal breach of trust.

Explanation 1:

A person being an employer, of an establishment whether exempted under Section 17 of the Employees' Provident Funds and Miscellaneous Provisions Act, 1952 (19 of 1952), or not who deducts the employees' contribution from the wages payable to the employees for credit to a Provident Fund or Family Pension Fund established by any law for the time being in force, shall be, deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said law, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Explanation 2:

A person, being an employer, who deducts the employees' contribution from the wages payable to the employee for credit to the Employees' State Insurance Fund held and administered by the Employees' State Corporation established under the Employees' State Insurance Act 1948 (34 of 1948), shall be deemed to have been entrusted with the amount of the contribution so deducted by him and if he makes default in the payment of such contribution to the said Fund in violation of the said Act, shall be deemed to have dishonestly used the amount of the said contribution in violation of a direction of law as aforesaid.

Illustrations:

- (a) A, being executor to the will of a deceased person, dishonestly, disobeys the law which directs him to divide the effects according to the will, and appropriates them to his own use. A has committed criminal breach of trust.
- (b) A, is a warehouse-keeper. Z, going on a journey, entrusts his furniture to A, under a contract that it shall be returned on payment of a stipulated sum for warehouse-room. A dishonestly sells the goods. A has committed breach of trust.
- (c) A revenue officer is entrusted with public money and is either directed by law, or bound by a contract, express or implied, with the Government, to pay into a certain treasury all the public money which he holds. A dishonestly appropriates the money, A has committed criminal breach of trust.

Ingredients:

1. Entrusting any person with property or with any dominion over property.
2. The person entrusted –
 - (a) Dishonestly misappropriates or converts the property to his own use, or
 - (b) Dishonestly uses or disposes of that property or wilfully suffers any other person so to do in violation –
 - a. Of any direction of law prescribing the mode in which such trust is to be discharged, or
 - b. Of any legal contract made touching the discharge of such trust.

1. Entrusted with property or with dominion over property in any manner

This section contemplates that there should be entrustment of the property or entrustment of dominion over the property. The essence of this section is that the property should be entrusted that means, the possession of the property must come to him by the person so entrusting. It signifies handing over of the property by one person to the other person out of trust. That means to say this implies the fiduciary relationship between the person entrusting and the person entrusted with. The person is in custody of the property. For example, if X gives his car to Y, stating that for some time he is going outside and during that period to look after and if needed to use it to a lesser extent. After some days, Y sells the car and uses the money. This is breach of trust and there a clear intention of causing wrongful gain to him by the fact of using the money, he is liable for criminal breach of trust.

But suppose, if X has given his car to Y for his case and he has also entered into an agreement with the person entrusted through a paper, and if Y sell car, then it is not breach of trust but misappropriation. Because, this is not totally out of trust. Because, by entering into agreement, they does not seem to have fiduciary relationship and trust and confidence.

When there is an entrustment, there is no transfer of ownership and the person holding it, will hold it only to take care of that or to do or directed by the entruster.

There should be original trust. If the trust is created by playing trick or deceit it is not trust.

The trust may be in the relationships of trustee and beneficiary, bailor and bailee, master and servant etc.

Property may be movable or immovable. It may also include sale proceeds, negotiable instruments etc.

There should not be abandonment of property. ~~If there is a constructive possession of the person, entrusting, then, it is not abandonment.~~ For example, if X says to Y that he is not interested in his car and tells Y to take it to the river and throw it. Then, Y, if takes the car and while going to the river turns it and starts using it. One day X sees it and if he sues for breach of trust. Here, Y has committed criminal breach of trust. Because X has still constructive possession, in the sense that, when he told Y to take to the river and then throw it, his intention to abandon immediately was not clear. There was a possibility to change his mind. So, Y will be liable for criminal breach of trust.

Suppose, X gives his car to Y and tells that he is not at all interested in it, and Y to take it and to do whatever he wants or throw it away. Here, there is a clear intention to abandon and it can be said that X was having constructive possession. So, Y even it has used it, has not committed criminal breach of trust.

Dominion over the property:

Dominion over the property means control over the property. This usually signifies those who deal with public money or holding any office entrusted with some property.

For example, an accountant of a company is having dominion over the accounts and if he dishonestly misappropriates or converts the property of the company, to his own use, he is said to commit the criminal breach of trust.

Similarly, a manager of the bank, a Tehsildar having dominion over the public money, Executive Engineer, holding some property or materials etc.

2. Dishonestly misappropriates or converts to his own use that property

Misappropriation or the conversion of the entrusted property is the actus reus of his offence and the mens rea consists in the dishonest intention to misappropriate or to convert the entrusted property. It is only the intention which is essential and not the actual wrongful gain or wrongful loss. Mere retention of the property with misappropriation is not criminal breach of trust. Where a person, is directed by his master to invest the money in one bank

and if he invests in another bank thinking that it will benefit the master, he has not done it with dishonest intention.

Case: Nizam Ali (1982)

In this case, the accused was entrusted with 9000 litres of diesel oil for being delivered to certain military depot by authorities of Indian Oil Company. The accused delivered only 61000 litres and hurriedly rushed to a certain place and erupted remainder into barrels of private depot owner. The accused pleaded that there was a mechanical problem in the vehicle. But was negatived. It was held that he did it with dishonest intention.

Misappropriate means putting a thing on to one's own use conversion means changing the form for his own use.

3. Dishonestly uses or disposes of that property in violation of any direction of law or of any legal contract touching the discharge of such trust, or wilfully suffers any other person so to do

When a person wrongfully gains or causes wrongful loss to the entruster by using the property he falls under this section. When a person is given the work of printing and is also provided with papers, if he uses some of the papers to print others work, he is said to use the property dishonestly.

In **Kalaktar Singh (1978)**, a contractor was engaged by the government for execution of work and was given cement for such construction. There was agreement between the contractor and the government that, he has to use the cement provided by the government, and has to return the surplus. But, he sold the cement unused. It was held that he was liable for criminal breach of trust.

Wilfully suffers any person to do:

This means ~~allowing other person~~ to use or dispose of the property knowingly and wilfully by the person entrusted, with the property or with dominion over the property. Mere negligence, will not amount to wilful allowance. Wilful suffering also includes wilful omission.

Case: Abdus Salam (1936)

In this case, a public servant was entrusted with the safe custody of records. He allowed the key of the room where records were kept, in the hands of another person, so that he may use these records for copying for corruption. It was held that the public servant was liable for criminal breach of trust by wilfully suffering other person to do, copies and for committing corruption.

4. In violation of any direction of law prescribing the mode in which trust is to be discharged or if any legal contract – touching the discharge of such trusts

The misappropriation, conversion etc. must be in violation of a legal direction prescribing the mode in which the person entrusted with the property is to carry out the trust or the contract.

Case: Jamsetji (1889)

In this case, the master entrusted the selling work liquor to his servant. There was a contract between the master and servant that, the servant should keep a certain quantity of liquor with him and he has to account the remainder to his master, and also that the servant should not mix water to it. But, the servant, by violating this term mixed water to the liquor and sold the adulterated liquor and appropriated the property to his own use. It was held that he was guilty of criminal breach of trust.

Difference between criminal misappropriation of property and criminal breach of trust:

In case of criminal misappropriation, the property comes into possession of the accused, by some manner i.e. either casually or otherwise and he misappropriates it afterwards. In case of criminal breach of trust, the property is lawfully entrusted with the accused and afterwards he dishonestly uses or converts that property.

The punishment for criminal appropriation is two years and for criminal breach of trust is three years as it involves the breach of faith and confidence.

The criminal misappropriation involves movable property, criminal breach of trust involves both movable and immovable property.

Criminal breach of trust deals with the use or disposal of property in violation of direction of law, legal contract. But criminal misappropriation does not deal with these aspects specifically.

In criminal breach of trust, a person may wilfully suffer other person to do it but, in criminal misappropriation, there is no such provision.

Section 407: Criminal breach of trust by carrier etc.

"Whoever, being entrusted with property as a carrier, wharfinger or warehouse-keeper, commits criminal breach of trust, in respect of such property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Carrier: A carrier is a person who undertakes to transport the goods of other persons from place to place, for hire. Any one who undertakes to carry goods of all persons indifferently for hire, is a common carrier.

Wharfinger: The term 'wharfinger' means a person who owns or keeps a wharf, which is a broad plain place, near some creek or haven, to lay goods and wares on, that are brought to or from the water.

Warehouse-keeper: One who keeps a warehouse which is a house to deposit or keep wares on ware is an article of merchandise, fabrics, especially in the plural, goods, commodities, merchandise.

Section 408: Criminal breach of trust by clerk or servant

"Whoever being a clerk or servant or employed as a clerk or servant, and being in any manner entrusted in such capacity with property, or with any dominion over property, commits criminal breach of trust in respect of that property, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

Ingredients:

1. The accused must be a clerk or servant.
2. He must have entrusted with property, or with dominion over property.
3. He must have committed criminal breach of trust in respect of such property.

Section 409: Criminal breach of trust by public servant, or by banker, merchant or agent:

"Whoever, being in any manner entrusted with property, or with any dominion over property in his capacity of a public servant or in the way of his business as a banker, merchant, factor, broker, attorney or agent, commits breach of trust in respect of that property, shall be punished with imprisonment for life, or with imprisonment of either description, for a term which may extend to ten years, and shall also be liable to fine.

Ingredients:

1. The accused must be a public servant, banker, merchant, attorney etc. He must have been entrusted, in such capacity, with property.
2. He must have committed breach of trust in respect of such property.

The persons coming under the ambit of this section are of a highly confidential character. They will be holding great powers of control and any misuse of the property by them, in their capacity, will seriously injure the public. So, they are punished severely.

RECEIVING OF STOLEN PROPERTY

Stolen property is defined in Section 410. The offences relating to stolen property is dealt with in Section 411 to 414 of IPC.

Section 410: Stolen property

'Property, the possession whereof has been transferred by theft or by extortion, or by robbery, and property which has been criminally misappropriated or in respect of which criminal breach of trust has been committed, is designated as 'stolen property' whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without India. But, if such property subsequently comes into the possession of a person legally entitled to the possession thereof, it then ceases to be stolen property.'

Ingredients:

1. Stolen property.
2. Whether the transfer has been made, or the misappropriation or breach of trust has been committed, within or without India.
3. When stolen property ceases to be "stolen property".
4. If such property subsequently comes into the possession of a person legally entitled to the possession thereof.
5. Stolen property coming into possession of owner before its receipt by person accused of receiving it.

Stolen property:

A stolen property is one on which the possession of the property is transferred by –

- (a) Theft, or
- (b) Extortion, or
- (c) Robbery, or
- (d) Where the property has been misappropriated criminally, or
- (e) The property in respect of which the breach of trust is committed.

The property received must be a stolen one, by any one of the above mentioned methods. The property into or for which the stolen property is converted or exchanged is not a stolen property.

In **Manmohan Roy (1875)**, it was held that the money obtained upon a money order which is a forged one, is not a stolen property.

But in **Cowell vs. Green**, it was held that the motion obtained by killing sheep which was stolen alive, was held that it was a stolen property.

When stolen property ceases to be a stolen property:

The property which treated to be the stolen property will not longer a stolen property when the legally entitled person of that property, gets back possession of that property. When, the owner of the property gets the possession of the stolen property, before it is received by some other person, it ceases to be a stolen property, and if the other person, having known of the fact that the property was stolen receives that property, he cannot be held for receiving stolen property. Because, before, he received that, it ceased to be a stolen property.

For example, if 'A' steals the watch of 'B' and 'B' immediately after somehow gets the watch from the thief and then 'B' gives it, 'A' to sell that watch. Here, 'A' cannot be held to receive the stolen property.

Another example, 'A' dishonestly, misappropriates the money of 'B' who is his manager. Afterwards, 'B' comes to know about this fact and gets the money so misappropriated. When 'B' gets back money, the money ceased to be a stolen money. 'B' then, pays out of

that money to 'A' as his salary. Here, 'A' cannot be held to receive the stolen property, even though he knew that it was a stolen one.

Section 411: Dishonestly receiving stolen property

Whoever dishonestly receives or retains any stolen property, knowing or having reason to believe the same to be stolen property, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both.

This section deals with the persons who receive the stolen property. It does not deal with the principal offenders. This is meant to prevent those persons who trade in the stolen article. Because, the objective of this section is that the receivers are actually, encouraging the commission of the crime, and sometimes, the detection of the stolen property becomes very difficult due to this intermediary act.

This section constitutes the substantial offence. This section does not the same as that of the abettor or conspirator. This section does not depend upon the conviction of the principal offender. And in fact, this section provides for more stringent punishment than the principal offences.

Ingredients:

1. Dishonestly receiving or retaining stolen property.
2. Knowledge or reason to believe at the time of receipt or retention that the property received or retained was a stolen property.

1. Dishonestly receiving or dishonestly retaining the stolen property

When a person receives or retains a stolen property dishonestly, it constitutes the actus. At the time of receiving or retaining the property, the person should do so dishonestly receiving and retaining or different. Deceiving means taking a thing from another. Retain means keeping a thing with oneself. So, when a person while taking delivery of a stolen property, intends to cause wrongful gain to himself and wrongful loss to the owner, he is said to receive the stolen property dishonestly.

Similarly, when a person retains or keeps a stolen property with himself, with the intention to cause wrongful gain to himself and wrongful loss to the owner, is said to retain the stolen property dishonestly. Suppose, when the person not being owner gets the possession of the stolen property, without knowing it to be the stolen property but afterwards, comes to know about this fact and even after, keeps that stolen property with himself, then he is said to retain the stolen property dishonestly. receiving and retaining are to be thus, qualified by the word "dishonestly". If anyone is present, then such act attracts the invoking of this section. This is the actus reus.

2. Knowledge or reason to believe the same to be stolen property

This part deals with the guilty mind or mens rea coupled with 'dishonestly'. So, when the person receives or retains the stolen property, he must have the knowledge that the property which he is receiving or retaining is a stolen property. So, when he receives or retains, at that very moment he should know about it.

Or, when he receives or retains the property, the person, receiving or retaining must have reason to believe that it is stolen property. This is to be tested objectively.

The knowledge or reason to believe falls just before the receipt or retention.

Some more points:

To constitute an offence under Section 411, all the ingredients must be satisfied. For example, suppose, while receiving or retaining the property, the person may receive or retain dishonestly, but may not have the knowledge or reason to believe that it is a stolen property in this case, Section 411 is not attracted.

And, suppose, a person receives or retains the stolen property, knowing or having reason to believe that it is a stolen property may not receive or retain it dishonestly. for example, the police officer receiving a stolen property believing or knowing to be a stolen property, from the thief, or the owner receiving the property.

The example for retention may be when a person steals the watch a person, and the owner after coming to know about him, tells him to keep himself it, by paying him (owner) the worth of that watch. Here, the thief when he pays the money and retains them, he does not keep it dishonestly. Because, now he is the owner of the watch and there is no question as to causing wrongful gain to himself or wrongful loss to the owner before.

In **Begarayi Krishna Saraher**, where a child committed theft and was discharged under Section 83, the accused received the stolen property from the child. Here, it was held that the discharge of the child is no bar for convicting the accusing for dishonestly receiving the stolen property having known of this fact.

In **Parr**, the person, directed his servant to receive the stolen goods into his premises. The servant in the absence of the principal, received the goods inside, having known that they were stolen. Here, both the servants and the principal were indicted jointly for committing offence under section 411.

Section 412: Dishonestly receiving property stolen in the commission of dacoity:

Whoever dishonestly receives or retains any stolen property, the possession whereof he knows or has reason to believe, to have been transferred by the commission of dacoity, or dishonestly receives from a person, whom he knows or has reason to believe to belong or to have belonged to gang of dacoity, property which he knows or has stolen to believe to have been stolen, shall be punished with imprisonment for life, or with rigorous imprisonment for a term which may extend to ten years, and shall also be liable to fixed.

This section applies to the persons other than the persons involved in dacoity.

Ingredients:

1.
 - (a) Dishonestly receives or retains any stolen property.
 - (b) The possession of that property must be coupled with the knowledge or reason to believe that, it has been transferred by the commission of dacoity.
2.
 - (a) Dishonestly receives property from a person.
 - (b) Had knowledge or reason to believe that such person belongs or to have belonged to a gang of dacoity.
 - (c) With knowledge or reason to believe that the property is a stolen.

This section provides for a more serious offence than Section 411. Before convicting a person, for receiving or retaining stolen property, it should be shown that the person should have possession at the material time or there should be a control of the place by the person, where, the property is said to be deposited or should have some knowledge of the deposition.

In **Anirudha Agasthi**, where the stolen articles were kept in a suitcase and recovered from a house occupied by the accused and other members of the family. It was held that, the accused cannot have exclusive or conscious possession of the accused.

The possession must be exclusive. If the possession and control is with another, then one cannot be said to have possession even though he is aware of the deposit of stolen property.

In **Man Singh (1993)**, where a person is not guilty under Section 394, for committing a dacoity but where the looted property is found in his possession and he has knowledge that it is looted property, it was held he can be held under this section.

In **Narendra Kumar (1956)**, where the accused is convicted under Section 395 for committing a dacoity, and it is in the course of that dacoity that the property which is found in his possession came to him, it was held he cannot be held under Section 412.

CHEATING
(Sections 415 to 420)

Section 415 – Cheating:

“Whoever, by deceiving any person, fraudulently or dishonestly induces the person so deceived to deliver any property to any person, or to consent that any person shall retain any property, or intentionally induces the person so deceived to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property, is said to cheat.”

Explanation – A dishonest concealment of facts is a deception within the meaning of this section.

Illustrations:

- a) A, by falsely pretending to be in the Civil Service, intentionally deceives Z, and thus dishonestly induces Z to let him have on credit goods for which he does not mean to pay. A cheats.
- b) A, by pledging as diamonds articles which he knows are not diamonds, intentionally deceives Z, and thereby dishonestly induces Z to lend him money, A not intending to repay it. A cheats.
- c) A intentionally deceives Z into belief that A means to deliver to Z a certain quantity of indigo plant which he does not intend to deliver, and thereby dishonestly induces Z to advance money upon the faith of such delivery. A cheats but, if A, at the time of obtaining the money, intends to deliver the indigo plant, and afterwards breaks his contract, and does not deliver it, he does not cheat, but is liable only to a civil action for breach of contract.
- d) A, intentionally deceives Z into a belief that A has performed A's part of a contract made with Z, which he has not performed, and thereby dishonestly induces Z to pay money. A cheats.

Ingredients:

1. Deception of any person
2.
 - a) Fraudulently or dishonestly inducing that person, or
 - a. To deliver only property to any person, or
 - b. To consent that any person shall retain any property.
 - b) Intentionally inducing that person – to do or omit to do anything which he would not do or omit if he were not so deceived, and which act or omission causes or is likely to cause damage or harm to that person in body, mind, reputation or property.

1. Deception of any person

Section 415, starts with the words, whoever by deceiving any person. These words are to be read through out the section. Section 415, provides two methods of cheating:

1. Fraudulently or dishonestly inducing any person to deliver the property or to consent to retain property. This is to be qualified by the words, by deceiving.
2. Intentionally inducing a person to do or omit to do, a thing which that person otherwise would not have done but for the deceit.

Deception is the most important aspect of the offence of cheating, which is the first step (initiating step) of this offence. To deceive means, the dishonest behaviour that is intended to make somebody believe something that is not true. For example, if X goes to Y and tells him that he is a doctor and offers to marry Y's daughter though actually he was not a doctor. Here he has deceived Y. So, deceit is causing to believe what is false, or misleading a fact.

It is not necessary that the deceived person is the person to whom the false representation is made. A person may falsely represent one and thereby may deceive another.

In the first part of this section, the person by such deceitful means, fraudulently or dishonestly makes one to deliver to consent to the retention of the property, or causes an act or omission by such deceitful means.

In case of false representation it is not only necessary that the representation was false, but it should also be not in the knowledge of the accused. Because, if he himself does not know about the falsity of the fact, then he cannot be said to be falsely representing. In **Motilal Chakrabarty (1950)**, where the accused sold some shares to the complainant, the accused did not know that the shares were stolen property, so he cannot be held for falsely representing the thing so as to deceive him. Even if the demand is illegal, but not involve any deceitfulness then, it cannot be considered for the purpose of cheating as fraudulent. Fraudulent pretence may be express or implied by the circumstances, or conduct. If a person, by wearing a khaki dress goes to a person and threatens him that if he does not give some property, then he will take him to the police station, then, that person is said to deceive the person. Because, by wearing khaki, he made the other person to believe that he is a police officer, and dishonestly caused that person to deliver the property.

2. Fraudulently or dishonestly, induces the person deceived, to deliver any property or to consent that any person shall retain the property

Section 25 defines 'fraudulently' as "A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise".

Defraud and deceit are not synonymous words. Defraud is getting money by somebody illegally by deceiving. So, defraud includes deceit and deceit does not include defraud.

Section 24 defines 'dishonestly' as "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing 'dishonestly'".

Wrongful gain – Section 23: 'Wrongful gain' is gain to unlawful means of property to which the person gaining is not legally entitled".

Wrongful loss – 'Wrongful loss' is the loss by unlawful means of property to which the person losing it is legally entitled.

The fraudulent or dishonest intention must be at the time of commission of the act regarding which the cheating is alleged. And that fraudulent or dishonest intention must be to induce that deceived person to deliver any property or to induce him to give consent that any property to be retained by any person. To constitute the offence of cheating, the inducement must be caused fraudulently or dishonestly, as a consequence of the deceit. So, if there is a deceit without any such inducement it will not be cheating. For example, if a person says that he has divine powers though he does not have it, and somehow manages to make the other person to believe, it is deceit or false representation. But this alone is not an offence. By making him to believe, he may further do some charms with the intention to get money or some article. This is inducement, which is called as fraudulent representation. So, if that other person, gives money then, it is said to cheating by fraudulent representation.

The example of cheating caused dishonestly may be, when a person goes to a shop to buy a refrigerator, the shopkeeper represents the buyer that the refrigerator is of a certain company and guarantees its durability and also promises that in case of any defect arising within the specified time, then the buyer may exchange it with the company. Suppose within that specified time, the defect was found, and if it goes to the company. And, suppose, there he finds that the refrigerator is not manufactured by that company and there is no such stipulation. Here, the shopkeeper, has falsely represented that the refrigerator belongs to a company and thereby dishonestly caused that buyer a wrongful loss, and causing himself

wrongful gain, by getting money. So, the shopkeeper will be liable for cheating by dishonestly causing the person to deliver the money, which he was not entitled to.

'Property', here may be an immovable property or movable property. It is not required that the property must be measured in terms of money. It is sufficient if for that person possessing it, it is having some value. For example, a railway ticket, a driving licence etc. Delivery to any person includes delivery to the agent.

Cheating is also committed when a person by deceitful means, fraudulently or dishonestly induces other to consent to retain any property by any person. For example, if X has given his truck to Y for sometime to use it for Y's business purpose, and to give him back after one week. After one week, Y comes to X and tells that there is a defect in the truck and makes him to consent that the truck is to be retained by Y until it is repaired. But actually the truck was in a proper condition and Y uses it for business purpose. This is cheating under this clause.

Case – In *Ram Chand vs. Jai Dial*, the accused was a judgment debtor. He applied for permission to raise the amount of the decree by transfer of his house, which had already been sold in execution of the decree. The application made was rejected. The accused then mortgaged the house to the complainant, representing that he was empowered to mortgage the house in order to pay off the decretal amount. He got the mortgage to pay the amount due to the decree holder, and received balance himself. It was held that he has committed the offence of cheating.

3. Intentionally induces the person so deceived to do or omit to do

This clause states that, where a person by deceitful means, intentionally induces any person, to do or omit to do a thing which otherwise, that person would have done, and that act or omission of that person so deceived and intentionally induced, suffers any harm in body, mind, reputation or property, then this amounts to cheating. So, there should be an inducement intentionally caused by the offender. 'Intentional inducement' is an important aspect of this clause. This constitute the mens rea.

The act or omission by the person so induced must be the result of such inducement. And by such act or omission, the person must suffer damage, and this damage must not be too remote.

For example, if X goes to a firm, and represents that he is a graduate of law and produces some false documents and gets the appointment there as a legal adviser. Later, it was found that he was not a law graduate and even the firm was to face insult by its customers for appointing such a person. Suppose the firm case files, against him for cheating. In this case, the person by deceiving the firm intentionally induces the firm to appoint him by presenting false documents, which the firm otherwise would not have appointed. The firm has incurred loss in property i.e. the salary paid to him, and also the reputation in the society. so, it will be a case of cheating under this clause.

In ***Kumaran (1961) case***, the doctor entered into a conspiracy with the accused to cheat the officers of a life insurance company, and was induced to certify a dying man as a first class life. This act of certifying is an inducement to the life insurance officers to enter into a contract and has also caused loss to the life insurance company. So, it was held it is was cheating.

Contract opposed to public policy:

The criminal prosecution is not based on the fact that a case is not allowed in a civil suit. For example, X promises to Y that if Y makes a favour to Z, for getting his job, then he will pay a sum of Rs. 50,000. without any intention to keep it. Later, he refuses to do the payment. This case does not fall under the contract, because it is an illegal agreement, and cannot be enforced in a civil suit. But, this does not fetter the prosecution. Because, the prosecution of cheating does not depend upon a contract. What it observes is only, the dishonest intention and thereby getting some benefit.

Section 420 – Cheating and dishonestly inducing delivery of property:

"Whoever cheats and thereby dishonestly induces the person deceived to deliver any property to any person, or to make, alter or destroy the whole or any part of a valuable property, or anything which is signed or sealed, and which is capable of being converted into a valuable security, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Ingredients:

- (1) Cheating
- (2) Thereby, dishonestly inducing to deliver any property to any person or to make of valuable property, or anything which is capable of converting into valuable security.

As to the second ingredient:

To constitute an offence under this section, there must be cheating by any of the two methods, specified under Section 415. And, as a consequence of such cheating, the person cheating must with deliberate intention to cause, wrongful loss to such person induce the cheated person to deliver any property or to make any valuable security, or to alter any valuable security or destroy the whole or any part of the valuable security or to deliver anything which is signed or sealed and which is capable of being converted into a valuable security.

This section is very wide to include all kinds of dishonestly inducing, relating to property, or valuable security. This is graver offence compared to the offence punishable under Section 417. The dishonest intention must be present at the time of committing act alleged under this section, apart from cheating.

Cheating by personation: Section 416

A person is said to "cheat by personation" if he cheats by pretending to be some other person; or by knowingly substituting one person for another, or representing that he or any other person is a person other than he or such other person really is".

Explanation – The offence is committed whether the individual personated is a real or imaginary person.

Illustrations

1. A cheats by pretending to be a certain rich banker of the same name. A cheats by personation.
2. A cheats by pretending to be B, a person who is deceased. A cheats by personation.

Ingredients:

1. Cheating
2. By pretending to be same person
3. By knowingly substituting one person for another, or
4. By representing that he or any other person is a person other than he or such other person really is.

1. Cheating:

For constituting an offence thus should be a cheating as requires under Section 415 of IPC.

2. By pretending to be same person:

To pretend means to behave in a particular way to make other people that something is true. Here, when a person, by doing anything makes other people to believe that he is a certain person, though actually he is not, is said to cheat, by personation. 'Personation' means to pretend to be a certain person.

For example, if A goes in a police dress to a house and makes them to believe that he is a police officer and searches the house under a false search warrant and takes the valuables, is said to cheat by personation, under this clause.

3. **Knowingly substitutes one person for another:**

Under this clause, whoever, substitutes any person for another person, with such knowledge and thereby cheats any person is said to be done offence under this section.

For example, A, the father of B was daughter wants to get her marriage done. Then, when the proposed in-laws came to see his daughter A shows or presents C who happens to be a relative of A. Then when the marriage was solemnising A substitutes his daughter B instead of C whom the in-laws had agreed for marriage. Here, A has committed the offence under this section.

4. **By representing that he or any other person is a person other than he or such other person**

When a person represents himself to be some other person, or represents that any other person is some other person, who are not actually the expected persons, and cheats thereby any person, then, he has committed the offence of cheating by personation.

For example, A, an old man is about to take his last breath, in some near dates. He makes a will in the name of his grandson, who has been residing in a foreign country, by bequeathing a part of his property. He has no issues living, and hands over the will to an advocate. Later, he does, Z a person who was known of this fact, pretends to come from the foreign country and represents the advocate that he is the grandson of A, and gets the will executed in his name. here, he has committed the offence by representation.

Cases:

1. **State vs. Ramesh Chandu Sharma, (1980)** – The accused was charged of cheating bank A by encashing cheque through bank B by opening account with it in a fictitious name. It was held that it was no cheating, it is not personation.
2. **Rama Rao K. V. (1960)** – The accused one K. V. Rama Rao who was an Overseer, had by his representation that he was K. Rama Rao, an Engineering Graduate of Mysore University, induces the Public Service Commission to select him for a post in government service. It was held that all the ingredients of section 416 are fulfilled and is liable under section 419.

FRAUDULENT DEEDS AND DISPOSITIONS OF PROPERTY
(SECTIONS 421 TO 424)

Section 421: Dishonest or fraudulent removal or concealment of property to prevent distribution among creditors

"Whoever dishonestly or fraudulently removes, conceals or delivers to any person, or transfers or causes to be transferred to any person, without adequate consideration, any property, intending thereby to prevent, or knowing it to be likely that he thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both."

Under this section, the act of removal, concealment, or delivery of any property or causing a transfer or transferring a property, to any person and without consideration is the actus i.e. the result of human conduct. The dishonest intention or fraudulent intention to transfer or remove etc. with the intention or knowledge that he is likely by such transfer, etc. the lawful distribution of property among the creditors of him or the creditors of any other person is the mens i.e. the mental element. So, when both the actus and mens are present in the act of a person, that act is prohibited by law.

The object of this offence is to regulate the acts of a fraudulent or dishonest debtor, by causing wrongful loss to the creditors.

Ingredients:

1. Dishonestly or fraudulently removes, conceals, or delivers to any person, or transfers or causes to be transferred to any person (any property).
2. Without any adequate consideration.
3. Any property.
4. Intending thereby to prevent, or knowing it to be likely that he will thereby prevent, the distribution of that property according to law among his creditors or the creditors of any other person.

1. Dishonestly or fraudulently removes, conceals or delivers to any person or transfers or causes to be transferred to any person (any property)

'Dishonestly' is defined in section 24 of IPC, as "Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing 'dishonestly'."

'Fraudulently' is defined in section 25 of IPC as "A person is said to do a thing fraudulently if he does that thing with intent to defraud but not otherwise."

'Removes' means taking out away from a place.

'Concealing' means hiding something.

'Delivery' means handing over of a thing to a person.

'Transfer' means changing or moving a thing from one place to another place.

So, when any person takes out a thing (property) away from a place, or hides that property or hands over to another or moves away or causes a move of that property from one place to another, with the intention to cause wrongful loss to one person and wrongful gain to another or to himself or with the intention to defraud that other person, is said to do the act constituting an ingredient of the offence of section 421.

For example, if X with an intention to cause wrongful loss to Y or so defraud him nominally hands over the possession of his land to Z without any reason or so as to take it back afterwards, he is said to fulfil this ingredient.

2. Without adequate consideration

For a contract to be valid the consideration should be valid and adequate. But, when the consideration is not adequate the court then examines the actual reason for non-adequate

consideration. So, when the property is transferred or delivered, without adequate consideration, the court imputes dishonest or fraudulent intention on the accused.

3. Any property

Property may be movable or immovable.

4. Intending thereby to prevent, or knowing it to be likely that he thereby prevent, the distribution of that property according to law among his creditors, or the creditors of any other person

This is a part of the mens rea to be fulfilled before invoking section 421.

For this section contemplates that, when the person removes, delivers, transfers or causes to transfer etc. of the property, with dishonest intention or fraudulent intention, and without adequate consideration for transfer, such removal etc. must be done with the intention to prevent the lawful distribution of that property among his creditors or any other person's creditor.

For example, X is indebted to Y for a sum of Rs. 2 lakhs. X fails to repay the amount and Y files a suit in the civil court for recovery of the debt. X fails to pay the decretal amount. Y files for execution and the court passes an order for attachment of the property of X so as to distribute the proceeds to Y. In the mean time, X knowing this transfers his 'house' to A, for a meagre amount telling him, that afterwards he will again claim it back. This transfer, he did with the intention to prevent the court from attaching it and thereby preventing the payment to his creditor Y. He commits the offence under section 421.

Suppose, in the same example, instead of X, if his servant P does the same work, then he is also liable under section 421.

So, both the dishonest intention at the time of transfer etc. of the property and the simultaneous intention to prevent the distribution of property transferred to the creditors lawfully, must co-exist.

Section 422: Dishonestly or fraudulently preventing debt being available for creditors

"Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person; shall be punished with, imprisonment of either description for a term which may extend to two years, or with fine or with both."

This section just like section 422, is intended to prevent the defrauding creditors by masking property. The offence consists in the dishonest or fraudulent evasion of one's own liability.

Ingredients:

1. The debt or demand was due to the accused, or some other person.
2. The accused prevented such debt or demand from being made legally available for his debts, or for the debt of another person.
3. He did it dishonestly or fraudulently.

Cases:

1. **Nobin Chundre Muddauk (1874)** – In this case A entered into an agreement with B not to compromise a case with C. Because, A had assigned the benefit of the suit to B as a security for the due payment of an instalment of money and A ignoring the agreement, compromises with C. It was held A is not liable, because, the compromise was not done with dishonest or fraudulent intention with C.
2. **Hara Kumary Chowdhaurani (1900)** – In this case, the accused's estate was under mortgage and in the management of certain persons under certain conditions as to payment of money realized by them. In execution of a decree obtained by the managers in a suit brought by them in the name of the accused; a certain under

tenure was sold for Rs. 3000. The judgment - debtor arranged with the accused that on payment of Rs. 1000 the sale should be set aside and he accordingly paid that sum into court, and an application was made by the accused to draw out the money upon which no order was made. They were convicted. It was held that the application to obtain the money paid into court might have been a breach of their contract with the mortgages, but such conduct would not be regarded as dishonest or fraudulent so as to render accused liable to punishment.

Section 423: Dishonest or fraudulent execution of deed of transfer containing false statement of consideration

"Whoever dishonestly or fraudulently signs, executes, or becomes a party to any deed or instrument which purports to transfer or subject to any change any property, or any interest therein, and which contains any false statement relating to the consideration for such transfer or change or relating to the person or persons for whose use or benefit it is really intended to operate, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both."

MISCHIEF

Section 425: Mischief

"Whoever, with intent to cause, or knowing that he is likely to cause, wrongful loss or damage to the public or to any person, causes the destruction of any property, or any such change in any property or in the situation thereof as destroys or diminishes its value or utility, or affects injuriously, commits 'mischief'."

Explanation 1:

It is not essential to the offence of mischief that the offender should intend to cause loss or damage to the owner of the property injured or destroyed. It is sufficient if he intends to cause, or knows that he is likely to cause, wrongful loss or damage to any person by injuring any property, whether it belongs to that person or not.

Explanation 2:

Mischief may be committed by an act affecting property belonging to the person who commits the act, or to that person and others jointly.

Illustrations

- (a) A voluntarily burns a valuable security belonging to Z extending to cause wrongful loss to Z. A has committed mischief.
- (b) A introduces water into an ice house belonging to Z, and there causes the ice to melt, intending wrongful loss to Z. A has committed mischief.
- (c) A having insured a ship, voluntarily causes the same to be cast away with the intention of causing damage to the underwriter. A has committed mischief.

Ingredients:

- 1. Intention to cause or knowledge that he is likely to cause wrongful loss or damage to the public or any person.
- 2.
 - (a) Causes destruction of property, or
 - (b) Causes any change in any property or in the situation of any property, destroys or diminishes its value or property or affects it injuriously.

1. Intention to cause or knowledge that he is likely to cause wrongful loss or damage to the public or to any person:

When a person intends to cause wrongful loss or damage to a person or to the public, and with that intention causes destruction or any change in the property, so as to destroy or diminish its value or utility is said to commit mischief. The intention is the mens rea part of this section. And, even if there is a knowledge on the part of the accused that he is likely to cause wrongful loss or damage by his act to the property of any person or public, then that also is sufficient to constitute the required mens rea. For example, when a person throws a valuable document into the river belonging to another person, his intention is clear to destroy that property.

Suppose, if that person puts water into those documents voluntarily, atleast he will have knowledge that he is likely by so putting water to destroy the document and he is likely thereby to cause damage to that another person. So, in the first case, the mens rea is intention to cause wrongful loss or damage, and in the second case, it is the knowledge that he is likely by his act to cause wrongful loss or damage.

And, here it is intention to cause or knowledge of causing damage that is essential, and whether he has actually caused the desired damage or not is immaterial.

2. Causes destruction or causes any change in it or in its situation, as destroys or diminishes its value or utility or affect it injuriously

Here, it contains two parts:-

- (1) Causing destruction of property, and
- (2) Causing any change in the property or in its situation as destroys or diminishes its value or utility or affects it injuriously.

Both these acts, constitute the actus part of the offence of mischief, and when it is coupled with the mens rea of either intention or knowledge, of causing damage or wrongful loss, the offence is complete.

Causing destruction of property:

It denotes that there should be destruction of property. That is total damage of the property, that it no longer exists. And also, it refers to the physical damage of the property. For example, burning of a house, throwing papers into the river, breaking the glasses etc.

Property means some tangible corporeal property capable of being physically destroyed. It does not include easement.

In **Sukha Singh Case**, the accused on receiving delivery of registered article from a Village Branch Postmaster was requested, to sign an acknowledgement for the article received by him, but instead of returning the same duly signed, he torn it and threw it on the ground. It was held that he was guilty of mischief, though was a small receipt was an asset of post office which has got some value for it.

Causes any change in or in its situation as destroys or diminishes its value or utility or affects injuriously:

When a person brings any change in the property or changes its placement so as to destroy or diminish its value or its utilisation or affects it, with the intention to cause or with knowledge that he is likely to cause wrongful loss or damage to the public or any person is said to commit mischief, change or placement of the property is caused so that it loses its natural use or its serviceability. For example, if X throws a big stone on the car and by that if it damages the parts of car and by that if it damages the parts of car, then its value diminishes. So, he is said to change the form, which is a mischief.

One X had tied his buffaloes so that they should not destroy his farm. Y with an intention to cause wrongful loss to X untied the buffaloes and they damaged the entire property. Here, Y does committed mischief.

Public or any person:

The mischief may be committed against public. If X leaves out a ferocious animal to go to a crowd, he commits mischief.

CRIMINAL TRESPASS

Section 441: Criminal Trespass

Whoever enters into or upon property in the possession of another with intent to commit an offence or to intimidate, insult or annoy any person in possession of such property or having lawfully entered into or upon such property, unlawfully remains there with intent thereby to intimidate, insult or annoy any such person, or with intent to commit an offence, is said to commit "criminal trespass".

The object of this section is to protect the possession of the person of the property. Even though the person does not have title, the possession must have possession of the property.

Ingredients:

1. Entry into or upon property in the possession of another.
2. If such entry is lawful then unlawfully remaining upon such property.
3. Such entry or unlawful remaining must be with intent –
 - (a) To commit an offence, or
 - (b) To intimidate, insult or annoy the person in possession of the property.

1. Entry into or upon the property in the possession of another

Trespass means unauthorised entry into the possession of any property of any person. So, there should an entry into or upon the property.

This entry should be against the will of the person possessing property. This may be direct or constructive. For example, when a person who is unknown to the person, enters into his house, without permission this is direct entry against the will of that person. Constructively, against the will means where the person has already entered lawfully into or upon the property, and remains their unlawfully afterwards, with malice or while entering with his permission, he has the unlawful intention, which was unknown to the owner or possessor of the property.

Property generally meant immovable property like land, house, building etc. But, it also includes movable properties like boat, transport vehicle, ship etc.

Possession must be actual possession of a person except the trespasser, i.e. physical possession. This involves right to object a person. The owner of the land may be having actual possession through his tenants.

2. If such entry is lawful then unlawfully remaining upon such property

Trespass may be committed, when, a person lawfully enters into the property in possession of a person and later, may remain unlawfully, with the mens rea required by this section. For example, when a land is leased to a person for three years on agreement, the lessee enters the land lawfully. But, after three years, if he remains there without any authority and intending to annoy the owner of the land then, he is said to trespass the land of the owner.

3. Such entry or unlawful remaining must be with intent; to commit an offence

The offence of criminal trespass requires that the person trespasses the property in possession of other person with the intention to commit an offence. So, one of the mens rea is the intention to commit an offence coupled with the actus of trespass.

For example, A, a friend of B, was in the habit of visit B's house. One day, he finds that, the mother of B, wears a gold chain which of a huge value. He then decides to snatch that chain or somehow to get that chain. Another day, he goes to his friend's house (B), and finds that B was absent. And, then decides to accomplish his design. So, with the intention of stealing it he remains there, and while snatching it he commits murder of that woman.

Here, in this example, his initial entry was lawful. But when he finally remains in the house of B so as to snatch or commit theft of chain, he remained unlawfully, with the intention of committing the offence of theft or even grievous hurt etc. So, the moment, he remains there with the intent to commit the offence, the offence of criminal trespass is complete.

4. Such entry or unlawful remaining must be with intent to intimidate, insult or annoy the person in possession of the property

So, the trespass may be with the intention to intimidate, insult or annoy the person in possession of the property. This section is very wide as it takes into account the 'annoy' which is a very wide term.

For example, A and B are husband and wife. C, a friend of B, the wife, used to visit her at their house. But, after some time, the husband dislikes the entry of C and tells his wife to stop him (C). The wife, informs him of the fact. But C with the intention to disturb their relationship again starts to visit their home. This entry was against their will, and there used to quarrels between the husband and wife. So, here C commits the offence of criminal trespass as he enters into their home against their will and with the intention to annoy them.

So, mere trespass does not constitute the offence. The trespass with the intention to commit an offence or with the intention to intimidate or insult or annoy the person in possession of the property constitutes trespass.

Cases:

1. Bans Gopal:

The accused was ejected from a plot of land. But even after he continued in possession and sowed a crop therein although the land was leased by the landlord to another person. After the crop had been cut and the land was lying fallow the lessee entered into possession but was forcibly ousted by the accused. It was held that the accused acquired no fresh right by forcibly cultivating the plot after his ejection, and was held guilty of criminal trespass.

2. State vs. Tanba Sadushio (1963)

In this case, the accused, the Vice - Chairman of the School Committee, entered the school premises, which were in possession and control of the Head master, with the sole purpose of giving a thrashing to and had actually beaten two boys. Further, he insulted the Head master by abusing him and also wanted to beat him. It was held that he committed criminal trespass.

OFFENCES RELATING TO MARRIAGE

CHAPTER XX OF I.P.C.

Introduction

Chapter XX of I.P.C. includes Section 493 to 498, which provides punishment for offences relating to marriage.

These offences may be grouped into four categories: -

- (i) Unlawful or deceitful marriage (Sections 493, 496);
- (ii) Bigamy (Sections 494, 495);
- (iii) Adultery (Sections 497, 498);
- (iv) Enticing or taking away or detaining with criminal intent a married woman (Section 498)

Chapter XX – A, inserted in the code vide criminal law (Second Amendment Act, 1983) provides punishment in case of cruelty by husband or relatives of husband to newly married bride in Section 498 – A, I.P.C.

This chapter penalizes conjugal infidelity and other offences connected therewith in a manner materially different from the English Law.

It punishes four principal offences relating to marriage, these being: - (1) cohabitation obtained by fraudulently inducing a belief in the woman that she is the accused's wife (Section 493), allied to which is the mock marriage punishable under Section 496.

The offence of Bigamy is provided against in Sections 494 and 495, but these provisions had to be made necessarily elastic so as to provide for the diverse customs of the various races inhabiting the nation.

The third offence of Adultery is a departure from the English Law under which adultery is not a crime, but merely a misconduct against which the aggrieved party has no redress against the adulterer or adulteress except in damages awarded in a suit for divorce or a judicial separation.

The offence of seduction of a married woman is one closely related to offence of adultery.

The first offence punishable under Section 493 was constituted an offence in spite of the trend of the English cases, which held such connection not to amount to rape. But this view has since been overruled by the Criminal Law (Amendment) Act, 1885, which now expressly declares such act to amount to rape.

The offence of Bigamy punishable under Section 494 and 495 materially differs from the corresponding rule of English Law, under which monogamy being the universal practice, the rule is simpler. But under these sections the criminality of the second or subsequent marriage depends upon the practice of the caste or race to which the accused belongs. If polygamy or polyandry was sanctioned by usage, one could not be convicted for doing an act in conformity with custom, nor could the law enforce monogamy upon the people with the same assurance as the abolition of suttee, since the one is by no means as serious as others.

UNLAWFUL OR DECEITFUL MARRIAGE

Section involved: - 493 & 496

Section 493: - "Cohabitation caused by a man deceitfully inducing a belief of lawful marriage" – Every man who by deceit causes any woman who is not lawfully married to him to believe that she is lawfully married to him and to cohabit or have sexual intercourse with him in that belief, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine.

Ingredients: - **The offence requires two essentials; -**

1. Deceit causing a false belief in the existence of a lawful marriage.
2. Cohabitation or sexual intercourse with the person causing such belief.

CASES AND JUDGEMENTS

1. **Raghunath Pandey v. State, AIR 1957, Orissa 198:** - The essence of the offence under Section 493 consists in the practice of deception by a man on a woman in consequence of which she is led to believe that she is lawfully married to him even though, in fact, it is not so. To prove deception it must be conclusively established that the petitioner either dishonestly or fraudulently concealed certain facts, or made a false statement knowing it to be false
2. **State of Gujarat V. Hiralal Metha, 1974, GUJ**
3. **Kompella A. N. Subramanyam v. J. Ramalakshmi (1974) Andhra: W. B 278:** - "It is essential that the deceit and fraudulent intention contemplated should be found to have existed at the time the ceremony of marriage was gone through."
4. **Amruta Gadtia v. Trilochan Pradhan 1993 (Criminal)**

Analysis of the offence:

1. **Principle:** - The commission of the offence here described is only possible when the woman is at least 16 years of age. If she is below that age, her consent is immaterial and cohabitation with her is rape. If she is above that age, the accused may induce her to believe him as her lawful married husband.
2. **Essence of the offence:** - The essence of the offence under this Section consists in the practice of deception by a man on a woman, in consequence of which she is led to believe that she is lawfully married to him, even though, in fact, they are not lawfully married. To prove deception, it must be proved that petitioner either dishonestly or fraudulently concealed certain facts, or made a false statement knowing it to be false.

- In **K. A. N. Subramanyam v. J. Rajnalakshmi (1971)** The Court held: The offence under Section 493, I.P.C. consists in giving a false assurance of the marriage to a woman and thereby procuring sexual intercourse with her. It is essential that the deceit and fraudulent intention contemplated should be proved to have existed at the time the ceremony of marriage was gone through.

The Section only punishes an act where such deception is practised before a woman consents to have sexual intercourse with a man. If therefore a man marries a woman in the bonafide belief that the marriage is effective, and afterwards discovers some flaw rendering it inoperative after which he continues to cohabit with her, he could not be said to have had sexual intercourse after causing belief in her marriage by deceit.

Section 496: - "Marriage Ceremony fraudulently gone through without lawful marriage" - Whoever dishonestly or with a fraudulent intention, goes through the ceremony of being married, knowing that he is not thereby lawfully married, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

This Section punishes the offence of contracting a mode-marriage, with object of achieving a dishonest or fraudulent purpose.

The essence of the offence is deception, whether of the other party to the marriage or a third person, and the marriage ceremony should be fraudulently gone through and that there should be no lawful marriage. The parties to the marriage, or at least one of the parties to the marriage must have knowledge that there is no marriage.

Case: - Sheikh Alimuddin, 10, C. W. N.

DIFFERENCE BETWEEN SECTION 496 AND 493

1. This Section is applicable both on men and women, unlike section 493 which applies only for man.
2. The offence under section 496 is complete without cohabitation or the holding of a sexual intercourse on faith of the marriage, whereas it is the sine qua non of the offence, punishable under section 493.

Case: -

1. **K. C. Chakrabarty and another V. emperor AIR 1937 Cal 214 (FB)**
2. **Vellai Mudali, In re AIR, 1947 Mad.**

OFFENCES RELATED TO BIGAMY

SECTION INVOLVED: 494 & 495

Section 494: "Marrying again during lifetime of husband or wife" – Whoever, having a husband or wife living, marries in any case in which such marriage is void by reason of its taking place during the life of such husband or wife, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine.

Exceptions: This section does not extend to any person whose marriage with such husband or wife has been declared void by a Court of competent jurisdiction, nor to any person who contracts a marriage during the life of a former husband or wife, if such husband or wife, at the time of the subsequent marriage, shall have been continually absent from such person for the space of seven years and shall not have been heard of by such person as being alive within that time provided the person contracting such subsequent marriage shall, before such marriage takes place, inform the person with whom such marriage is contracted of the real State of facts so far as the same are within his or her knowledge.

Section 495: "Same offence with concealment of former marriage from person with whom subsequent marriage is contracted" – Whoever commits the offence defined in the last preceding Section having concealed from the person with whom the subsequent marriage is contracted the fact of the former marriage, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

Comment: Section 494 punishes the offence known to the English Law as Bigamy.

Scope: Section 494 does not apply to Mohammedan males, who are allowed to marry more than one wife, but it applies to Mohammedan females, and to Hindus, Christians, and Parsis of entire sex.

Ingredients: Section 494 requires: -

1. Existence of the First Wife or husband when the second marriage is celebrated.
2. The second marriage being void by reason of the subsistence of the first according to the law applicable to the person violating the provision of the law.

Cases and Judgements:

1. **Bhaurao Shankar Lokhande v. State of Maharashtra AIR 1965 CD 1564** – "To constitute an offence of bigamy the marriage must have been celebrated with proper ceremonies and in due form. Merely going through certain ceremonies with the purpose that the parties be taken to be married will not effect a marriage between them. Where the ceremonies performed are not prescribed by law or approved by custom, the marriage is not a valid marriage and so it is no marriage in the eyes of law to hold a person liable under Section 494".
2. **Nuthummal v. Maruthathai, 1981, Cr. C. J.**
3. **Modi Bala Krishna Ramaraju v. B. Thirpathamma, 1957, Cr. L. J. 208 at pp. 209, 211.**
4. **In Re. Dolgonti Raghav Reddy; AIR, 1968 A.P.**
5. **Sart, Munni Devi v. State, 1969 A. W. R. (High Court) 468**
6. **Radharani Radhi v. Annapurna Padhi 1994 (11) Orissa I. R.**
7. **Dilip Laxman v. State of Maharashtra, 1977 (1) Bom. Cr. C**
8. **Urmila v. State of U.P., 1994 Cr. L. J. (ALL)**
9. **Vinita v. Dr. Amar Nath Mishra, 1989 East Cr. C, (Pat.)**
10. **Smt. Baby Kar Roy v. Ram Rati Devi, 1975 Cr. L.J. Cal**
11. **Gomti v. Bahadur, 1997 (2) A. I. Cr. L. R, (P & H)**

ANALYSIS OF BARE ACT

1: "Whoever Marries"

The expression "whoever marries" must mean "whoever marries validly" or "whoever marries and whose marriage is a valid one". If the marriage is not a valid one,

according to the law applicable to the parties, no question of its being void by reason of its taking place during the life of the husband or wife of the person marrying arises. If the marriage is not a valid marriage, it is no marriage in the eye of law.

In order to constitute a valid marriages certain ceremonies have to be necessarily gone through. What ceremonies are necessary depends upon the customs of the community to which the parties belong.

In a case under section 494, I.P.C. both the alleged marriage of a person have to be proved as a fact.

If the person is deserted from spouse for two years, or there is a judicial separation, it cannot be said that the marriage has dissolved. In this case, the marriage is still subsisting and if there is a divorce, then the marriage has dissolved and is no marriage in the eye of law.

It has been held in the case of **Usman v. Budlm AIR 1942, Sind 92** and **Bumodin Howaldar v. Emperor AIR, 1921 Cal 480**, that in order than an offence of bigamy can be committed, there must a previous valid subsisting marriage.

In **Santosh Kumari v. Surjit Singh, AIR 1990 H.P. TT**, the Court held, Divorce dissolves a valid marriage, and the parties obtaining such dissolution can re-marry.

In **Abdul Ghani v. Azizul Haq (1911) 39 Cal.**, the Court held that, a Mohammedan woman marrying within the period of her iddat (The period of four months which divorced wife was to observe after divorce before re-marrying) is not guilty of Bigamy.

In **Anwar Ahmad v. State of U.P., 1991 Cr. LJ: Sl. Jafri. J.** observed: "Notwithstanding the fact that the personal law permits a Muslim male to contract four marriage if a second marriage is contracted under the special marriage Act, 1954. vis-a-vis the fact that he has a legally wedded wife who has been married to him under the Mohammedan Law, Section 494 has to claw at the erring male."

2. "Second marriage with void"

In **Sita Ram v. Jagannath, 1961, Raj**, the Court held. that where marriage is an ingredient of an offence, marriage must be strictly proved.

In **Malan v. State of Bom. AIR 1960 Bombay**, the Court observed: In order that an offence under section 494 may be committed, it is necessary, at least, that all the ceremonies which are necessary to be performed in order that a valid marriage may take place, ought to be performed and ordinarily, all these ceremonies would amount to valid marriage but for the fact that the marriage becomes void on account of the existence of a previous wife.

The second marriage of a person can be void only when the first marriage was valid.

And, the second marriage must also be valid.

In **Gopal Lal v. State of Rajasthan 1979 Cr. L. J. (S. C)**: The Court held that "merely because the second marriage even if performed by performing all the essential ceremonies turns out to be void by virtue of section 17 of the Hindu Marriage Act, 1955, it cannot be said that section 494, I.P.C. will not be attracted.

In **Narantakath v. Parakkal, (1922) Mad**, it has been held, that good faith and mistake of Law are no defence to a charge of Bigamy.

Living – The question arises whether the healthy living or a vegetative living. It is to be noted that even a vegetative living, comes under the bond of marriage. Because, under the law, the marriage is still in existence unless it is ended by death or by a decree of divorce.

One more question arises as to the knowledge that the spouse is living or the knowledge that one has already married. The first case is governed by the proviso to this section. In the second case, he/she is not considered to be married, because, for a valid marriage, consent should be there, and that consent involves the element of knowledge.

EFFECT OF CONVERSION OF RELIGION ON BIGAMY

In *Sarla Mudgal v. U.O.I*, AIR 1995 SC 1531, the Court held that the second marriage of a Hindu husband after his conversion to Islam is a void marriage in terms of section 494 I.P.C. and is also in violation of the principles of Natural Justice.

The four petitions under Article 32 of the Constitution has been disposed of together since they related to legality of contracting a second marriage by a Hindu husband after embracing Islam. The common questions for consideration before the apex Court were: -

1. Whether a Hindu husband, married under Hindu Law, by embracing Islam, can solemnize second marriage?
2. Whether such a marriage, without having the first marriage dissolved under law would be a valid marriage qua the first wife who constitutes to be a Hindu?
3. Whether the apostate (convert) husband would be guilty of the offence under section 494 of I.P.C?

After examining a number of cases in which one of the partners, either husband or wife after renouncing their original religion embraced another faith and contracted a second marriage. The Court said:

"A marriage celebrated under a particular personal law cannot be dissolved by the application of another personal law to which one of the spouses converts and the other refuses to do so. Where a marriage takes place under Hindu law, the parties acquire a status and certain rights by the marriage itself under the law governing the Hindu marriage and if one of the parties is allowed to dissolve the marriage by adopting and enforcing the new personal law, it would then amount to destroying the existing rights of the other spouse who continues to be Hindu. We therefore, hold that under Hindu personal law as it existed prior to its codification in 1955, a Hindu marriage continued to subsist even after one of the spouses converted to Islam. There was no automatic dissolution of the marriage.

As regards the plea advanced by the accused that having embraced Islam, one can have four wives irrespective of the fact that his first wife continues to be Hindu, their Lordships held that such an argument is untenable. The Court said:

The Modern Hindu Law strictly enforces monogamy. A marriage performed under the Hindu Marriage Act 1955, cannot be dissolved except on the grounds available under section 13 of the Hindu Marriage Act, 1955. In that situation, parties who have solemnized the marriage under the act remain married even when the husband embraces Islam in favour of another wife. A Second marriage by an apostate (convert) under the shelter of conversion to Islam would nevertheless be a marriage in violation of the provisions of the act by which he would be continuing to be governed so far as his first marriage under the act is concerned despite his conversion to Islam. The second marriage of an apostate would therefore, be illegal marriage qua his wife who married him under the act and continues to be a Hindu. Between the apostate and his Hindu wife, the second marriage is in violation of the provisions of the act and as such would be non-est (non in existence).

The Court further said: Conversion to Islam and marrying again would not, by itself, dissolve the Hindu marriage under the act. The second marriage by a convert would therefore be in violation of the act and as such void in terms of section 494 I.P.C. Any act which is in violation of the mandatory provisions of law is per se void. The real reason for the voidness of the second is the subsisting of the first marriage, which is not dissolved even by the conversion of the husband. It would be given a go-by to the substance of the matter and acting against the spirit of the statute if the second marriage of the convert is legal.

As regards the contention that a convert to Islam is governed by Muslim personal law and not by Hindu personal law the Court said:

A matrimonial dispute between a convert to Islam and his or her non-Muslim spouse it obviously is not a dispute where the parties are Muslims and therefore; the rule of decisions

in such a case was or is not required to be the Muslim Personal Law. In such cases the Court shall act and the judge should decide according to justice, equity and good conscience. The second marriage of a Hindu husband after embracing Islam being violative of justice, equity and good conscience would be void and attract the provisions of Section 494 I. P.C.

With regard to applicability of section 494 I.P.C., the Court said that since all the ingredients of the Section are satisfied in case of a Hindu husband, who marries for the second time after conversion to Islam, the said marriage is void by reason of its taking place during the life-time of the first wife, and so the accused is liable for bigamy under Section 494. I.P.C.

CONVERSION FROM MOHAMMEDANISM

In the case of an apostate from Mohammedanism, the marriage tie is dissolved and the wife will not be guilty of bigamy if she marries again.

CONVERSION FROM CHRISTIANITY

A Christian cannot by embracing Mohammedanism marry a second time during the life-time of his first wife.

Case:

1. *Skinna vs. Orde, (1871)*
2. *Massaminat Revi, (1918)*

COURT PERMISSION FOR SECOND MARRIAGE

No Court is authorised to permit a second marriage, even if be at the application of the first wife. Such permission is illegal. — — —

Case: *Santosh Kumari v. Surjit Singh 1990 Cr. L. J*

Exception: Exception to section 494 lays down three conditions: -

1. Continual absence of one of the parties for the space of 7 years;
2. The absent spouse not have been heard of by the other party as being alive within that time; and
3. The party marrying must inform the person with whom he or she marries of the above fact.

1. "Continual absence of such person for the space of 7 years"

The absence must be continuous, and there should not be any break in between. But in Tolson (1889) QBD, the Court held that if the second marriage takes place within 7 years under a bonafide belief based on reasonable grounds that the former consort is dead, no offence is committed. Because, the object is to promote the marriage in such cases.

2. "Shall not have been heard of by such person as being alive within that time"

In Enai Beebee (1865) 4 WR (Cr) the Court held that in case a woman who having the means of acquiring knowledge of the fact of the death of her first husband, does not choose to make use of them, is guilty of bigamy. Because, the person must take reasonable steps to find out his/her whereabouts.

3. "Inform the person with whom such marriage is contracted"

In Umi, (1882) 6 Bom, the Court held that if the second marriage is contracted within seven years, it is incumbent on the person contracting to inform the other party about the first marriage.

4. Abetment of bigamy – Where the person abets the second marriage is liable for punishment. The priests, the parents who participate in the second marriage, knowingly, are to be held for abetment of bigamy.

Case – Gajja Nand, 1921, Lahore High Court – In this case, the mother of the girl, was willing to get her married with one person, but the father was unwilling. Accordingly, the mother got her daughter married with that person. The married couple started living together and in the mean time, the father took his daughter from her matrimonial home, and he got his daughter married again to some other person.

So, it was held that the father was liable for abetment of bigamy.

Some other aspect – The law as to bigamy needs an amendment. Because, it requires that the second marriage should be proved. There may arise a case, where the person knowing that he is already married, may not fulfil the full requirements of the second marriage, so as to deprive the provisions of law. So, to avoid such situations the law needs to be changed.

KIDNAPPING, ABDUCTING OR INDUCING WOMAN TO COMPEL HER TO MARRIAGE ETC.

Section 366:

Whoever kidnaps or abducts any woman with intent that she may be compelled, or knowing it to be likely that she will be compelled, to marry any person against her will, or in order that she may be forced or seduced to illicit intercourse, or knowing it to be likely that she will be forced or seduced to illicit intercourse, shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine; and

Whoever, by means of criminal intimidation as defined in this code or of abuse of authority or any other method of compulsion, induces any woman to go from any place with intent that she may be, or knowing that it is likely that she may be, or knowing that it is likely that she will be, forced or seduced to illicit intercourse with another person shall also be punishable as aforesaid.

Ingredients, I part:

1. There should be kidnapping or abduction of a woman.
2. Such kidnapping or abduction must be –
 - (a) With the intention that, she may be compelled or knowledge that it is likely that she will be compelled to marry any person against her will or
 - (b) In order that she may be forced or seduced to illicit intercourse.

II part:

1. By means of criminal intimidation or by means of abuse of authority or by any other method inducing any woman to go from any place.
2. Such going must be with an intention that she may be or with knowledge that, it is likely that she will be, forced or seduced to illicit intercourse, with some person.

1. Kidnapping or abduction of a woman

So, in order to commit this offence, primarily there should be a kidnapping or abduction of a woman, woman also includes a minor child.

2. With intention or knowledge that she may be compelled or will be compelled to marry against her will

The kidnapping or abduction must be committed with the intention that she may be forced to accept for marriage or with the knowledge that she will be compelled to marry. This should be against her will. That is she should not be willing to marry. In this case, it is

just sufficient, if he intends or knows that she may be or will be compelled. Whether he has really compelled her or not is not required.

3. In order that she may be forced or seduced to illicit intercourse or knowing it to be likely that she will be forced or seduced to illicit intercourse

Here also, the kidnapping or abduction must be for the purpose of illicit intercourse. Here, knowledge is required. Force is not physical force. Even the circumstances may also constitute force. Seduce means "enticing or tempting". Illicit intercourse means intercourse between man and woman who are not husband and wife.

III part:

1. Inducing a woman, by criminal intimidation or by means of abuse of authority or compulsion to go from any place

Here, it does not expressly say kidnapping and abduction, but, impliedly it involves kidnapping or abduction. There should be criminal intimidation or abuse of authority or compulsion.

2. For illicit intercourse with some person

The going of the woman by inducement and such inducement is with the intention or knowledge that she will be forced or seduced for illicit intercourse with another person.

**ENTICING OR TAKING AWAY OR DETAINING WITH CRIMINAL INTENT A
MARRIED WOMAN**

Section 498:

Whoever takes or entices away any woman who is and whom he knows or has reason to believe to be the wife of any other man, from that man or from any person having the care of her on behalf of that man, with intent that she may have illicit intercourse with any person, or conceals or detains with that intent any such woman, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine or with both.

This is an offence against the matrimonial relationship. It protects the right of the husband of that wife. Under this section, the husband only can complain about the offence. The consent of that wife is immaterial.

Ingredients:

1. Taking or enticing away a married woman.
2. The accused had the knowledge or had reason to believe that she is married.
3. Intention was to make her have illicit intercourse with some other person.
4. Conceals or detains with that intent.

1. Takes or entices a woman

Taking is not forceful taking, if the accused assists the woman to come out of her husband or from the care of the person, then it is called taking. This means some influence, whether physical or moral. Under this section, if the person takes away or entices away, with the intention to have illicit intercourse, the offence is completed there and then, whether there was actual illicit intercourse or not. The enticement or taking must be from the husband or from the person taking care of her on behalf of the husband, and not enticing or taking away from any other person that attracts the infliction of this section.

2. Intention to illicit intercourse

There should be intention that she may have illicit intercourse with any person when, she was enticed or taken away, if such intention is present that case will come under this section.

3. Conceals or detains with such intention

In *Sundara Dass Tevan*, it was held that the words "conceals or detains" are intended to be applied to the enticing or inducing a wife to withhold or conceal herself from her husband, and assisting her to do so, as well as to physical restraint or prevention of her will or action. Depriving the husband of his proper control over his wife, for the purpose of illicit intercourse, is the gist of the offence, and a detention occasioning such deprivation may be brought about simply by the influence of allurements and blandishments.

Detention does not mean that it is against the consent of the woman.

Difference between Section 366 and Section 498:

Section 366

1. Under this section, any woman can be kidnapped or abducted.
2. Kidnapping or abduction is for the purpose of marriage or illicit intercourse.
3. Kidnapping or abduction must be there.

Section 498

1. Must be a married woman.
2. Enticing or taking away for only illicit intercourse.
3. No such thing required.

FRAMEWORK SHEET

CRIME AGAINST WOMEN

INTRODUCTION

The provisions relating to crimes against women can broadly be classified into two categories

1. The crime provided for under the I.P.C.
2. Crime identified under Special Social Legislation

The crimes provided for under I.P.C. can be classified into a number of categories depending on the nature and gravity of the offence.

1. Rape (Section 376 I.P.C.)
2. Kidnapping and abduction of girls and women for different purposes (Section 363 – 373 I.P.C)
3. Homicide for dowry and dowry death (Section 304 B)
4. Assault and Molestation (Section 354 I.P.C.)
5. Sexual harassment and eve teasing (Section 509 I.P.C.)
6. Importation of girls [(up to 21 years of age) (Section 366 B I.P.C.)]
7. Adultery (Sections 497, 498)
8. Bigamy (Sections 494, 495)
9. Cruelty (Section 498A)
10. Abetment of suicide for dowry (Section 306)

Crimes against women under the special legislations have been enacted with a view to eliminate social evils prevailing in the society. Such as the practice of sati, dowry, indecent representation of woman, trafficking of woman for immoral purposes etc.

Such offence have been covered by specific enactments to safeguard woman and their interest. These are: -

- (i) the Commission of Sati (Prevention) Act 1987
- (ii) The Dowry Prohibition Act, 1961
- (iii) The Immoral Traffic (Prevention) Act 1956
- (iv) The Indecent Representation of Women (Prohibition) Act, 1986

Rape

Sections Involved: Section 375, 376, 376 A to 376 D of I.P.C.

Section 375 defines rape and Section 376 prescribes punishment and 376 A to 376 D defines custodial rape and prescribes punishment for the same.

Definition of Rape

Section 375 of I.P.C. defines rape:

Section 375: Rape: A man is said to commit "rape", who except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the six following descriptions: -

Firstly – Against her will

Secondly – Without her consent

Thirdly – With her consent, when her consent had been obtained by putting her or any person in whom she is interested in fear of death or of hurt.

Fourthly – With her consent, when the man knows that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawful married.

Fifthly – With her consent, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by him personally or through

another of any stupefying or unwholesome substance, she is unable to understand the nature and consequences of that to which she gives consent.

Sixthly – With or without her consent, when she is under sixteen years of age.

Explanation: Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

Exception: Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age, is not rape.

Ingredients: The following are the essential ingredients of the offence of rape

1. There must be sexual intercourse with a woman by a man.
2. Such a sexual intercourse should be under any of the following circumstances:
 - (a) Against her will;
 - (b) Without her consent;
 - (c) With consent, obtained under fear of death or hurt;
 - (d) With consent given under misconception of fact, that the man is her husband;
 - (e) Consent given by reason of unsoundness of mind, intoxication, or under influence of any stupefying or unwholesome substance;
 - (f) With a woman under 16 yrs of age with or without consent

Case and judgments:

1. **Tukaram V. State of Maharashtra, AIR 1979 SC (Mathura Case):** The Bombay High Court observed that there was a difference between "consent" and "passive submission", and held that mere passive or helpless surrender of the body and its resignation to equalled with the desire or will.
To nullify the effect of the SC judgement in this case, extensive amendments were introduced to the I.P.C. and to the Indian Evidence Act. Section 376 A to 376 D were incorporated into the I.P.C.
2. **Ghanshyam Misra V. State, AIR 1957, Orissa:** "Penetration is sufficient to constitute sexual intercourse, necessary for the offence of rape. The depth of penetration is immaterial as far as the offence under Section 376 is concerned".
3. **Phani Bhushan Behera V. State of Orissa, 1995 Cr L. J.:** "The Orissa High Court has held: -
"The rupture of hymen is by no means necessary to constitute the offence of rape. Even a slight penetration in the vulva is sufficient to constitute the offence of rape. Vulva penetration with or without violence is as much rape as vaginal penetration. The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact."
4. **Madan Gopal Karkad V. Nabal Dubey, 1992 (s) Section 204,** "The question as to whether an act amounts to rape or not, is not a matter of medical opinion, but a question of law."
5. **Jagdish Pr. Sharma V. State, 1995 Cr. LJ 2501 (Del):** "The depth of penetration is immaterial as far as the offence under Section 376 is concerned."
6. **State of Maharashtra V. Madhukar Narayan Mardikar; AIR 1991 SC 207:** "Even a woman of easy virtue is entitled to privacy and no one can invade her privacy as and when he likes"
7. **State of Maharashtra V. Prakash, 1992 SC 1275:** "Consent obtained under fear of death or of hurt or threat is no consent".
8. **Addepalli Setti Babu V. State of A. P. 1994 Cr. LJ 1420 (A.P.):** Consent obtained by fraud is no consent".
9. **Harpal Singh V. State of H.P., AIR 1981 SC 361:** "Sexual intercourse with a woman under 16 years of age will amount to rape, whether it is done with her consent, because the consent of a minor is no consent."

10. **State of Punjab V. Gurmit Singh, 1996, SD 1393:** "The Court must ensure that cross-examination is not made a means of harassment for causing humiliation to the victim of crime."

The SC also observed that testimony of victim in cases of sexual offence is vital and unless there are compelling reasons, which necessitate looking for corroboration for her statement, the Court should find no difficulty to act on the testimony of a victim of sexual assault alone".

11. **Bodhisattwa Gautam V. Miss Subhra Chakraborty AIR 1996 SC 922:** "SC laid down broad parameters in assistance of the rape victims".

Issues:

1. What is the extent of penetration required to prove the offence of rape?
2. Difference between "against the will" as per Cl (1) and with her consent" as per secondly of section 375.
3. Changing trends of exception to section 375 i.e. cases related to "Rape by husband".
4. Differentiate between consent and submission.

Analysis of section 375 and issues:

The word "rape" is derived from the Latin term "vrapio", which means "Forcible seizure". It signifies "the ravishment of a woman without her consent, by force, fear or fraud" or "the knowledge of a woman by force against her will".

1. **"Against Her Will":** The first clause of section 375 stipulates that a man commits the offence of rape, if, he has sexual intercourse with a woman 'against her will'.

When something is done "against the will" the element of active opposition is absent

For Example: - If Sexual intercourse is done with a woman who is asleep, then it would amount to being against her will. (Mayers, 12 Cox C. C. 311)

The term "against her will" is not similar to "without her consent" as in clause (2) of section 375. Though every Act done 'against the will' of a person will also mean that it is done "without the consent" of the person, an act done "without the consent" of a person does not necessarily mean "against the will". "Without consent" denotes an act being done inspite of opposition of the person.

"Will" is the faculty or power of the mind by which we determine either to do or not to do something. It implies consciousness, cognition and mental determination.

2. **Without consent:** The second clause of section 375 stipulates that if a man has sexual intercourse with a woman without her consent, then it amounts to rape.

The Court held in **Rao Hamain Singh v. State AIR, 1958, Punjab**, that consent as a defence to an allegation of rape requires voluntary participation, not only after the exercise of intelligence based on the knowledge of the Act, but after having freely exercised the choice between resistance and assent.

So a helpless resignation in the face of inevitable compulsion or passive giving in is not a consent in law.

"Consent" here means free consent, which must be an Act of reason, accompanied with deliberation, after the mind has weighed as in a balance, the goods and evil on each side, with the existing capacity and power to withdraw the assent according to one's will or pleasure.

Consent implies the exercise of a free and untrammelled right to forbid or without what is being consented to, it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.

In a case of Rape: It is no defence that the woman consented after the Act.

Section 114 - A of Evidence Act, provides a presumption as to absence of consent in certain prosecution for rape.

According to this section, where sexual intercourse by the accused is proved, and the question is whether it was without the consent of the woman to have been raped and she states in her evidence before the Court, that she had not given consent, the Court shall presume that consent was not given by her.

(Related to consent)

Cases:

- (i) **State of H.P. V. Dharma Dass, 1922 Cr L.J.** – Free consent established, the accused was acquitted.
- (ii) **Biram Soren V. State of W.B., 1992 Cr LJ (Cal.)** (Prosecutrix being a consenting party and she being not a minor, it was not a case of rape).
- (iii) **Bharat V. State of M.P., 1992 Cr LJ (M.P.)** (Consent, hence no rape).
- (iv) **State of Orissa V. Gangadhar Behuria, 1992 Cr LJ (Ori)** (No consent, Rape established).
- (v) **Mukhera Belakota Reddi V. State of A.P., 1952 Cr LL (AP)**: (Absence of injuries on the body of the victim, does not lead to inference of consent).
- (vi) **Dmagistrate Das V. State, 1992 Cr LJ (Orissa)**
- (vii) **Addepalli Settibatu V. State of A. P. 1994, Cr LJ (A.P.)**: (Consent by fraud is no consent).

Submission without resistance is not necessarily amount to consent. The person assaulted may be too young to appreciate the nature of the act done or to do more than submit without actually consenting.

In **R. V. Day**, it was held that submission by a child in the hands of an older and stronger person, and possible under the influence of fear of or a sense of constraining authority, has been held not to be equivalent to consent.

DIFFERENCE BETWEEN SUBMISSION AND CONSENT

There is a difference between submission and consent. Every consent involves a submission but the converse does not follow and a mere Act of submission does not involve consent.

Consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former.

The consent, to be operative, must be a free consent. If it is induced by fear, it is not consent at all but a mere submission.

3. **"Consent by 'Fear of death or of hurt'":** Clause (3) of 375 stipulates that consent obtained under fear by putting the woman or any person in whom she is interested, in fear of death or hurt is not consent and hence, the act would amount to rape

Cases:

- (i) **State of Maharashtra V. Prakash, AIR, 1992 SC**
- (ii) **Jones, (1864) L. R. 2 C. C. 10**

This clause has been amended by the Criminal Law (Amendment) Act, 1983 (No. 43 of 1983) and now consent obtained by putting a person in whom the victim woman is interested in fear of death or of hurt will be of no help to the accused. It is now not necessary that the offence of rape is completed only when the victim woman must be put in fear of death or hurt but an offence or rape would be complete even when the accused puts a person in whom the victim woman is interested in fear of death or hurt and her consent is obtained thereby.

4. **"Consent obtained by fraud or under misconception of fact or due to unsoundness of mind":**

Clause (4) and (5) of section 375 deal with these aspects.

Consent obtained by fraud is no consent, For instance: If a woman gives consent on the basis of a false promise of marriage by the man, then her consent is no consent under law.

Example: If a woman consents under the belief that he is her lawfully married husband, then such consent is not a valid consent under law.

Case:

Salesh Khatoon V. State of Bihar, 1989 Cr LJ (Pat)

"Consent obtained by deceitful means is no consent and comes within the ambit of ingredients of the definition of rape".

5. **Consent of a woman under 16 years of age:** Clause (6) provides that sexual intercourse with a woman under 16 years of age will amount to rape, whether it is done with or without her consent.

Case:

Harpal Singh V. State of H.P. AIR, 1981 SC 361: "The SC held that once it was proved that the girl was below 16 years of age, the question of consent became wholly irrelevant.

Other issues related to offence of rape:

1. Necessity of penetration:

In interpreting the explanation to Section 375 I.P.C. whether complete penetration is necessary to constitute an offence of rape, various High Court have taken a consistent view that even the slightest penetration is sufficient to make out an offence of rape and the depth of penetration is immaterial.

Penetration is not only sufficient but also necessary to constitute the sexual intercourse required of this offence.

Even "vulva penetration" only is sufficient to constitute rape.

In ***State of M.P. V. Bhanwarla, 1985 Cr LJ M.P.:*** - The Court held that in order to constitute an offence of rape, under Section 376, I.P.C., a complete penetration is not necessary.

Rape and homicide:

A person causing the death of the woman by rape can be convicted of homicide, depending upon his intention and knowledge whether his act was the proximate cause of death and whether the offender could have known it to be likely.

The fact that the offender was husband does not confer him greater immunity.

Cases:

- (i) ***Hurec Mohan Mythee V. Emperor, Cal 49***
- (ii) ***Shahu V. Emperor; S. L. R. 76***
- (iii) ***Shambhu Katri V. Emperor, I.P.C., Patna***

Punishment for rape:

Section Involved: Section 376, 376-A to 376-D

Section 376: Punishment for rape – (1) Whoever, except in the cases provided for by sub-Section (2), commits rape shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the women raped is his own wife and is not under twelve years of age, in which cases, he shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgement, impose a sentence of imprisonment for a term of less than seven years.

(2) Whoever, -

(a) being a police officer commits rape -

- (i) within the limits of the Police Station to which he is appointed; or
- (ii) in the premises of any station house whether or not situated in the Police Station to which he is appointed; or
- (iii) on a woman in his custody or in the custody of a Police Officer subordinate to him; or

(b) being a public servant, takes advantage of his official position and commits rape on a woman in his custody as such public servant or in the custody of a public servant subordinate to him; or

(c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a woman's or children's institution takes advantage of his official position and commits rape on any inmate of such jail, remand home, place or institution; or

(d) being on the management or on the staff of a hospital, takes advantage of his official position and commits rape on a woman in that hospital; or

(e) commits rape on a woman knowing her to be pregnant; or

(f) commits rape on a woman when she is under twelve years of age; or

(g) commits gang rape,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine:

Provided that the Court may, for adequate and special reasons to be mentioned in the judgment, imprisonment of either description for a term of less than ten years.

Explanation to Section 376:

Explanation 1: Where a woman is raped by one or more of a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang rape within meaning of this sub-section.

Explanation 2: "Women's or children's institution" means an institution, whether called an orphanage or a home for neglected woman or children or a widows' home or by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3: "Hospital" means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.

Analysis of Section 376, and 376-A to 376-D:

Section 376 provides for the punishment for the offence of rape. In view of growingly increasing incidence of this offence stringent punishment has been provided. It is to be a sentence between 7 yrs and life imprisonment or for 10 yrs and additional imposition of fine.

If sentence of imprisonment to be awarded is to be less than 7 years it will be only for adequate and special reasons and these will have to be recorded in the judgement.

However, if the woman raped is wife of the accused, and is not under 12 year of age, the imprisonment may be for a term extending to 2 years or he may be punished with fine or both.

Offence under Section 376 (2) Graver: However if this offence has been committed by persons responsible for the protection of the people by taking advantage of their official position, the punishment is very stringent. The offender shall be punished for a term which shall not be less than 10 years, but which may be for life and shall also be liable to fine.

Section 376 - A: Intercourse by a man with his wife during separation: - Whoever has sexual intercourse with his own wife, who is living separately from him under a decree of separation or under any custom or usage without her consent shall be punished with

imprisonment of either description for a term which may extend to two years and shall also be liable to fine.

Comments:

Section 376 – A makes punishable the sexual intercourse by a person with his separated wife without her consent. The separation may be under a decree of separation or may be under any custom or usage. Though after separation, the woman remains the wife of the person with whom she is married, but she is under no conjugal liability. Therefore sexual intercourse without her consent is an offence under this section. If it is with consent, then no offence is constituted.

Section 376 B – Intercourse by Public servant with woman in his custody - Whoever, being a public servant, takes advantage of his official position and induces or seduces, any woman, who is in his custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Comments:

Where a public servant by taking advantage of his official position induces or seduces a woman who is in his custody or in the custody of his subordinate to have sexual intercourse with him it is punishable under this section. The act should not amount to the offence of rape. If it amounts to rape then it is punishable under section 376.

In such a case, there is no use of force and the woman is in fact induced or seduced i.e., there is element of allurement. In such cases, consent is deemed to be given but due to the power of official position, it is only taken to be submission and not active or free consent. Hence such an offence is punishable, even though not amounting to rape.

Section 376 C: Intercourse by superintendent of jail, remand home, etc: - Whoever, being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and induces or seduces any female inmate of such jail, remand home, place or institution to have sexual intercourse with him, such sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Explanation 1: "Superintendent" in relation to jail, remand home or other place of custody or a women's or children's institution includes a person holding any other office in such jail, remand home, place or institution by virtue of which he can exercise any authority or control over its inmates. **Explanation 2:** The expression "women's or children's institution" shall have the same meaning as in Explanation 2 to sub-section (2) of section 376.

Comment:

Sexual intercourse by a superintendent or manager of a jail, remand home, or other place of custody established by, or under any law or of a women's or children's institution with a female inmate by inducing or seducing her by taking advantage of his official position has been made punishable under this section.

The Act should not amount to the offence of rape. If it amounts to rape, it will be punishable under section 376.

Section 376 D: Intercourse by any member of the management or staff of a hospital with any woman in that hospital: - Whoever, being on the management of a hospital or being on

the staff of a hospital takes advantage of his position and has sexual intercourse not amounting to the offence of rape, shall be punished with imprisonment of either description for a term which may extend to five years and shall also be liable to fine.

Explanation: The expression "hospital" shall have the same meaning as in Explanation 3 to sub-section (2) of section 376

Comments:

This section makes punishable, the sexual intercourse by a member of the hospital staff with any woman by taking advantage of his position. The Act punishable under this Section should not amount to the offence of rape. In that case it will be punishable under Section 376.

Other issues and related cases:

1. **Rape victims entitled to compensation:**

- (a) *Bodhisatwa Gautam V. Subhva Chakraborty AIR (1996) SC 922*
- (b) *Uttarakhand Sangharsh Samiti, Mussoorie V. State of U.P., (1996) SC, All.*

2. **Enhanced sentences in rape cases:**

- (a) *State of A.P.V. Bodem Sudea Rao, AIR, (1996), SC*

3. **Delay in lodging complaint does not raise inference that complaint was false:**

- (a) *Karnel Singh V. State of M.P., AIR (1995) SC*
- (b) *State of Punjab V. Gurmit Singh, AIR, 1996 SC*

Cases and judgements:

- 1. *Sidheshwar Ganguly V. State of W. Bengal, AIR 1958, SC:* "Determination of age of girl – Birth certificate is conclusive proof.
- 2. *Pramod Mahto V. State of Bihar (1989), SC:* "plea that case was foisted on accused due to communal feelings.
Held: Even if communal feeling had run high, it is inconceivable that an unmarried girl and two married women would go to the extent of staking their reputation and future in order to falsely set up a case of rape on them for stake of communal interest.
- 3. *Bharads Bhoginbhai Hirjibai V. State of Gujarat, 1983, SC:* "Corroboration is not the sine quo non (necessary requirement). For a conviction in a rape case.
- 4. *State of Punjab V. Gurmit Singh, AIR, 1996 SC:*
 - (a) Delay in lodging FIR is not material when properly explained.
 - (b) Testimony of prosecutrix (victim) in cases of sexual assault is vital and unless there are compelling reason which necessitate looking for corroboration of her statement, the court should find no difficulty in convicting the accused on prosecutrix testimony alone.
 - (c) Trial of sexual offences should be in camera and invariably by lady judges wherever available.
 - (d) Court must restrain making observations that probably the prosecutrix is a girl of loose moral character.
 - (e) Court is under an obligation to see that prosecutrix is not unnecessarily harassed and humiliated in cross – examination in case of rape trial.
- 5. *Bodhisattwa Gautam V. Subhra Chakraborty, AIR, 1996, SC* compensation to victims of rape during pendency of trial: - Court has jurisdiction to award interim compensation pending prosecution. "It is a crime against basic human right and violates right to life (Article 21).

6. ***Delhi domestic working women's forum V. U. O. I.(1995) SC:***

The Court indicated the broad parameters in assisting the victims of rape and observed that.

- (a) The complainants of sexual assault cases should be provide with legal representation.
- (b) Legal assistance will have to be provided at the Police Station since, the victim of social assault might very well be in distressed state upon arrival at the Police Station, the guidance and support of a lawyer at this stage and whilst she was being questioned would be of great assistance to her.
- (c) The police should be under a duty to inform the victim of her right to representation before any question were asked to her and that the police report should state that the victim was so informed.
- (d) The police should be under a duty to inform the victim of her right to representation before any question were asked of her and that the police report should state that the victim was so informed.
- (e) A list of advocates willing to act in these cases should be kept at the Police Station for victims who did not have a particular lawyer in mind or whose own lawyer was unavailable.
- (f) The advocate shall be appointed by the Court, upon application by the police at the earliest convenient moment, but in order to ensure that victim were questioned without under delay, the advocate would be authorised to act at the Police Station, before leave of the Court was sought or obtained.
- (g) In all rape trials, anonymity of the victims must be maintained, as far as necessary.
- (h) It is necessary having regard to the DPSP contained under Article 36(1) of the constitution of India, to set up the criminal injuries compensation board. Rape victim frequently insure substantial financial loss. Some for example, are too traumatized to continue in employment.
- (i) Compensation for victims shall be awarded by the Court on conviction of the offender and by the criminal injuries compensation board, whether or not a conviction has taken place. The board will take into account pain, suffering and shock as well as loss of earnings due to pregnancy and the expenses of child birth if this occurred as a result of rape.

LAW COMMISSION OF INDIA

ONE HUNDRED AND SEVENTY SECOND REPORT

ON

REVIEW OF RAPE LAWS MARCH, 2000

[The 15th Law Commission of India, headed by Shri Justice B. P. Jeevan Reddy, a former judge of the Supreme Court of India, in its 172nd Report on Review of Rape Laws has recommended stringent provisions in the Indian Penal Code (IPC). Code of Criminal Procedure, 1973 and Evidence Act, 1872, suggesting changes for widening the scope of the offence in section 375 of IPC to make it gender neutral. The Commission has recommended various other changes in section 376, 376A, 376D of IPC. It has also suggested insertion of a new section 376E dealing with unlawful sexual contact, deletion of section 377 of the IPC and enhancement of punishment in Section 509 of the IPC. It has also recommended various changes in the Code of Criminal Procedure and in the Evidence Act in order to plug the loopholes in procedural provisions.]

The Law Commission Report focuses on the need to review the Rape Laws in the light of increased incidents of custodial rape and crime of sexual abuse against youngsters, the objective being prevention of child prostitution. The crime of sexual assault on a child

causes lasting psychic damage to the child and as such, it is essential to prevent sexual abuse of children through stringent provisions. The United Nations Convention and various constitutional provisions also underlined the need for protecting the child from all forms of sexual exploitation and sexual abuse.

The report follows the directions of the Supreme Court seeking Law Commission's well considered views following criminal Writ Petition No. 33 of 1997 by Sakshi, an organisation interested in the issues concerning women, before the Supreme Court of India for directions concerning the definition of the expression "sexual intercourse" as contained in Section 375 of the IPC. The Supreme Court referred the matter to the Law Commission and the 15th Law Commission submitted its final report to the Supreme Court on March 14, 2000.

In the well-considered views of the Commission, all cases of sexual assault must be tried by Special Courts with court personnel including judges, prosecutors, counselors, specially trained and sensitised to issues of sexual assault.

The present report includes the observations of the Commission in response to the Supreme Court direction. Later on, three other organisations namely Interventions for Support, Healing and Awareness – IFSHA, All India Democratic Women's Association – AIDWA and the National Commission for Women – NCW also presented their views on the proposed suggestions.]

The petitioner 'Sakshi', an organisation interested in the issues concerning women, had approached the Supreme Court of India with the aforesaid Writ Petition praying for (a) issuance of a writ in the nature of a declaration or any other appropriate writ or direction declaring inter alia that 'sexual intercourse' as contained in Section 375 of the Indian Penal Code shall include all forms of penetration such as penile/vaginal penetration, penile/oral penetration, penile/anal penetration, finger/vaginal and finger/anal penetration and object/vaginal penetration and (b) to issue a consequential writ, order or direction to the respondents in the Writ Petition and to their servants and agents to register all such cases found to be true on investigation.

Changes recommended in the Indian Penal Code, 1860

Substitution of definition of 'rape' by definition of 'sexual assault':

Not only women but young boys are being increasingly subjected to forced sexual assaults. Forced sexual assault causes no less trauma and psychological damage to a boy than to a girl subjected to such offence. Boys and girls both are being subjected to oral sexual intercourse too. According to some social activists like Ms. Sheela Barse, both young girls and boys are being regularly used for all kinds of sexual acts and sexual perversions in certain tourist centres like Goa – mainly for edification of the foreign tourists. Sakshi have also recommended for widening the scope of the offence in section 375 and to make it gender neutral. Some of the Western countries have already done this. It is also necessary to include under this new definition (sexual assault) not only penile penetration but also penetration by any other part of the body (like finger or toe) or by any other object. Explanation to section 375 has also been substituted by us to say that penetration to any extent whatsoever shall be deemed to be penetration for the purpose of this section. This is so provided for the reason that in the case of children, penetration is rarely complete – for physical reasons. So far as the Exception is concerned, we have retained the existing Exception the only change made being in the matter of age; we have raised the age of the 'wife' from fifteen to sixteen. The age of the person assaulted sexually referred to in the clause "sixthly" has also been raised to sixteen from fifteen.

Substitution of existing section 375 of the IPC recommended:

- We accordingly recommend that the existing section 375 be substituted by the following:
"Section 375 – Sexual Assault: Sexual assault means –
(a) Penetrating the vagina (which term shall include the labia majora), the anus or urethra of any person with –

- a. any part of the body of another person or
- b. an object manipulated by another person
except where such penetration is carried out for proper hygienic or medical purpose;
- (b) manipulating any part of the body of another person so as to cause penetration of the vagina (which term shall include the labia majora), the anus or the urethra of the offender by any part of the other person's body;
- (c) introducing any part of the penis of a person into the mouth of another person;
- (d) engaging in cunnilingus or fellatio; or
- (e) continuing sexual assault as defined in clauses (a) to (d) above in circumstances falling under any of the six following descriptions:

First – Against the other person's will.

Secondly – Without the other person's consent.

Thirdly – With the other person's consent when such consent has been obtained by putting such other person or any person in whom such other person is interested, in fear of death or hurt.

Fourthly – Where the other person is a female, with her consent, when the man knows that he is not the husband of such other person and that her consent is given because she believes that the offender is another man to whom she is or believes herself to be lawfully married.

Fifthly – With the consent of the other person, when, at the time of giving such consent, by reason of unsoundness of mind or intoxication or the administration by the offender personally or through another of any stupefying or unwholesome substance, the other person is unable to understand the nature and consequences of that to which such other person gives consent.

Sixthly – With or without the other person's consent, when such other person is under sixteen years of age.

Explanation? Penetration to any extent is penetration for the purposes of this section.

Exception: Sexual intercourse by a man with his own wife, the wife not being under sixteen years of age, is not sexual assault."

Representatives of Sakshi wanted us (the Law Commission) to recommend the deletion of the exception, with which we are unable to agree. Their reasoning runs thus: where a husband causes some physical injury to his wife, he is punishable under the appropriate offence and the fact that he is the husband of the victim is not an extenuating circumstance recognised by law, if so, there is no reason why concession should be made in the matter of offence of rape/sexual assault where the wife happens to be above 15/16 years. We are not satisfied that this Exception should be recommended to be deleted since that may amount to excessive interference with the marital relationship.

Modification of Section 376:

So far as the proposed section 376 is concerned, we are not suggesting any substantial changes except two and adapting the language of the section to accord with the change in section 375. In the light of instances coming before the courts and the instances mentioned in the Note prepared by Sakshi, we have proposed addition of a proviso to sub-section (1) (while treating the existing proviso as the second proviso) providing that where the sexual assault is committed by the father, grandfather or brother, the punishment should be severe. On the basis of suggestions made by Sakshi, we have also added the words "or any other person being in a position of trust or authority towards the other person" after the words "father, grandfather or brother". The second change suggested by us is in the matter of the age of wife referred to in proposed sub-section (1) as also of the person assaulted in clause (f) of sub-section (2). The age "fifteen" is raised to "sixteen".

The reasons for these changes are:

1. to visit with a severe penalty the near relations and persons in position of trust and authority who more often than not commit the offence of sexual assault on the members of the family or on unsuspecting and trusting young persons. We have in this connection taken note of the extremely odious and debased conduct of the father of the minor girl in the facts highlighted in **Sudesh Jakhoo vs. K. C. J. and other [1996 (3) AD Delhi 653 = (1996) 62 DLT 563]** and
2. to maintain uniformity in the matter of age of wife or any other young person who needs special protection – as sixteen.

Section 376 shall be re-cast as follows:

"Section 376 – Punishment for sexual assault:

- (1) Whoever, except in the cases provided for by sub-section (2), commits sexual assault shall be punished with imprisonment of either description for a term which shall not be less than seven years but which may be for life or for a term which may extend to ten years and shall also be liable to fine unless the person subjected to sexual assault is his own wife and is not under sixteen years of age, in which case, he shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine.

If the sexual assault is committed by a person in a position of trust or authority towards the person assaulted or by a near relative of the person assaulted, he/she shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may extend to life imprisonment and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than minimum punishment prescribed in this sub-section.

- (2) Whoever –

- (a) being a police officer commits sexual assault –

- a. within the limits of the police station to which he is appointed; or
- b. in the premises of any station house whether or not situated in the police station to which he is appointed; or
- c. on a person in his custody or in the custody of a police officer subordinate to him; or

- (b) being a public servant, takes advantage of his official position and commits sexual assault on a person in his custody as such public servant or in the custody of a public servant subordinate to him; or

- (c) being on the management or on the staff of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his official position and commits sexual assault on any inmate of such jail, remand home, place or institution; or

- (d) being on the management or on the staff of a hospital, takes advantage of his official position and commits sexual assault on a person in that hospital; or

- (e) commits sexual assault on a woman knowing her to be pregnant; or

- (f) commits sexual assault on a person when such person is under sixteen years of age; or

- (g) commits gang sexual assault,

shall be punished with rigorous imprisonment for a term which shall not be less than ten years but which may be for life and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment of either description for a term of less than ten years.

Explanation 1 – Where a person is subjected to sexual assault by one or more in a group of persons acting in furtherance of their common intention, each of the persons shall be deemed to have committed gang sexual assault within the meaning of this sub-section.

Explanation 2 – “Women’s or children’s institution” means an institution, whether called an orphanage or a home for neglected women or children or a widows’ home or an institution called by any other name, which is established and maintained for the reception and care of women or children.

Explanation 3 – “Hospital” means the precincts of the hospital and includes the precincts of any institution for the reception and treatment of persons during convalescence or of persons requiring medical attention or rehabilitation.”

Amendment of Section 376A:

Representatives of Sakshi wanted us to recommend the deletion of section 376A (as well as Exception to section 375). Their logic was this: when a man who causes hurt or any other physical injury to his own wife is liable to be punished for such offence like any other person causing such hurt or physical injury, why should a husband who sexually assaults his wife, who is living separately under a decree of separation or under any custom or usage, be not punished like any other person. Section 376A, which provides a lesser punishment to a husband who sexually assaults his own wife living separately in the aforesaid circumstances, they argued, is arbitrary and discriminatory. They say that once section 376A is deleted, the husband in such a case would be punished under section 376 (1) which carries higher punishment than section 376A. While we appreciate the force of said argument in the context of the wife who is living separately under a decree of separation or under any custom or usage, we can not at the same time ignore the fact that even in such a case the bond of marriage remains unsevered. In the circumstances, while recommending that this section should be retained on the statute book, we recommend enhancement of punishment under the section.

Accordingly, section 376A shall be read as follows:-

“376A. Sexual assault by the husband upon his wife during separation – Whoever commits sexual assault upon his wife, who is living separately from him under a decree of separation or under any custom or usage, without her consent, shall be punished with imprisonment of either description for a term which shall not be less than two years and which may extend to seven years and shall also be liable to fine.”

Amendment of Section 376B, 376C and 376D:

Having regard to the gravity of these offences, we recommend enhancement of punishment – with a minimum punishment of not less than five years. We have also added an Explanation which will govern all these three sections. The Explanation defines “sexual intercourse” to mean any of the acts mentioned in clauses (a) to (e) of section 375. Explanation to section 375 will however apply even in the case of sexual intercourse as defined by the Explanation to this section.

Modifications in sections 376B, 376C and 376D of the IPC recommended:

Accordingly, section 376B with necessary adaptations and changes, shall read as follows:

“376B. Sexual intercourse by public servant with person in his custody – Whoever, being a public servant, takes advantage of his/her official position and induces or seduces any person, who is in his/her custody as such public servant or in the custody of a public servant subordinate to him, to have sexual intercourse with him/her, such sexual intercourse

not amounting to the offence of sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than five years and which may extend to ten years and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than five years.

Explanation: "Sexual intercourse" in this section and sections 376C and 376D shall mean any of the acts mentioned in clauses (a) to (e) of section 375. Explanation to section 375 shall also be applicable."

"376C. Sexual intercourse by superintendent of jail, remand home, etc. – Whoever, being the superintendent or manager of a jail, remand home or other place of custody established by or under any law for the time being in force or of a women's or children's institution takes advantage of his/her official position and induces or seduces any inmate of such jail, remand home, place or institution to have sexual intercourse with him/her, such sexual intercourse not amounting to the offence of sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than five years and which may extend to ten years and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than five years.

Explanation 1 – "Superintendent" in relation to a jail, remand home or other place of custody or a women's or children's institution includes a person holding any other office in such jail, remand home, place or institution by virtue of which he/she can exercise any authority or control over its inmates.

Explanation 2 – The expression "women's or children's institution" shall have the same meaning as in Explanation 2 to sub-section (2) of section 376."

"376D. Sexual intercourse by any member of the management or staff of a hospital with any woman in that hospital. Whoever, being on the management of a hospital or being on the staff of a hospital takes advantage of his/her position and has sexual intercourse with any person in that hospital, such sexual intercourse not amounting to the offence or sexual assault, shall be punished with imprisonment of either description for a term which shall not be less than five years and which may extend to ten years and shall also be liable to fine.

Provided that the court may, for adequate and special reasons to be mentioned in the judgment, impose a sentence of imprisonment for a term of less than five years.

Explanation – The expression "hospital" shall have the same meaning as in Explanation 3 to sub-section (2) of section 376."

Insertion of section 376E:

This is a wholly new section recommended by us. We have called it the 'offence of unlawful sexual contact'. This section is intended to cover a wide variety of offences including sexual harassment at work place and sexual perversions of the kind mentioned in the note submitted by Sakshi. Sub-section (1) of this new section covers touching, directly or indirectly, with a part of the body or with an object, any part of the body of another person (not being the spouse of such person), with sexual intent and without the consent of such other person. In case the other person is below sixteen years of age, we have recommended higher punishment. Sub-section (2) is an extension or elaboration of the offence mentioned in sub-section (1), while sub-section (3) deals with a case where such offence is committed on a young person – young person being defined by the Explanation to mean a person below the age of sixteen years. If the offence of unlawful sexual contact is committed on a young person by a person with whom such young person is in a relationship of dependency, the punishment is rigorous imprisonment which may extend to seven years or with fine or with both and in case the offender happens to be the father, grandfather or brother, a still higher punishment is provided for. In the case of a 'young person', consent is

treated as irrelevant. (Sections 151, 152 and 153 of the Canadian Criminal Code also contain similar provisions).

Insertion of new section 376E recommended:

We therefore recommend that a new section, namely, section 376E be inserted in the IPC in the following terms:

"376E. Unlawful sexual contact –

- (1) Whoever, with sexual intent, touches, directly or indirectly, with a part of the body or with an object, any part of the body of another person, not being the spouse of such person, without the consent of such other person, shall be punished with simple imprisonment for a term which may extend to two years or with fine or with both.
- (2) Whoever, with sexual intent, invites, counsels or incites a young person to touch, directly or indirectly, with a part of the body or with an object, the body of any person, including the body of the person who so invites, counsels or incites, or touches, with sexual intent, directly or indirectly, with a part of the body or with an object any part of the body of a young person, shall be punished with imprisonment of either description which may extend to three years and shall also be liable to fine.
- (3) Whoever, being in a position of trust or authority towards a young person or is a person with whom the young person is in a relationship of dependency, touches, directly or indirectly, with sexual intent, with a part of the body or with an object, any part of the body of such young person, shall be punished with imprisonment of either description which may extend to seven years and shall also be liable to fine.

Explanation: "Young person" in this sub-section and sub-section (2) means a person below the age of sixteen years."

Deletion of section 377:

In the light of the change effected by us in section 375, we are of the opinion that section 377 deserves to be deleted. After the changes effected by us in the preceding provisions (sections 375 to 376E), the only content left in section 377 is having voluntary carnal intercourse with any animal. We may leave such persons to their just deserts.

Amendment of section 509:

So far as this section is concerned, the only change we are suggesting is enhancement of punishment. We recommend that the existing section 509 be amended as follows:

"509. Word, gesture or act intended to insult the modesty of a woman:

Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object intending that such word or sound shall be heard, or that such gesture or object shall be seen, by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to three years and shall also be liable to fine."

New Section 166A, IPC:

The 84th Report of the Law Commission had recommended that a new section, namely, section 166A, be inserted in the Indian Penal Code. The object behind this new section was to punish a public servant who knowingly disobeys any direction of law prohibiting him from requiring the attendance at any place of any person for the purpose of investigation into an offence or other matter or knowingly disobeys any other direction of law regulating the manner in which he shall conduct such investigation and which act of his causes prejudice to any person. The representatives of Sakshi with whom we had a discussion, requested that a new section as recommended by 84th Report of the Law Commission be recommended to be inserted in the IPC. This provisions must be understood in the light of the fact that in the next chapter, we are recommending several measures with respect to the

manner in which the statement of women and children (below 16 years) should be recorded, the place where it should be recorded and so on.

New section 166A of the IPC recommended. Accordingly, we recommend that a new section be introduced in the IPC in the following terms:

"166A. Whoever, being a public servant –

- a) knowingly disobeys any direction of the law prohibiting him from requiring the attendance at any place of any person for the purpose of investigation into an offence or other matter, or
- b) knowingly disobeys any other direction of the law regulating the manner in which he shall conduct such investigation, to the prejudice of any person, shall be punished with imprisonment for a term which may extend to one year or with fine or with both."

Views of "Sakshi" for defining 'consent' considered:

Lastly, we may refer to a request of Sakshi to insert the definition of "consent" for the purpose of the aforesaid section. We are however of the opinion that no such definition is called for at this stage, for the reason that the said expression has already been interpreted and pronounced upon by the courts in India in a good number of cases. Reference in this behalf may be made to page 700 of the Commentary on IPC by Justice Jaspal Singh (First Edition 1998) where it is stated, on the basis of the decisions of the Madras, Punjab and Nagpur High Courts, that "consent implies the exercise of a free and untrammelled right to forbid or withhold what is being consented to; it always is a voluntary and conscious acceptance of what is proposed to be done by another and concurred in by the former."

ADULTERY

SECTION INVOLVED: 497

Section 497: Adultery – Whoever has sexual intercourse with a person who is and whom he knows or has reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine, or with both. In such case the wife shall not be punishable as an abettor

Comment

Adultery was added as an offence punishable under this Code on the recommendation of Section law commission. It is an invasion on the right of the husband over his wife i.e an offence against a husband in respect of his wife.

cope

The cognizance of the offence of adultery is limited to adultery committed with a married woman, and the male offender alone has been made liable to punishment.

Thus, under the Code, adultery is an offence committed by a third person against a husband in respect of his wife.

It is not committed by a married man who has sexual intercourse with an unmarried woman, or with a widow, or even with a married woman whose husband consents to it.

In *Mahbub Chunder Giri (1873) 21 WR*, the Court said, "it is not necessary that the adulterer should know whose wife the woman is, provided he knew she was a married woman."

Principle

This Section defines the offence of adultery in a special narrow sense, as having knowledge of a married woman with knowledge or reasonable belief that the woman was married and without consent or connivance of her husband.

The offence can only be committed by man, the woman being exempt from punishment as an abettor, and of course, as an adulteress. But the man may be married or unmarried though the woman he ravishes must be married, for if she is unmarried he commits no offence by the mere fact of having sexual intercourse with her. The offence is thus held punishable not because of the connection had with woman, but for the collateral purpose of preserving the peace and sanctity of family life.

Adultery is not an offence under English Law.

Ingredients

The section requires the following essentials: -

1. Sexual intercourse by a man with a woman who is and whom he knows or has reason to believe to be the wife of another man.
2. Such sexual intercourse must be without the consent or connivance of the husband.
3. Such sexual intercourse must not amount to rape

Cases

1. *Boulting v. Boulting*, (1864) 33 L J (PM & A), "Connivance is an act of mind it implies, knowledge and acquiescence. As a legal doctrine, connivance has its source and its limits in the principle *volenti non fit injuria*", a willing mind; this is all that is necessary.
2. *Sowmithri Vishnu v. U.O.I*, (1985) Cr. L J 1312 SC, "The SC upheld the constitutional validity of Section 497, I.P.C."

3. *V. Revathi v. U.O.I.* (1988) SC, "Emphasised the validity of Section 497"
4. *Chandra Chhitar Ladha v. Mst Nandu*, A.I.R. 1965 M. P., "In the I.P.C. adultery is viewed primarily as an invasion on the right of the Husband over his married wife."
5. *M. Karripa v. Akilandamma* A.I.R., 1954 Mad. 427, "Under the I.P.C., a married wife cannot commit adultery or the abetment thereof. The term "adultery" is therefore to be understood in the light of social ideas of the community as being a serious breach of matrimonial tie."

Analysis of the offence

1. "There must be Sexual intercourse"

The Section, assumes that the sexual intercourse was had with the consent of the wife, for otherwise the offence would be rape and to merely adultery.

Penetration of the male organ is necessary to constitute the sexual intercourse necessary to this offence. Single intercourse is sufficient to constitute the offence.

Case: *Mahbub Chander Giri*, 21 W. R.

2. "Woman must be married"

The woman with whom connection is had must be married, that is to say; lawfully married to another, of which there must be strict and formal proof.

Case: *Pitamber Singh I. L. R. Cal*

3. "Knowledge and reasonable belief essential"

It is not necessary that the accused should know who the husband of the woman is, for all that is necessary is that he should know that she has a husband though the accused may not know him.

If the woman herself makes him to believe that she is not married, then it is said that he has no reason to believe that she is married. If he knows, that he is divorced or widow, then he will not be punished.

4. "Consent or connivance of the husband"

The adultery complained should not have been consented to or connived at by the husband, this is necessary, for the offence is intended to preserve his bed unsullied, and if he elected otherwise, the law cannot help, him against himself.

Constitutional validity:

Earlier view:

The offence of adultery was created in late 19th century and at that time polygamy was in vogue in general practice. Woman as such needed protection, and therefore, authors of IPC said that on the one hand, women are subjected to so much of atrocities and if we impose this penal law on them, they will be subjected to double punishment. Therefore, they have said that woman should not be subjected to adultery or abetment.

Present view:

The constitutional validity of this section is questioned on two aspects. They are:-

- (1) Irrational classification and
- (2) Under inclusive classification.

As to irrational classification:

The offence of adultery is criticised as violative of Articles 14, 15 and 21 of the Constitution, and is also violative of Article 13 of the Constitution. The objection is that the law discriminates between man and woman. It punishes only the man, and the husband of the wife, committing sexual intercourse, is given the right to complain.

However, the offence of adultery is created to protect the matrimonial sacredness and sanctity. It is the offence against the husband of that wife. It is also said that the woman by their nature are subjected to the commission of such an act by the enticing of a man. The man seduces the woman. It is also said that the woman or wife is the victim of the crime and not the author of the crime. So, the classification is a rational classification and that classification is having nexus to the object sought to be achieved by the law.

As to under inclusive classification:

It is also objected that the offence of adultery suffers from under classification from two perspectives. The one is that it does not give a right to the wife of the husband, who is committing adultery and thereby denies her right to be heard under Article 21 of the Constitution. On the other hand, it does not punish the woman who participates in the commission of such adultery.

But, in **Soumitri Vishnu vs. Union of India (1985)**, it was observed that, though Section 497 does not expressly provide the right to be heard, yet by means of impleading application, she may be heard.

Notably, however, the law tries to strike a balance between the right of both the woman, by not allowing the wife to complain and by not punishing the woman involved. This classification i.e. the under-inclusive classification is held to be valid in **Maganlal Chhaganlal Case**. He said that, sometimes the under inclusive classification is valid, and it held so on the basis of an experiment by conducting a survey. Moreover, by considering the Indian society and its culture and social milieus this seems to be the valid law.

FRAMEWORK SHEET
CRIMINAL INTIMIDATION (CHAPTER XXII)

- **SECTION INVOLVED** – Section 503, 506, 507.
- **SECTION 503** –

Whoever threatens another with any injury to his person, reputation or property, or to the person or reputation of any one in whom that person is interested, with intent to cause alarm to that person, or to cause that person to do any act which he is not legally bound to do, or to omit to do any act which that person is legally entitled to do, as the means of avoiding the execution of such threat, commits criminal intimidation.

- **EXPLANATION** –

A threat to injure the reputation of any deceased person in whom the person threatens is interested, is within this section.

- **ILLUSTRATION** –

A, for the purpose of inducing B to desist from prosecuting a civil suit, threatens to burn B's house. A is guilty of criminal intimidation.

- **INGREDIENTS** – This section requires following essentials:

1. Threatening a person with any injury
 - (a) to his person, reputation or property; or
 - (b) to the person, or reputation of any one in whom that person is interested.
2. The threat must be with intent:
 - (a) to cause alarm to that person, or
 - (b) to cause that person to do any act which he is not legally bound to do as the means of avoiding the execution of such threat, or
 - (c) to cause that person to omit to do any act which that person is legally entitled to do as the means of avoiding the execution of such threat.

- **PRINCIPLE** –

The anxiety and mental anguish caused by an injury threatened may often be as great as or even greater than the actual injury. And since it may lead to reprisals and the consequent breach of the peace, the law esteems such threats an offence, even though they fall short of a preparation to commit the offence threatened.

- **COMMENT** –

The offence of criminal intimidation requires either a person or another in whom he is especially interested to be threatened. There must be intent to cause alarm to the former by a threat to him of injury to himself or to the latter. The intent itself might be complete, though it could not be affected.

The existence of the interest seems essential to the offence, as also and equally to the attempt to commit the offence, since otherwise the attempt would be to do something not constituting the offence.

Case: Mangesh Jivaji (1887) 11 Bombay 376.

1. Threatening a person injury

Threatening means saying that if one does not do what the person threatening wants then that person will cause hurt. Here, there must be communication of that threat. That threat must be to a person, and threat is to cause injury. For example, if X says the thief that if the thief does not give him back the stolen property of him, then he will complain about the theft, then this is not a threat under this section. Because, it will not cause any harm illegally. Because, the theft itself is an illegal act, and it cannot cause injury to him.

2. Injury to the person, reputation or property

The threat caused may be an injury to the person, reputation or property, the person who is threatened. Person, means the individuality of a man, individual character or station,

bodily form or substance. Reputation is the honour, credit, character or good name that one is having. Property may be movable or immovable property.

3. Injury to the person, reputation or property of another person in whom the person threatened is interested

The threat of injury must not be to the person etc. of the person threatened but, it may be to the person or reputation of the person in whom he is specifically interested. Notably, property is missing here, may be on public policy. For example, if X threatens Y that if 'A' does not withdraw the case then, he will kill Y who happens to be the son of 'A' or

If X threatens the pleader of Y that, he will cause bodily injury to the pleader if Y does not take back his complaint.

4. Threat must be with an intention to cause alarm to that person

Threat must be with intention to cause a fear or anxiety in the mind of the person that something unpleasant thing would happen. This is very wider term so as to include a variety of cases. The importance of this offence is the creation of a fear in the mind of that person. But, whether the person was actually got frightened or not is unimportant. It is the intention to cause such fear or anxiety that is sufficient to constitute offence of criminal intimidation.

5. Threat with intent to cause that person to do any act which he is not legally bound to do so as the means of avoiding the execution of such threat

For example, when there is a hostility between A and B. A threatens a police officer that if he does not register a criminal case against B, then he will kill the son of the police officer. Here, the police officer is not legally bound to register a case against B, but A has caused him to do it. So, as soon as A threatens the police officer, the offence of criminal intimidation is complete, whether he register the case or not that is immaterial. To avoid the killing, the police officer may do it.

6. Threat with intent to cause that person to omit to do any act which he is legally entitled to do

If X, a criminal facing the charge of murder, threatens the Magistrate that if he pronounces the judgment against him, which he was actually bound to pronounce, then, he will burn his house, here, if the Magistrate does so, to avoid the execution of threat, it is the omission of the act which he was legally bound to do.

• **CASES AND JUDGMENTS:**

1. **GUNGA CHANDER SEN VS. GOUR CHUNDER BANIKYA (1888) 15 CALCUTTA** - "The gist of the offence is the effect which the threat is intended to have upon the mind of the person threatened."
2. **DORASWAMY AYYAR, (1929) MADRAS** - "The threat must be one which can be put into execution by the person threatening."
3. **GOVIND (1900) 2 BOMBAY L.R. 55** - "A threat in order to be indictable, must be made with intent to cause alarm to the complainant. Mere vague allegation by the accused that he is going to take revenge by false complaints cannot amount to criminal intimidation."

• **OTHER CASES:**

1. **Habibullah Kherullah vs. State of Madhya Pradesh, 1961 L.J., 1190.**
2. **B.V.S. Rao vs. Nandipathi Mathayya, AIR, 1964 A.P.**
3. **R.C. Nayak vs. State (1966) Cutt. L.J.**
4. **M.I. Maracayar vs. Ismail Maracayar, AIR 1949 Madras.**
5. **Philip Rangel vs. Emperor AIR 1932 Bombay.**

PUNISHMENT FOR CRIMINAL INTIMIDATION

- **SECTION 506 –**

Whoever commits the offence of criminal intimidation shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both;

If threat be to cause death or grievous hurt – and if the threat be to cause death or grievous hurt, or to cause the destruction of any property by fire, or to cause an offence punishable with death or imprisonment for life, or with imprisonment for a term which may extend to seven years, or to impute unchastity to a woman, shall be punished with imprisonment of either description for a term which may extend to seven years, or with fine, or with both.

- **CASES:**

1. **NOBLE MOHANDAS VS. STATE, 1989 Cr. L.J. 669 MADRAS** – “The threat must be real in the sense that the accused means what he says and the victim of the threat should feel threatened actually.”
2. **AMULYA KUMAR BEHERA VS. NABAGHANA BEHERA, 1995 Cr. L.J. 3559 (ORISSA)** – “Intention of the accused must be to cause alarm to the victim and whether he is alarmed or not is of no consequence.”

CRIMINAL INTIMIDATION BY AN ANONYMOUS COMMUNICATION

- **SECTION 507 –**

Whoever commits the offence of criminal intimidation by any anonymous communication, or having taken precaution to conceal the name or abode of the person from whom the threat comes, shall be punished with imprisonment of either description for a term which may extend to two years, in addition to the punishment provided for the offence by the last preceding section.

- **COMMENT –**

The aggravating feature of this offence is the anonymity which accompanies the threat which produces in the receiver a great uneasiness than when the author of the threat is known. Such a threat, moreover, shows greater malignity of mind, while the care taken to escape detection presents difficulties in proof, all of which makes such an offender, a subject of exemplary punishment.

Case: Doraswamy Ayyar (1924) 48 Madras 774.

FRAMEWORK SHEET

INSULT (CHAPTER XXII)

- **SECTIONS INVOLVED** – Section 504, 509 of IPC.
- **SECTION 504 OF IPC – INTENTIONAL INSULT WITH INTENT TO PROVOKE BREACH OF THE PEACE:**

Whoever intentionally insults, and thereby gives provocation to any person, intending or knowing it to be likely that such provocation will cause him to break the public peace, or to commit any other offence, shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

- **INGREDIENTS:**

This section requires two essentials:

1. Intentionally insulting a person and thereby giving provocation to him.
2. The person insulting must intend or know it to be likely that such provocation will cause him to break the public peace or to commit any other offence.

- **PRINCIPLE:**

The object of this section is clearly to prevent the use of language which is resented by the person with reference to whom it is used, and which, if allowed to go unpunished, is provocative of reprisals thereby disturbing the public tranquility.

1. Intentionally insulting and thereby provoking

First there must be an insult intentionally caused. Insult means lowering one's individuality in the eyes of one's or in the eyes of others. Insulting signifies, lowering the dignity or insolence or contempt of respect. Insulting is made by the abusive and vulgar language. Insult here may be by words or conduct. Intentional insult per se is not an offence. The insult must be so grave that it provokes a man to disturb the peace. If such insult does not provoke it is not a punishable insult.

Mere abusive words do not amount to insult. Because, certain words or expressions may commonly be used among the friends, or in a particular locality. But, the same words may constitute insulting language when they are used in unfriendly relations.

2. Intentional insult must be with the intention or knowledge that such provocation disturbs the peace or to commit offence

When a person intentionally insults a person, such intention must be accompanied by intention or knowledge that such an insult is likely or knowledge that such an insult is likely to make him to break the public peace or with the intention or knowledge that such insult is likely to make him to commit an offence. What would amount to insult and whether is capable of causing a person to disturb the peace or to commit offence, depends upon the status of the person, circumstances and facts of each case. It is to be seen that, whether a person standing in his position, could be provoked to disturb the peace or to commit offence.

This section requires that there should be an intentional insult. And when such insult was caused with the intention or knowledge of producing the required consequences as required by this section, it is sufficient to make him liable under section 504. The actual breaking of peace or actual commission of offence is not necessary.

Rangel (1932), Bombay – At a meeting of the shareholders of a company requisitioned by the accused, a proposal was made to explain 1, the accused from the company. The accused became angry at the proposal, and as he was leaving the room of the meeting he muttered: "You damn bloody bastards and cads", which was overheard by some of the members present.

It was held that he had committed no offence, because there is no intention to insult as the words used were not intended to be taken literally but were intended as mere abuse.

- **CASES:**

1. *Pukh Raj, (1953) Rajasthan 983.*
2. *Abraham, AIR, 1960 Kerala.*
3. *Mohammad Sabad Ali vs. Thuleswar Borah, (1954) 6 Assam.*
4. *Jogayya, (1887) 10 Madras.*
5. *Kanshi Ram vs. Fazal Mohammad (1932) 14 Lahore.*
6. *Jodh Singh vs. State of Uttar Pradesh, 1991 Cr. L.J. All.*

- **SECTIONS 499 AND 504:**

The difference between an offence under this section and defamation lies in the fact that in defamation, publication to the prosecutor alone is not sufficient, as such an imputation could not be said to harm the reputation of the person; but under this section this would complete the offence.

- **SECTION 509 – WORD GESTURE OR ACT INTENDED TO INSULT THE MODESTY OF A WOMAN:**

Whoever, intending to insult the modesty of any woman, utters any word, makes any sound or gesture, or exhibits any object, intending that such words or sound shall be heard, or that such gesture or object shall be seen by such woman, or intrudes upon the privacy of such woman, shall be punished with simple imprisonment for a term which may extend to one year, or with fine, or with both.

- **INGREDIENTS:**

This section requires:

1. Intention to insult the modesty of a woman.
2. The insult must be caused
 - (a) By uttering any word or making any sound or gesture, or exhibiting any object intending that such word or sound shall be heard or that the gesture or object shall be seen by such woman, or
 - (b) By intruding upon the privacy of such woman.

- **PRINCIPLE:**

This section enacts an offence because it causes annoyance to the woman, and it therefore finds place in this chapter which deals with the offences of "criminal intimidation, insult and annoyance."

- **COMMENT:**

This section makes intention to insult the modesty of a woman the essential ingredient of the offence.

It does not require that the woman should hear such insulting words or see the action. The intention to insult the modesty of a woman is sufficient. The word modesty does not contemplate the sexual relationship, it means indecency, which is a very wider connotation.

In *Rupan Deol Bajaj vs. Gill KPS (1996)* a topmost state police officer had allegedly slapped a senior lady officer on her posterior in presence of an elite gathering. It was held that the act would amount to outraging the modesty of the lady officer.

If a man intending to outrage the modesty of a woman exposes his person indecently to her or uses obscene words intending that she should hear them or exhibits to her obscene drawing, he commits this offence.

It also includes a case where a person intrudes upon the privacy of such woman, coupled with the intention to insult her modesty. In *Premanundo Shaho vs.*

Brindabun Chung, where a man entered into the house where four women stayed in the midnight. It was held that he was guilty under this section.

• **CASES:**

1. **Phiaz Mohammad**, (1903) 5, **Bombay LR 502.**
2. **Tarak Das Gupta**, (1925) 28, **Bombay LR 99.**
3. **Balmakund Ram vs. Ghansham Ram** 2 LR 22 **Calcutta.**
4. **Bankey vs. State**, AIR 1961 All.

Ranvir's IAS

ATTEMPT UNDER SECTION 511 AND ATTEMPT TO MURDER

Section 511

"Whoever attempts to cause an offence punishable by this code with imprisonment for life or imprisonment, or to cause such an offence to be committed, and in such attempt does any act towards the commission of the offence, shall where no express provision is made by this code, for the punishment of such attempt, be punished with imprisonment of any description provided for the offence, for a term which may extend to one-half of the imprisonment for life or, as the case may be, one-half of the longest term of imprisonment provided for that offence, or with such fine as is provided for the offence, or with both."

"Whoever attempts to commit an offence": The expression "whoever attempts to commit an offence" in section 511, can only mean "whoever intended to do a certain act with the intent or knowledge necessary for the commission of that offence."

"Or causes such an offence to be committed": This means a person who instigates or engages another to commit an offence. It would thus include one who attempts to abet an offence.

"Does any act towards the commission of the offence": These words are equivalent to the English phrase "does an overt act". They exclude a mere intention not followed up by an overt act; they also exclude acts not proximate and necessarily connected with the commission of the offence.

"Where no provision is made for the punishment of such attempt": In one sense these words are clear enough, but in another sense they are not. For instance, suppose A runs after B with a hatchet intending to murder B. He is rescued before A can give a stroke. Is he guilty under section 307 or under this section?

The Allahabad High Court has held that this section does not apply to attempt to commit murder which is fully and exclusively provided for by section 307. The Bombay High Court has held to the contrary.

This Section is in terms wider than section 307. Under section 307 the act must be done capable of causing death, and it must also be the last proximate act necessary to constitute the completed offence (as believed earlier). Under Section 511 the act may be any act in the course of the attempt towards commission of the offence.

However, this proposition that under section 307 the act must be the last proximate act is no longer correct and the position under either section is the same.

In *Om Prakash's Case*, the Supreme Court has clearly held that like Section 511 IPC, in section 307 IPC too the act need not be the penultimate act. In the instant case, the accused denied food to his wife for several days by keeping her confined in a room with a view to accelerate her death though she ultimately managed to escape. It was held that the act of the accused came within the mischief of section 307, IPC though the act was not the last proximate act which would have caused death. Act does not mean only any particular, specific, instantaneous act of a person but denotes according to Section 33 of the code, as well, a series of acts.

Essentials

In every crime there is first intention to commit it; secondly preparation to commit it; thirdly, attempt to commit it. If the third stage, that is, attempt is successful then the crime is complete. If the attempt fails, the crime is not complete but the law punishes the person attempting the act.

An attempt to commit a crime must be distinguished from an intention to commit it, and from preparation made for its commission.

A culprit first intends to commit the offence, then makes preparation for committing it and thereafter attempts to commit the offence. If the attempt succeeds he has committed the offence, if it fails due to reasons beyond his control he is said to have attempted to commit the offence. Attempt to commit an offence can be said to begin when the preparations are

complete and the culprit commences to do something with the intention to committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence – the act need not be the penultimate act towards the commission of the offence but it must be an act during the course of committing that offence.

(For the various theories on 'criminal attempt', see the notes on "Fundamental elements of Crime".)

Intention

Intention is direction of conduct towards the object chosen upon considering the motives which suggest the choice. But law does not take notice of an intention without an act. Mere intention to commit an offence, not followed by any act, cannot constitute an offence.

Preparation

Preparation consists in devising or arranging the means or measures necessary for the commission of an offence. The provisions of the section do not extend to make punishable as attempts acts done in the mere stage of preparation.

The law allows a *locus poenitentiae* and will not hold that a person has attempted a crime until he has passed beyond the stage of preparation. Mere intention not followed by any act does not constitute an offence, and indirect preparation, which does not amount to an act which amounts to a commencement of the offence, does not constitute either a principal offence or an attempt or abetment of the same.

Mere preparation to commit an offence is punishable only when the preparation is to commit offences under section 122 (waging war against the Government of India), section 126 (preparation to commit depredation on the territories of any power at peace with the Government of India) and section 399 (preparation to commit dacoity).

Attempt

Attempt is the direct movement towards the commission after the preparations is made.

An 'attempt' is an intentional preparatory action which fails in object, which so fails through circumstances independent of the person who seeks its accomplishment when a man does an intentional act with a view to attain a certain end and fails in his object through some circumstances independent of his own will, then that man has attempted to effect the object at which he aimed.

The test for determining whether the acts constitute attempt or preparation is whether the overt acts already done are such that if the offender changes his mind and does not proceed further in its progress, the acts already done would be completely harmless. But where the thing done is such as, if not prevented by any extraneous cause, would fructify into commission of an offence; it would amount to an attempt to commit that offence.

An attempt to commit an offence does not cease to be an attempt merely because after the attempt is made and before the actual completion of the offence, the offender may be able to prevent its completion by doing some other act in pursuance of a changed intention.

Intention followed by preparation followed by any "act done towards the commission of the offence" is the vital words in this connection.

In **Ram Sarun's Case**, **Turner J.** said, "To constitute, the offence of criminal attempt under this section, there must be an act done with the intention of committing an offence, and for the purpose of committing that offence, and it must be done in attempting the commission of the offence".

An accused is liable for attempt where his failure to commit an offence is not due to any act or omission of his own, but to the intervention of some factor independent of his own volition.

Distinction between preparation and attempt

There is a thin line between the preparation for and an attempt to commit an offence. Undoubtedly a culprit first intends to commit the offence, and then makes preparation for committing it and thereafter attempt to commit the offence. If the attempt succeeds, he has committed the offence; if it fails due to reasons beyond his control, he is said to have attempted to commit the offence. Attempt to commit an offence, therefore, can be said to begin when the preparations are complete and the culprit commences to do something with the necessary intention of committing the offence and which is a step towards the commission of the offence. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. This is clear from the general expression "attempt to commit the offence" and is exactly what the provisions of Section 511, IPC requires. Preparation consists in devising or arranging the means or measures necessary for the commission of the offence. It differs widely from attempt which is the direct movement towards the commission of the offence after preparation has been made. The question whether a certain act is merely one of preparation or one committed in the course of an attempt is a question of fact. An attempt is a direct movement towards the commission after the preparation has been made. There is a greater degree of determination in "attempt" as compared with "preparation". Acts remotely leading to the commission of an offence are not to be considered as attempt to commit it but acts which are immediately connected with it are attempt. The difference between mere preparation and actual attempt to commit an offence consists in the greater degree of determination in attempt as compared with preparation. An attempt to commit an offence is an act, or series of acts, which leads inevitably to the commission of the offence unless something, which the doer of the act or acts neither foresaw nor intended, happens to prevent it. An act done towards the commission of an offence, which does not lead inevitably to the commission of the offence unless it is followed or, perhaps, preceded by other acts, is merely an act of preparation. An attempt is an act of such a nature that it is itself evidence of the criminal intent with which it done. A criminal attempt bears the criminal intent upon its face. The thing speaks for itself. In order to constitute an attempt to commit an offence, there must be an intention to commit the crime, a commencement of the commission, and an act done towards the commission. Neither the mere forming of the intention to commit the crime nor the mere preparation for an offence is punishable. The dividing line between a mere preparation and an attempt to commit a crime may be rather thin in some cases and the question whether there has been an attempt or only a preparation to commit it is to be decided on the facts of each particular case. One important consideration in such cases is whether there was *locus poenitentiae*.

The test for determining whether the act of an accused constitute an attempt or preparation is whether the overt acts already done are such that if the offender changes his mind does not proceed further in its progress the acts already done would be completely harmless.

Kennedy in his **Outlines of Criminal Law** defined "attempt" to commit a crime as the last proximate act which a person does towards the commission of an offence, the consummation of the offence being hindered by circumstances beyond his control. This definition is too narrow. What constitutes an attempt is a mixed question of law and fact depending largely on the circumstances of the particular case. "Attempt" defines a precise and exact definition. Broadly speaking, all crimes which consist of the commission of affirmative acts are preceded by some covert or overt conduct which may be divided into three stages. The first stage exists when the culprit first entertains the idea of intention to commit an offence. In the second stage he makes preparation to commit. The third stage is reached when the culprit takes deliberate overt steps to commit the offence. Such overt act or step in order to be criminal need not be the penultimate act towards the commission of the offence". It is sufficient if such act or acts were deliberately done, and manifest a clear

intention to commit the offence aimed, being reasonably proximate to the consummation of the offence.

As pointed out in **Abhayanand Mishra vs. State of Bihar (1962) 2 S.C.R. 241**, there is a distinction between "preparation" and "attempt". Attempt begins where preparation ends. In sum, a person commits the offence of "attempt to commit a particular offence" when (i) he intends to commit that particular offence and (ii) he, having made preparations and with the intention to commit the offence, does an act towards its commission; such an act need not be the penultimate act towards the commission of that offence but must be an act during the course of committing that offence.

In order to constitute "an attempt" first, there must be an intention to commit a particular offence, second, some act must have been done which would necessarily have to be done towards the commission of the offence and third, such act must be proximate, to the intended result. The measure of proximity is not in relation to time and action but in relation to intention. In other words the act must reveal, with reasonably certainty, in conjunction with other facts and circumstances and not necessarily in isolation an intention, as distinguished from a mere desire or object to commit the particular offence, though the act by itself may be merely suggestive or indicative of such intention, but that it must be that is, it must be indicative or suggestive of the intention.

But between preparation and an attempt there is only a difference of degree. For instance, where a married woman entered the shop the accused with a view to have sexual intercourse, and the shop was immediately afterwards besieged, it was held that the act done amounted only to preparation or providing an opportunity, being a stage of the proceeding short of attempt which is not punishable by law. This case followed an earlier precedent in which the accused, who was a member of the Municipal Committee of a town, had a woman brought into the committee room for cohabitation, with whom he intended to pass the night, but before he had sexual intercourse with her, her husband surprised them whereupon the Court held that the accused had not proceeded beyond the stage of preparation. The accused, who was the milk contractor to the regimental hospital of Ferozepur, was detected in the hospital compound with about three gallons of stale milk in the possession going in the direction of the place where the cows were about to be milked, the milk being in a can similar to those in which the cows were milked. His intention was clearly to adulterate the old milk with the new, for which he was convicted, but the Court held the act to amount only to preparation.

The accused asked a doctor for medicine to poison her son-in-law. It was held that the act was not an attempt to murder but merely a preparation, though it might be viewed an instigation of the doctor to abet her in the commission of murder, and as such it would be an offence punishable under sections 302/116 of the Code. The accused had a quarrel with the complainant who was his brother in the course of which he ran off and fetched a sword, when he was disarmed by by-standers. It was held that the mere act of bring a sword was not an act of such an approximate nature as would amount to an attempt to commit murder or grievous hurt, though there was a preparation towards the commission of some such offence a mere preparation was not sufficient to constitute an attempt though his menacing attitude while armed was sufficient to constitute criminal assault for which he was convicted under Section 352. Where the accused raised his knife in a threatening manner manifesting an intention to stab the complainant, but did not actually try to stab him, the act was held to fall short of an attempt to stab.

A young Brahmin widow was confined of a child. The police made a raid on her house and found lying on the first floor, while her new born child was found on the second floor wrapped up in a cloth with cooking pot turned over it. She was prosecuted under section 307, but **West J.**, held the evidence insufficient to sustain the conviction. But he did not go into the question whether the act if proved would have sufficed to sustain the conviction, though this may be presumed.

Where the accused, who was employed to weigh the sugarcane carts purchased by his employer, entered a larger weight in the register but was promptly detected before he could fill up the other connected columns completing the transaction, his act was held to have proceeded no further than the stage of a mere preparation. Such was held to be the case of the accused who was detected on the roof of a bazaar with an open clasp knife in his hands and two gunny bags. He had come to steal but was surprised before he had proceeded beyond the stage of the preparation. Such was held to be the case of the accused who had entered the complainant's house with intent to commit adultery with his wife. He was held to be guilty of house-trespass but not of an attempt to commit adultery.

Preparation; Attempt

The case where the accused purchases a stamp paper in the name of a person, in whose name it was intended to forge a bond, is not unlike another in which the accused purchased poison to commit murder, or in which the accused printed the receipt forms with intent to forge the receipts of a company. In these cases, the accused takes merely preparatory steps towards the commission of the offence which fall short of an attempt punishable under this section. And even if, after the purchase of such a stamp paper, the accused prepared a draft to be copied thereon, it would not be an attempt, but it would still be a preparation, since he had done no overt act towards the commission of the offence which could be dealt with under this section, though in such case, the Madras High Court would treat the as amounting to the abetment of forgery under section 116 of the Code. But if in such a case a portion of the draft had been copied on the stamp paper it would then clearly be a case of attempt under this section.

For instance, take the following case: The accused was the station-master of a wayside station, where a guard of a goods train when just about to start was persuaded by him to initial in pencil the Station Receipt Book against the word "one only". The description column of the book was then blank. He filled this later on by adding "Four bales silk" and altered "one only" into "four only". The additions and alterations were made to convert the entry to mean that the accused had entrusted to the guard four bales of silk for conveyance for which he was responsible. His intention was proved to be to defraud the railway company, but the Court held that the forwarding by the accused of the fictitious consignment notes could only be regarded as preparatory to the offences of cheating. But the Court held that the act was nevertheless sufficient to uphold the accused's conviction for abetment of cheating.

The same principle may be illustrated by another case with widely different facts. The accused, Baku, was prosecuted at Sholapur for having taken a girl under sixteen years of age from that place to Tuljapur in the Nizam's territory and there dedicated her to a goddess with the intent, or knowing it likely, that the minor would be employed or used for purpose of prostitution. She was charged under section 372 but the Court acquitted her, holding that the removal of the minor from Sholapur to Tuljapur was at the most a preparation for the commission of the offence, and as such did not constitute either the principal offence or the abetment thereof. As compared to the cases, there is no difficulty in holding that a person who was intent upon contracting a bigamous marriage cannot be convicted of an attempt if he had done nothing more than caused the publication of means of the contemplated bigamous marriage. So, a person could not be convicted of an attempt to cheat on the mere fact found against him that he had fraudulently induced the octroi office to grant him a certificate entitling him to obtain a refund of octroi duty, or that he had despatched an insured parcel to the complainant purporting to enclose currency note in payment of his debt, whereas it contained in fact only waste paper, much less where the accused had taken the thumb impression of the complainant on a blank piece of paper upon which he feared a receipt might be written up. The intent to pass prosecuted for conveying a police jacket under his arm with intent to pass himself off as a policeman. It was held that the

accused could not be convicted under section 171 as his act amounted to no more than a preparation to commit that offence.

Similarly in an attempt to commit theft, the question depends upon the proximity between the act done and the act which constitute the offence. For instance, if A wishes to pick B's pockets the facts that he was seen shadowing him is too remote, and so is the fact that he lifted the tail of B's coat to ascertain if there was anything in the pocket but if the same object A put his hand into B's pocket, then it is clearly an attempt, even though the pocket be empty. So it was clearly an attempted house-breaking where the accused was making a hole in the wall with a view to obtain an entry in the house, but before the hole could be completed he had to run away leaving it unfinished, on being surprised. Such was the case of the accused who had offered to sell to the complainant a bagful of coins which were found to be counterfeit. He was arrested before their delivery.

An accused is liable for attempt to commit an offence when his failure to commit it is not due to any act or omission of his own, but to the intervention of some factor independent of his own volition. In illustration (a) to the section, A is guilty of an attempt to commit theft, because the theft would have been committed but for the circumstances that a factor independent of his own volition intervened to inhibit it. The same applies to illustration (b). Similarly, as **Blackburn and Mellor JJ.**, decided in **Raghu vs. Hensler (1870) 11 Cox. C.C. 570**, an accused may be convicted of an attempt to steal watch although he is frustrated by the fact that the watch was securely fastened by a guard. But where a person intending to administer poison to another prepares and administers some innocuous substances believing it to be poison, he cannot be convicted of attempted poisoning.

Impossible offence

The offence of criminal attempt is possible, even when the offence attempted cannot be committed, as when a person, intending to pick another person's pocket thrusts his hand into the pocket, but finds it empty. It is possible to attempt to commit an impossible theft and so offence against the code because theft is itself an offence against the code and may, therefore, be attempted within the meaning of the code.

At the same time, it is necessary to show that the means adopted are sufficient. Thus, where a man threatens the life of another with a child's popgun using a cork as a projectile, or tries to pick the pocket of a man who is well beyond the reach of his hand, no attempt either to commit murder or to steal can be said to have been committed as the means adopted are impossible of achieving the designed purpose.

Thus where the act is such that it is incapable of commission e.g. trying to steal from an empty room or an empty pocket or trying to kill a person by shooting at a bulge in a bed thinking it to be the enemy, no attempt can be said to have been committed.

In IPC however, trying to steal from an empty pocket would still constitute an attempt as illustration (b) to section 511 says so.

In England, the position has materially changed in the **Haughton's Case** by House of Lords.

It is felt that the law in India should be changed on this score atleast to bring about uniformity of approach to this question of attempt so far as sections 307 and 511 IPC are concerned.

At present under section 307 an absolutely impossible act, e.g. trying to kill a person by shooting at a bulge in a bed thinking it to be the enemy, would not constitute an attempt to murder and yet putting one's hand in a totally empty pocket would constitute an attempt under Section 511, IPC, even though it is equally an act which is impossible of commission.

In **R v. Shivpuri**, the appellant was arrested by customs officers while in possession of a suit case which he believed to contain prohibited drugs. On analysis the substance was found to be harmless vegetable matter. It was held that on the true construction of Section 1 (1) of the Criminal Attempts Act 1981, a person is guilty of an attempt merely if he does an act which is more than merely preparatory to the commission of the offence which he

intended to commit, even if the facts are such that the actual offence is impossible and since the appellant had done acts which were more than preparatory, he was rightly convicted.

Impossibility of performance, for making a person liable for attempt to commit offence can be seen in two aspects:-

- (1) With respect to the subject matter and
- (2) With respect to the insufficiency of means.

Subject matter

Again, here we have to observe the situations regarding the presence of subject matter and absence of subject matter.

Subject matter present

One situation is that where the subject matter is present and the person committing the act is a person incapable of doing the offence in which case mens rea is taken to be absent and even in cases where the person is given exemptions supposing him to be not having the required mens rea for the required offence.

Illustrations

1. Where X is a lunatic and kills Y, he is not liable for his act of causing death. Because, even though it is the actus, is not forbidden by law if the law also does not attribute mens rea.
2. If X in private/self-defence causes death, he will not be liable under Section 302.

One more point is that, for an act to be criminal attempt, the mens rea should be same and to the same extent as that required for the prime offence. So, in both the examples earlier stated, the mens rea for the prime offence as is absent, they cannot be held liable for the attempt of such offences (in these cases for the acts done).

In case of the offences incapable of commission by the incapable persons, where the prime offence is itself not attributable, the attempt for that offence is also not attributable.

The other situation, where the subject matter is present but the person is not liable for criminal attempt is that where the insufficient means used is within the control of the accused or doer, which is to be dealt with in detail later in this part.

Subject matter absent

This aspect may be analysed in light of two sections:-

- (1) Situations falling under section 307.
- (2) Situations falling under section 511.

It has been a settled law that where the law or I. P. C. has provided for the punishment of attempts of the offences specifically and manifesting by express provisions, section 511 will not apply.

It was finally settled in Vasudeo Balwant Gogte (1932) case that section 511 and section 307 are exclusively distinct and cannot control one another.

Section 307

Section 307 requires that to constitute the offences of attempt to murder, the act must be the last possible act which must be capable of causing death, which would have amounted to murder, if not prevented by extraneous matters, the situation must be so founded that in all possibility it would have caused death.

But, each case has to be examined 'under the circumstances' of the case, which is also provided by section 307. We may analyse it by examples:

- (1) Where X shoots at a tree thinking that it is Y – In this case, the first thing is it is mistake of fact.

Secondly, here, the person has shot tree, with the intention of causing death of Y. The intention is crystal clear. But, the object of intention is absent, i.e. subject matter (X). Even if he was aimed at the tree and shot at tree, it is not the act which would have caused the death of Y. Because, when Y is not at all there, there is undoubtedly no possibility of committing any act forbidden by law. If, in the same case, Y would be present and if X aiming at Y, truly shoots at tree, which has failed due to the bending of Y, then it would have clearly amounted to attempt to murder. Because, if that failure has not caused, he would have completed the intended offence.

- (2) If X goes with an intention to kill Y to the house of Y and Y has went to some other city or to neighbours' house.

In this case, X even with a high degree of intention goes to Y's house, and enters his house with a capped gun; he will not be said to attempting to murder. Because, he is said to be not on the job. Even if he tries his best luck, he cannot cause the death of Y which would amount to murder. Because, as the subject matter of the offence i.e. Y is absent and if X wants to kill it has to search and then aim at him, which requires a series of acts to constitute the process of attempts. The reaching and entering into house of Y is not the last proximate act or the act having capable of causing death. So, it is not attempt.

- (3) X sees Y on the bed and when he shot at the bed, he was just went to toilet or neighbours' house etc.

In this case, the act of X is sufficient and it was the last proximate act which would have caused death if X was there. It is just a matter of few second/minutes that the extraneous/supervening matter took place. There was every possibility of causing death by his act, which would have resulted into complete offence i.e. murder.

Here, we can get clue from the illustration under Section 511. There the person has thrust his hand to the empty pocket. In the case, there was every possibility of committing the offence of theft, had the money been there. It is the last possible act which would have actually completes the offence.

Section 511

Under section 511, the act towards the commission of the offence which would have amounted to offence, if a supervening event, not happened would be an act which is termed as an attempt.

Section 511 is wider than section 307. It is not the last penultimate act. It may be an act towards the commission of the offence. It takes care of cases not covered under section 307, 308 and 309. Here, also we have to observe under the circumstances of the case. For example, in the illustrations under section 511, the person who breaks the jewel box and the person who thrusts his hand to the empty pocket are the acts which would constitute an act sufficient to complete offence. But, because of the subject matter being absent, which was independent of his volition, the offence failed in its completion. The person has sufficiently tried his best to commit theft, which was the most proximate acts towards the commission of the offence.

But, for example, if a person breaks up the door of a building/room and that room was empty, he cannot be said to attempt to commit theft. Because, the actus is to be seen with respect to the subject matter. When, there was nothing in the room, we cannot assume in air that he was attempting to commit theft of a particular thing. Here, his act of entering into room is not the final possible act from which we can undoubtedly come to the conclusion that, he had done an act which failed due to a supervening act. This act is just a part of series of acts which never ripened into the stage of attempt. But he can be held liable for breaking upon the house is criminal trespass.

In English Law, where the subject matter is absent, the person will not be liable.

Insufficiency of means

To make a person (accused) liable for criminal attempt, insufficiency of means is to be seen in two situations:-

- (1) When the insufficient means to be applied was within the volition of the accused.
- (2) When the insufficient means to cause the effect of the offence was beyond the control of the accused.

In the first case, where it was within the volition of the accused the accused will not be liable. Because, the final proximate act was not independent of his control, where we can say that the preparation stage has not yet completed. For example, if X takes up a gun which was uncapped believing that it was capped and triggers the gun aiming at Y that act is not sufficient to cause death and even it is impossible to cause death. Here, the fault was within his volition. And, any act to become an attempt must pass through the stage of preparation.

But, in a case where, the insufficient means to cause the effect was independent of his volition he will be liable because here, he has made all his preparations and has completely made up his mind to commit the offence. Here, the mens rea is completely in concurrence with the actus, which if implemented become reus, imputing criminal liability.

In the same example said earlier, if X has capped the gun and kept it beyond the reach of any other person. In such a situation if the caps were removed by some other person, this was the act independent of his volition and a supervening event. Had, this supervening event not happened; he would have succeeded in killing Z. So, this was the stage where it was short of final commission. So, he will be liable for criminal attempt.

Attempt to murder – Section 307

"Whoever does any act with such intention or knowledge, and under such circumstances that if he by that act caused death, he would be guilty of murder, shall be punished with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, and if hurt is caused to any person by such act, the offender shall be liable either to imprisonment for life, or to such punishment as is herein before mentioned."

In attempt to murder, there has been not merely a commencement of an execution of the purpose, but something little short of a complete execution, the consummation being hindered by circumstances independent of the will of the author. The act or omission, although it does not cause death is carried to such a length as, at the time of carrying it to that length, the offender considers sufficient to cause death. It is sufficient if the act was one capable of causing death and there was an intention to cause death.

The Orissa High Court has held that the causing of injuries, though with the intention of causing death but which do not result in death does not come under this section whether act committed must be capable of causing death. According to the Bombay High Court, the act committed by the accused must be an act capable, of causing death, in the natural and ordinary course of things, and if the act complained of is not of that description, the accused cannot be convicted under this section.

To support a conviction under this section the accused should have done the act with such guilty intention or knowledge and in such circumstances, that but for some intervening act the act would have amounted to murder in the normal course of events.

The Bombay High Court has held that there may be an attempt under section 307 which does not come within section 307.

The Allahabad High Court has held differing from *Reg. vs. Cassidy* that section 307 does not apply to attempts to commit murders which are fully and exclusively provided for by section 302.

The Lahore High Court, differing from Bombay High Court, had held that it is not necessary that the injury inflicted should in itself be sufficient in the ordinary course of nature to cause death, and this section will apply even if no hurt is caused. The causing of hurt is merely an aggravating circumstance.

The court observed, "All that is necessary to be established is the intention with which the act is done and if once that intention is established the nature of the act will be immaterial".

The Nagpur High Court differing from **Cassidy's Case** had held that for the purpose of this section what is material is the intention or knowledge, not the consequences of the actual act done for the purpose of carrying out the intention. An offence under this section can be committed when there is no intention proved but only knowledge that the act is so imminently dangerous that it must be likely to cause death.

The Supreme Court has held that a person commits an offence under this section when he has an intention to commit murder and in pursuance of that intention does an act towards its commission irrespective of the fact whether that act is penultimate act or not. It is not necessary that a bodily injury capable of causing death should have been inflicted. It is not a ground to let off the accused that the injury inflicted was in the nature of a simple hurt. Though the nature of injury gives a vital clue to the intention of the accused but it may also be deduced/adduced from the circumstances of the case without looking at the actual wound.

Where the accused stabbed the victim thrice with a penknife which had penetrated the plural cavity, it was held that the accused was guilty of an attempt to murder.

But where in a similar case of knife blow on the chest only a simple incised wound amounting to simple hurt was caused, it was held that the accused should be convicted under section 324 and not under section 307, IPC.

The matter has now been concluded by the Supreme Court in **State of Maharashtra vs. Balaram Bama Patil**: "To convict the accused under this section it is not necessary to show that bodily injury capable of causing death was inflicted, what the court, has to see is whether the act, irrespective of its result, was done with the intention, or knowledge and under circumstances mentioned in this section."

Repeating the same thing in **Hari Singh Case**, the Supreme Court added that, "the intention or knowledge of the accused must be such as is necessary to constitute murder, without this ingredient being established there is no offence of attempt to murder..... The intention is to be gathered from all the circumstances, and not merely from the consequences that ensue. The nature of the weapon used; the manner in which it is used, motive for the crime, severity of the blow, the part of the body where the injury is inflicted, are some of the factors that may be taken into consideration to determine the intention.

Some specific questions pertaining to the topic are as follows:

Q1. Definition of attempt/why has criminal attempt been created to be an offence?

Ans. An attempt is an intentional preparatory action which fails in object, which so fails through circumstances independent of the person who seeks its accomplishment. Attempt begins when preparation ends.

The basic purpose of criminal law is to prevent the crime and to protect the society from the effect of such crimes. Criminal attempt is just sharp of a complete offence. But, the graveness and degree of the attempting act is same even if no complete offence is committed. The society gets scared by such act. So, to avoid such effect on the society and to keep the society peacefully so that the society should not have the fear of repetition of such offence again. One more purpose is to avoid the repetition of the offence by the offender.

Q2. When does a preparation amount to an attempt?

Ans. Preparation is the stage when a person intending to commit an offence, devices or arranges the means or measures necessary to commit that offence. Attempt is a direct act towards the commission of the offence. However, there is a thin line between preparation and attempt. Attempt is a stage which consists of a greater determination. When he is at the stage of preparation, there is a chance that he may take back his mind to commit the

offence. When a stage is reached where he cannot change his mind it is the stage of attempt. Attempt is the failure in the commission of the offence due to circumstances independent of the volition of the offender. The moment he commences to do an act with the necessary intention, he commences his attempt to commit the offence. The difference between mere preparation and actual attempt to commit an offence.

Q3. The differences between sections 307, 308, 309 and 511.

Ans. All sections deal with attempt to commit an offence. In 307, 308 and 309 are specific provisions dealing with specific offences. But Section 511 is general provision. It applies to all attempts to commit an offence. The basic difference between these sections is that of degree of mens rea. Whereas 307, 308 and 309, specifically deal with the causing of death section 511, deals with all types of offences. The striking difference lies in section 309, because it is an offence where a person attempts to put an end to his own life, and if he succeeds in his attempt, it is no more an offence due to the death of person unlike other cases. The punishment also varies in these sections. Whereas 307 is considered to be a greater degree of offence, 308 is quite less, 309 is more less than that. And in Section 511 it varies according to the prime offences.

Section 307 and section 308 are worded in similar manner and are to be applied similarly.

Another important difference is that each Section is to be applied distinctly. Because, now the law is clear that section 307, 308 and 309 are separate and distinct and each of them cannot be read with section 511 which is wider compared to other.

Q4. Is Section 307 exhaustive of the attempts to murder?

Ans. Yes. Earlier there was a notion that Section 307 is not exhaustive, and it has to be read with section 511. But in **Nidha's Case (1861)**, the Allahabad High Court held that section 511 will not apply to attempt to commit murder which is fully and exclusively provided for by Section 307. Finally, it was settled in **Vasudev Baldeo Gole Case** that it is exclusive and exhaustive.

The wordings of section 307:

"Whoever does any act, with such intention or knowledge and under circumstances that, if he by that act (emphasis supplied) caused death, he would be liable for murder, shall be " clearly shows that the attempt to commit murder is defined in this section. That is to say, if a person does any act which act would have caused death if the supervening event had not happened, that act would be considered to be an attempt. This section, moreover, provides for punishment for attempt to murder. So, from there it can be said undoubtedly that section 307 is exhaustive of the attempt to murder.

Q5. Is the penultimate act essential for a criminal attempt?

Ans. The basic question in India is whether the penultimate act is a must for making a person liable for attempt. The answer to this question lies in the fact as to how to distinguish between an attempt and a preparation. To distinguish between these two, the courts have adopted several facts in point of answer.

- (1) **Proximity test** – Under this test, an act constituted an attempt of the accused has completed all or almost all important or necessary steps towards the commission of the crime but falls short of the consequences desired. It is also called as penultimate test which is to be analysed in detail in this question.
- (2) **Mens rea test** – Salmond has advocated this test. Under this test, if the act itself is a clear evidence of mens rea, it is an attempt and if the act itself is not a clear evidence of mens rea, it is preparation.
- (3) **Social alarm test** – Professor Sayre of USA has advocated this test. In **Common Wealth vs. Kennedy**, 'A' and 'B' agreed to place a bomb on the railway track. When 'A' left his home on a bicycle with a bomb in pursuance of the agreement and

immediately in front of his house he was arrested. It was held that, he was not in stage of preparation but has attempted to commit arson i.e. if the act causes social alarm, it would be regarded as an attempt howsoever remote, it may be from the completed offence.

Neither of the theories have given total and concrete distinction. However, in India, all the theories are applicable.

Let us analyse whether penultimate act is considered to be essential in India:

Preparation has been defined in Maine's Commentaries as "preparation consists in devising or arranging the means or measures necessary for the commission of the offence," whereas attempt has been defined as "the direct movement towards the commission after the preparation has been made."

In **Abhaynand Mishra v. State of Bihar (1961)**, the accused had applied to the Patna University for the permission to appear at the M. A. Exams as a private candidate. He had represented falsely that he was a graduate and also had produced some forged certificates. His misrepresentation was revealed and he was arrested.

The charge against him was of forging the certificates and also an attempt to cheat. The contentions of the accused were:

- (1) His act was a mere preparation and not an attempt.
- (2) That even if he had appeared at the exams, this would not have been a cheating as this would not have been a loss to University, and under Section 40 "loss is a must".

The Supreme Court with regard to point no. 1, enumerated four stages of commission of a crime and also mentioned that there is a very thin line between preparation and attempt. Attempt begins where preparation ends.

The requirements under Section 511 are:-

- (1) Attempt to commit an offence.
- (2) During such attempt, an act towards the commission of the offence should have been done.

The Court also held that the act which would make the accused punishable for attempt to commit an offence must be an act which by itself or in combination with other acts could lead to the commission of the offence.

In the same year i.e. in 1961, another case is **Om Prakash's Case**. The Supreme Court made this point very clear. In that case, the accused had kept his wife starving for several days by illegally omitting to give her the food. The wife somehow escaped and lodged the complaint against accused. The contention of the accused was based upon the **Francis Cassidy Case' (1861)** decision, in which it was held that the penultimate act is a must for liability for criminal attempt. The accused contention was that he had not starved his wife, the last possible act of a starvation just before death, and therefore, not liable for criminal attempt. This contention was rejected and the Supreme Court held that, the requirement of penultimate act is not always an essential test. In certain circumstances, even certain acts which lie in stages much before the penultimate act would amount to criminal attempt.

The decisions of the above cases were analysed in **State of Maharashtra vs. Mohammad Yakub (1980)**.

In this case, on prior information, the Superintendent of Central Excise, followed a jeep and a truck, on the suspicion that they were carrying goods to be smuggled. Both the vehicles were stopped near the creek and some goods were seen to be taken out from the vehicle. The presence of a small motor-boat in the sea nearby, was also noticed. At this point, the driver of the two vehicles were arrested and was also seized, some silver biscuits, some currency notes and some weapons. The contention of the accused was that it was just a stage of preparation and not a criminal attempt.

Sarkaria J. (Minority) and **Chinnappa Reddy J. (Majority)** made observations which are relevant to discuss here. The opinion of Sarkaria J. was attempt should be only the last proximate act which a person does in the commission of a crime, the consumption of the offence being hindered by the circumstances beyond his control.

However, this definition appears to be very narrow. As per Chinnappa Reddy J., the question has to be examined from a different angle. He suggested that in the cases of criminal attempt mens rea is always a must and in fact, there is no controversy as to the determination of mens rea. Controversy mainly arises vis-a-vis the determination of the actus, which is to be seen to be reus. As to the actus reus, Chinnappa Reddy J. cited some English examples.

- (a) As suggested by **Parke B.** in **R. V. Eagleton, 1854** – It is not merely intention that is criminal, but some act also is to be found. It is also not every act that is criminal, but, the act to be criminal must be immediately connected with the commission of the offence. The difficulty lies in the fact as to how to determine what is reasonably connected and what is not. Parke B. further went on to resolve his problem by suggesting that the only test possible, is the last possible act.
- (b) Professor Stephen suggests that in a series of acts the point at which the final act i.e. the offence starts cannot be defined universally, but it depends a lot upon the circumstances of the case.
- (c) Professor Turner, according to him, the act to be termed as an attempt, should be immediately and not remotely connected with the offence. Moreover, the doing of the thing i.e. that particular act cannot reasonably be regarded as having any other purpose than the commission of the specific offence. However, Professor Turner himself was not satisfied with his definition, and therefore, latter on modified and said that the act must be immediately be able to independently establish prima facie that the intention was to commit that offence.

But, at the same time, Professor Turner said that there must be other abundant evidence to establish his mens rea (such as confession is irrelevant to the question whether he has done enough to constitute the actus reus).

Hai Isham C.J. in **Haughton vs. Smith (1975)** derived three propositions from the observations made by **Parke B.** in **Eagleton Case** and **Parker C.J.** in **Davey vs. Lee Case**.

- (1) There has to be distinction between intention and attempt to commit a crime.
- (2) Mens rea should be accompanied by overt act and thus form a part of the series of acts, which would constitute the actual commission of the offence, if not interrupted.
- (3) The act must not be merely preparatory, but bear a relationship to the completion of the offence, i.e. it must be proximate and immediately connected with the commission of the offence.

Chinnappa Reddy J. also went to observe the Indian decisions. In **Abhayanand Mishra (1961)**, wherein **Raghubar Dayal** and **Subbarao Justice** had rejected the test of last proximate act and held that the essential requirement for an act to amount to a criminal attempt are:-

- (1) Presence of the mens rea, and
- (2) The preparation must have been completed and after that an act towards the commission of the offence, should have been done. This act, need not be the penultimate act, but must be an act during the course of the commission of that offence.

Preparation/Attempt/Result

Drawing clue from the above precedents, Chinnappa Reddy J. gave his own formulations.

- (1) Intention is a must.
- (2) Some act towards the commission should have been done.
- (3) Act must be proximate to the intended result. (Notably, not last proximate)

He went on to give the definition of proximity as:

"The measure of proximity is not in relation to time and action, rather it is in relation to the intention i.e. the act must reveal with reasonable certainty in conjunction with other facts and circumstances and not necessarily in isolation, an intention, and not a mere desire or

object to commit the particular offence, though the act by itself, may be merely suggestive or indicative of such intention, but that it must be i.e. it must be indicative or suggestive of the intention."

Very notably, all these cases have not totally discarded the last proximate act or penultimate act test. Rather, they have just liberalized this test.

The entire situation can now be summarized as follows:

The various steps to determine whether an act is an attempt or not are as follows:

- (1) The establishment of mens rea.
- (2) The establishment of actus reus:
 - (a) Was the concerned act a part of the series of acts towards the commission of the offence.
 - (b) Is the act concerned suggestive or indicative unequivocally of the intention to commit that offence.
 - (c) In certain cases, particularly, the cases of attempt to murder specifically through the use of weapons, it can also be examined whether the concerned act if left alone, would have resulted into the intended offence – but not always true.

Q6. Liability for an attempt to commit an impossible act.

Ans. This question is to be analysed in two aspects: (1) Remote case, and (2) Proximate case.

- (1) **Remote** – Where a person tries to commit an offence which offence is impossible to commit. For example, if 'X' takes a gun and shoots at a thinking that it is 'Y' then this act is impossible so as to cause death of 'Y'. So, he will not be liable. Here, the object of his intention is not at all present and is a remote kind of circumstances.
- (2) **Proximate** – Where the person does all possible act necessary for the commission of the act and attempts to commit the offence, he fails due to the impossibility of committing that offence due to non-existence of the subject matter. For example, in the illustration under Section 511, the person thrusts his hand to steal money but he failed due to the pocket being empty. Here, though the commission of theft is impossible, his failure was due to non-existence of the money and not by his own act. So, he will be liable in such cases.

Q7. Liability for an attempt to commit a criminal act by insufficient means.

Ans. This question has also to be analysed in two aspects: (1) Dependent on the volition of the accused, and (2) Independent of the volition of the accused.

- (1) **Dependent** – Where the insufficient means used was based on the volition of the accused, he will not be liable. For example, if 'X' shoots at 'Y' with a toy gun, the commission of the offence is not possible. So, 'X' will not be liable.
- (2) **Independent** – Where the accused has done all his efforts sufficient for the commission of the offence and the means used was independent of his volition, he is liable for the attempt. For example, if 'X' secures poison to kill 'Y' and kept it on the table. Some third person say 'P' knowing replaces that bottle with a honey bottle and then 'X' mixes that in the food and offers to 'Y'. Here, 'X' will be liable because if the intervening event would not have happened, he would have succeeded in his attempt.

Q8. Liability for an attempt to abet an offence.

Ans. The liability for an attempt arises in cases where the accused has failed in committing the prime offence. As section 107, specifically provides for the prime offence of abetment, the attempt to abet must be an offence. Here, the person is liable as if he has attempted some other offence. For example, if 'X' writes a letter to 'Y', abetting him to commit an offence. But, the letter did not reach 'Y' because he has shifted to some other place. If 'X'

was caught at this stage, he would be liable for attempt to abet. Because, if the letter had reached the person addressed, he would have completed the offence of abetment. As it was short of completion, he would be liable for attempt to abet an offence.

Q.9 Can there be an attempt by omission?

Ans. Yes. Sections 307, 308, 309 and section 511, use the word "act" referring to the act which would amount to attempt. So, act includes omission or illegal omission as per Section 33 and 32, respectively. So, an attempt can be committed by omission specifically illegal omission. The leading case on this point is that of Om Prakash (1961), where the person attempted to kill his wife of illegally omitting to give her food, he was held liable for attempting to murder by starvation by illegally omission. So, there can be an attempt by omission/illegal omission.

Q.10 What is the actus reus and mens rea in criminal attempt?

Ans. The actus reus of the offence of criminal attempt lies in the very act which can be defined to be an attempt or the act which was an intentional preparatory action which failed in its accomplishment due to the circumstances outside the volition of the accused, and the I. P. C. specifically forbidding such an act of attempt under sections 511, 307, 308 and 309. It can be noted that this reus element of the actus of a criminal attempt is to be seen with respect to the presence or absence of the mens rea requisite to the intended offence.

DEFAMATION

Everyone in the country is having a fundamental right to freedom of speech and expression. But, this right is not absolute. The constitution of India provides certain reasonable restrictions on such a right. One of such restrictions is defamation. Even though it is true that one is having right to speak as he wishes, to publish what he wants. But, this right does not cause harm to others. So, the civil law provides for a claim for damages for such a defamation. But, money alone will not fulfill the purpose. Because, such acts need not to be curbed. So, there must be a fear of being punished so that such an act should not be committed by the people. This is the most important aspect of penal law. That is to say, if there is a deterrent and preventive element behind providing such a law, in order to maintain the harmony in the society.

Section 499: Defamation

"Whoever, by words either spoken or intended to be read, or by signs or by visible representations, makes or publishes any imputation concerning any person intending to harm or knowing or having reason to believe that such imputation will harm, the reputation of such person, is said, except in the cases hereinafter excepted, to defame that person.

Explanation 1 – It may amount to defamation to impute anything to a deceased person, if the imputation would harm the reputation of that person if living, and is intended to be hurtful to the feelings of his family or other near relatives.

Explanation 2 – It may amount to defamation to make an imputation concerning a company or an association or collection of persons as such.

Explanation 3 – An imputation in the form of an alternative or expressed ironically, may amount to defamation.

Explanation 4 – No imputation is said to harm a person's reputation, unless that imputation directly or indirectly, in the estimation of others; lowers the moral or intellectual character of that person, or lowers the character of that person in respect of his caste or of his calling, or lowers the credit of that person, or causes it to be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

Illustrations

1. A says "Z is an honest man; he never stole B's watch" intending to cause it to be believed that Z did steal B's watch. This is defamation, unless it falls within one of the exceptions.
2. A draws a picture of Z running away B's watch intending it to be believed that Z stole B's watch. This is defamation, unless it falls within one of the exceptions.

First exception - Imputation of truth which public good required to be made or published

It is not defamation to impute anything which is true concerning any person, if it be for the public good that the imputation should be made or published. Whether or not it is for the public good is a question of fact.

Second exception - Public conduct of public servants:

It is not defamation to express in good faith any opinion whatever respecting the conduct of a public servant in the discharge of his public functions, or respecting his character, so far as his character appears in that conduct and no further.

Third exception - Conduct of any person touching any public question:

It is not defamation to express in good faith any opinion whatever respecting the conduct of any person touching any public question, and respecting his character, so far as his character appears in that conduct, and no further.

Illustration

It is not defamation on A to express in good faith any opinion whatever respecting Z's conduct in petitioning Government on a public question, in signing a requisition for a meeting on a public question, in presiding or attending at such meeting, in forming or joining any society which invites the public support, in voting or canvassing for a particular candidate for any situation in the efficient discharge of the duties of which the public is interested.

Fourth exception - Publication of reports of proceedings of courts:

It is not defamation to publish a substantially true report of the proceedings of a Court of Justice, or of the result of any proceedings.

Explanation - A justice of the peace or other officer holding an enquiry in open court preliminary to a trial in a Court of Justice, is a Court within the meaning of the above section.

Fifth exception - Merits of case decided in court or conduct of witnesses and others concerned:

It is not defamation to express in good faith any opinion whatever respecting the merits of any case, civil or criminal, which has been decided by a Court of Justice, or respecting the conduct of any person as a party, witness or agent, in any such case, or respecting the character of such person, as far as his character appears in that conduct, and no further.

Illustrations

- a) A says - "I think Z's evidence on that trial is so contradictory that he must be stupid or dishonest". A is within this exception if he says this in good faith, in as much as the opinion which he expresses respects Z's character as it appears in Z's conduct as a witness, and no further.
- b) But if A says - "I do not believe that what Z asserted at that trial because I know him to be a man without veracity". A is not within this exception, in as much as opinion which he expresses of Z's character is an opinion not founded on Z's conduct as a witness.

Sixth exception - Merits of public performance:

It is not defamation to express in good faith any opinion respecting the merits of any performance which its author has submitted to the judgment of the public, or respecting the character of the author so far as his character appears in such performance, and no further.

Explanation - A performance may be submitted to the judgment of the public expressly or by acts on the parts of the author which imply such submission to the judgment of the public.

Illustration

1. A person who publishes a book, submits that book, submits that book to the judgment of the public.
2. A says of a book published by Z - "Z's book is foolish; Z must be a weak man, Z's book is indecent; Z must be a man of impure mind." A is within the exception, if he says this in good faith in as much as the opinion which he expresses of Z respect Z's character only so far as it appears in Z's book, and no further.
3. But if A says - "I am not surprised that Z's book is foolish and indecent for he is a weak man and a libertine." A is not within this exception, in as much as the opinion which he expresses of Z's character is an opinion not founded on Z's book.

Seventh exception - Censure passed in good faith by person having lawful authority over another:

It is not defamation in a person having over another any authority, either conferred by law or arising out of a lawful contract made with that other, to pass on good faith any censure on the conduct of that other in matter to which such lawful authority relates.

Illustration

A judge censuring in good faith the conduct of a witness, or of an officer of the court; a head of a department censuring on good faith those who are under his orders, a parent censuring in good faith, a child in the presence of other children; a school-master, whose authority is derived from a parent, censuring in good faith a pupil in the presence of other pupils; a master censuring a servant in good faith for remissness in service; a banker censuring in good faith the cashier of his bank for the conduct of such cashier as such cashier are within this exception.

Eighth exception - Accusation preferred in good faith to authorised person:

It is not defamation to prefer in good faith an accusation against any person to any of those who have lawful authority over that person with respect to the subject-matter of accusation.

Illustration

If A in good faith accuses Z before a Magistrate; if A in good faith complains of the conduct of Z, a servant, to Z's master; if A in good faith complains of the conduct of Z, a child, to Z's father – A is within this exception.

Ninth exception - Imputation made in good faith by person for protection of his or other's interests:

It is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it or of any other person, or for the public good.

Illustration

A, a shopkeeper, says to B, who manages his business – "Sell nothing to Z unless he pays you ready money, for I have no opinion of his honesty." A is within the exception, if he has made this imputation on Z in good faith, for the protection of his own interests.

Tenth exception - Caution intended for good faith of person to whom conveyed or for public good:

It is not defamation to convey a caution in good faith, to one person against another, provided that such caution be intended for the good of the person to whom it is conveyed, or of some person in whom that person is interested, or for the public good.

Ingredients:

1. Making or publishing any imputation about any person.
2. Such imputation must have been made –
 - (a) By words, either spoken or intended to be read, or
 - (b) By signs, or
 - (c) By visible representation.
3. With the intention of harming, or with the knowledge of having reason to believe that it will harm the reputation of the person concerning whom it is made.
- 4.

1. Making or publishing imputation about a person

So, the first ingredient of Section 499, is that there must an imputation made about a person or a publication of such imputation concerning a person. Making of imputation may involve, any composition, dictation, writing, or any way of libel. When one person tells another and that other writes, then both will be said to be making an imputation.

'Published' means making known about the imputation, to some other person other than the person who makes it. A maker cannot publish to himself. That is to say, there should be communication of that statement. For example, if a person writes a letter to the person, whom he knew that he can not read, by writing some imputation against him, and if that person came to know by giving that letter to read to another, then the person writing such letter should be liable for defamation. Because, when he wrote that letter, he should reasonably expect that that may be read by another, when the addressee refers so.

In **Sundaram S. K. (2001)**, a telegraphic communication despatched to the Chief Justice of India containing threats with command hurled at the Chief Justice to step down forthwith from the constitutional office, describing him as an offender having committed offences of cheating and falsification of records and criminal breach of trust. This was held to be amounting to publication, as the message is open to be read by all those who are engaged in the process of transmission unlike a letter handwritten by the sender and enveloped in a sealed cover to be opened only by the sender for reading.

It will not be publication if the letter is sent by a registered post with acknowledgement due.

Communication between husband and wife:

In England, the husband and wife are treated be to single person, as such their communication will not be treated as publication. But, in India, husband and wife are treated separately. They are not treated as one. So, the communication between a husband and wife may be called before the court.

In **Vergheese M. C. vs. Ponnann T. J. (1970)**, where the husband wrote a letter to the wife, imputing defamatory statement against her father, it was held that, that amounted to publication and, the husband was liable for defamation.

Publication in newspapers:

Newspaper is supposed to be read by a large number of people, and it has great power to influence of the minds of the people who read it. So, the publisher should take care while publishing. The publisher is liable for defamation, if any defamatory statement is published, whether he knows the contents of the paper or statement or not.

But, in **Jawahar Lal Dhara vs. Hanohar Rao Ganpatrao Kaprikar (1998)**, where there was a publication disclosing the actual, accurate and the report of proceedings of Legislative Assembly, mentioning the name of the complainant as one of the persons involved and likely to be suspended in a case of misappropriation of governments, it was held that, it does not amount to publication of defamatory statement. Because it was published for the public good and not intending to harm the reputation of the Minister.

"**Imputation**" means an accusation, or something more than an expression of a suspicion. But, if there is a suspicion, that must be reasonable. The words containing imputation must be regarding a particular person, or person, who can be identified. The imputation can be direct or indirect.

2. Imputation may be by words spoken or intended to be read

In England, spoken words are not considered to be defamation. But in India, both spoken and written statements are considered as defamatory. In fact, spoken words are considered more serious because of their tendency to provoke the person whom they are intended to defame, and also tendency to reflect more on one who reads.

The words involving imputation are in writing, the writer must intend that, that statement is to be read by the persons, and in order to harm the reputation of the person, on whom such imputation is made.

3. Imputation by signs or visible representations

This is considered by English law as a serious offence. The signs or visible representations have same effect as written words. Visible representations appeal much to the reader. Signs or visible representations may be, statue, a caricature, an effigy, chalk marks on a wall, signs or pictures.

4. Imputation intending to harm, or with knowledge or having reason to believe that such imputation will harm the reputation of the person:

It is clear from the words that the section uses intention or knowledge or reason to believe. So, if any one of them is proved, it is said, that he was intending to defame the person. It is not necessary that there should be direct or indirect defamation of the person. It is sufficient if any imputation is made or published. But, if the case falls within any one of the exceptions, then he will not be liable. An imputation against another person, although made in the absence of actual ill-will, is not on that ground to be accepted as being made bonafide. Conscious violation of law to another's prejudice is sufficient, though there may be no malice in fact.

The intended harm must be directed towards the reputation, i.e. character, tame in order to tower him in the eyes of others or in the estimation of others.

Explanation 1 - Imputation against a dead person:

This explanation states that the imputation made on the dead person constitutes defamation. This should indicate that, if the person is alive it would amount to harm on his reputation. And such imputation must be made with an intention to cause hurt to the feelings of the members of his family or his near relatives. So, it follows that, such members can institute a prosecution on such a person making or published imputation. But, they cannot bring a suit for damages.

Explanation 2 - Imputation against combination of persons:

This explanation says that, an imputation made on a company or association or collection of persons may amount to defamation. The words "collection of person" is very wide to include all such persons who form a class or society or a group. So, a club, a religious society, a firm, even the college as such comes under this connotation.

In *Wahid Ullah (1935)*, there was a defamatory article in the paper, that the girls of college were habitually guilty of the misbehaviour, that was explained in the article. It was held that that included each and every girl and everyone has to suffer, and so. It was a defamation and the writer was held liable.

Explanation 3 - Ironical expression:

Ironical means telling one thing to mean the opposite of it. So, whenever any person makes ironical expressions, which are defamatory, then, means, if other things satisfied, it is considered to be defamation.

Explanation 4:

This explanation, says that, to constitute an imputation, the reputation may be harmed in the following ways by directly or indirectly, in the estimation of other –

- a) Lowers the moral or intellectual character of that person, or
- b) Lowers the character of that person in respect of his caste or of his calling, or
- c) Lowers the credit of that person, or

- d) Causes it be believed that the body of that person is in a loathsome state, or in a state generally considered as disgraceful.

Directly or indirectly means whether by express words or that by any communication, by reading which any person will think that it is indicating misconduct or bad conduct etc. The words used in this explanation are very wide and it can include anything which tends to lower the reputation of a person. This lowering must be in the estimation of others and not in one's own estimation.

Exceptions:

Section 499 provides 10 exceptions in which case a statement or expression or publication does not amount to defamation.

1. Imputation of truth which public good requires to be made or published.
2. Public conduct of public servant.
3. Conduct of any person touching any public question.
4. Publication of reports of proceeding of courts.
5. Merits of a case decided in court or conduct of witnesses and other concerned.
6. Merits of public performance.
7. Censure passed in good faith by a person having lawful authority over another.
8. Accusation preferred in good faith to an authorised person.
9. Imputation made in good faith by a person for the protection of his or other's interests.
10. Caution intended for the good of the person to whom it is conveyed or for public good.